Introduction

On 27 June 1986, the International Court of Justice pronounced its much-anticipated judgment in the *Nicaragua* case. For the first time in its history, it gave a direct and elaborate ruling on issues pertaining to the international law on the use of force (*Ius ad Bellum*), including on the conditions for the exercise of States' right of self-defence. If the Court's approach merits praise for unequivocally affirming that disputes involving the recourse to force are inherently justiciable, it is somewhat puzzling what led the Hague Judges to conclude that '[t]here appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks', triggering the right of self-defence.[1] Whether it was naïvety, over-confidence or bluff on their part is open to speculation, yet one need not possess the combined legal skills of Grotius and Vattel to understand that it did not completely reflect normative reality.

Indeed, ever since the creation of the United Nations in 1945, scholars have been deeply divided over the purport of Article 51 UN Charter, which enshrines the right of self-defence 'if an armed attack occurs'. Opinions differ as to whether the latter phrase extends to 'protection of nationals' abroad; whether it sanctions defensive measures against small-scale attacks or 'imminent' attacks; whether it permits military action against States engaged in so-called 'indirect aggression', et cetera. The confusion over the 'armed attack' requirement is further compounded by additional sources of controversy, in particular the relationship between Article 51 and the general prohibition on inter-State use of force of Article 2(4) UN Charter, and the relationship between Article 51 and the customary right of self-defence.

Despite this bleak picture, the distinct lack of 'general agreement' proved reasonably manageable for most of the Charter era. A majority

[1] ICJ, *Case concerning military and paramilitary activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), (Merits) Judgment of 27 June 1986, (1986) ICJ Rep 14–150, § 195.

of international lawyers consistently stuck to an extensive interpretation of the prohibition on the use of force along with a more or less restrictive reading of self-defence. More importantly, save rare exceptions, States refrained from eroding the scope of Article 51 UN Charter by asserting new or contested applications of the right of self-defence. Most often, whether as a matter of legal conviction or as an effort to minimize exposure to international criticism, States engaging in military intervention abroad stayed on safe legal grounds.[2] When, in spite thereof, controversial legal questions surfaced, States generally circumvented these conundrums, instead focusing on the necessity and proportionality of the interventions under consideration.

The delicate equilibrium that existed was, however, fundamentally disturbed by the 9/11 attacks and their aftermath. All of a sudden, the slumbering academic controversies were pushed to the forefront of public attention. Several countries expressly argued that the Charter rules on the use of force were no longer suitable to deal with 'new' twenty-first century security threats such as transnational terrorism, proliferation of weapons of mass destruction and the collapse of governmental authority in 'failed' or 'failing' States. Military manuals and security doctrines were adapted to integrate a more expansive interpretation of self-defence.[3] International lawyers for their part were anything but insensitive to shifts in customary practice. Some have gone as far as to qualify the US response to the 9/11 attacks (viz. the intervention in Afghanistan and the promulgation of the 'Bush doctrine') as 'instant custom' modifying the existing norms.

Almost a decade later, there now exists a significant amount of subsequent practice and *opinio iuris* that allows us to put into perspective the various claims. These evidentiary elements admittedly affirm that some of the more radical suggestions raised in the immediate aftermath of 9/11 were made on the spur of the moment, without necessarily corresponding to actual changes in the normative groundwork. At the same time, if States recognized in the 2005 World Summit Outcome Document that 'the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security,' it would seem rather

[2] C. Gray, *International law and the use of force*, 3rd edn. (Oxford University Press, 2008), p. 118.

[3] See in particular White House, National Security Strategy of the United States of America, Washington DC, 17 September 2002, available at http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/index.html (accessed 6 May 2009).

naïve to take for granted the status quo. Against this background, the key research question the present study intends to tackle is whether and to what extent recent evolutions have altered the customary boundaries of the right of self-defence, both *de lege lata* and *de lege ferenda*. Has the storm radically changed the landscape of the *Ius ad Bellum*; has it dwindled without doing any damage; or has it merely torn out a few sloping trees?

