BREACH AND EVOLUTION OF CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE

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Over the past few years, legal controversies regarding military interventions carried out without an express authorization of the Security Council have multiplied, in particular in relation to the interventions in Yugoslavia, Afghanistan, or Iraq. These controversies have essentially related to the issue of the actions' conformity with international conventional law and international customary law prohibiting the use of force. Another aspect of the debate refers to a classic problem within the domain of resort to force: supposing breach of the rule is established, can it generate an evolution of this rule? This second issue is entirely different from the first. It does not depend on the question of the lawfulness, \textit{in casu}, of an armed attack, and is not consequently tied to an operation of a judicial nature, tending to judge a state's conduct.
Rather, it has to do with asking whether a given precedent has given rise to an evolution of the rule, whether the latter was or was not breached in the case in question.\(^4\)

The present work will proceed along these lines and will consist of a methodological analysis of the problem. We will ask, therefore, under what conditions a breach of international law prohibiting the use of force, assuming the breach is established, could generate an evolution of this rule.

Prior to developing the elements of a response, it must be noted that the inquiry depends first of all on selection of a theoretical approach in international law, and more particularly of its system of sources. For our part, we will rely on an approach which tends to avoid what we consider to be two excessive stances.

The first extreme would be that of an exaggerated formalism, according to which the only means by which there could be an evolution of the rule prohibiting the use of force, which is first and foremost a conventional rule, would be to revise or amend the Charter of the United Nations in conformity with the procedures provided for within this instrument (Arts. 108 and 109). The fact even of considering an evolution deduced from a breach implies that we distinguish ourselves from this approach and admit the possibility of an informal evolution, which is the hallmark of customary rules.\(^5\)

The second extreme is that, in our opinion, of an almost unlimited flexibility, which can be found in certain Anglo-saxon inspired doctrines such as the *policy-oriented* perspective.\(^6\) Custom is viewed by these authors as a means of adapting the law to certain policy objectives, which would enable the disposal of not only conventional texts but also of those generally considered capable of expressing the *opinio juris* of states, such as certain key resolutions of the United Nations General Assembly.\(^7\) A preponderant weight is then given to the practice of so-called major or leading states.

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5 We have not yet found evidence of such a formalist excess in contemporary doctrine, even though certain American authors seem to think that such formalism prevails in European doctrine. See e.g. R. N. Gardner, *'Neither Bush nor the “Jurispruders”’*, 97 AJIL, 2003, p. 585.


whose conduct would determine the evolution of international law. Should this logic be followed to its ultimate consequences, one will inevitably be forced to conclude that any breach of the rule instantaneously transforms the meaning of this rule, in conditions that are extremely difficult to define with any precision but that appear, in any case, to be extremely loose.\(^8\)

Between these two extremes, we will privilege the approach adopted by the International Court of Justice, in particular in its judgment in the case concerning *Military and Paramilitary Activities in and Against Nicaragua*. According to this judgment:

“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.”\(^9\)

Following this approach, we will not ask whether an action which is “apparently irreconcilable” with the rule either is or is not lawful (question of lawfulness *in casu*), but, rather, we will focus on the official justifications advanced by the state concerned.\(^10\)

The Court adds further on that:

“Reliance by a State on a novel right or an unprecedented exception to a principle might, if shared in principle by other States, tend towards a modification of customary international law.”\(^11\)

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10 This kind of approach is also followed by C. Gray, *International Law and the Use of Force* (2nd edn., Oxford, OUP, 2004), at 7.

11 *Nicaragua case, supra* n. 9, at 108-109, para. 207.
The Court’s approach then comes down to imposing two conditions on the evolution of the customary rule: first, a state must invoke a new right, in other words claim that a modification of the rule occurred; second, this claim must be accepted by other states. We will outline successively these two conditions below. We will see that it is not the (presumed) breach that, in itself, is capable of generating an evolution of the rule of law. It is rather the circumstances, and more particularly the legal opinions issued by states, that will matter. This point will be taken up again in our conclusions.

1. RELIANCE ON A NOVEL RIGHT

We could imagine, following a military intervention that is controversial from a legal point of view but which is broadly accepted as legitimate, the intervening state or states asking for a formal modification of the United Nations Charter, whether by way of a revision or an amendment. In this scenario, a possible breach of the rule could lead to its evolution. The hypothesis is, however, theoretical — no precedent to this effect existing today — and would be limited in any case by conventional law. In real-

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12 This approach appears to privilege opinio juris, or a psychological element, over practice, or a material element. In reality, as opinio juris can be established only by taking a particular practice into account, the two elements are effectively considered from within a single perspective. See P. Weil, 'Le droit international en quête de son identité. Cours général de droit international public', 237 Rec. des Cours, 1992, p. 9, at 170; L. Condorelli ‘La coutume’, in: M. Bedjaoui (ed.), Droit international. Bilan et perspectives (Paris, Pedone/UNESCO, 1991), at 198-199; L. Boisson de Chazournes, ‘Qu’est-ce que la pratique en droit international?’, in: La pratique et le droit international. SFDI. Colloque de Genève (Paris, Pedone, 2004), at 19-20. These works go back to a concern over the customary phenomenon summarized in the following quote: “il paraît exact, comme le prétendent les objectivistes, que la norme coutumière vient consacrer une règle largement inspirée par les nécessités sociales. Il demeure, cependant, que le passage reste obligé par une forme ou une autre de consentement, fut-il tacite, émanant des Etats auxquels on prétend imposer la norme [. . .]. Loin de garder l’idée simpliste de la nécessité de privilégier dans la formation de la coutume soit la volonté soit la société, on doit au contraire comprendre que la contrainte sociale naît elle-même de l’affrontement de volontés initialement contradictoires, mais amenées à composer les unes avec les autres. Autant dire qu’il peut y avoir aussi des situations dans lesquelles un ou plusieurs Etats se verront pratiquement contraints d’accepter l’opposabilité à leur égard de la règle générale, ce qui, ainsi que l’affirment les objectivistes, manifeste la puissance normative des contraintes sociales”. P. M. Dupuy, ‘L’unité de l’ordre juridique international. Cours général de droit international public’, 197 Rec. des Cours, 2002, p. 9, at 168-169; see also Id., Droit international public (7th edn, Paris, Dalloz, 2004), at 328-329, n. 325-327.

