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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 military force by and between states (the '*jus ad bellum*'), 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 legal 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' contained in the Covenant of the League of Nations (1919) and the Kellogg–Briand Pact (1928).[1] According to the Charter regime, states were, therefore, prohibited from resorting to military action against and in the territory of other states unless acting in self-defence or under the authority of the UN Security Council.[2] This regime has so far stood the test of time, at least to the extent that it continues to exist today. However, it is, as this book attempts to demonstrate, subject to constant scrutiny and challenge in terms of its breadth, effectiveness and relevance.

Although the world has not witnessed catastrophic global wars since 1945, the use of force has never been far from our consciousness. This has often been 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 drafters of the prohibition of force contained within Article 2(4) of the UN Charter, confined as it is to the 'international relations' between states.[3] The military action by the United States, the United Kingdom 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 today.[4] Nearly two decades later Russia's invasion of Ukraine in 2022 demonstrates that such large-scale

[1] See Section 1.2. [2] See Chapters 6–8 and 3–5, respectively. [3] See Section 1.3.1.4.
[4] See Section 4.3.

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inter-state uses of force with significant global ramifications have not been eradicated in the UN Charter era.[5] Of course, it cannot go unnoticed that both were perpetrated by permanent members of the UN Security Council, the body ordained with 'primary responsibility for the maintenance of international peace and security'.[6]

Today it is, however, more likely that when a state resorts to force it does so against a non-state actor, often of a perceived terrorist nature. Indeed, just a few years preceding its use of force against Iraq in 2003, 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.[7] 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 of the *jus ad bellum* have not been introduced since 1945, the interpretation provided to existing ones has often 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 both the use of force against Iraq in 2003 and the Russian invasion of Ukraine in 2022 vividly demonstrate – weapons of mass destruction, drones, and cyber weaponry have asked questions of the rules in this area, as will be highlighted throughout the chapters of this book. The rapidly occurring and far reaching climate change that the world is currently witnessing is also tentatively beginning to raise certain questions of the law governing the use of inter-state force.[8] In particular, the pressures that will be placed on the international community through, for example, migration and land and water shortages, have already begun to be addressed in terms of their threat to peace and security.[9]

In addressing the various issues and controversies that arise one may question what this branch of international law seeks 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 deemed to be necessary. Indeed, to deny states the possibility of using force would have in the view of some 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

[5] This incident is discussed throughout the book. See, in general, James A. Green, Christian Henderson and Tom Ruys, 'Russia's Attack on Ukraine and the *Jus ad Bellum*' (2022) 9 *Journal on the Use of Force and International Law* 4.

[6] Article 24(1), UN Charter (1945).

[7] See, in particular, Sections 7.4.2 and 8.3.2.

[8] See, for example, Craig Martin, 'Atmospheric Intervention?: The Climate Change Crisis and the *Jus ad Bellum* Regime' (2020) 45 *Columbia Journal of Environmental Law* 331.

[9] Ibid., at 374–8.

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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,[10] 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.[11] Although the existence and functioning of regional organisations is expressly recognised in the UN Charter,[12] 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.[13]

However, closely tied to the question of what this branch of the law seeks to do is the question of what it can realistically achieve. The law is to a great extent premised upon reciprocity between states and, although the notion of sovereign equality is preached within the UN Charter,[14] one does not have to look far to see that it is imperfectly practised. As noted in the previous paragraph, the Security Council stands at the apex of the system of collective security and holds potentially great power not only over collective measures but through its oversight of invocations of self-defence.[15] Yet, the Council consists of five permanent members (the United Kingdom, United States, France, Russia and China) that not only have a permanent presence within the Council but also possess a power of veto,[16] 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 international law regulating the use of force 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.[17] 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.[18] For example, whether or not it is simply a case of saving face, states nonetheless often appear compelled to justify their actions, which can be taken to indicate that the law in this context is not, at least, purely epiphenomenal.