Since recent controversy has focused first and foremost on various aspects of the 'armed attack' requirement, it is precisely this precondition that is at the centre of our analysis. More specifically, the thesis examines its meaning from a threefold perspective: *ratione materiae, ratione temporis*, and *ratione personae*. Each angle raises a different set of thorny interpretative questions. As regards the material aspect, we mainly identify what sort of acts qualify as 'armed attack'; whether there exists a *de minimis* threshold under which no self-defence is permitted; and, if so, whether various small-scale attacks may be 'accumulated' so as to reach this threshold (Chapter 3). The *ratione temporis* aspect addresses the long-standing controversy as to whether self-defence may be exercised only *after* an armed attack has taken place, or whether, and to what extent, such attack may be intercepted or anticipated (Chapter 4). Finally, the *ratione personae* aspect relates to the question from 'whom' the armed attack must emanate in order to trigger the right of self-defence (Chapter 5). Should an armed attack be attributable to a State, or does it equally cover attacks by non-State actors, such as terrorist groups? At the same time, the thesis takes account of the remaining conditions of self-defence, in particular the customary standards of necessity and proportionality (Chapter 2). Because of their inextricable link to the 'armed attack' criterion, a proper understanding of the purport and application of these two standards is indispensable to tackle the questions raised above.

However, it should be noted that this study does not have the ambition to cover the whole area of the *Ius ad Bellum*. Collective security is beyond the scope of our survey, implying that (consensual) peace-keeping and Security Council authorized enforcement action are not considered. Furthermore, of the various modalities of unilateral recourse to force,[4] we will only look at those related to the 'inherent' right of self-defence.

[4] This term is hereby understood as covering all enforcement action that is not authorized by the UN Security Council. It includes not only military interventions undertaken by one or more individual States, but also action undertaken by regional arrangements or

Other legal constructions, such as humanitarian intervention, intervention by invitation or pro-democratic intervention, which are sometimes claimed to fall outside the prohibition on the use of force, will not be scrutinized.

Underlying our research are a number of considerations that merit briefly being restated. First, while it is premature to declare the death of Articles 2(4) and 51 UN Charter, the wide variety of challenges to their scope does threaten the 'determinacy' of these rules, i.e., their ability to generate an ascertainable understanding of what is permitted or prohibited.[5] Indeed, the confusion on the shared normative framework renders it increasingly difficult to come to a reasoned consensus on the legality of a particular intervention through the exchange of claims and counter-claims at the international level. The implication is an erosion of the 'compliance pull' of the *Ius ad Bellum*, which can only be remedied by a much-needed clarification of the law.

Second, on a more methodological level, the present thesis starts from the premise that the evolution of the *Ius ad Bellum* is essentially a State-driven process (Chapter 1). Customary practice has a crucial role in clarifying and supplementing the precise content of Article 51 UN Charter, and may inspire evolutions in its interpretation. For this reason, the primary material guiding the analysis consists in the customary practice of States, both concrete – viz. the justificatory discourse pertaining to specific interventions – as well as abstract – viz. general statements on the content of the norms under consideration. Conversely, the case law of the ICJ and legal doctrine are only considered a subsidiary source of interpretation, the evidentiary value of which is reduced by inconsistencies and disagreement.

Third, the various aspects of self-defence, and in particular the different dimensions of the 'armed attack' requirement, are ultimately interlinked and cannot be examined in strict isolation. For example, one cannot scrutinize the debate on anticipatory self-defence without examining the prospective dimension of the necessity standard; nor can one grasp the *de minimis* controversy without at the same time considering the 'accumulation of events' doctrine. Whether one accepts a stricter or more flexible approach to one aspect of self-defence inevitably impacts

regional agencies in contravention of Article 53(1) UN Charter (which requires authorization by the Council for such action).

[5] T. M. Franck, *Fairness in international law and institutions* (Oxford: Clarendon Press, 1995), pp. 30–4.

on the desirability or risk of interpreting other aspects in a similar fashion. For this reason, the present thesis tries to make correlations where needed and concludes with a more integrated picture of Article 51 (Chapter 6).

The analysis of relevant customary practice was concluded in December 2009.