13 Similar to Christine Gray, we believe therefore that “[g]iven the problems of any empirical investigation into ‘effectiveness’, it is all the more important to look at international law on the use of force in terms of the language used by states”. C. Gray, International Law . . ., supra n. 10, at 26.
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ity, it is possible only to entertain the theory of an evolution through the informal means of custom. This theory presupposes all the same that the existence of a true legal claim be verified, which implies:

1.1. the formulation of a claim;
1.2. the formulation of a claim of a legal nature;
1.3. the formulation of a claim of a legal nature tending to modify, and not simply to confirm, the rule prohibiting the use of force.

1.1. *The Formulation of a Claim*

Often when confronted with an accusation of having breached the rule prohibiting the use of force, a state simply denies the facts. This first scenario is common enough, and generally covers the case of indirect aggressions or attacks, or of covert actions, even though it could be extended to other hypotheses. Thus, state A may dispute having entered the territory of state B, or having armed or supported irregular forces operating against the government of state B, or even being the author of the bombing of one of state B’s ships. The following examples, all taken from legal practice, illustrate the point:

- In the case of *Military and Paramilitary Activities in and Against Nicaragua*, Nicaragua denied having supported Salvadoran rebel forces in providing them military and logistical support. This argument, which was accepted by the Court, prevented the United States from validly invoking the argument of collective self-defense.

- In the *Oil Platforms* case, Iran denied having led military attacks against Kuwaiti ships, attacks which the United States claimed to have responded to in collective self-defense.

- In the *Armed Actions on the Territory of the Congo* case, Uganda claimed that its intervention in the Congo was justified as an act of defense in response to support

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15 *Nicaragua case, supra* n. 9, at 72-73, para. 131.

provided by the Congolese authorities to armed groups operating on Ugandan territory. The Democratic Republic of the Congo resolutely denied the facts.\textsuperscript{17}

Whether it pertains to Nicaragua, to Iran or to the Congo, the state accused of having breached the rule does not here formulate any claim. The state does not claim to act lawfully, and even less that this rule should be modified. In contesting the facts, it focuses the debate on the application of the existing rule and not on its modification. Supposing the breach is established, it is therefore not at all capable of generating an evolution.\textsuperscript{18} This scenario is common enough, and entails the rejection of a large part of practice as irrelevant:

"In numerical terms, commonest use of force since the Second World War has been the limited cross-frontier action. The only disagreement in the mass of these cases concerns factual differences in questions such as whether there was a cross-border incursion or who began the conflict. This may occur in up to a hundred minor incidents a year. The UN may receive reports from both sides but is not often in a position to assign responsibility. Thus the vast mass of state practice, even if one of the parties is breaking the law, does not lead to any need to reappraise the content of the law."\textsuperscript{19}

1.2. The Formulation of a Legal Claim

Even once the intervening state assumes the material fact of its intervention it is not obvious that it provides a justification for it in legal terms. In practice, many military actions are frequently legitimated by reference to other types of arguments, such as politics or morality. Doctrines formulated by several United States presidents, for example, rely generally on a political argumentation that invokes arguments such as national security, the struggle against communism (thereafter terrorism) or world peace.\textsuperscript{20} They are generally not accompanied by justifications or claims bearing on a potential modification of international law.

This scenario was evoked by the International Court of Justice on two occasions in its judgment in the \textit{Nicaragua} case. Indeed, the Court noted that:

\textsuperscript{17} See Intervention of the Ugandan delegate to the General Assembly, UN GAOR, 95th Plenary meeting, UN Doc. A/53/PV.95 (1998), esp. at 14.
\textsuperscript{18} T. J. Farer, 'The Prospect for International Law and Order in the Wake of Iraq', 97 AJIL, 2003, p. 621.
\textsuperscript{19} C. Gray, \textit{International Law} \ldots, supra n. 10, at 10.
\textsuperscript{20} We refer, namely, to the doctrines associated with Presidents Eisenhower, Nixon, Clinton, Bush, etc. See J. Heffer, \textit{Les Etats-Unis de Truman à Bush} (Paris, Armand Colin, 1992), at 190.
"The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements in international policy, and not an assertion of rules of existing international law."

The Court notes, moreover, that:

"Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force."

The Court clearly distinguishes between legal considerations and extra-legal considerations. Only the first ones are capable of giving rise to a potential evolution of the rule, which is illustrated in the following famous *dictum*:

"The Court [. . .] is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form."

In practice, it can at times be difficult to distinguish between, on the one hand the legal character, and on the other the political or moral character, of a justificatory discourse. This is simple if a state claims to be intervening in order to safeguard its security (a political argument) or to put an end to massacres (a moral argument). Unless a reference is also made simultaneously to legal considerations — an explicit reference to international law, a formal source of a legal nature, or a legal institution —, such justifications are hardly determinative of the issue of the evolution of the rule prohibiting the use of force. Difficulties set in once the intervening states develop a discourse colored by legal considerations, but from which a clear reference to positive international law cannot be deduced. One can, by way of an example,
consider the following EU declaration issued on March 26, 1999, the day after the beginning of military operations against Yugoslavia:

"On the threshold of the 21st century, Europe cannot tolerate a humanitarian catastrophe in its midst. It cannot be permitted that, in the middle of Europe, the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. We, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behavior and violence, which became tangible in the massacre at Racak in January 1999, are not repeated."