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

[10] Article 51, UN Charter (1945). See Chapters 6–8.
[11] Article 24(1), ibid. See Chapters 3–5.
[12] Chapter VIII, UN Charter (1945).
[13] See Section 3.5.
[14] Article 2(1), UN Charter (1945).
[15] See, in particular, Section 6.6.
[16] See Articles 23(1) and 27(3), respectively, UN Charter (1945).
[17] Nigel D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, 2nd ed. (Manchester University Press, 1997), at 7.
[18] See further, in particular, Section 1.7.

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Charter is often referred to as the 'cornerstone' provision of what some have described as the 'constitution' of the international community.[19] 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 the broader field of 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.[20] Compared with, for example, the law regulating armed conflicts (the '*jus in bello*' or international humanitarian law), which is comprised of numerous dedicated treaties and conventions, this is legal regulation at its most minimalist.

RELATED FRAMEWORKS OF INTERNATIONAL LAW

While the branch of international law under focus in this book ostensibly seeks to limit when states resort to the use of inter-state force, there are other related branches and frameworks of international law that will be touched upon.[21] For example, when states resort to armed force, the *jus in bello* will frequently be triggered.[22] It is often said that, whereas the *jus ad bellum*, which is under focus in this volume, seeks to regulate *when* states may resort to force, the *jus in* bello regulates *how* states may use force within the context of an armed conflict. Indeed, the key underlying obligations within this latter branch of international law provide for the distinction between civilians and combatants and civilian objects and military objectives, the balancing of the principles of military necessity with that of humanity, the obligation to take precautions in attacking the opposing party to an armed conflict and the obligation that any military advantage gained in an attack must be proportionate to the collateral civilian harm caused by it. However, the 'when' and 'how' distinction between the *jus ad bellum* and *jus in bello* frameworks is not entirely accurate. As will be seen, the twin criteria of 'necessity' and 'proportionality' within the *jus ad bellum* also have much to say on the 'how'

[19] See James L. Brierly, *The Law of Nations*, 6th ed. (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).

[20] In particular, Articles 2(4), Chapter VII, including Article 51, and Chapter VIII.

[21] There are additional frameworks and areas of international law that are of some relevance, including arms control law, the law of the sea, civil aviation law, disarmament and non-proliferation and the law relating to outer space, although due to limited space they are not covered or given similar attention here.

[22] For an overview of this area of international law, see Emily Crawford and Alison Pert, *International Humanitarian Law*, 2nd ed. (Cambridge University Press, 2020).

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question, as well as the where and when questions, and continue to operate in parallel with the operation and application of the *jus in bello*.[23]

A further branch of international law that is increasingly seen as having a role in decisions and actions regarding the inter-state use of force is that of international human rights law.[24] Indeed, although there has long been a debate regarding the relationship between the *jus in bello* and international human rights law and when each will apply or be said to constitute the *lex specialis*, as well as interest in the relationship between the *jus ad bellum* and *jus in bello*, there has been until recently comparatively little interest in the relationship between the *jus ad bellum* and international human rights law, in particular the right to life.[25] There are several possible reasons for this void, including that decisions to resort to inter-state force and war are often perceived as being removed from the obligations that states owe to individual human beings. In addition, although the position is increasingly less common, the idea still lingers that states somehow shed their obligations to protect human rights once they venture outside of their territory and jurisdiction. This book will address the idea that the *jus ad bellum* has a 'human element' and, although international human rights law is arguably of relevance across the spectrum of issues covered in this book, it has been given particular attention in the context of so-called targeted killings, which is arguably where the interaction between the three branches of the *jus ad bellum*, *jus in bello* and international human rights law is particularly pertinent.[26]

In addition, while so often associated more with war crimes and violations of the *jus in bello*, international criminal law is now another framework of relevance in discussions on the *jus ad bellum*, in particular with the emergence of the crime of aggression as a crime the International Criminal Court now has jurisdiction over.[27] Indeed, although the law on the use of force is generally seen at the level of the 'state', the crime of aggression has to an extent 'individualised' the law in this area, so that those individuals engaged in decisions to resort to such inter-state force may be held accountable. The crime might still be perceived as being of restricted utility, with limited possibilities for holding individuals accountable. Yet it is nonetheless arguably a step forward in attempting to achieve the founding purpose of the United Nations of 'saving succeeding generations from the scourge of war'.[28]

[23] See, in particular, Section 6.3. See, in general, Keiichiro Okimoto, *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello (Hart, 2011).
[24] See, in general, Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds.), *International Human Rights Law*, 4th ed. (Oxford University Press, 2022).
[25] Although see Section 1.6. [26] See Section 8.5. [27] See Section 1.5.5.2.
[28] Preamble, UN Charter (1945).