1

The methodological debate and the quest for custom

Legal rules are not static, but are capable of evolving over time. This holds all the more true for a multilateral convention such as the UN Charter, which spells out a broad array of open-textured principles intended to regulate the relations between States for an indefinite period of time. The Charter regime indeed constitutes 'a living, growing, and above all discursive system for applying the rules on a reasoned, principled, case-by-case basis'.[1]

In the present chapter, we intend to shed further light on how this process of change operates in relation to the legal regime on the use of force. It may be noted at the outset that several excellent monographs attempt to identify the substance of the present-day *Ius ad Bellum* by analysing relevant state practice and *opinio iuris*, albeit without explaining at much length *why* or *how* (changing) custom influences the law on the use of force. Nonetheless, both issues are of crucial importance. The methodological approach one adopts to a large degree determines the outcome of any inquiry into the substantive content of the law on the use of force.[2] A different approach may lead one author to acknowledge the legality of pre-emptive self-defence or humanitarian intervention, while leading another to reject it. Hence, for the sake of intellectual honesty and academic accuracy, the issue of methodology should not lightly be passed over.

Hereafter, we will first examine the interaction between treaty law and custom in order to understand the impact of customary practice through the distinct processes of interpretation and modification (Section 1.1). Subsequently, we will briefly spell out some considerations in relation to

[1] T. M. Franck, *Fairness in international law and institutions* (Oxford: Clarendon Press, 1995), p. 260.
[2] See O. Corten, 'The controversies over the customary prohibition on the use of force: a methodological debate', (2006) 16 EJIL 803–22, at 803.

the identification and assessment of state practice and *opinio iuris* in the field of the *Ius ad Bellum* (Section 1.2).

1.1 Treaty vs. custom

1.1.1 The Charter and pre-existing custom

The obvious starting point for an analysis into the boundaries of self-defence is the ICJ's *Nicaragua* case, which is widely perceived as the Bible of the *Ius ad Bellum* (if now only the Old Testament). *In casu*, the Court for the first time engaged in an in-depth examination of the substantive content of the law on the use of force. At the same time, the judgment is significant from a methodological perspective, since the Court pronounced on the interaction between the Charter and customary law on the use of force. The immediate cause for this was the fact that the United States had adopted a reservation (the so-called 'Vandenberg reservation') which withheld from the Court's jurisdiction 'disputes arising under a multilateral treaty, unless (1) all the parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the [United States] specially agrees to jurisdiction'.[3]

In the US view, the reservation barred the Court from looking into Nicaragua's claims concerning the alleged use of armed force on the grounds that it prohibited the Court from applying any rule of customary international law the content of which was also the subject of provision in the relevant multilateral treaties.[4] Contrary to Nicaragua's position, the US claimed that the Charter provisions and the customary rules were identical, leaving no room for 'other customary and general international law' on which Nicaragua could rest its claims.[5]

The Court, however, refused to follow this line of reasoning.[6] On the one hand, it found that the incorporation of a customary norm into treaty law did not deprive it of its applicability as distinct from that of the treaty norm, *even if the two rules would be completely identical*.[7] On the other hand, the Court disagreed with the United States' view that the two

[3] See ICJ, *Case concerning military and paramilitary activities in and against Nicaragua* (*Nicaragua* v. *United States of America* (Merits)), Judgment of 27 June 1986, (1986) ICJ Rep 14–150, § 42.
[4] *Ibid.*, § 173. [5] *Ibid.*, §§ 173, 187.
[6] ICJ, *Case concerning military and paramilitary activities in and against Nicaragua* (*Nicaragua* v. *United States of America* (Admissibility)), Judgment of 26 November 1984 on the jurisdiction of the Court, (1984) ICJ Rep 392, § 73.
[7] ICJ, *Nicaragua* case (Merits), §§ 177–9.