The war appears to be justified as a response to unlawful acts perpetrated by Yugoslavia (the text evokes "grave human rights abuses"). At the same time, it is difficult to deduce from these remarks a clear legal position, the overall tone appearing rather to refer to morality or perhaps to a kind of contemporary natural law (as the following expressions suggest: "ne peut tolérer une catastrophe humanitaire en son sein" or that of a "obligation morale"). To summarize, the EU affirms here that its intervention is just or legitimate, but it is not a straightforward matter to deduce from this a position related to the lawfulness of its action, from a positive law perspective, and even less a claim bearing on the modification of the rule. Subsequent assertions of several high-ranking European officials, according to whom Kosovo could not be considered as a precedent in legal terms, appear to confirm this impression. The justificatory discourse does not seem to refer exclusively to legal concepts or institutions, which alone would allow for a potential evolution of the rule. An author makes clear in this respect that

28 See L. Weerts, 'Droit, politique et morale dans le discours justificatif de l'Union européenne et de l'OTAN: vers une confusion des registres de légitimité', in: Droit, légitimation et politique extérieure . . ., supra n. 26, at 85.
30 See Declaration by Joska Fischer (German Minister of Foreign Affairs) to the General Assembly on 22 September 1999 (http://www.nato.int/germany/reden/s990922c.html); Declaration by Louis Michel (Belgian Minister of Foreign Affairs), La Libre Belgique (Brussels), 27 September 1999; Declaration by Hubert Védrine (French Minister of Foreign Affairs), Base documentaire des déclarations françaises depuis 1990 (http://www.diplomatie.fr). F. Dubuisson, 'La problématique de la légalité de l'opération "Force alliée" contre la Yougoslavie: enjeux et questionnements', in: Droit, légitimation et politique extérieure . . ., supra n. 26, at 176-179.
“le véritable test de la pratique unilatérale pertinente consiste à savoir si l’État qui adopte un comportement donné est prêt à admettre d’un autre État le même comportement que le sien dans une situation semblable. On peut nourrir des doutes que ce soit le cas dans la pratique récente en matière de recours à la force.”

Of course, one cannot expect a state to pronounce only in strictly legal terms. It is perfectly imaginable, even probable, that political or moral arguments will be put forward to justify a military action. The only condition necessary to envisage an evolution of the rule is that a state’s arguments be combined or articulated with considerations that enable extrication of “the considered expression of a legal conception”. Even then, such considerations must allow for interpretation as claims aiming at a modification of the meaning of the rule prohibiting the use of force.

1.3. The Formulation of a Claim Bearing on the Evolution of the Legal Rule

Supposing that it properly refers to the positive rule prohibiting the use of force, an intervening state can either invoke a classical exception to this rule or claim that its behavior is based on a new exception or legal justification. A careful examination of practice shows that the first scenario is the most frequent, as shown by the following examples drawn from doctrine:

- The 1999 war against Yugoslavia has not generally been justified by the formulation of a new right of humanitarian intervention, but rather has been legally grounded on the argument of an implicit authorization that could have been deduced from several Security Council resolutions.
- The 2001 war against Afghanistan has not been justified by some new rule authorizing armed reprisals, but by a reference to self-defense within the meaning of Art. 51 of the Charter of the United Nations.

33 C. Gray, International Law..., supra n. 10, at 24 and 27.
- The 2003 war against Iraq has not been justified by reference to a new doctrine of "pre-emptive war", but by an argument based on a Security Council authorization deduced from several resolutions adopted since 1990.37

- The military interventions in Liberia and Sierra Leone have not been justified by a new legal argument of an a posteriori approval by the United Nations Security Council, but essentially by reference to the consent of the two governments concerned.38

The International Court of Justice has very clearly specified the consequences of this type of situation. It has thus noted that

"the United States has, on the legal plane, justified its intervention expressly and solely by reference to the “classic” rules involved, namely, collective self-defense against an armed attack."39

As mentioned above, the Court considered that even if a breach of the rule is accompanied by a justification referring to the rule in question, "the significance of that attitude is to confirm rather than to weaken the rule".40 The methodology relies here on a radical separation between fact and law. Practice cannot, as such, modify the law. It is only capable of it if it reveals an opinio juris, which implies firstly a clear legal position from the intervening state. If this legal position refers to the existing rule, this rule is confirmed in law, even if it (maybe because, here again, the question of lawfulness in casu of the conduct does not matter) is breached in fact.41

Let us be clear that, in order to be relevant, the legal stance of the intervening state must, as far as possible, be devoid of ambiguity, which presupposes a “constant and uniform practice”.42 For example, Belgium furtively invoked, before the International...
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Court of Justice, a right of humanitarian intervention to justify its military action against Yugoslavia.\(^\text{43}\) However, this legal position was not maintained, the Belgian authorities affirming a few months later that the Kosovo war could not be viewed as a precedent giving rise to a right of unilateral military intervention. But, “contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law.”\(^\text{44}\) In such a case, it is difficult to conclude in favor of a true claim to change by the intervening state,\(^\text{45}\) unless one limits this claim to a very short period, which would imply admitting the possibility of an almost instantaneous custom, a possibility which would in turn presuppose an immediate and massive acceptance on the part of the international community of states as a whole, in conditions that will be detailed below.

Before that, however, the radical separation between new and existing law, which should guide the interpretation of a state’s legal position, must be distinguished. In practice, it is true that the intervening powers often tend to rely on classical exceptions or institutions, such as self-defense, authorization of the Security Council or state consent.\(^\text{46}\) *A contrario*, it is difficult to envisage the introduction in international customary law of other justifications, such as the right of humanitarian intervention, pre-emptive action or *a posteriori* approval by the Security Council. The prudence of intervening states is explained by a fear of frightening other states with new claims, and by the fact that, by definition, they are compelled to justify their conduct with respect to existing law at the time of the acts, resulting in a discourse bearing a classical tone.\(^\text{47}\) However, the classical character of the legal discourse can be but a gloss. It is indeed possible for a state to invoke an existing institution while conferring on it a new meaning, which, under the guise of interpretation, devolves to the formulation of a claim in favor of an evolution in the legal rule. The possibility of intervening militarily on the basis of an implicit Security Council authorization constitutes a

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\(^{43}\) CR 99/15, Monday, 10 May 1999, pleadings of M. Ergec.


\(^{45}\) See P. M. Dupuy, ‘L’unité de l’ordre juridique...’, supra n. 12, at 172.

\(^{46}\) See generally C. Gray, *International Law...*, supra n. 10, at 22.

good example, as well as reference to pre-emptive self-defense, or even to self-
defense targeting a state that would simply have tolerated the presence of irregular
forces on its territory, without having participated or acquiesced in the organized
activities of these groups, nor having sent them itself onto the territory of a third
state. In all of these scenarios, it is clear that the intervening state aims to modify,
or at least to interpret in a very particular way, the existing law. It could therefore be
asked whether or not this rule is capable of evolving in this direction, a question which
requires an examination of other states’ reaction to this claim.