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THE SOURCES OF THE LAW ON THE USE OF FORCE AND THE QUESTION OF METHODOLOGY

Ascertaining the contours of the law is in this area is by no means an easy or straightforward task, and several qualifications are called for. The book takes its cue from the sources of international law found within Article 38(1) of the Statute of the International Court of Justice (1945), in particular treaties and customary international law.[29] Both of these main sources of international law are of key relevance to the topic of this book as, while the adoption of the Charter of the United Nations as a treaty in 1945 was a landmark moment in the historical regulation of the threat or use of force, it is broadly accepted that inter-state force is also regulated through customary international law,[30] with extensive similarities, if not total symmetry, in the law as it is contained in both sources.

There is no formal hierarchy between the sources of international law. Yet, in addressing the law this book will start where possible with the text of the UN Charter. Indeed, it is easy to be drawn first to the Charter given its written and tangible nature from which to obtain an understanding of the contours and content of the law. As Bianchi has noted, in this area of international law '[t]he instinct to give priority to the UN Charter provisions is . . . understandable in the light of the allegedly more secure character of a written text, particularly as compared with the uncertain process of ascertaining the existence as well as the content of unwritten rules of customary law.'[31] Furthermore, one could argue that 'the sheer fact that something is written down gives it a special authority'.[32] In any case, virtually the entire international community of states is a member of the United Nations, meaning that

[29] Article 38(1)(a) and (b), Statute of the International Court of Justice (1945). Treaties are written agreements between states and may take a multilateral form, such as the UN Charter, or be of a bilateral nature between two states. Customary international law, on the other hand, is formed through the practice of states which is underpinned by a general belief (*opinio juris*) that the particular act or omission is either required or prohibited as an international legal norm. Article 38, which also includes in paragraph (d) 'judicial decisions and the teachings of the most highly qualified publicists' as 'subsidiary means for the determination of rules of law', is arguably incomplete or at least does not paint a complete and accurate picture of the sources of international law. For sure, while not fitting squarely under the headings of Article 38, the work of the International Law Commission, resolutions and statements of – as well as debates within – the UN Security Council and General Assembly, as well as documents of other organisations are central to any discussion and analysis of the law.

[30] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, (1986) ICJ Reports 14, at para. 34.

[31] Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22 *Leiden Journal of International Law* 651, at 657.

[32] Ibid., at 658.

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whatever arguments one may make about the possible nature of, or changes to, the customary source of a particular obligation or right, these would still need to be squared with the obligations and rights states have under the Charter.[33]

A discernible level of agreement exists both between states and between scholars on the core of the law within these sources, and the basic processes and fundamental principles regarding ascertaining the law and the formation, interpretation and modification of both treaties and customary international law. Yet, beyond this we find that any agreement soon begins to dissipate.[34] For example, while there is a core of law that is clear and agreed upon by states – indeed, no state denies that there is a prohibition of the threat or use of force or that all states have a right of self-defence – questions remain regarding its extent and breadth, over which there are sometimes significantly differing views.

Resorting to the Vienna Convention of the Law of Treaties (1969) (VCLT) provides some guidance as to how one should approach interpreting the UN Charter.[35] These rules of interpretation, however, leave a large measure of discretion to the individual interpreter and, in many ways, give rise to more questions than answers. For example, the VCLT provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[36] Yet, in addition to any 'subsequent agreement' between the parties regarding the interpretation of the treaty,[37] the interpreter is also

[33] In this respect Bianchi claims that 'it is puzzling to see how there can be state practice on the use of force outside the UN Charter'. Ibid., at 661. Crawford and Nicholson also note that the relevant norms and rules of the *jus ad bellum* 'are first and foremost treaty rules, subject to the law of treaties'. James Crawford and Rowan Nicholson, 'The Continued Relevance of Established Rules and Institutions Relating to the Use of Force', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 96, at 110. In any event, Article 103 of the UN Charter provides that Member states agree that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' There does not seem to be a reason for excluding customary international law from coming within the reference here to 'any other international agreement'.

