INTRODUCTION

It is a sad and depressing reality that for any international lawyer interested and working in the field of international law governing the use of force business tends to be bad during moments of relative peace and stability. Arguably even more depressing, however, is the fact that this is not often the case. The adoption of the United Nations (UN) Charter in 1945, at the end of the Second World War, was a landmark moment for this branch of international law, in that a prohibition of the 'threat or use of force' had taken the place of the broader – and largely unsuccessful – attempts at regulating the resort to 'war' as found in the Covenant of the League of Nations (1919) and the Kellogg–Briand Pact (1928). Although the world has not witnessed catastrophic global wars since 1945, the use of force is, nonetheless, never far from our consciousness. This is often in the form of one or more states taking, or at least threatening, military action against another, which was arguably the type of scenario envisaged by the prohibition of force contained within Article 2(4) of the UN Charter, confined as it is to the 'international relations' between states. The military action by the United States, the UK and Australia against Iraq in 2003, which had the somewhat inevitable result of a regime change, provides a notable example of such action, and one which proved highly controversial and the ramifications of which both Iraq and the broader international community are continuing to face.

However, today it is more likely that when a state resorts to force it does so against a non-state actor, often of a terrorist nature. Indeed, just a few years preceding its use of force against Iraq, the United States responded to the attacks of 11 September 2001 by launching a military campaign against al-Qaida, the terrorist group responsible for the attacks. To remain relevant, the law, whilst not being infinitely malleable to suit the interests and actions of individual states, must be capable of meeting new developments and challenges within the international community. In this respect, the rise to prominence of contemporary terrorism, ranging from lone-wolf suicide bombers to groups with aspirations of statehood, has meant that, while new rules have not come into existence, the interpretation provided to existing ones has been brought into sharp focus. Further questions have been asked of the law due

to the evolution in weaponry, in that while what may be considered to be relatively conventional weaponry is still very visible – as the use of force against Iraq again vividly demonstrated – weapons of mass destruction, drones, cyber weaponry and suicide bombers have asked questions of the rules in this area, as well as in the fields of the law of armed conflict (or international humanitarian law) and international human rights law.

The decision to resort to the use of force is one of the most solemn that a state can take and the international legal regulation of the use of force undoubtedly remains one of the most fundamental areas of international law. Indeed, the prohibition of force contained within Article 2(4) of the UN Charter is often referred to as the 'cornerstone' provision of what some have described as the 'constitution' of the international community.[1] Furthermore, there can be little of greater importance to a state or the international community than self-preservation and the protection of sovereignty, and this is what much of the law is concerned with. Yet, and partly for these very reasons, the law in this area also remains one of the most controversial within international law.

A further reason for the controversy regarding this area of the law can be found in its relative simplicity, consisting mainly of just a handful of provisions within the UN Charter. Compared with, for example, the law of armed conflict, this is legal regulation at its most minimalist. However, while the rules are open to differing interpretations, there is a level of apparent agreement amongst states in regard to their central elements. Disagreements and divisions have occurred, and will continue to occur, in connection with the interpretation of the law itself, but more often they arise in regard to issues of fact and in the application of the law. It is, however, universally accepted, that the use of force is also regulated through customary international law and it is the interplay between the two sources of the law that makes this particular branch of international law so fascinating. This interplay can be seen, for example, in connection with the various state interventions against the so-called Islamic State group in Syria. The United States and other states took action in collective self-defence of Iraq against the attacks of this group which were emanating from within both Iraq and Syria, expressly invoking Article 51 of the UN Charter. Yet, in the very same letter notifying the UN of its actions and associated legal justifications, claims were also made that it was taking such action due to the 'inability or unwillingness' of the Assad regime in Syria to take action itself,[2] a notion which is not contained within the Charter and remains controversial within customary international law.

[1] See James L. Brierly, *The Law of Nations*, 6th edn (rev. Humphrey Waldock) (Oxford University Press, 1963), at 414 and Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009).

[2] See, for example, UN Doc. S/2014/695, 23 September 2014.

In addressing the various issues and controversies that arise one may question what this branch of international law aims to do. While the law regulating the use of force is centred upon a broad prohibition of the threat or use of force there is also a pragmatic realisation that there will be occasions when force will be necessary. Indeed, to deny states the possibility of using force would have made signing up to and ratifying the UN Charter akin to a suicide pact, something which states, for obvious reasons, would never have agreed to. The law therefore aims to minimise to the greatest extent possible the occasions when force will be used, by not only preserving an 'inherent' right of states to engage in self-defence,[3] but also through centralising the collective use of force within the UN, in particular the Security Council in providing it with primary responsibility for the maintenance of international peace and security.[4] While the existence and functioning of regional organisations is expressly recognised in the UN Charter,[5] it is also clear that, in terms of enforcement measures involving the use of force, the Security Council is to take precedence and possess ultimate control.