2. **THE ACCEPTANCE OF THE MODIFICATION OF THE LEGAL RULE BY THE
INTERNATIONAL COMMUNITY OF STATES AS A WHOLE**

In the context of treaty law, an evolution of the rule prohibiting the use of force would
require, in conformity with Arts. 108 and 109 of the Charter of the United Nations,
ratification by at least two thirds of the state parties, including all permanent mem-
ers of the Security Council. This onerous procedure is by definition not applicable
in the realm of custom. However, this does not mean that one is free from taking cer-
tain precautions before concluding to an evolution of a legal rule. To take up the words
of the International Court of Justice, the invocation by a state of a new right or a new
exception could tend to modify international customary law only if it is “shared by
other states”. More precisely, an effective modification of the legal rule would
imply:

2.1. an acceptance;
2.2. an acceptance of the modification of the legal rule;
2.3. an acceptance of the modification of the legal rule by the international commu-
nity of states as a whole.

2.1. *An Acceptance*

Supposing that we find ourselves in the situation – rare enough in practice, as it was
shown in the first part of this text – where one or more intervening states have

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48 See generally O. Corten, F. Dubuisson, ‘L’hypothèse d’une règle . . . ’, supra n. 35; O. Corten,
F. Dubuisson, ‘L’opération “liberté immuable” . . . ’, supra n. 36.
49 *Nicaragua case*, supra n. 9, at 108-109, para. 207.
justified their actions by invoking an argument tending to modify the legal rule, it is still not obvious that this claim will be accepted by the other states. It is of course possible that a very clear acceptance be ascertained, as was the case, for example, at the time of the war fought against Iraq in order to force it to withdraw from Kuwait in 1991 a war fought, for the first time in the history of the United Nations, on the basis of a Security Council authorization. However, it is also possible that an armed action might give rise to substantial opposition, as was the case, for example, during military actions taken by South Africa in retaliation against its neighboring states. It is obviously only in the first scenario that an evolution in the rule is imaginable. As the *Dictionnaire de Droit International Public* notes,

"[l]a coutume est le résultat de la conjonction d'une pratique effective et de l'acceptance par les États du caractère juridique – et donc obligatoire – des conduites constitutives d'une telle pratique (opinio juris sive necessitatis)."

More specifically, when there is a true acceptance of acts that constitute a breach of the rule, "the initial act will begin to appear as a precedent rather than remain stigmatized as delinquency."

It is not, however, always easy to determine if, and to what extent, acceptance may be established. Everything will depend in each case on how the discourse is interpreted. It will be essential to be able to demonstrate that this discourse reveals an acceptance of the justification of military intervention.

It is important here to mention the hypothesis of silence. Silence is relatively common in practice, many states not officially issuing a legal position after the launch of a military attack. It is perfectly thinkable to deduce an acceptance from a silence that, in the situation, itself conveys acceptance, whether in the domain of non-use of force or in another. Again, it is necessary before reaching such a conclusion, to take


51 See generally examples available on the following website: http://www.ulb.ac.be/droit/cdi/interdictonforce.html.

52 One author insists on the necessity of demonstrating an "absence de protestation" or an "acquiescence" by the lead state. See P. Cahier, "Changements et continuités du droit international. Cours général de droit international public", 195 Rec. des Cours, 1985, p. 9, at 232.

53 J. Salmon, *Dictionnaire de droit international public* (Brussels, Bruylant-AUF, 2001), at 284 (see "coutume").

54 T. J. Farer, "The Prospect for International Law . . .", *supra* n. 18, at 623.

55 J. Salmon, *Dictionnaire . . .*, *supra* n. 53, at 1035 (see "silence", definition "C").
certain precautions, which can be drawn from a dictum of the Permanent International Court of Justice, which is undoubtedly still valid:56 "for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom."57

First, to be meaningful, the silence must register itself in a context where the state concerned is considered to be in a situation in which it is expected to condemn the intervention. If state A attacks state B, the silence of state C is only relevant if, for example, state C is a state close to state B, or had previously expressed its concern about the degradation of relations between A and B. In practice, and even if the rule at stake is legally opposable erga omnes, it should be stated that states may have relatively little concern for a military intervention.58 This is particularly true in the case of military operations of a regional nature, such as the military actions of African States in Liberia or Sierra Leone, the foreign military interventions in the Democratic Republic of the Congo, the conflict between Ethiopia and Eritrea, between Cameroon and Nigeria or, on another continent, the troubles between India and Pakistan over Kashmir.59 One may also consider the scenario of a military operation limited in its scope or in its effects, such as that which occurred in Iraqi Kurdistan, in April 1991, or even of the Turkish army's recurrent operations in Iraqi territory. Each of these events has of course given rise to some reactions from states more or less directly concerned, but it has not brought about a debate on a universal scale comparable to that which followed the recent interventions in Yugoslavia (1999), in Afghanistan (2001), or in Iraq (2003). In these conditions, it will be particularly difficult to assert that the customary rule has evolved, since the silence of other states may only difficultly be interpreted as meaningful.

56 L. Condorelli, 'La coutume', supra n. 12, at 197.
58 Therefore, the silence "peut bien refléter une attitude prise au travers d'un propos délibéré, mais il peut également résulter de l'absence d'informations suffisantes sur l'action d'autres Etats". L. Boisson de Chazournes, 'Qu'est-ce que la pratique . . . ?', supra n. 12, at 35.
59 The United States' military intervention in Liberia in August 1990, which gave rise only to very limited position-taking, is another example. See M. Weller (ed.), Regional Peace-Keeping and International Enforcement: The Liberian Crisis (Cambridge, CUP, 1994). This silence is easily explained, particularly in light of the period, the Iraqi invasion of Kuwait monopolizing at the time every debate within the United Nations.
Within this perspective, one may recall that, contrary to what a part of doctrine pos-
tulates, the absence of condemnation of a military intervention by the political organs of the United Nations can hardly be considered an acceptance. Without deny-
ing the importance of the United Nations in the formation of customary law, it must be recalled that this organization evolves only by the expedient of Member State posi-
tion-taking, to which UN resolutions give rise, and not through the resolutions adopted by the organs as such. In so far as they are political and not judicial organs, the United Nations General Assembly and Security Council are not supposed to pro-
nounce systematically on the lawfulness of all conduct seemingly contrary to the pro-
hibition of the use of force. It is of course possible for condemnations to be prononounced, once the political conditions are met. However, it is also common that no resolution is adopted, or even that a resolution contains neither condemnation nor approval of the intervention. An examination of the resolutions adopted regarding Iraq after the cease fire in April 1991 illustrates the scenario: the military operations in Kurdistan, and the frequent bombardments by the United States in the name of respect for the no-fly zones, have never been mentioned in these resolutions. Similarly, it would be improper to deduce anything from these texts on the potential evolution of the customary rule, simply because the states are not presumed to approve implicitly of interventions by the sole fact that they abstain from condemn-
ing them through the United Nations political organs.