[34] As Bianchi notes, 'the societal consensus on the centrality of the Charter regulatory framework to the use of force evaporates when it comes to interpreting the content and scope of application of its most fundamental provisions.' Ibid., at 658. Bianchi puts this down to a failure 'to agree on the method that must be used for interpreting the law'. Ibid., at 654.

[35] See Articles 31–33, Vienna Convention of the Law of Treaties (1969).

[36] Article 31(1), ibid.

[37] Article 31(3)(a), ibid. While states rarely adopt express 'agreements' on interpretation, as per Article 31 of the Vienna Convention, they have attempted to provide some elaboration on the brief provisions of the UN Charter through the adoption of various general resolutions of the UN General Assembly. These have been declaratory on issues of the *jus ad bellum*, although

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permitted to take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'[38] and '[a] special meaning shall be given to a term if it is established that the parties so intended'.[39] However, if after having applied these general rules of interpretation the interpreter still feels the need to 'confirm' a particular meaning,[40] or if the application of the rules has left 'the meaning ambiguous or obscure' or has led 'to a result which is manifestly absurd or unreasonable',[41] they are permitted to have recourse 'to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'.[42]

All of these aspects of treaty interpretation leave the interpreter with a good degree of interpretative latitude, with the very real possibility of their application leading to diverging interpretations. For example, in the context of the UN Charter the right of self-defence is described as an 'inherent right' in Article 51 and one which arises 'if an armed attack occurs', which has led to much disagreement as to what the drafters of the Charter meant by the inclusion of these terms and what they should mean in the contemporary context, as well as disagreement regarding the impact differing interpretations of them have had on the extent of the contemporary right of self-defence and, therefore, the breadth and scope of the prohibition of force.[43] Furthermore, the Charter does not expressly provide for a right of so-called humanitarian intervention. Yet, questions have been raised as to whether one might be read into the Charter. This is on the basis of the references made

the price of consensus has usually been a good degree of ambiguity, meaning that, while representing elaborations on the bare bones of the Charter provisions, these resolutions often simply raise further questions. See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (1970); Definition of Aggression, UNGA Res. 3314 (XXIX) (1974); Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UNGA Res. 42/22 (1987).

[38] Article 31(3)(b), ibid. For example, while formally '[d]ecisions of the Security Council on all [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members' (Article 27(3), UN Charter (1945)), the requirement for the 'concurring votes' of the permanent members has been interpreted through the practice of the states on the Council to permit abstentions from voting. See Constantin A. Stavropoulos, 'The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations' (1967) **61** *American Journal of International Law* 737. In the context of the *jus ad bellum*, such 'subsequent practice' can be seen in the form of the UN Security Council now 'authorising' individual states and coalitions of states to employ force, something which is not expressly found within the Charter, in particular Article 42. See, further, Chapters 3–5.

[39] Article 31(4), ibid. [40] Article 32, ibid. [41] Articles 32(a) and 32(b), respectively, ibid.

[42] Article 32, ibid. [43] See, further, Chapters 6–8.

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in it to human rights and self-determination, or due to the fact that the UN Security Council has not operated in line with its original purposes and functions as set out within the Charter, which has meant that it has been unable to reliably prevent such humanitarian atrocities from occurring, or finally due to the various incidences of armed intervention that have occurred since 1945 and which appeared ostensibly to have a humanitarian purpose.[44]

By contrast, the methodology for understanding the formation and modification of customary international law has emerged largely within the jurisprudence of the International Court of Justice (ICJ)[45] and within scholarship.[46] In essence, in order to confirm both the existence and contours of a rule, or the modification or particular interpretation of one, a general state practice confirming the rule or interpretation should be supported by *opinio juris* (that is, a belief by states that the practice is permitted or prohibited *as a matter of law*). While there is extensive scholarship on customary international law in general, and the International Law Commission has set out its views on aspects of it,[47] there has also been much written specifically on the customary regulation of the use of force and associated methodological issues.[48]