sources of law necessarily overlapped: 'On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content.'[8] The Court recognized that the UN Charter by no means covered the whole area of the regulation of the use of force in international relations. It regarded the reference to the 'inherent' character of self-defence in Article 51 UN Charter as an affirmation of the relevance of customary law. It moreover stressed that a definition of 'armed attack' was not provided in the Charter or elsewhere in treaty law, and should therefore be sought in custom. The Court furthermore noted that the criteria of necessity and proportionality were not enshrined in Article 51 UN Charter but formed part of the customary right of self-defence.[9] Last but not least, it considered whether the obligation under Article 51 to report measures taken in self-defence to the Security Council also existed in customary law. Given that this procedure was 'so closely dependent on the content of a treaty commitment and of the institutions established by it', the question was answered in the negative.[10]

Regardless of whether one finds the Court's circumvention of the 'Vandenberg reservation' artificial or not,[11] the *Nicaragua* judgment raises important questions vis-à-vis the overlapping and, more importantly, the possible discrepancies between the Charter provisions and customary international law on the use of force. Indeed, even if it did not explicitly affirm or exclude the existence of *substantive discrepancies* between the two sources of law,[12] the Court's approach acquires particular meaning when tested against the long-standing doctrinal

[8] *Ibid.*, §§ 175–6. [9] *Ibid.*, § 194. [10] *Ibid.*, § 199.

[11] Remark: the ICJ's disregard for the 'Vandenberg reservation' was one of the reasons why the US withdrew from the case and revoked its acceptance of compulsory jurisdiction. The US Legal Adviser, Judge Sofaer, declared before the Senate Foreign Relations Committee: 'We carefully considered modifying our 1946 declaration as an alternative to its termination, but we concluded that modification would not meet our concerns. No limiting language that we could draft would prevent the Court from asserting jurisdiction if it wanted to take a particular case, as the Court's treatment of our multilateral treaty reservation in the Nicaragua case demonstrates.' The Court's approach was strongly criticized by Judge Schwebel: ICJ, *Nicaragua* case, (Admissibility), Separate opinion of Judge Schwebel, § 88; ICJ, *Nicaragua* case (Merits), Separate opinion of Judge Schwebel, §§ 95–6.

[12] Remark: when referring to customary law to clarify the meaning of the phrase 'armed attack' or to identify the criteria of necessity and proportionality, the Court was clearly not deviating from, but interpreting and supplementing, the Charter regime. The same criteria were used in later judgments in which the Court addressed issues of the *Ius ad Bellum* without being barred from applying the UN Charter. See, e.g., ICJ, *Case*

schism between the so-called 'restrictionist' school and the 'counter-restrictionist' (or 'expansionist') school.

On the one hand, a considerable group of scholars (the 'restrictionists') have consistently argued that the inclusion in the UN Charter of Articles 2 (4) and 51 has left unaffected pre-existing customary law on the use of force.[13] According to these authors, the reference to the 'inherent' nature of self-defence illustrates that Article 51 was only intended to give particular emphasis, *in a declaratory manner*, to self-defence in the case of an armed attack. McDougal, for example, argues that there is 'not the slightest evidence' that the framers of the UN Charter intended to impose new limitations upon the traditional right of self-defence.[14] Rather, the insertion of Article 51 aimed at clarifying the position of collective security arrangements, like the Act of Chapultepec. In this view, the right enshrined in Article 51 UN Charter is merely part of a much broader customary right to self-defence. Regardless of the text of Article 51, these authors claim a right to use force against imminent or non-imminent threats of attack, to protect nationals abroad, to resort to armed reprisals or even to protect economic interests in a foreign country.

It should be observed that this approach is clearly distinct from the one adopted by the parties to the *Nicaragua* case. As mentioned before, the United States proceeded on the basis that there existed a complete identity of the relevant customary rules with the provisions of the Charter.[15] Nicaragua similarly asserted that the rules incorporated in the UN Charter corresponded 'in essentials' to those found in customary

concerning armed activities on the territory of the Congo (*Democratic Republic of the Congo* v. *Uganda*), Judgment of 19 December 2005, (2005) ICJ Rep 116–220, § 147; ICJ, *Case concerning oil platforms* (*Islamic Republic of Iran* v. *United States of America*), Judgment of 6 November 2003, (2003) ICJ Rep 161–219, § 43. The only real 'discrepancy' between the two sources of law expressly identified in the *Nicaragua* case concerned the existence of a duty to report under Article 51 UN Charter. However, this is merely a procedural obligation, linked to the monitoring of treaty commitments by an institution established by the treaty, rather than a substantive rule.