60 See e.g., T. Franck, Recourse to Force. State Actions Against Threats and Armed Attacks (Cambridge, CUP, 2002), at xii and 250.


62 C. Gray, International Law... supra n. 10, at 17. Evoking the Security Council and General Assembly, the author notes that "[b]oth are fora in which states can set out their legal justifications for the use of force and appeal to other states for support".

63 Ibid., at 18.

64 With respect to the General Assembly, one may think, for example, of the resolutions condemning the Soviet invasion of Afghanistan (GA Res. ES 6/2 of 10 January 1980, adopted by 104 in favor, 18 against, with 18 abstentions), or the United States' intervention in Panama. See Effects on the Situation in Central America of the United States' Military Intervention in Panama (GA Res. 44/240 of 22 December 1989, adopted by 75 in favor, 20 against, and 40 abstentions).

65 C. Gray, International Law... supra n. 10, at 20-22.


67 M. G. Kohen, 'La pratique et la théorie . . .', supra n. 32, at 91. In this sense the Nicaragua case may be cited, in which the Court at no point considers the absence of condemnation by the Security Council of the United States' action as relevant.
Finally, it must be emphasized that, to be determinative, the silence must convey a true will of acceptance. In practice, the refusal to condemn can reveal a simple tolerance which will not necessarily equal a true acceptance. As one author summarizes:

“For a new customary norm to have emerged, absence of condemnation itself it not enough. There must also be an intention for that failure to condemn to amount to acceptance of the legality of the threat or an alteration of the pre-existing law, in other words, *opinio juris* [. . .]. Reluctant tolerance does not evidence *opinio juris*.”

In this context, it would be excessive to deduce acceptance from an official declaration of a diplomatic nature, in virtue of which one or several states express “understanding”, without clearly approving the military intervention. This kind of formula was regularly used at the onset of certain bombardments launched against Iraq in the 1990s. The difficulty here again lies in revealing an acceptance following this ambiguous conduct and, moreover, an acceptance that is not simply political or diplomatic but legal, of the intervening power’s claims.

### 2.2. An Acceptance of the Modification of the Legal Rule

Beyond the expression of a simple “understanding”, certain states may more clearly approve, celebrate or even support a particular military intervention. This approbation of the intervention as a fact will not necessarily be accompanied by an approbation of the legal justification put forward by the intervening state. So some states, while supporting operation *Provide Comfort* in Iraqi Kurdistan, carefully abstained from pronouncing on the legal validity of the argumentation put forward by the intervening powers. This attitude is perfectly understandable, if one takes note of the dif-

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69 M. Byers, ‘The Shifting Foundations of International Law. A Decade of Forceful Measures against Iraq’, 13 EJIL, 2002, p. 21, at 35. Similarly, Malcolm Shaw remarks that “it is not inconceivable that in some situations the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved in circumstances of gross oppression by a state of its citizens due to an outside intervention. This does not, of course, mean that it constitutes a legitimate principle of international law”. M. Shaw, *International Law* (3rd edn., Cambridge, CUP, 1991), at 725. See also G. Cahin, *La coutume internationale* . . ., supra n. 14, at 328 and 345.

70 See C. Denis, ‘La résolution 678 (1990) peut-elle légitimer . . .’, supra n. 66, at 489.


ference between the issue of the legitimacy of the intervention and that of its legality. Unless restricting oneself to a purely legalist vision of legitimacy, this concept may indeed call forth moral considerations that, in certain circumstances, are capable of justifying an action which is otherwise admitted to have been carried out in breach of positive law. It is possible, therefore, for a state to approve an action in the name of a particular moral or political philosophy, while reserving its position in strictly legal terms.

Such conduct would obviously not suffice to conclude in favor of the evolution of the customary rule. In the same way that this presupposes a strictly legal claim on the part of the intervening power, it also presupposes a legal acceptance on the part of other states. One gets back here to the most classical definitions of custom, which do not refer to a simple acceptance of the practice, but to an acceptance of the practice “as the law” (I.C.J. Statute, Art. 38), which is incomparably more demanding. According to a classical dictum pronounced by the International Court of Justice,

“[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”

A contrario, the approval of particular conduct does not necessarily mean that there exists a legal belief (opinio juris) that this conduct is in conformity with positive law. This approval can be dictated by courtesy, political alliance, diplomatic concerns, or “considerations [. . . ] of convenience.”

In some instances, the legal justification of a military intervention is explicitly taken up or accepted. In 1991, a very large number of states thus supported the arguments

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77 North Sea case, supra n. 57, at 44, para. 77.
78 Ibid.
of collective self-defense and Security Council authorization which had been put forward by the coalition of states to justify their military attack against Iraq. The same scheme can be observed at the onset of more controversial military operations. In March 2003, the day after the launching of the third Gulf war, otherwise considered by many as contrary to international law, Nicaragua and Micronesia clearly expressed their support for the argument invoked by the intervening states of implicit Security Council authorization. But, except for these hypotheses, a strictly legal belief is quite difficult to establish in the highly political context of international relations generally, and in the debates surrounding military interventions in particular. Must one then conclude that it is impossible to establish a legal belief in cases other than when it is expressed in an explicit manner? Certainly not. Here again, the general rules pertaining to the establishment of a customary rule dictate nonetheless a certain prudence, which calls for three qualifications.