There is, however, no agreed upon method for determining relevant state practice and *opinio juris* for the purposes of identifying customary international law.[49] For example, while the general understanding is that there should be general consistency, rather than complete uniformity, between states in the context of a particular practice,[50] it is difficult to pinpoint when sufficient consistency and agreement has become identifiable. In addition, it is possible that a state that persistently objects to the formation of a customary rule can be excluded from being a subject of it,[51] and the interests of specially affected states may be taken into account in determining the status of

[44] For more on these issues see Chapter 10 on the doctrine of humanitarian intervention.

[45] See, for example, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, (1969) ICJ Reports 3, at para. 77; *Nicaragua* case, n. 30, at paras. 184, 186.

[46] See, for example, Michael Akehurst, ‘Custom as a Source of International Law’ (1974–5) **47** *British Yearbook of International Law* 1; Pierre-Marie Dupuy (ed.), *Customary International Law* (Edward Elgar, 2021).

[47] See International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10 (2018), 121. These were adopted by the UN General Assembly in UNGA Res. 73/203 (2018).

[48] See, for example, Enzo Cannizzaro and Paolo Palchetti (eds.), *Customary International Law on the Use of Force: A Methodological Approach* (Martinus Nijhoff, 2005).

[49] See, for example, Daniel H. Joyner, ‘Why I Stopped Believing in Customary International Law’ (2019) **9** *Asian Journal of International Law* 31.

[50] *Nicaragua* case, n. 30, at para 186.

[51] On this possibility, see James A. Green, *The Persistent Objector Rule in International Law* (Oxford University Press, 2016).

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customary rules.[52] Furthermore, some scholars adhere to an 'extensive' approach, which prioritises physical state practice and, in that sense, the actions, views and values of powerful states who are more readily able to engage in it,[53] while others adhere to a more 'restrictive' approach, which focuses rather on *opinio juris*, something which all states are in principle able to participate in.[54] There is also the question of whether a lack of state practice can be compensated for by a strong *opinio juris*, and vice versa, an issue which has never been, and perhaps never can be, fully settled, at least not in the abstract.[55]

Ultimately, regardless as to how thorough and objective one claims to be, interpreting treaties and the meaning and legal significance of state practice and *opinio juris* will always be clouded by at least a measure of selection bias and subjectivity.[56]

LEGAL AND PROCEDURAL ISSUES ASSOCIATED WITH THE *JUS AD BELLUM*

There are, however, further particular methodological issues in identifying and interpreting international law, several of which are specific to the context of the *jus ad bellum*. For example, whereas states are required under Article 51 of the UN Charter to report their actions taken in self-defence to the UN Security Council,[57] they are not obliged to provide a legal justification as such. When states resort to military action – whether in self-defence or otherwise – they may well offer a legal justification, although they do not

[52] See Keven Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112 *American Journal of International Law* 191. Whilst 'specially affected' states might, for example, plausibly include those with a coastline in the context of the formation and interpretation of customary rules regarding the law of the sea, it is more difficult to identify whether such a doctrine exists in the context of the *jus ad bellum*, and if so to which states it would apply to.

[53] For an example of this approach see Abraham D. Sofaer, 'On the Necessity of Pre-emption' (2003) 14 *European Journal of International Law* 209.

[54] For an example of this approach, see François Dubuisson, 'La problématique de la légalité de l'opération "Force alliée" contre la Yougoslavie: enjeux et questionnements', in Olivier Corten and Barbara Delcourt (eds.), *Droit, légitimation et politique extérieure: l'Europe et la guerre du Kosovo* (Bruylant, 2001), 176.

[55] On this possibility, see Frederic L. Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146.

[56] Indeed, '[l]egal significance must be inferred from primary materials and factual content, which necessarily involves a degree of personal judgment. Identifying relevant state practice and discerning *opinio juris* requires a measure of subjectivity.' Chris O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (Oxford University Press, 2021), at 16.

[57] See, further, Section 6.6.1.

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