However, closely tied to the question of what this branch of the law aims to do is what it can realistically achieve. While the notion of sovereign equality is preached within the UN Charter,[6] one does not have to look far to see that it is imperfectly practised. As noted earlier, the Security Council stands at the apex of the system of collective security and holds great power not only over collective measures but through its oversight of invocations of self-defence. Yet, the Council consists of five permanent members (the UK, United States, France, Russia and China) that not only have a permanent presence within the Council but also possess a power of veto,[7] providing these member states with notably greater rights and power than other states. This, combined with the pressures of international politics, has meant that the system of collective security, and this branch of law more generally, has not functioned as arguably intended most of the time, with the collective security system in a state of partial paralysis for most of its existence.[8] That said, however, and in particular with the end of the Cold War, the law can arguably be seen to have played a role in restraining, or at least conditioning, the forcible actions of states. For example, whether or not it is simply a case of saving face, states nonetheless often appear compelled to justify their actions, at least, indicating that the law is not purely epiphenomenal.

This book, which is targeted at students, academics and practitioners, aims to provide a contemporary introduction to international law governing the resort to force. In this sense, it has aspired to be challenging yet accessible and

[3] Article 51, UN Charter (1945). [4] Article 24(1), *ibid*. [5] Chapter VIII, *ibid*.
[6] Article 2(1), *ibid*. [7] See Articles 23(1) and 27(3) respectively, *ibid*.
[8] Nigel D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, 2nd edn (Manchester University Press, 1997), at 7.

comprehensive yet concise. Unfortunately, space does not permit the depth of detail and discussion that the subject ultimately deserves, but the book provides relevant signposts to further investigation and discussion where appropriate and references to additional sources and academic commentary are contained both within the footnotes and in 'suggested further reading' sections at the end of each chapter. There is, however, considerable literature on the topic and this book has inevitably had to be selective. In addition, the author's woeful proficiency in languages other than English means that the book does not fully represent the breadth and scope of literature on the subjects addressed within. Furthermore, while an attempt has been made to make the book as up to date as possible, events have inevitably outpaced the production of it. Lastly, some examples of state practice in this area are useful in more than one chapter of the book, often as a result of a state's 'shotgun' approach to justification, or several legal bases perhaps being implicit in its justification. While attempts have been made to keep factual repetition to a minimum, and appropriate cross-references are included where necessary, it is also recognised that readers may dip into the book at various places, and so as much detail as possible has been included in each of the chapters to ensure that they present a full picture of the issues discussed.

The book has attempted to be conscious of historical developments in regard to this area of the law. Yet, it has as its focus the law – including its development and the challenges to it – since 1945; that is, since the adoption of the UN Charter. While this is a task that could be undertaken in different ways, with different agendas and different focuses, this book mainly takes, to use the words of Ian Brownlie, an 'objective positivist' approach to the law.[9] While cognisant that the rules governing the use of force, or the '*jus ad bellum*', and the system and structures that underpin it are far from perfect, or indeed in many respects fair, the central aim of the book is to employ sources and secondary rules of international law formation, modification and interpretation in a transparent and methodical way in determining what the rules and present state of the law are (*lex lata*), as well as being cognisant of its possible future direction (*lex ferenda*). In particular, while it views the law through the primary sources of treaty and customary international law, it also incorporates discussion of how it has been viewed through the eyes of the epistemic community, including commentators, various courts and tribunals, and commissions of inquiry. Of course, in this sense it may be charged with promoting what might be considered an elitist conception of the law, in particular with the focus upon states – and perhaps certain states – and rules developed predominantly by them. It might also be said to cover over biases and agendas that arguably make the law illegitimate. Yet, the aim of the book

[9] Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff, 1998), at 2.

is to attempt to provide an overview of how the law operates in practice, and how it is used (and abused) by states in their international relations. Of course, in doing so it is hoped that utilising these sources in a transparent way will expose any hidden agendas. But that is not to say that they are in any way straightforward to apply, as will become clear throughout the book.

With this as the background, Part I focuses upon the contemporary prohibition of the threat or use of force. While Chapter 1 addresses the general breadth and scope of the prohibition, Chapter 2 looks more specifically at the meaning of 'force'. Parts II and III address the two main established exceptions to this prohibition. Part II concerns the use of force in the context of collective security. While Chapter 3 sets out the general structure of the UN Charter and the ways in which force might be taken under the auspices of the UN and other organisations, Chapter 4 takes a closer look at issues in relation to 'authorisation' being granted, or not, by the UN Security Council, while Chapter 5 examines peacekeeping and the use of force specifically within peacekeeping operations. Part III is on the right of self-defence with Chapter 6 examining general aspects of the right. Chapters 7 and 8 address particularly controversial aspects of the right in the form of preventative self-defence and the use of force against non-state actors. Finally, Part IV has as its focus forcible intervention in situations of civil unrest with Chapter 9 examining consent to intervention and intervention in civil wars, while, finally, Chapter 10 has as its focus intervention for humanitarian purposes.

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