Leiden Journal of International Law, 22 (2009), pp. 651–676
 doi:10.1017/S092215650999015X

ARTICLES

The International Regulation of the Use of Force: The Politics of Interpretive Method

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Abstract

The difficulty in identifying the contours of the international regulation of the use of force is not merely the product of the highly politicized character of this area of international law, let alone of the divide between theory and practice. This paper submits that the problem rather lies in the fact that the interpretive community that produces the official discourse on the use of force is no longer able to agree on the way in which legal categories and interpretive techniques should be used to identify the applicable law. A reflexive consideration, by all actors involved, of the method by which the discourse on the use of force is formed seems to be necessary in order to establish or restore, within that interpretive community, the societal consensus needed to provide the international community with a common understanding of the extant regulatory framework and its scope of application.

Key words

armed reprisals; customary law; humanitarian intervention; interpretation; interpretive community; legitimacy; methodology; necessity; regime failure and fallback theories; relation between treaty law and customary law; self-defence; societal consensus; treaty interpretation; UN Charter; use of force

1. How method bears on normative outcomes: a divided interpretive community

The international legal regulation of the use of force is often referred to as one of the most controversial and politically charged areas of international law, or as the domain in which the hiatus between theory and practice is most prominent. While these statements may well be an accurate representation of widespread convictions, they fail to capture the reasons that inspire such a perception. In particular, the descriptive elements underlying these propositions are unlikely to constitute a reasonable explanation of the phenomena on which they are meant to shed light. To

* Professor of International Law, Graduate Institute of International and Development Studies, Geneva. This paper was submitted to a Group of Experts on Counterterrorism Strategies, convened by the Grotius Centre for International Legal Studies of Leiden University, in co-operation with the Netherlands Ministry of Foreign Affairs, at The Hague on 11–13 June 2009. The present article is the advance publication of a chapter to be published in Larissa van den Herik and Nico Schrijver (eds.), *Counterterrorism Strategies, Human Rights and International Law: Meeting the Challenges* (2010, forthcoming). The author would like to thank Lorenzo Gradoni, Claus Kress, Steven Ratner, Christian Tams, Elizabeth Wilmshurst, Michael Wood, Fouad Zarbiev, and the two anonymous reviewers of this journal for their useful comments on earlier drafts of the paper.

say that the use of force is controversial is to state the obvious, and does not make this area any different from others in which the substance or the scope of application of international regulatory standards is disputed. Nor is the contention that the subject at hand is highly political sufficient to explain its allegedly peculiar character. Most of international law is influenced by political (and other) considerations.[1] To believe that the law is distinct from its underlying social realities is either illusory or mystifying.

This paper submits that the current difficulties in determining the exact contours of the international legal regulation of the use of force would greatly benefit from a reflexive consideration, by all relevant actors, of some methodological aspects underlying the legal discourse on the use of force. The fundamental contention is that to agree on method could cure much of the current divergence of views about the content and scope of application of some of the international rules regulating the use of force. For the limited purpose of this paper, 'method' is taken to mean the intellectual matrix that provides the paradigms (legal categories and interpretive techniques) used to identify the state of the law on the use of force. The importance of paradigms in any given discipline can hardly be underestimated, as they are the tools by which reality is constructed. The paradigm provides all the relevant players 'with the rules of the game, describes the pieces with which it must be played, and indicates the nature of the required outcome'.[2] An explicit reflection on method, meant as the way in which a set of relevant normative and interpretive paradigms are used to analyse, explain, and justify legal and social realities, is all the more compelling at a time when the capacity of international law to provide satisfactory regulation of the use of force is increasingly called into question.[3]

The interpretive presuppositions that inspire doctrinal analysis or diplomatic stances taken by states are rarely revealed, and yet there is always an implicit set of methodological assumptions that directs the normative outcome. Despite the abundant writing on the use of force, only episodic attention is paid to the methodology of the discourse. Exceptions exist,[4] but they tend to simplify the debate

1 See R. Higgins, *Problems and Process: International Law and How We Use It* (2004), 5: 'I believe there is no avoiding the essential relationship between law and policy. I also believe that it is desirable that the policy factors are dealt with systematically and openly.' See also by the same author, 'Integrations of Authority and Control: Trends in the Literature of International Law and Relations', in B. Weston and M. Reisman (eds.), *Towards World Order and Human Dignity* (1976), 85: 'Policy considerations . . . are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is *part of the legal process* . . . A refusal to acknowledge political and social factors cannot keep law "neutral", for even such a refusal is not without political and social consequences. There is no avoiding the essential relationship between law and politics' (emphasis in original).

2 T. Kuhn, 'The Function of Dogma in Scientific Research', in A. C. Crombie (ed.), *Scientific Change, Historical Studies in the Intellectual, Social and Technical Conditions for Scientific Discovery and Technical Invention, from Antiquity to the Present* (1963), 362. See also T. Kuhn, *The Structure of Scientific Revolutions* (1996), 113: 'a paradigm is prerequisite to perception itself. What a man sees depends both upon what he looks at and also upon what his previous visual-conceptual experience has taught him to see.'

3 In particular, claims are often made that the changing circumstances of the use of force warrant a reconsideration of a legal regime that was largely designed in the aftermath of the Second World War. Such allegations are oblivious of the fact that law possesses tools of analysis and interpretation that may ensure the adjustments of its rules to the changing demands of international society (see *infra*, especially sections 2–5), if only one can agree on how to use them.

4 See the introductory remarks by C. Gray to her *International Law and the Use of Force* (2008), 1–29.

by contrasting European and American approaches or conservative and progressive scholarly stances.[5] The problem, however, is not one of taxonomy, but rather of lack of social consensus on the use of methods of legal analysis and interpretation.

If the way in which legal categories and interpretation techniques are used is a determinant of the normative outcome, one may wonder why issues of method have attracted so little interest. In fact, neglect of method may be partly due to the attitude of considering methodological issues as a purely theoretical preoccupation and of regarding theory and practice as the two opposite poles of the legal spectrum, which are doomed never to meet. This simplistic attitude, which inspires many a practitioner's disbelief as to the relevance of the theoretical or doctrinal debate carried out in academic circles to the practice of the use of force, hides the simple fact that theory and practice are complementary and mutually constructive. Despite some attempts at 'armchair theorizing' in which certain strands of academic work indulge,[6] most of the time theory provides the framework for justifying practice. Sometimes its role consists in opening up a range of possible avenues, into which practice can be channelled. At the same time, the widespread belief that the practitioners do the job on the ground without bothering too much with the theoretical aspects of the matter is simply false. Practitioners, even when not conscious of it, always presuppose 'a theory' or 'a method'. It is against the backdrop of theory and method, whatever they may be, that they provide their choices with the necessary level of credibility and persuasiveness required by the players of the game, which are no longer exclusively states.

Furthermore, the attitude of distinguishing sharply between theory and practice is oblivious to the modalities by which the legal discourse is formed. The *interpretive community*[7] that shapes the common understanding of legal rules on the use of force is much wider than that of national governments and their legal advisors or the judges of the International Court of Justice (ICJ). It includes also the handful of

5 See for instance O. Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate', (2005) 16 EJIL 803, and, more extensively, by the same author, *Le droit contre la guerre* (2008), especially 9–62.

6 Admittedly, a certain strand of literature has favored the emergence of such a bias, particularly by projecting into the practice the ideal of an absolute, rational coherence, detached from reality and removed from the actual practices of the agents. According to Pierre Bourdieu this amounts to a most serious epistemological error, that of 'putting a scholar inside the machine', with the undesirable effect of 'picturing all social agents in the image of the scientist, or, more precisely, to place the models that the scientist must construct to account for practices into the consciousness of agents, to operate as if the constructions that the scientist must produce to understand practices, to account for them, were the main determinants, the actual cause of the practices' (P. Bourdieu, 'The Scholastic Point of View', (1990) 5 *Cultural Anthropology* 380, at 384).

7 On the concept of 'interpretive community' see S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980), and, by the same author, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989). As is known, the notion of 'interpretive community' was developed by Fish in connection with literary studies, to explain the question of the source of interpretive authority (see Fish, *Doing What Comes Naturally*, at 141). Fish describes an interpretive community as 'not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property. It followed that such community-constituted interpreters would, in their turn, constitute, more or less in agreement, the same text, although the sameness would not be attributable to the self-identity of the text, but to the communal nature of the interpretive act' (ibid.).

academics who have made the use of force their specialty or occasionally write about it, non-governmental organizations, lobbies, and pressure groups that may have an interest in particular instances, and intellectuals and opinion-makers who influence public opinion by publicly voicing their position on any given matter. The concept of interpretive community is key to understanding that the discourse about the legal aspects of the use of force is a single one, in which different societal forces are at work and several actors interact at different levels and with varying degrees of influence and responsibility with a view to imposing their own way of interpreting legal rules. The complexity of this interpretive community hardly allows differentiating between the theory and practice of the international regulation of the use of force. The problem rather lies in the fact that the interpretive community is currently divided and is no longer able to agree on the method that must be used for interpreting the law.