In the first place, the state’s conduct must express a true belief, which supposes that it is not vitiated by pressure or distorted by excessive emotion. Since, "[p]ar définition, l’opinio juris ne peut résulter que d’une expression de volonté librement consentie". The condition appears to refer to vices of consent such as are found in the law of treaties, even though it may be asked if it would not be more appropriate to be more rigorous in the case of a customary rule, which requires a sentiment of conforming to an already existing rule of law, which is not (necessarily) the case when a treaty is concluded. This condition of sincerity of the state’s opinion conduces moreover to consider that the acceptance of the lawfulness of an intervention will be a priori more relevant where it does not come from an ally of the intervening power, an ally that can be submitted to strong political, economic or diplomatic constraints. The same logic conduces to think that a condemnation is much more significant where it comes from an ally of the intervening state. It is also by referring to this condition of sincerity that some authors have expressed reservations over the possibility of deducing an evolution of the rule prohibiting the use of force, towards extending the concept of indirect aggression, from the fairly broad approval of the military operation against

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80 O. Corten, ‘Opération *Iraqi Freedom . . .*’, *O p e r a t i o n I r a q i F r e e d o m . . .*, supra n. 3, at 240-241.
82 Since then, "[s]i les États condamnent certains États mais pas d’autres, alors que les faits sont les mêmes, on n’est pas devant une nouvelle interprétation de la règle — encore moins devant sa modification — mais tout simplement devant des prises de position politiques sans implications sur le plan de la règle." M. G. Kohen, ‘La pratique et la théorie . . .’, *La pratique et la théorie . . .*, supra n. 32, at 91.
Afghanistan beginning in October 2001.\textsuperscript{84} The specific context following September 11th, marked at once by compassion in favor of the United States and by fear provoked by the at times threatening words of this country’s leaders, effectively made the expression of a sincere legal belief difficult.\textsuperscript{85}

These concerns lead us to believe that, in order to be established, an acceptance of a modification of the rule of law must be able to be deduced not only from one but from multiple precedents: "in order to prove acquiescence, there must be a ‘consistent and undeviating attitude’, a ‘clear’, ‘definite’ and ‘unequivocal’ course of action, showing ‘clearly and consistently evinced acceptance’, to use the wording of the ICJ on different occasions."\textsuperscript{86} Indeed, the Court insisted that rigor be observed, particularly when one claims to establish a rapid evolution of a customary rule:

"Although the passage of only a short period of time is not necessarily, or in itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."\textsuperscript{87}

Thus, independent of the issue of knowing from which threshold a practice may be termed "general", the existence of an \textit{opinio juris} cannot reasonably be confirmed from a single case, precisely because that case may be dictated by considerations of courtesy or convenience.\textsuperscript{88} To take up the example of Afghanistan, a softening of the concept of armed aggression would presuppose, in order to be recognized, that it is accepted through multiple precedents, in such a way that the strictly legal belief is beyond any doubt.\textsuperscript{89} It is in this sense that the possibility for the Security Council to

\textsuperscript{84} M. G. Kohen, ‘The Use of Force by the United States after the End of the Cold War, and Its Impact on International Law’, in: \textit{United States Hegemony...}, \textit{supra} n. 75, p. 197, at 221-226. See also Id., ‘La pratique et la théorie...’, \textit{supra} n. 32, at 92.

\textsuperscript{85} A. Lagerwall, ‘Kosovo, Afghanistan, Irak...’, \textit{supra} n. 3, at 93; C. Gutierrez Espada, ‘La “contaminacion” de Naciones Unidas o las Resoluciones 1483 y 1511 (2003) del Consejo de seguridad’, 19 \textit{Anuario de derecho internacional}, at 76.

\textsuperscript{86} M. G. Kohen, ‘The Use of Force by the United States...’, \textit{supra} n. 84, at 224.

\textsuperscript{87} \textit{North Sea case}, \textit{supra} n. 57, at 43, para. 74; see also Judge De Castro, Separate Opinion, \textit{Fisheries Jurisdiction case}, \textit{supra} n. 42, at 89-90.

\textsuperscript{88} See P. Daillier, A. Pellet, D. Nguyen Quoc, \textit{Droit international...}, \textit{supra} n. 81, at 329, n. 210; M. Byers, ‘The Shifting Foundations of International Law...’, \textit{supra} n. 69, at 28 and 35. Consequently, “[i]n short the practice the more important is its uniformity and its acceptance by the international community as binding law”. R. Bernhardt, ‘Customary...’, \textit{infra} n. 108, at 901.

\textsuperscript{89} J. Verhoeven, ‘Les “étirements” de la légitime défense’, AFDI, 2002, p. 49, at 64.
authorize military actions carried out by Member States, which is not provided for in the text of the UN Charter, may be considered as established on a customary basis, multiple precedents having occurred with an express or tacit approval of the States Parties to the Charter as a whole.  

Finally, we will recall that it is to avoid these difficulties of distinguishing considerations of convenience and legal belief that the jurisprudence often tends to rest, not on the reactions provoked by this or that specific military operation, but on the positions put forward generally within normative texts. Taking the attitude of states vis-à-vis certain General Assembly resolutions regarding the non-use of force into account is increasingly important, particularly where they reveal a will to pronounce on a specifically legal plane. Within this perspective, it would make more sense to take into account the positions expressed in general and theoretical terms during the debates raised on the right of humanitarian intervention in October 1999, rather than canvas the reactions of states to the military intervention launched against Yugoslavia in March of the same year. It is obvious in this respect that some states may not wish to condemn a specific operation, while defining their legal position on the same issue in general terms.

In these conditions, but only in these conditions, a breach of the rule prohibiting the use of force may potentially generate an evolution of this rule. It is nevertheless necessary, for it to be so, that the legal acceptance be the act not of a few states but of the international community of states as a whole.


92 See Declaration of 24 September 1999, issued by the Foreign Ministers of 132 states, adopted in the context of the “Group of 77”, and according to which: “The Ministers stressed the need to maintain clear distinctions between humanitarian assistance and other activities of the United Nations. They rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or in international law.” (emphasis added) Available online at http://www.g77.org/DoSC/Decl1999.html.