[13] See for example: D. W. Bowett, *Self-defence in international law* (Manchester University Press, 1958), pp. 187 *et seq.*; J. E. S. Fawcett, 'Intervention in international law: a study of some recent cases', (1961-II) 103 RdC 343–423, at 360 *et seq.;* M. S. McDougal, 'The Soviet–Cuban quarantine and self-defense', (1963) 57 AJIL 597–604, at 599–600; J. N. Moore, 'The secret war in Central America and the future world order', (1986) 80 AJIL 43–127, at 82–3; S. M. Schwebel, 'Aggression, intervention and self-defence in modern international law', (1972-II) 136 RdC 411–97, at 479–83; C. H. M. Waldock, 'The regulation of the use of force by individual states in international law', (1952-II) 81 RdC 451–517, at 496–9.

[14] McDougal, 'The Soviet–Cuban quarantine', 599.

[15] See ICJ, *Nicaragua* case (Merits), § 181.

law.[16] The idea that pre-existing custom has continued to exist *unaltered* alongside the Charter provisions is furthermore hard to reconcile with the Court's opinion that customary international law has developed under the influence of the Charter.[17]

A majority of scholars (the 'counter-restrictionists') reject the parallel subsistence of pre-existing custom diverging from the Charter provisions.[18] Ago, for example, has stressed that 'it is right to dismiss at the outset so unconvincing an idea as that two really divergent notions of self-defence, based respectively on general international law and on the United Nations system, could co-exist'.[19] And according to Dinstein, it 'can be taken for granted that pre-Charter customary international law was swayed by the Charter and that, *grosso-modo*, customary and Charter *Ius ad Bellum* have converged'.[20] Last but not least, in 1966, the International Law Commission observed that 'the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force'.[21]

Scholars of the majority group have occasionally discarded the views of the 'restrictionist' group by arguing that they were in reality referring to custom as it existed in the nineteenth century, rather than to custom as it had developed in the period immediately prior to the UN Charter.[22] Brownlie, for example, rejects the anachronistic and 'episodic reference to the *Caroline* incident and the related correspondence of the years

[16] *Ibid.*, § 187 *iuncto* 188. [17] *Ibid.*, §§ 176, 181.

[18] See, *inter alia*: R. Ago, 'Addendum to the 8th Report on State Responsibility', (1980-II) 32 YBILC, Part One, 63; I. Brownlie, 'The principle of non-use of force in contemporary international law', in W. E. Butler (ed.), *The non-use of force in international law* (Dordrecht: Martinus Nijhoff, 1989), pp. 17–27, at 19; I. Brownlie, 'The use of force in self-defence', (1961) 37 BYBIL 183–268, at 239 *et seq.*; A. Constantinou, *The right of self-defence under customary international law and Article 51 of the UN Charter* (Brussels: Bruylant, 2000), p. 204; Y. Dinstein, *War, aggression and self-defence*, 4th edn (Cambridge University Press, 2005), p. 96; T. Gazzini, *The changing rules on the use of force in international law* (Manchester University Press, 2005), pp. 121–2; C. Gray, *International law and the use of force*, 3rd edn (Oxford University Press, 2008), pp. 98–9. For other references, see: A. Randelzhofer, 'Article 51', in B. Simma, in collaboration with H. Mosler, A. Randelzhofer, C. Tomuschat and R. Wolfrüm (eds.), *The Charter of the United Nations: a commentary*. Vol. I (Oxford University Press, 2002), pp. 788–806, at 792, footnotes 24–5; A. Cassese, 'Article 51', in J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies*, 3rd edn (Paris: Economica, 2005), pp. 1329–61, at 1336, footnote 4.

[19] Ago, 'Addendum', 63. [20] Dinstein, *War, aggression and self-defence*, p. 96.

[21] ILC, 'Reports of the Commission to the General Assembly', (1966-II) YBILC 247.

[22] See Cassese, 'Article 51', p. 1336.