The tendency to obfuscate the terms of the discussion by using different interpretive methods, the presuppositions of which are often hidden or merely implied, has found fertile ground in international law, where, as aptly noted some time ago by Sir Gerald Fitzmaurice, lawyers must often confront themselves not just with the question of 'what is the law?' but also with the much more challenging one of determining 'what the law is'.[8] While, traditionally, in case of disputed issues the international lawyerly instinct is to revert to the case law of the ICJ to find guidance,[9] the exercise risks being futile at this time. Despite the strong influence of the *Nicaragua* case,[10] the ICJ, certainly an important actor in the interpretive community, has failed to address convincingly the issues related to the use of force recently submitted to it. After the cautious and narrow approach taken in the *Oil Platforms* case,[11] with Judge Simma complaining of a missed chance for shedding light on the more fundamental aspects of the regime, the Court had two more chances to provide the much needed interpretive guidance on the regulation of the use of force. In a fairly convoluted paragraph in its Advisory Opinion on the *Israeli Wall*, the ICJ interpreted narrowly Article 51 of the UN Charter, by postulating the requirement that an armed attack must be carried out by a state in order to trigger the

8 G. Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today', Special Report, *Annuaire IDI, Livre du Centenaire* (1973), 251.

9 Such an instinct is curious indeed, given that in the international legal system the judicial function remains minimal. It can probably be explained by the inferiority complex that international lawyers have long suffered vis-à-vis their fellow domestic lawyers, to whom they were in desperate need to demonstrate that international law was like domestic law, including the function of the judiciary. Occasionally, the almost religious deference shown by some commentators towards the ICJ judgments borders on the ridiculous (see the remarks by R. Jennings, 'The Role of the International Court of Justice' (1997) 68 BYIL 1, at 41, describing the way in which some international lawyers scrutinize the tiniest detail of a judgment as if it were a religious text). This attitude is by no means peculiar to international lawyers. Pierre Schlag has qualified many domestic law scholars as 'journalists of case law' (P. Schlag, *The Enchantment of Reason* (1998), 109). The irony is that even some distinguished (former) judges of the Court reject such a deferential attitude and invite the paying of more attention to what the actors, rather than the Court, think to be normative (see R. Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law', (1991/V) 230 RCADI 9, at 43).

10 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 392; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14.

11 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161 and 324 (Simma).

right to self-defence, and distinguished, not without ambiguities, the case of terrorist attacks, to which UN Security Council Resolutions 1368 and 1373 would apply.[12] Finally, in *Congo* v. *Uganda* the Court held it unnecessary to pronounce on the very aspect which would have been most relevant to the current debate on self-defence and terrorist activities, namely the determination whether or not self-defence can be relied on against large-scale attacks by irregular forces.[13]

Interestingly enough, the individual opinions attached by some judges to the above-mentioned cases indirectly provide the reasons for the lacunal and laconic treatment of the subject. Judge Kooijmans's and Judge Simma's views on self-defence and defensive actions more properly amount to a dissent rather than to a concurring opinion.[14] In other words, the Court itself reflects the difference in opinion that characterizes the debate on the use of force and pays little attention to interpretive and methodological issues.[15] The lack of social consensus on some fundamental interpretive tenets of the regime of the use of force is thus unlikely to be reconstituted by the piecemeal and inconsistent approach of the Court after *Nicaragua*.

The ambition of the following remarks is a limited one. They are not meant to advocate any particular normative outcome, although personal preferences might occasionally come to the surface. They rather attempt to draw attention to some

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12 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136, para. 139. It is interesting to note that Judge Higgins rightly pointed out that what the Court says in para. 139 of its opinion, namely that 'Article 51 of the Charter recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State', is erroneous, as Art. 51 states nothing of the kind. Judge Higgins underscores that the requirement that the prior armed attack be carried out by a state was stipulated by the Court itself in the *Nicaragua* case (Separate Opinion of Judge Higgins, [2004] ICJ Rep., 215, para. 33).

13 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, para. 147: '[T]he Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.'

14 Ibid. [Kooijmans], paras. 25–29: '[T]he Court refrains from taking a position with regard to the question whether the threshold set out in the *Nicaragua* Judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986. . . . Even if one assumes (as I am inclined to do) that mere failure to control the activities of armed bands cannot in itself be attributed to the territorial State as an unlawful act, that in my view does not necessarily mean that the victim State is under such circumstances not entitled to exercise the right of self-defence under Article 51. . . . If the activities of armed bands present on a State's territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence' (emphasis in original, internal references omitted). Ibid. [Simma], paras. 12–13: 'I fully agree with his [Judge Kooijmans's] conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it "would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require". . . . I also subscribe to Judge Kooijmans' opinion that the lawfulness of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality?' (internal references omitted).

15 Besides Judge Higgins's critical remarks (see *supr*a note 12), see also the statement by Judge Kooijmans in his Separate Opinion. Kooijmans states in strong terms his conviction that the use of force against terrorist groups in the territory of another state is lawful under international law, regardless of which particular legal justification one is prone to use (self-defence, necessity, or legality of extraterritorial law enforcement operations against terrorists, as advocated by Dinstein) (para. 31).

methodological issues that should be carefully assessed with a view to establishing (or restoring, as the case may be) societal consensus, within the interpretive community that generates the discourse on the use of force, on *how* certain legal categories and interpretive techniques should be used in relation to the use of force.

2. The UN Charter as the beginning and the end of the inquiry?

Nobody would seriously contest that the UN Charter provides the basic legal framework for the international regulation of the use of force. The history and purpose of the Charter's regime are often analysed in detail to provide further support for the proposition that the only source of the rules on the use of force is the UN Charter. Indeed, to many states and scholars alike the Charter ought to be the starting and ending point of any enquiry on the regulation of the use of force. This stance is not without merit. The Charter was intended to provide a comprehensive and exclusive system of collective security where the unilateral use of force was outlawed. Whatever the customary international law that existed before with respect to the use of force, the Charter clearly laid down rules for the purpose of establishing a special regime. Nowadays, the Charter having been ratified by virtually all states, its regulatory framework can be deemed to be generally applicable *qua* treaty law, regardless of any other considerations related to customary law.

Furthermore, to many the UN Charter would enjoy a quasi-constitutional status, given that it contains the 'fundamental rules' of the post-Second World War international order. This strand of international constitutionalism, developed primarily by European (and most notably German) scholars, projects at the international level the structural mode of domestic legal orders, importing into international law a vertical or hierarchical element of organization which would find in the Charter its centre of gravity.[16] However reassuring one might find this intellectual construct, the approach is far from universally shared, particularly in terms of its potentially far-fetched consequences. To give quasi-constitutional status to some of the Charter provisions may have non-negligible systemic effects which the international legal order is not particularly prepared to absorb. As acknowledged by some of its most fervent proponents, the choice of the Charter as a 'constitution' is somewhat compelled by the very simple fact that the Charter is the one international law instrument that most resembles a constitution,[17] which – of course – is not dispositive of the issue of

16 See for instance, A. Verdross and B. Simma, *Universelles Völkerrecht* (1984), commented on also by B. Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', (1995) 6 EJIL 33. Earlier European contributions to the constitutionalism strand include A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926); G. Scelle, 'Le droit constitutionnel international', in *Mélanges Carré de Malberg* (1933), at 501 ff.; W. Friedman, *The Changing Structure of International Law* (1964), 293 ff. An overview of the constitutionalism debate can be found in the recent collection of essays R. St John Macdonald and D. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005).

17 B. Fassbender, 'The United Nations Charter as World Constitution', (1998) 36 *Columbia Journal of Transnational Law* 529; See also P.-M. Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', in A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of UN Law* (1997), 1.

https://doi.org/10.1017/S092215650999015X Published online by Cambridge University Press

whether there is or there should be anything like a constitution in the international legal system.