93 Even if, at this juncture, the conclusions that one may draw are similar; see e.g., Rio Group Declaration of 25 March 1999 (GRIO/SPT-99/10; transmitted to the Security Council by a letter by the Mexican representative dated 26 March 1999; A/53/884—S/1999/347); Declaration of the Movement of Non-Aligned States of 5 April 1999 (statement by the NAM on the situation in Kosovo, Federal Republic of Yugoslavia, 9 April 1999, http://www.nam.gov.za/media/990409kos.htm.).
2.3. **An Acceptance of the Modification of a Legal Rule by the International Community of States as a Whole**

In a very large number of cases, the reactions to the launching of a military intervention are diverse and even opposed or polarized. Throughout the Cold War, for example, the military operations of the great powers in their respective “backyards” provoked a heated debate, during which the weapon of international law was brandished on both sides, even though, in general, it was mostly used by those opposing the war.\(^94\) More recently, the military operations against Yugoslavia (1999), and against Iraq (2003), were marked by lively opposition, within the UN as well as elsewhere, between those who considered these operations as lawful and those, a much larger group, who labeled them as a breach of international law, as acts of aggression.\(^95\)

In such instances, it goes without saying that it would be improper to conclude in favor of an evolution of the rule, and this independently of the issue of lawfulness *in casu* of the intervention. Thus,

\[\text{"ce[s] ex} \text{emple[s] man} \text{ifester[nt] clairement que, lors de la proposition normative faite par certains, celle-ci ne peut se cristalliser en règle coutumière que sur la base d’une adhésion des autres États et, d’abord, des plus concernés d’entre eux (lesquels, en l’occurrence, sont tous les membres de l’Organisation des Nations Unies et pas seulement ceux du Conseil de sécurité). Cette adhésion, dans le temps comme dans l’espace, peut être simplifiée par le cadre au sein duquel elle intervient, mais elle reste indispensable."}\(^96\)

As already mentioned, the International Court of Justice has stated on this subject that the invocation of a new right or a new exception could not tend to modify international customary law unless it was “shared by other States”.\(^97\) For this modification to be effective, it is without a doubt a very large majority of states that must indicate their approbation.\(^98\) The Court thus notes, in the same judgment, that states frequently mention the prohibition of the use of force “as being not only a principle of

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95 P. M. Dupuy, ‘L’unité de l’ordre juridique . . .’, *supra* n. 12, at 171-173. The author concludes from the Yugoslav precedent that “on voit bien que, dans une telle situation, et même si le nombre des États précités avait été moins important, il est parfaitement impossible de parler de création d’une nouvelle coutume. Les conditions requises pour qu’on discerne une *opinio juris* concordante et imputable à une vaste majorité d’États ne sont tout simplement pas réalisées”.
97 *Nicaragua case*, *supra* n. 9, at 108-109, paras. 207.
customary international law but also a fundamental or cardinal principle of such law," indeed, as the International Law Commission put it, "a conspicuous example of a rule in international law having the character of *jus cogens*." This description, which is broadly shared by doctrine, implies that, in order to evolve, the rule must be able to rest on the acceptance of the "international community of States as a whole", to recall the words of the Vienna Convention on the Law of Treaties.

This requirement renders a demonstration according to which a breach of the rule would have generated an evolution very difficult. That would indeed presuppose, proof not only of an acceptance, but further of an acceptance that signals a specifically legal belief, and finally a quasi-unanimous acceptance. This rigorous condition is not shared by a certain doctrine which, as we indicated in the introduction, often tends to value loosely the conditions to which an evolution of the rule would be submitted. Two particulars are worth noting in this respect.

First of all, the characterization of the rule as a rule of *jus cogens* runs clearly against the argument according to which a privileged status must be reserved to major or leading states. The fact that these states (which are none other than Western States, even though identification is not always easy) are both democratic (on the level of legitimacy) and more capable than others of enforcing the rule (on the level of effectiveness) is not relevant. For a rule as fundamental as the prohibition of the use of force to evolve, an acceptance on the part of the whole of states is needed, which entails a criteria that is both quantitative (a very large majority is required) and qualitative (this majority must include states with different political systems and values and belonging to all regions of the world).

The expression "international community of States as a whole" properly indicates that what is relevant here is a state-centric vision of the international legal system.

99 Nicaragua case, *supra* n. 9, at 100-101, para. 190.
100 Ibid.
101 See e.g., C. Gray, *International Law . . ., supra* n. 10, at 29.
102 See Arts. 53 (on the existence of a *jus cogens* rule) and 64 (on the evolution of a *jus cogens* rule) of the Vienna Convention of 1969 on the *Law of Treaties*.
104 Therefore, "a general custom [. . .] can henceforward no longer be received into international law without taking strict account of the opinion or attitude of the States of the Third World." *Barcelona Traction case, supra* n. 61, at 330.
107 See V. D. Degan, *Sources of . . ., supra* n. 25, at 148; L. Boisson de Chazournes, "Qu'est-ce que la pratique . . .", *supra* n. 12, at 32. Even limiting the determination of *opinio juris* to the position of
It is not the commentators (journalists, media or various political actors), nor even international law specialists, who must accept the evolution of the rule, but the states themselves. These states may express themselves by various means, whether through multilateral conferences, the taking of individual positions or within the organs of international organizations, such as the Security Council. It is, however, indeed the position of the states that matters, and not that of the organs or the conferences. Contrary to what some authors assert, who refer notably to the Security Council, there exists no other "international jury" beyond that of the whole of the states.

The characterization of a rule as *jus cogens*, even though it may entail particularly demanding evidence to show that the rule has evolved, still does not render it impossible. One may even consider that it is made easier than if one considers the case of a simple rule *jus dispositivum*. In this latter case, indeed the persistent objector theory—which remains fairly widespread—would demand a unanimity of states, and not a very large majority. This theory is in any case inapplicable in the context of a peremptory norm, which is so fundamental for international society that one can admit that it is opposable *erga omnes*, even against the will of one or another state.