Be that as it may, there are good reasons for considering the provisions of the Charter as the starting point of the inquiry on the international legal regulation of the use of force. The first obvious reason is that there is widespread social consensus on this proposition. In most of the debates before the Security Council, in which issues of the use of force are discussed, reference is primarily made to the law of the Charter. Also in other fora the 'official discourse' on the use of force relies heavily on the central character of the Charter provisions. It is obvious that most states would consider it risky to depart from the Charter. A good illustration of this attitude is the justification provided by the United Kingdom for the war against Iraq.[18] The United Kingdom found it wise to justify its decision to participate in the military intervention by resorting to a 'creative' interpretation of Resolution 1441. By acknowledging that in the very words of the resolution Iraq was found by the Security Council to be in 'material breach' of its previous resolutions, including the so-called 'truce resolution' 687 of 1991, in which the cessation of hostilities was made dependent on Iraq's pledge fully to disarm, the argument was made that the failure by Iraq to honour its pledge would entitle the parties to the conflict to suspend the application of Resolution 687 and to revive the authorization to use force under Resolution 678. Whatever one may think of this legal reasoning, which draws the decisive argument by way of analogy from the law of treaties (in particular Article 60 of the Vienna Convention on suspension and termination of the operation of a treaty as a consequence of its breach) by equating a Security Council resolution to a treaty, the attitude of the United Kingdom is quite telling in terms of its willingness not to venture into the slippery slope of justifications grounded outside the law of the Charter. It is of note that even the United States addressed to the Security Council a letter of almost identical content to that sent by the United Kingdom,[19] even if the legal justification used by the US government for the war in Iraq relied heavily on the notion of pre-emptive self-defence.[20]

The instinct to give priority to the UN Charter provisions is also 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. To be able to rely on written provisions traditionally gives lawyers an argumentative advantage over claims based on unwritten rules. This remains the case regardless of any technical consideration

18 See Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Security Council, UN Doc. S/2003/350. See also 'Statement by the Attorney General, Lord Goldsmith, in answer to a parliamentary question, Tuesday 18 March 2003', available at www.fco.gov.uk/resources/en/news/2003/03/fco_not_1803 03_legaladvice#. For further comments on Britain's and similar positions, see T. Franck, 'What Happens Now? The United Nations after Iraq', (2003) 97 AJIL 607; V. Lowe, 'The Iraq Crisis: What now?', (2003) 52 ICLQ 859; J. Yoo, 'International Law and the War in Iraq', (2003) 97 AJIL 563; C. Stahn, 'Enforcement of the Collective Will after Iraq', (2003) 97 AJIL 804.

19 See Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the Security Council, UN Doc. S/2003/351.

20 For an accurate reconstruction of the justifications used by the US for the war in Iraq see Gray, *supra* note 4, at 216 ff.

of the relationship between treaty and customary law. It is also a basic finding of hermeneutics that 'the sheer fact that something is written down gives it special authority. It is not altogether easy to realize that what is written down can be untrue. The written word has the tangible quality of something that can be demonstrated and is like a proof.'[21]

As is well known, the problem with the Charter is twofold. On the one hand, the collective security system has proved over time that it is flawed or, if one were to use a euphemism, unduly selective and inefficient. This is particularly true as regards situations concerning the use of force by one of the five permanent members of the Security Council or one of its allies. In such instances the collective security system is doomed not to work. Certainly, at least in theory, there is the possibility that the General Assembly may take over as it did by adopting the 'Uniting for Peace' resolution, a development recently sanctioned by the ICJ in its Advisory Opinion on the *Israeli Wall*.[22] However, such scant practice hardly amounts to convincing evidence that this option will often be resorted to. The point is reinforced if one considers the projects of Security Council reform, all of which acknowledge the continuing central role of the organ for the maintenance of international peace and security.[23]

On the other hand, despite the rhetorical commitment to the Charter, the interpretation of its provisions, particularly Article 2(4) and Article 51, has become highly controversial. In other words, the social 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. If this is evidence that textual determinacy is but a myth also as regards legal texts, the problem remains of how to reconstruct the necessary societal consensus on the interpretation of such provisions.

Be that as it may, to assume that the Charter is the central normative reference for reconstructing the international regime of the use of force presupposes some constraints on the interpreter. In particular, the main challenge lies in the interpretation of the text as it currently stands. Just to give an example, the 'prior armed attack' requirement of Article 51 would make it difficult, in the absence of any

21 H. G. Gadamer, *Truth and Method* (2004), 274. Gadamer concluded that 'It requires a special critical effort to free oneself from the prejudice in favor of what is written down and to distinguish here also . . . between opinion and truth.'

22 *Legal Consequences*, *supra* note 12 paras. 28–32.

23 The High-Level Panel on Threats, Challenges and Changes stated: 'The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which states are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has' (*A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2004), paras. 198, also 193–198, 244 ff.). In the same sense, the UN Secretary-General: 'The Council must be not only more representative but also more able and willing to take action when action is needed. Reconciling these two imperatives is the hard test that any reform proposal must pass' (In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, UN Doc. A/59/2005 (2005), para. 168). Finally, the '2005 World Summit Outcome' stated: 'We also reaffirm that the Security Council has primary responsibility in the maintenance of international peace and security. We also note the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter' (UN Doc. A/RES/60/1 (2005), paras. 80, and also 79, 152–154). See also 'Strengthening of the United Nations: An Agenda for Further Change', Report of the Secretary-General, UN Doc. A/57/387 (2002), paras. 20–22.

accepted modification via the development of customary law, or other theories that may allow departure from the text, to justify the doctrine of preventive self-defence. To go against the letter of the provision may turn out to be a difficult (albeit not impossible) task,[24] if one starts from the assumption that self-defence is regulated only, or at least primarily, by Article 51. Textual constraints might appear less compelling as regards the interpretation of Article 2(4), where threats or uses of force that are not directed against the territorial integrity and political independence of a state might be considered not to be within the purview of the prohibition. However, the subsequent requirement prohibiting the threat or use of force 'in any other manner inconsistent with the Purposes of the United Nations' might actually reintroduce further constraints on possible justifications and contribute, together with a contextual and teleological interpretation of Article 2(4), to making the margin for manoeuvre a very narrow one indeed.

The above considerations have been advanced with the sole purpose of showing that to take the Charter as the starting point of analysis creates interpretive constraints and directs the discourse on the use of force towards issues of treaty interpretation. Therefore, from this perspective, any attempt to justify threats or uses of force should be carried out at the level of interpretation of the Charter provisions. The textual constraints notwithstanding, it would still be possible to maintain that the Charter provisions have been amended via subsequent practice. Modification of a treaty by a subsequent 'consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions' was thought by the International Law Commission (ILC) to be a perfectly admissible process.[25] The notorious Article 38, elaborated by the ILC draft articles on the law of treaties and eventually not included in the Vienna Convention, envisaged this process as a different one from that of interpreting the provisions of a treaty in the light of the subsequent practice of the parties. For this finding the ILC relied on the *Air Transport Services Agreement* arbitration.[26] Although claims of modification of a treaty by way of subsequent practice remain scant,[27] this is a theoretical possibility under the law of treaties.

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24 An often neglected interpretive instrument to depart from the ordinary meaning of the text is Art. 31(4) of the Vienna Convention on the Law of Treaties, which stipulates that 'A special meaning shall be given to a term if it is established that the parties so intended.' The intention of the parties as to the interpretation of any treaty provision is also a way to secure the latter's adjustment to new societal demands. The parties' intention should not be taken to mean an immutable stance taken at the time of negotiating the treaty. If it can be established that the parties to the agreement intend to give new meaning to a term of the treaty, departure from ordinary meaning is a perfectly admissible process. What matters is that the parties' intent be rigorously established.

25 *Yearbook of the International Law Commission* (1966), II, 236.

26 Ibid. In the arbitration award rendered in Geneva on 22 December 1963, the arbitrators (R. Ago, P. Reuter, and H. P. de Vries) held that subsequent practice by the parties of a treaty was not only relevant for the purpose of treaty interpretation but could also be 'a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim.'

27 See, for instance European Court of Human Rights, *Öcalan v. Turkey*, Application no. 46221/99, Grand Chamber, Judgment of 12 May 2005, §§162–163, quoting with approval §§190–196 of the Trial Chamber judgment of 12 March 2003, where subsequent practice by the parties to the European Convention was deemed to justify the abrogation of Art. 2(1), second sentence, allowing for the death penalty in certain circumstances.

Certainly, the proponent would bear the burden of proving that such subsequent practice exists, and, given the high number of parties to the UN Charter, the argument would need to rely on a substantial and coherent body of practice of states and, arguably, UN organs. Whether modification of a treaty by subsequent practice is coterminous with the issue of modification of treaties by custom is no easy question to answer.[28] The issue was set aside by the ILC as too complex to be broached in isolation from the more general topic of the relationship between treaty and custom, and was thought to depend in any given case on the particular circumstances and intentions of the parties to the treaty.[29]

3. Is there a customary law on the use of force?

The answer to the rhetorical question of whether there is a customary law on the use of force ought to be in the affirmative if one takes the findings of the ICJ in *Nicaragua* as an authoritative determination of the state of international law on the matter.[30] The ICJ held then not only that there is a customary international law on the use of force which is distinct from the law of the Charter, but also that that body of law has a separate existence and can be applied separately to states.[31] Contrary to the US allegations that existing customary law rules had been incorporated into the Charter or had been 'subsumed and supervened' by the Charter[32] – quite an ironic stance in the light of subsequent US practice! – the Court maintained that the two regimes do not have an identical content and 'do not exactly overlap'.[33] Interestingly enough, the Court added that the UN Charter 'by no means covers the whole area of the regulation of the use of force in international relations'.[34] Emphasizing the use of the adjective 'inherent', attached to the right of self-defence in Article 51, which, in the Court's view, clearly hints at the existence of a pre-existing customary law,

28 The question has arisen also as regards the interpretation of Art. 27(3) of the UN Charter. In this respect see the interesting remarks by the representative of the Secretary-General of the UN, Mr Stavropoulos, 'The constant practice of the Security Council of not treating the voluntary abstention of a permanent member of the Security Council as a vote against a substantive draft resolution before the Council is customary law . . . Even if the development relating to voluntary abstentions is looked upon as an interpretation of the Charter by subsequent practice, the result cannot be different and the practice must be recognized as being authoritative' (Oral Statement of Mr Stavropoulos, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ, *Pleadings, Oral Arguments, Documents*, II, 39).

29 See *Yearbook of the International Law Commission* (1966), II, 236.

30 'The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those on the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and freedom of navigation, continue to be binding as part of international customary law, despite the operation of provisions of conventional law in which they have been incorporated' (*Military and Paramilitary Activities* 1984, *supra* note 10, para. 73; *Military and Paramilitary Activities* 1986, *supra* note 10, para. 174). Generally on this issue see H. Charlesworth, 'Customary International Law and the Nicaragua case' (1991) 11 *Australian Yearbook of International Law* 1.

31 *Military and Paramilitary Activities* 1986, *supra* note 10, paras. 175–176.

32 Ibid., paras. 46 and 14.

33 Ibid., para. 175.

34 Ibid., para. 176.

https://doi.org/10.1017/S092215650999015X Published online by Cambridge University Press

the Court concluded that 'customary international law continues to exist alongside treaty law'.[35]

It matters little that the ICJ's findings might have been prompted by the need to circumvent the difficulty posed by the Connelly reservation to the jurisdiction of the Court. The Connelly reservation, attached by the United States to the unilateral declaration of acceptance of the Court's jurisdiction, prevented the Court from applying the Charter to the case at hand. Therefore, in order to decide the case on the merits, the Court was compelled to find rules of customary international law applicable to the conduct of the United States, regardless of the UN Charter provisions. The systemic consequences of admitting of the separate existence of a customary international law on the use of force might have escaped the Court's attention at the time.

To conceive of a separate and distinctly applicable customary law on the use of force has allowed states to invoke and rely on customary international law rules justifying intervention on humanitarian grounds and anticipatory self-defence. Unlike in *Nicaragua*, where customary law was used to complement the law of the Charter by specifying the requirements of necessity and proportionality for the exercise of self-defence and by demanding that the victim of an armed attack expressly ask others to intervene in collective self-defence, arguments based on customary international law have gone as far as to admit of the existence of further exceptions not included in the Charter. These arguments allege the existence of contemporary rules on humanitarian intervention, or draw on those customary rules that pre-date the Charter and would remain unaffected by it, as is the case with anticipatory self-defence, whose existence in pre-Charter customary law is asserted with reference to the *Caroline* case. One may or may not agree with any specific justification for the use of force advanced by states on different occasions, but it is undoubtedly true that the ICJ itself favoured, by its findings in *Nicaragua*, the use of customary law rules on the use of force, which might not necessarily be identical to those of the Charter.

If the idea of the distinct existence and separate applicability of the international customary law regime on the use of force was expedient to overcome the jurisdictional objections and provide the applicable law in the *Nicaragua* case, to conceive of two distinct lives for the same societal body (virtually all states are parties to the UN Charter) may be difficult. In other words, it is puzzling to see how there can be state practice on the use of force outside the UN Charter.[36] It is enlightening that the ICJ in *Nicaragua* stated that not all the issues of use of force in international relations are regulated by the UN Charter,[37] but it would have been useful had the Court sketched out where these uncharted waters lie and how a UN member state could freely sail in them without colliding with the 'cornerstone' of the prohibition of the use of force.[38]

35 Ibid.
36 See G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (1979), 44 ff.
37 *Military and Paramilitary Activities* 1986, *supra* note 10, para. 176.
38 *Armed Activities*, *supra* note 13, para. 148.

4. The old controversy: words or deeds?

To admit that there may be rules of customary law on the use of force that do not coincide with those of the Charter is not tantamount to saying that the customary rules invoked by states in recent practice actually exist. Their existence needs to be established. Ascertaining whether customary rules have emerged, allowing states to act in preventive self-defence or on grounds of humanitarian intervention, or to resort to force against a military intervention short of an armed attack, is a matter of interpretive method. The ICJ has invariably upheld the dual-element theory of custom, whereby the generality of practice must be accompanied by *opinio juris*. A certain relaxation of the element of *usus* has already taken place in certain areas of international law. By way of example, one may quote the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which seems to attribute more importance to states' official pronouncements than to other elements. The reasons for giving priority to 'words' rather than 'deeds' lies in the 'inherent nature of the subject matter', namely the law of armed conflict, as well as in the special role that *opinio juris sive necessitatis* has in this area due to the existence of the Martens clause, taken as an overarching interpretive principle inspiring law-making.[39] This attitude stands in sharp contrast to what the ICJ maintained in *Nicaragua* as regards the ascertainment of customary rules on the use of force, when it stated that '[t]he mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider them as being part of customary international law.'[40] From this dictum one can reasonably infer that the ICJ intended to privilege what states do rather than what they say, although in the very same *Nicaragua* case the Court gave a lot of weight to General Assembly resolutions and to the official pronouncements of the parties to the case.

The doctrinal debate on which elements to take into account when examining state practice, whether claims submitted in the context of a dispute should count more than acts and/or statements unilaterally made by states and so on, may well carry an old-fashioned flavour with it.[41] Furthermore, it may well be true that '[t]here is no compelling reason for attaching greater importance to one kind of practice than to another.'[42] However, particularly at a time of uncertainty about the state of customary law on the matter, it remains crucial to trace some consensus on whether

39 See *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para 99: 'In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.' See also para. 527, where, as regards the customary rule prohibiting reprisals against civilians, the Appeal Chamber states, 'This is however an area where *opinio juris sive necessitatis* may play a much greater role than *usus* as a result of the aforementioned Martens Clause. In the light of the way states and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where state practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule of humanitarian law.'

40 *Military and Paramilitary Activities* 1986, *supra* note 10, para. 184.

41 See, by way of example, A. D'Amato, *The Concept of Custom in International Law* (1971), 88; H. Thirlway, *International Customary Law and Codification* (1972), 58.

42 M. Akehurst, 'Custom as a Source of International Law', (1974–5) 47 *British Yearbook of International Law* 1, at 21.

https://doi.org/10.1017/S092215650999015X Published online by Cambridge University Press

one should look at 'words' or 'deeds'. Deeds attest to a constant and arguably increasing recourse to force in certain contexts, particularly vis-à-vis terrorist groups and states harbouring terrorists, in the aftermath of 9/11. As regards official pronouncements, the situation is disconcertingly confusing. It suffices to cast a glance at the debates before the Security Council on the occasion of recent uses of force to realize that, despite the adversarial political rhetoric, states consciously characterize in very different legal terms the same factual matrices. Whereas some states qualify certain uses of force as acts of aggression and grave violations of the prohibition of the use of force, others see the very same acts as lawful responses in self-defence or as lawful uses of force even though they might fall short of the required proportionality.[43] Very little attention is devoted to construing the arguments in a legally plausible sense. One has the impression that the differences in vocabulary hardly hide a more profound division in the legal categories used to evaluate the limits posed by international law to the use of force.

Equally striking is the silence surrounding certain instances in which force is used. The Turkish incursions into Iraqi territory to hit PKK (Kurdistan Workers' Party) strongholds and militants have not been accompanied by any official justification,[44] nor have they aroused particular interest on the part of other states. Similarly, US raids against allegedly terrorist targets in the territories of several states seem to have elicited very few, if any, comments on their legality or lack thereof. If, in some instances, like Yemen, the consent of the territorial state's authorities may have remedied any violation of the territorial state's sovereignty, this is not the case for other instances of use of force against terrorist groups. Indeed, silence towards significant events, potentially affecting the interests of all states, remains enigmatic,[45] all the more so when one realizes that nowadays many are the international fora in which states can express themselves. The relevance of acquiescence and the wider significance of the lack of reaction even by those states that are directly affected by such uses of force ought to be carefully analysed in any serious attempt to discern states' *opinio juris*.[46]

The old debate about the elements of custom, the meaning of general practice and the role of *opinio juris*, perceived by many as outdated, are all the more relevant today at a time in which, particularly in the literature, although not exclusively, customary norms are reconstructed on a fairly flimsy base. A dictum of the ICJ may suffice, or a single nineteenth-century diplomatic case of dubious relevance like the *Caroline* case might well do to establish the existence of a custom. Contrary to conventional wisdom, even the ICTY has repeatedly shown a certain lack of rigour

43 See, for instance, the UN Security Council debates on 'The Situation in the Middle East, Including the Palestinian Question', UN Doc. S/PV.5493 (2006), on the occasion of the Israeli military intervention against Lebanon.