It must also not be forgotten that what is difficult to demonstrate is an evolution of the legal rule. Now, as already indicated, an intervening state will often repudiate the presentation of its justification as supposing an evolution of the rule, and will prefer to assert that it is only relying on the existing law. Within the framework of the debate on pre-emptive self-defense, for example, the proponents of the idea believe that it has for a long time been a part of international customary law, and it is therefore up to the opponents to demonstrate that this rule has evolved. This attempt to reverse the burden of proof runs aground of the fact that, as the International Court

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111 We realize that this theory is far from unanimously shared. See e.g., Judge Ammoun, Separate Opinion, *North Sea Case*, supra n. 57, at 104; Judge Lachs, Dissenting Opinion, *ibid.*, at 228 and 231. The characterization as a norm *jus cogens* allows one, however, to avoid this debate from the outset.
112 V. D. Degan, *Sources of*, supra n. 25, at 183.
114 See e.g., D. Bowett, *Self-Defence in International Law* (Manchester, MUP, 1958), at 58-60.
of Justice recognized, the customary rule prohibiting the use of force is supposed, if one excludes the strictly institutional aspects related to the competence of UN organs, to reflect conventional law.\textsuperscript{115} The text of the Charter, but also General Assembly resolutions having as their purpose its interpretation (such as, namely, resolutions 2625 and 3314), must therefore be taken as a departure point from which the \textit{opinio juris} of states must be determined. Moreover, to the extent these texts explicitly subordinate a situation of self-defense to the existence of an “armed aggression” (Art. 51 of the Charter), it is up to those who deny this condition to demonstrate that customary law has led to its suppression, or at least to its reformulation.\textsuperscript{116}

\textbf{CONCLUSION}

A breach of international law, as such, cannot generate an evolution of the rule prohibiting the use of force.

“As in treaty law, the breach of a norm of customary law does not mean that the norm no longer exists. The disappearance of a customary norm and its replacement by a new norm require again widespread acceptance in the international community.”\textsuperscript{117}

To conclude otherwise would mean returning to adherence of the maxim \textit{ex injuria jus oritur} and, in the case of custom, of confusing practice with law, which would amount to a definitive denial of the autonomy and therefore the existence of a true international legal system.

However, while a breach in itself cannot bring about an evolution, it can create a situation rendering an evolution possible: “breach of law can lead to the formation of a new law”.\textsuperscript{118} We considered that, particularly in the domain of the non-use of force,

\begin{footnotes}
\item[115] \textit{Nicaragua case}, supra n. 9, at 94-96, paras. 176-179.
\item[117] R. Bernhardt, ‘Customary . . .’, supra n. 108, at 901.
\end{footnotes}
"it appears that significant change through the development of new customary law will usually, if not always, require illegality". The scenario is not at all absurd on the theoretical plane.

A state violates the rule in putting forward a justification that is not in conformity with it. The other states accept this justification. In applying the most basic principles of intertemporal law, this acceptance cannot legalize the armed intervention a posteriori. The only possible legal effects in casu could be a situation of waiver (third states renouncing to engage the responsibility of the intervening state) or, as the case may be, mitigation of the responsibility. But, if the international responsibility of the intervening state cannot be excluded by the general acceptance of its act, this can, for the future, generate an evolution of the rule. This evolution, which will undoubtedly have to be deduced from multiple precedents in order to be recognized, will imply that if another intervention of the same type is subsequently carried out, it will no longer be considered a violation of international law. The principle *ex injuria jus non oritur* does not present an obstacle, because it is not the breach that generates the evolution but rather the change of position that this breach provoked: "in short, acts in opposition to existing rules constitute violations of those rules, whereas statements in opposition do not". This theoretical framework has already been observed in practice in several respects. The possibility for the Security Council to authorize military interventions of a humanitarian nature in conceiving very broadly the idea of a threat to peace, as well as the emergence of a delegation mechanism through which states lead collective security military actions, are examples of evolutions accepted on a universal scale. It is far from certain, on the other hand, that theories

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119 A. Buchanan, 'Reforming the International Law of Humanitarian Intervention', in: *Humanitarian Intervention...*, supra n. 8, p. 130, at 135. The author also affirms that "the prospect that illegal acts may be necessary in order to achieve significant improvements in the international system arises because of the difficulty of achieving reform through purely legal means". *Ibid.*, at 133.

120 Corten, F. Dubuisson, 'L'hypothèse d'une règle...*, supra n. 35, at 905-907.

121 In application of Art. 45 International Law Commission's Articles on State Responsibility, of which the General Assembly took note (GA RES/56/83 of 12 December 2001, adopted by consensus) and which we can consider as expressive of customary law (see *Rapport de la Commission du droit international à l'Assemblée générale*, UN Doc. A/56/10); "The responsibility of a State may not be invoked if: a) The injured State has validly waived the claim; b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim". One could consider that, in certain instances, one finds oneself in this second scenario.

122 Certain authors defend the concept of mitigation within this perspective. See T. M. Franck, 'Interpretation and Change in the Law...*, supra n. 110, at 212-215.

123 M. Byers, S. Chesterman, 'Changing the Rules about Rules...', supra n. 76, at 188.

such as implicit authorization, pre-emptive self-defense or the right of unilateral humanitarian intervention fit with the necessary conditions for modification of the rule.

Finally, we are effectively led to apply to the particular case of the non-use of force, the classical principles that govern the establishment or the evolution of a customary rule. These principles are, as is well known, very demanding, particularly in the presence of a peremptory norm. It is surprising then that a certain part of doctrine seems to contemplate less rigorously the evolution of international law within the domain of the prohibition of the use of force than in other areas, such as the law of the sea or diplomatic law. Such a position is difficult to explain in law, and one may think that it conveys more of a desire to legitimate certain interventionist policies on a moral or political level.125 Be that as it may, it must be recognized that a particularly high level of rigor is required in the case of the interdiction of war, the normal mode remaining a modification of conventional law, which implies putting into place onerous procedures.126 It would be improper to insist that these procedures are followed in respect of every evolution, the customary mode always having been accepted as a more flexible means of adapting the law to evolutions in international relations. It would, however, be similarly improper to content oneself with an unlawful practice under the pretext that it was followed or accepted by several states which proclaim themselves to be the representatives of the international community.127

125 Certain authors consider moreover that it would be unadvisable to codify the evolution of the rule on the non-use of force, though they may wish to, admitting that the majority of states are obviously not ready to accept it. J. E. Stromseth, ‘Rethinking Humanitarian Intervention . . .’, supra n. 31, at 259.

126 See supra, and the necessity of beginning with the conventional source recalled by Christine Gray. See C. Gray, International Law . . ., supra n. 10, at 5-6.