44 See Gray, *supra* note 4, at 140 ff.

45 It would be but logical to think that states would react to acts affecting their own interests (see *Fisheries*, [1951] ICJ Rep., at 138–9; *Temple of Preah-Vihear*, [1962] ICJ Rep., at 31, and *Dubai-Sharjah*, Arbitral Award, (1996) 91 ILR, at 623). All the more so in the light of the *erga omnes* character of the prohibition of the use of force.

46 For an attempt to address these issues see S. Ratner, '*Jus ad Bellum* and *Jus in Bello* after September 11', (2002) 96 AJIL 905, at 909–10; A. Bianchi, 'Enforcing International Law Norms against Terrorism: Achievements and Prospects', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (2004), 491, at 508.

in reconstructing customary law rules.[47] An accurate reconstruction of custom and a solid societal agreement on the relevant elements to ascertain its existence seem to be compelling, particularly if such custom modifies rather than complements the UN Charter provisions.

5. The relationship between the law of the Charter and customary law

In assessing the relationship between the law of the Charter and customary law on the use of force one should not depart from what is accepted under general international law. Against the backdrop of what the ICJ said in the *Nicaragua* case about the separate existence of customary rules and the UN Charter provisions, the least problematic case would be the one in which customary law rules integrate and specify the rules laid down in the Charter. The fact that the Charter is silent on the requirements of necessity and proportionality as regards an act of self-defence, or the further condition that the state which is a victim of an armed attack has expressly to call for intervention in collective self-defence, makes recourse to customary law somewhat easier, as none of these customary-law-based requirements for the exercise of self-defence fundamentally alters the rules of the Charter. Certainly, insofar as these normative standards claim to reflect customary law, their basis on a generality of practice accepted as law must be firmly established.

Along similar lines, the ICJ relied on the wide acceptance by states of certain General Assembly resolutions to complement the law of the Charter as regards other aspects of the use of force. An illustrative example is that concerning the notion of armed attack, which must not necessarily be carried out by the armed forces of a state, but could also emanate from armed bands or irregulars sent by that state or acting on its behalf, as is made clear in Article 3(g) of General Assembly Resolution 3314 (XIX) on the definition of aggression, adopted on 14 December 1974.[48]

However, a more difficult instance is that of establishing the existence of a customary rule which markedly departs from the law of the Charter. Although in principle this is a perfectly admissible process, in this case the burden of proof should be more onerous for the proponent. The ICJ admitted of the possibility that customary law may develop under the influence of the law of the Charter, but it then qualified this statement by saying that '[t]he essential consideration is that they [customary rules and Charter provisions] stem from a common fundamental principle outlawing the use of force in international relations.'[49] The Court later restated the idea that the prohibition of the use of force is a 'cornerstone' of the law of the Charter in *Armed Activities in the Territory of the Congo*.[50] The particularly important character

47 See L. Gradoni, 'L'attestation du droit international pénal coutumier dans la jurisprudence du Tribunal pour l'ex-Yougoslavie: "Régularités" et "Règles"', in M. Delmas-Marty et al. (eds.), *Les sources du droit international pénal* (2004), 25–74.

48 The customary character of this proviso was restated by the ICJ in *Armed Activities*, *supra* note 13, para. 147.

49 *Military and Paramilitary Activities* 1986, *supra* note 10, para 181.

50 *Armed Activities*, *supra* note 13, para 148.

https://doi.org/10.1017/S092215650999015X Published online by Cambridge University Press

of Article 2(4) of the Charter should therefore be taken into account when considering whether to allow uses of force other than those expressly permitted under the Charter, like self-defence under Article 51 and the authorization to use force granted by the Security Council.[51] At the very least a presumption against allowing other uses of force is strong and would make the burden of proving that a derogatory custom has emerged a particularly exacting one.[52] States are aware of this difficulty and tend to rely on self-defence as a justification, even when their uses of force seem hardly to conform to the notion of self-defence.[53]

An alternative approach consists of submitting that whenever the Security Council is unable to act, the failure of the collective security system would revive the applicability of customary international law, or even customary international law predating the Charter and allow uses of force otherwise prohibited under the Charter. This theory is reminiscent of so-called 'fallback theories' in international law, to which we shall now briefly turn.

6. Fallback theories and their relevance to the debate

The UN Charter could be characterized as or at least be eligible for the controversial status of, 'self-contained regime'.[54] The widespread diffidence towards the expression has recently caused the ILC to adopt the term 'special regimes' in its stead.[55] Nobody denies that a treaty may derogate from general international law rules on responsibility, so-called 'secondary rules'. What makes certain regimes 'special' is their opting out of the general international law of responsibility by adopting 'a full (exhaustive and definite) set of secondary rules'.[56] The essence of fallback theories is to maintain that special secondary rules adopted within special regimes should always be given priority over general international law rules, but only insofar as the situation is 'normal'.[57] When secondary rules contained in the special regime are no longer able to induce compliance with the regime's primary rules, the

51 Although not expressly contemplated by the Charter, authorization by the Security Council to use force has come to be accepted by states as consistent with the UN Charter since its first application in Resolution 678.

52 On the particularly onerous burden of proof for establishing a custom that derogates previous law, see Akehurst, *supra* note 42, at 19.

53 See *infra*, section 8.

54 As is well known, the ICJ endorsed the notion of 'self-contained regimes' in the *US Diplomatic and Consular Staff* case, where it was stated that '[t]he rules of diplomatic law . . . constitute a self-contained regime', in that they specify 'the means at the disposal of the receiving State to counter any . . . abuse' of diplomatic privileges and immunities, and '[t]hese means are by their nature, entirely efficacious' (*Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3, para. 40).

55 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission (Finalized by M. Koskenniemi), UN Doc. A/CN.4/L.682 (2006), para. 193. As noted by the Study Group, Art. 42 of the Vienna Convention on the Law of Treaties, which provides, *inter alia*, that the validity of a treaty can only be impeached through the application of the Convention itself, 'is the "minimum level" at which the Vienna Convention regulates everything that happens in the world of regime building and regime-administration', so that at least '[t]hrough it . . . every special regime links up with general international law' (ibid., para. 194).

56 See B. Simma, 'Self-Contained Regimes', (1985) 16 *Netherlands Yearbook of International Law* 111, at 117.

57 A normal situation would be one in which a satisfactory level of compliance exists and there is no perception by the parties that the regime is chronically inefficient and no longer able to accomplish the goals for which it was created.

system is deemed to have failed and its parties would be entitled to invoke general international law.[58]

Regime failure has attracted some interest in specific contexts, such as European Union (EU) and World Trade Organization (WTO) law, although few are the works that broach the issue in comprehensive terms.[59] Several theories have been advanced to justify fallback on general international law in case of regime failure. Some rely on a peculiar application of the principle of effective interpretation to assert the existence of a strong, albeit rebuttable, presumption against the continued applicability of special secondary rules in case of regime failure.[60] Others postulate fallback as a structural feature of the international legal order which should allow states party to a self-contained regime to take extra-systemic countermeasures in case of exceptionally serious violations of the treaty.[61] This power would be inherent in the concept of state sovereignty, of which it is an essential guarantee. More mildly, the ILC seems to take the position that fallback can be triggered by a material breach of a treaty or by a fundamental change of circumstances under Article 60 and Article 62 of the Vienna Convention on the Law of Treaties.[62]

The problems with regime failure and fallback theories in our context are numerous. First, it should be noticed that these theories are little explored, and so far they seem to have remained largely confined to the narrow boundaries of academic debates. Their potentially disruptive effects on international co-operation make one hesitate to draw the practical consequences of such intellectual constructs. Second, there is the difficulty of conceiving the UN Charter as a self-contained and autonomous regime, given that the ICJ has repeatedly stated that customary law rules and Charter provisions coexist even within the system of the Charter. In other words, the inside/outside binary category which is the necessary presupposition and fundamental element to trigger the operation of fallback theories would be blurred by the somewhat peculiar system of the Charter. Lastly, even admitting that failure of the collective security system, which could be categorized as a set of secondary rules to enforce the primary rule on the prohibition of the use of force, might trigger the fallback on general international law, what could this imply? If the object of fallback theories is that of securing the effectiveness of the fundamental primary rules of the system, which surely include the prohibition of the use of force, it would be difficult to use such theories to justify an expansion of the exceptions to the general

58 'What such failure might consist in has not been explicitly treated by the Commission. However, an analogy could be received from the conditions under which the exhaustion of local remedies rule need not be followed. These would be cases where the remedy would be manifestly unavailable or ineffective or where it would be otherwise unreasonable to expect recourse to it' (Fragmentation of International Law, *supra* note 55, para. 152(4)). Note, however, that the same report in fine raises the question as to what may count 'as "regime failure" in the first place' and recommends that the ILC further examine '[t]he conditions and consequences of regime failure' (ibid., para. 493(2)(e)).

59 An exception is the recent book by L. Gradoni, *Regime failure nel diritto internazionale* (2009).

60 B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) 17 EJIL 483.

61 G. Arangio-Ruiz, 'Fourth Report on State Responsibility', 1992 *Yearbook of the International Law Commission*, II, Part I, paras. 112–125.

62 Fragmentation of International Law, *supra* note 55, para. 188. For a critique of these theories see A. Bianchi and L. Gradoni, *Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law* (2008), 17–23.

rule of non-use of force. Moreover, it is doubtful that once one falls back on general international law, one would be entitled to revive armed reprisals and other forms and uses of force that in contemporary international law are widely recognized as unlawful. Even the Articles on State Responsibility (ASR), elaborated by the ILC and largely considered to be declaratory of customary international law,[63] exclude the use of force from the range of admissible countermeasures and refer to self-defence in conformity with the Charter as the only admissible circumstance exonerating from responsibility.[64] Furthermore, the UN Charter as a whole is considered as *lex specialis* vis-à-vis the Articles.[65]

Finally, the contention that fallback into customary international law as it existed prior to the entry into force of the Charter should occur is not terribly persuasive. The fallback theories thus far developed clearly contemplate only fallback into contemporary general international law. This is perfectly consistent with the logic of a theory founded on a synchronic special/general binary mode, to which diachronic elements are entirely alien. To presume the reviviscence of extinct legal rules allowing the unilateral use of force in international relations would not only be dangerous as a normative choice, but would also be thoroughly unsubstantiated in theory as well as in practice, as there is no indication that states would like to do away with the prohibition of the use of force as a general rule.

7. The definitional conundrum: use of force and its next of kin

One of the neglected issues that would merit further consideration in relation to the international legal regime on the use of force is whether there is agreement on the interpretation of the content and scope of application of Article 2(4). In particular, what remains rather unclear is the meaning of a 'use of force'. The issue takes up particularly important connotations in the light of the widespread conviction that the prohibition of the use of force is a rule of *jus cogens*.[66] Although it may be difficult to provide a clear-cut definition of 'use of force', some distinctions can be drawn with a view to shedding light on such an unqualified notion.

A first obvious distinction is that a use of force is not necessarily synonymous with the notion of armed attack under Article 51 of the Charter. If all armed attacks are uses of force, the reverse is not necessarily true. Interestingly enough, however, much of the discussion about the use of force has taken place in connection with the notion of armed attack, particularly for the purpose of establishing whether the requirements for a response in self-defence were met. Also the expression 'armed attack' lacks a definition in the Charter. The ICJ may have been accurate in 1986 when it stated that there was then agreement on what acts amounted to an armed

63 UN Doc. A/RES/56/83 (2001).
64 Art. 21.
65 Art. 59.
66 It is impossible for the limited purposes of this paper to account exhaustively for the literature on this particular point. See, just as a recent example, the extensive treatment devoted to this very issue by Corten, *Le droit contre la guerre*, *supra* note 5, esp. at 293 ff.

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attack in international law.[67] Besides 'action by regular armed forces across an international border', the Court considered that customary international law would also consider an armed attack '"the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force as to amount" (inter alia) to an actual armed attack conducted by regular armed forces, "or its substantial involvement therein"', directly quoting from Article 3(g) of General Assembly Resolution 3314 on the Definition of aggression of December 1974.[68] The Court then went on to distinguish in customary international law the case in which the sending by a state of armed bands into the territory of another state to conduct an operation which, 'because of its scale and effects', would have been classified as an armed attack if conducted by regular armed forces, from the case of 'assistance to rebels in the form of the provision of weapons or logistical or other support',[69] which might substantiate a violation of the prohibition of the threat or use of force. The Court restated this distinction later in the judgment by stressing that the supply of arms to armed bands cannot be equated to an armed attack, but may nonetheless 'constitute a breach of the principle of the non-use of force . . . of lesser gravity than an armed attack'.[70] Incidentally, this position was confirmed by the Court in 2005 in the case of the *Armed Activities in the Territory of the Congo*, attracting some strong criticism by individual judges who thought that the Court missed an opportunity 'to fine-tune the position it took 20 years ago'.[71]

The use of force seems, therefore, to be a matter of degree. International tribunals have been reluctant to go a further step up the ladder to identify acts of aggression. The ICJ in the *Armed Activities in the Territory of the Congo* case considered that '[t]he unlawful military intervention by Uganda was of such magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force.'[72] Not without reason, Judge Simma in his separate opinion criticized the Court for not having called 'a spade a spade' and qualified the military intervention by Uganda as an act of aggression.[73] The same criterion of 'magnitude' was used by the Eritrea-Ethiopia Claims Commission to distinguish such 'relatively minor incidents' as 'localized border encounters between small infantry units, even those involving loss of life', and 'geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked and disputed border' from armed attacks falling within Article 51 of the Charter.[74]

67 *Military and Paramilitary Activities* 1986, *supra* note 10, para. 195.
68 Ibid.
69 Ibid.
70 Ibid., para. 247.
71 See *Armed Activities*, *supra* note 13, [Kooijmans] para. 25. As is well known, Judge Kooijmans's dissent focused on the refusal by the Court to pass judgement on whether a response in self-defence can be lawful even when the armed attack comes from a non-state actor (Ibid., [Kooijmans] paras. 28–29). Judge Kooijmans had already expressed his dissent as regards the finding by the Court in its Advisory Opinion on the *Israeli Wall* that an armed attack must come from a state for the right to self-defence to apply (*Legal Consequences*, *supra* note 12, para. 139; and *Armed Activities*, *supra* note 13, [Kooijmans] para. 35).
72 *Armed Activities*, *supra* note 13, para. 165.
73 Ibid., [Simma] para. 2.
74 Eritrea-Ethiopia Claims Commission, Partial Award on the *Jus ad Bellum* (Ethiopia's Claims 1–8), 19 December 2005, paras. 11–12.

A fairly thorny issue is that of determining whether the uses of force prohibited under Article 2(4) are only those directed against the territorial sovereignty or political independence of another state. The issue of which interpretation to give to such an expression has recently emerged, particularly as regards military interventions against groups of terrorists in the territory of another state which are clearly not directed against the territorial integrity or political independence of the state in the territory of which force is used. The theory of lawful 'defensive actions', developed by Judge Simma in his separate opinion in the *Armed Activities in the Territory of the Congo* case,[75] as well as the stance taken in the same case by Judge Kooijmans on the legality of uses of force against terrorists in another state,[76] connect with doctrinal contributions[77] to converge on giving a restrictive reading to the prohibition of the use of force. Although this is done indirectly by expanding the notion of self-defence, the ultimate effect is that of narrowing down the scope of the prohibition laid down in Article 2(4) of the Charter.

A further distinction that could be made concerns extraterritorial acts of enforcement that violate the territorial sovereignty of the foreign state but which would not be within the purview of Article 2(4), even if perpetrated by state organs, including regular armed force members of the wrong-doing state. Targeted killings or police operations carried out in a foreign state's territory should be framed under the law of international jurisdiction, which lays down a clear prohibition as regards the carrying out of extraterritorial acts of enforcement in the territory of another state in the absence of the latter's consent.[78] Further limits to state conduct can obviously be traced to human rights and international humanitarian law, depending on the circumstances.[79] However, a sound argument can be made that such instances should not be framed against the background of the international regulation of the use of force, as their nature and purpose are fundamentally different.

8. Legal qualification and its consequences: the problem of mischaracterization

Legal qualification is an essential tool for lawyers. Legal rules are supposed to be applied to factual matrices that are identified beforehand in general and abstract terms by the lawmaker. In other words, law provides regulation for certain facts or activities that – experience suggests – occur or take place in a certain fashion. Most

75 *Armed Activities*, *supra* note 13, [Simma] paras. 11–13.
76 Ibid., [Kooijmans] para. 31.
77 See for instance the concepts of 'extraterritorial law-enforcement operations' and 'defensive reprisals', elaborated by Y. Dinstein, *War, Aggression and Self-Defence* (2005), at 219 ff. See also O. Schachter, 'The Use of Force against Terrorists in Another State', (1989) 12 *Israeli Yearbook of Human Rights* 225, who relies on necessity to justify the use of force against terrorists in another state.
78 See *SS Lotus (France v. Turkey)*, PCIJ Rep., (1927) Series A No. 10, at 18–19: 'Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'
79 For a comprehensive treatment of the topic of targeted killings see the recent work by N. Melzer, *Targeted Killings in International Law* (2008).

work by those who are entrusted to apply the law consists of 'characterizing' these facts with a view to determining what the applicable rules are. 'Characterization' or 'qualification' is the interpretive operation whereby the facts are subsumed into legal rules. The outcome of this operation is the identification of the applicable law. Since in international law the opportunities of having authoritative qualifications by adjudicatory bodies is less frequent than in domestic legal orders, states themselves advance their characterization, which will be accepted or contested by others. This premise is particularly relevant as we set out to explore an additional reason why the international regulation of the use of force is in such a state of confusion and disarray.

A quite distinct trend in recent practice is that states tend as much as possible to use self-defence as a justification for their uses of force. With the notable exception of humanitarian intervention, almost all legal justifications recently provided by states rely on self-defence. Specific characterization of self-defence, such as preventive self-defence and self-defence to rescue citizens abroad (recently invoked by Russia to justify its intervention against Georgia) are but two examples of how the outer limits of the notion of self-defence tend to be stretched. This attitude by states is comprehensible, as self-defence is the only universally accepted exception to the unilateral use of force. The problem is that many instances of uses of force, particularly those related to terrorism, can hardly be amenable within the purview of self-defence, either because the prerequisites for its exercise are absent or because by their nature and purpose they would better fit other qualifications. In particular, states have often resorted to force in response to terrorist attacks in forms that are reminiscent of armed reprisals for their punitive and deterrent character. Such instances as the bombing of Sudan and Afghanistan in 1998, following the terrorist attacks against US embassies in Africa, or the 1993 bombing against Baghdad, to mention just a few cases related to terrorism, are readily identifiable as armed reprisals properly so called, for the punitive character of the action and its intended deterrent effect.[80] The problem is that armed reprisals are almost universally regarded, with few highly controversial exceptions,[81] as having been outlawed in contemporary international law, even by those who carry them out.[82] However, as I have written elsewhere, 'armed reprisals risk sneakingly making their way back into the reality of international relations if not in its illusive representation'.[83]

The risk of overtly admitting the legality of armed reprisals is self-evident, as this might undermine the general prohibition of the use of force, to which everyone seems committed. On the other hand, to use self-defence as a misnomer to justify uses of force that are clearly punitive and deterrent in character may have the unfortunate consequence of jeopardizing the credibility of the international regulatory system.

80 See the definition provided by D. Bowett, 'Reprisals Involving Recourse to Armed Force', (1972) 66 AJIL 1, at 3.

81 See Dinstein, *supra* note 77, admitting of the legality of defensive armed reprisals somewhat amenable within the scope of self-defence.

82 See the 'categorical position' taken by the United States 'that reprisals involving the use of force are illegal under international law' (M. L. Nash, 'Contemporary Practice of the United States Relating to International Law', (1979) 73 AJIL 476, at 491).

83 See Bianchi, *supra* note 46, at 506.

The blurring of the distinction between distinct legal categories, already highlighted by some commentators,[84] seems to be of even greater significance. If one looks at the debates before the Security Council, emphasis is often placed, in order to determine the lawfulness of uses of force, on their necessity and proportionality regardless of their qualification as acts of self-defence.[85]

Inaccurate and self-serving, purposeful characterizations of uses of force unilaterally advanced by states add to the confusion and in the absence of authoritative determinations risk obfuscating even more an already murky scenario. Once again, however, it is worth noting that mystifying characterizations and the like are but the symptoms of a much more serious disease, namely the lack of consensus on how to use legal categories and interpretive techniques for the purpose of identifying the precise contours of the international regulation of the use of force.

9. Necessity between primary and secondary norms

Necessity is a concept incorporated into many rules of international law. In many ways, it could be characterized as one of those 'interstitial norms',[86] that adjust their content to the normative setting to which they apply. The flexibility and multifunctionality of this and similar concepts (another example could be that of proportionality) make them particularly suitable to shape and to direct the interpretation and application of many primary norms. Necessity is relevant to many normative regimes of international law. It is relevant to the field of human rights, in which it is a prerequisite for the limitation of specific rights in claw-back clauses or, more generally, in derogation clauses. But necessity is also relevant to international humanitarian law by limiting the conduct of hostilities and the use of certain weapons. In the area of the use of force necessity comes into play as a general limitation to any use of force and as a particular prerequisite for the exercise of an action in self-defence.[87] Most of the time associated with the complementary concept of proportionality, necessity is regarded primarily as a component of primary rules on the use of force.

As is well known, however, necessity is also a concept relevant to secondary rules. The plea of 'state of necessity' is one of the circumstances precluding wrongfulness under the law of state responsibility, as codified in the ILC ASR. Well before the completion of the codification process, the ICJ in the *Gabcíkovo-Nagymaros Project* case stated that 'the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with

84 See P. Klein, 'Vers la reconnaissance progressive d'un droit à des représailles armées?', in K. Bannelier et al. (eds.), *Le droit international face au terrorisme* (2002), at 249 ff. See also R. W. Tucker, 'Reprisals and Self-Defence: The Customary Law', (1972) 66 AJIL 586, at 595, stressing 'the little significance of prohibiting armed reprisals while retaining the customary right of self-defence'.

85 Some statements made by Western states on the occasion of the 2006 Israeli military intervention in Lebanon can be interpreted to this effect (see the minutes of the debate before the Security Council in UN Doc. S/PV.5493 (2006)).

86 See V. Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers (ed.), *The Rule of Law in International Relations* (2000), 207 ff.

87 See, generally, J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004).

an international obligation'. The Court went on to spell out the rigorous conditions for invoking the state of necessity defence, relying on the work of the ILC.[88] Article 25 of the ASR now codifies necessity as a circumstance precluding wrongfulness under the law of state responsibility.[89] The article as such is widely regarded as declaratory of customary international law. Recently, the plea of state of necessity has been invoked before domestic courts[90] and international arbitral tribunals[91] in connection with the failure by Argentina to repay its creditors in the aftermath of its bankruptcy. Even though tribunals have come up with conflicting views on the applicability of the state of necessity to the economic and financial situation faced by Argentina at the time and to its sovereign debt crisis, the status of the plea under international law and the conditions for its application have not really been called into question. The discrepancies in the various judgments derive mainly from a different interpretation of the applicability of the state of necessity plea requirements to the facts of the case.

Most likely, to invoke the plea of necessity in the context of the use of force would be generally regarded as anathema by international lawyers, at least since the time when Roberto Ago, Special Rapporteur of the ILC on state responsibility, decided to dissociate self-defence and necessity, which had been for a long time closely intertwined in international practice as justifications for forcible measures of self-help.[92] However, on closer scrutiny, to rely on the plea of necessity as a circumstance precluding wrongfulness under the secondary rules of state responsibility, in order to justify certain uses of force in exceptional circumstances, could have the merit of reversing the presumption of legality. The use of force in cases other than those expressly authorized under the UN Charter and under customary international law would remain prohibited unless it could be proved that a state of necessity, the ascertainment of which would be subject to the strict standards laid down in Article 25 of the ASR, exists. Such a plea could be successful in the case of a clear and imminent danger of an attack with weapons of mass destruction.[93] In such a case, a

88 *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7, paras. 51–52. Such rigorous conditions are now codified in Art. 25 (see *infra*, note 89).

89 Art. 25 (Necessity) reads: '1. Necessity may not be invoked by a State as a ground for precluding wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.'

90 See the decision of the Bundesverfassungsgericht of 8 May 2007 (for a comment see S. Schill, 'German Constitutional Court Rules on Necessity in Argentina Bondholder case', (2007) 11 (20) *ASIL Insights*, 31 July 2007.

91 See the two conflicting ICSID arbitrations: LG&E Energy Corp, LG&E Capital Corp., and LG&E International Inc. Argentina, ICSID Case No. ARB/01/1, Award, 3 October 2006, 46 ILM 36 (2007) and CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, 12 May 2005, 44 ILM 1205 (2005) as well as the Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic in the CSM v. Argentina case, 46 ILM 1132 (2007). For a comment see M. Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&G', (2007) 20 LJIL 637.

92 See Roberto Ago, Addendum to the Eighth Report on State Responsibility, Un Doc. A/CN.4/318/ADD.5-7 [1980] II (I) ILC YBK, especially at 39–40, 61–3.

93 While it is true that the invocation of a state of necessity can be abused and that – as the ICJ put it in the *Gabcíkovo-Nagymaros Project* case – the invoking state cannot be the sole judge of its own necessity

response by the potential victim could be justified out of a state of necessity, without calling into question the general prohibition of the use of force and the requirement of a prior armed attack under the law of self-defence. Incidentally, this might have been a much more convincing response to the question submitted to the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case.[94] Rather than answering in a fairly convoluted manner that the 'Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake',[95] the Court could simply have said that in such a case the threat or use of nuclear weapons in extreme circumstances could be justified, subject to its strict conditions, by a state of necessity. Even the much celebrated passage from the diplomatic correspondence between the United States and the United Kingdom on the occasion of the *Caroline* case, taken by many as evidence of the existence at the time of a right to preventive self-defence, could be more properly framed under the state of necessity.[96] When Secretary of State Webster made reference to the 'necessity of self-defence . . . instant, overwhelming, and leaving no choice of means and no moment for deliberation',[97] the point that he was attempting to make was that the United Kingdom had violated international law and that only evidence of the existence of a state of necessity in the terms just described could have exempted it from responsibility. From a systemic point of view, given the widely shared perception of the centrality of the prohibition of the use of force to international relations, reliance on necessity as a secondary rule exonerating a state from responsibility under strict circumstances seems no more dangerous than widening the range of admissible exceptions to the prohibition of the use of force, the contours of which are still highly controversial as in the case of humanitarian intervention and anticipatory self-defence.[98]

10. The use of different axiological categories: legality vs. legitimacy

As the above remarks have made abundantly clear, the methodological difficulties and hard interpretive choices underlying the legal regulation of the use of force are by themselves quite a skein to unravel, even within the fairly homogeneous traditions of international legal discourse. Certainly, there was hardly any need further to muddle up the matter by introducing analytical frames that rely on

(*supra* note 88, para. 51), it is also true that 'a measure of uncertainty about the future does not necessarily disqualify a state from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time (Commentaries to Art. 25(16); reproduced in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), 184).

94 *Legality or Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 226.

95 Ibid., p. 266.

96 In the same sense the ILC's Commentary to Art. 25 (see Crawford, *supra* note 93, at 179–80).

97 See 'Letter from D. Webster, US Secretary of State, to Mr Fox (24 April 1841)', (1857) 29 *British and Foreign State Papers* 1129, at 1138.

98 As to the objection that Art. 26 of the ASR would preclude invocation of necessity for acts contrary to peremptory norms, its practical impact would depend on the definition of the content of any such peremptory norm (see *supra*, section 7). If one takes only the prohibition of acts of aggression to be a peremptory norm, there would be room for resorting to the plea of necessity as regards uses of force short of an act of aggression.

different axiological categories. Reference is here made to the use of the category of 'legitimacy' used in juxtaposition to 'legality' to convey the sense that the use of force by states in certain circumstances can be appraised by a dual (or perhaps double) standard. The issue came dramatically to the fore on the occasion of the military intervention in Kosovo, when even less than a formalistic reading of the Charter would clearly point to the illegality of the intervention. Nor did the arguments that anchored the use of force to an alleged customary law rule on humanitarian intervention sound terribly convincing. It is a fair speculation to make that the use by some international lawyers of the characterization of the intervention in Kosovo as legitimate albeit illegal, or not too illegal, was a desperate attempt to avoid the defeat of having the law (and their own personal authority) discredited by a widespread perception of inefficacy and unfairness.[99]

Legitimacy is a complex category, whose genealogy goes well beyond the limits of these scattered considerations on its impact on the debate on the use of force. Incidentally, some interesting studies on legitimacy have been produced in international law scholarship, particularly the well-known book by Thomas Franck, who developed a theory of legitimacy as an important compliance-inducing factor in international law.[100] However, the appeal and popularity of the dichotomy between legality and legitimacy presumably derives from the well-known essay by Carl Schmitt, which was too historically rooted and context-based to lend itself to the generalizations it later produced.[101] Be that as it may, it is rather along the lines of Schmitt's juxtaposition of the conformity of the law with some pre-legal moral values and the respect for formal rules of the legal order that the debate on the use of force has developed in international legal scholarship.[102] The idea of legitimacy has been fairly simplistically associated with some correspondence of the challenged action with some communal moral and political values, as opposed to compliance with particular legal rules. The tactical as well as the strategic value of the use of the dichotomy are self-evident: in this way, hard cases on the fringe of illegality can be accommodated, and their status as legal precedents can be less easily denied, and, as in all good stories, there may eventually be a happy ending, with legality and legitimacy meeting again and reconciling with each other. For instance, Resolution 1244 passed by the Security Council in the aftermath of the military intervention in Kosovo was considered by some commentators to have achieved such a noble goal.[103] In any event, the potential for a loose use of the two categories to accommodate specific political interests and produce normative uncertainty cannot be underestimated.[104]

99 See B. Simma, 'Nato, the UN and the Use of Force: Legal Aspects', (1999) 10 EJIL 1, and A. Cassese, '*Ex Iniuria Jus Oritur*: Are We Moving towards International Legitimization of Forcible Humanitarian Countermeasures?', (1999) 10 EJIL 23.

100 T. Franck, *The Power of Legitimacy among Nations* (1990).

101 C. Schmitt, *Legalität und Legitimität* (1932), trans. into English as *Legality and Legitimacy* (2004).

102 See the interesting considerations advanced by R. Falk, 'Legality and Legitimacy: The Quest for Principled Flexibility and Restraint', (2005) 31 *Review of International Studies* 33.

103 See A. Pellet, 'Brief Remarks on the Unilateral Use of Force', (2000) 11 EJIL 385, at 389. Pellet conceded, however, that the ex-post legalization of the intervention was not a 'satisfactory picture'.

104 As an apt illustration I would quote the article by A.-M. Slaughter, 'Good Reasons for Going around the UN', *New York Times*, 18 March 2003, A33.

At first sight the use of the concept of legitimacy may be thought to have brought further uncertainties into the legal standards regulating the use of force by states. On closer scrutiny, however, some lessons can be learnt from it. The first and obvious one is that a certain contamination of categories is well under way in international law. The influence of other disciplines, be it economics or international relations, should provide some food for thought for those who still believe in the 'romantic insularity' of international law as an autonomous, and possibly prominent, discipline among others. Even more importantly, the legitimacy/legality debate has provided a good opportunity to reflect on the limits of conceiving of the law as detached from the societal body from which it emanates and from its underlying values. Whether this will have an influence in shaping foreign policies and future legal regimes may be 'uncertain at this juncture',[105] but a powerful warning sign may well have positive effects in a long-term perspective.

11. Conclusion: interpretive method and societal consensus

The purpose of the preceding sections has not been simply to highlight the thorniest substantive issues in the international regulation of the use of force, but also to show that the main problem lies in the methodology by which the legal discourse is formed. Method, far from being a theoretical preoccupation, lays down the framework in which practice takes place. The credibility and persuasive force of any legal argument depend heavily on the extent to which it fits a generally shared methodology of legal reasoning and interpretation.

The broken societal consensus on many issues related to the use of force has caused interpretive methods to proliferate. The panoply of discourses is a symptom rather than the cause of the current disagreement, but risks widening the gap between diverging positions. Any serious attempt to rebuild social consensus on the interpretation of the rules governing the use of force must be geared towards seeking a common methodology within the interpretive community that generates the official discourse. It would be illusory to believe that such common method can be traced to the rules of treaty interpretation or to theories of customary law-making, as they can be twisted and turned at will, unless there is consensus on how to use them and how to direct the interpretive discourse.

In the constant tension between a formalistic normative mode which is far removed from social realities and a cynical acknowledgement of power politics relations which overlooks the powerful moral and political drive of legal commitments, a point of equilibrium must be found. All the more so in relation to the use of force, in which the legal and political dimensions are indissolubly linked. The politics of the use of force cannot alone accomplish any meaningful goal unless it can rely on a sufficiently generally shared method of legal interpretation to provide it with the necessary level of acceptance by the societal body. At the same time, interpretive

105 Falk, *supra* note 102, at 50.

methods need to rely on political realities and societal values to have a bearing on normative outcomes.

To bring to the fore and to broach the methodological and interpretive issues raised in this paper could be a sensible way to try and restore a common starting point. It will not be easy to construe a new societal consensus on the international regulation of the use of force, but the stakes involved are such as to make the effort worthwhile. If method directs the normative outcome there cannot be any acceptable outcome, unless the method is sufficiently approved and shared by the players of the game.