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Customary International Law on the Use of Force

A Methodological Approach

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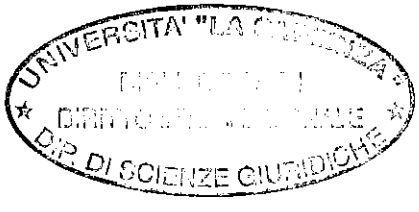

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CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE: INDUCTIVE APPROACH VS. VALUE-ORIENTED APPROACH

Enzo Cannizzaro

Introductory Remarks. International Law on the Use of Force in a Changing World

Recent events strike the foundations of the law of pacific coexistence among states at their very roots. Unilateral interventions led by Western Powers in different areas of the globe, allegedly carried out with a view to stopping egregious abuses of human rights, to responding to or forestalling terrorist attacks, to pre-empting the proliferation of weapons of mass destruction, have been met with wide consent by some states and with strong criticism by others, thus revealing the existence of deep cleavages within the international community. These episodes have not only rekindled the long-standing debate on the state of the current regulation of the use of force. Insofar as they address the law in a dynamic perspective, they call into being the process of change of international law and its capacity to bridge the gap between law and reality.

With a view to effectuating such link, the idea has increasingly been put forth that the rules which hitherto governed the use of force reflect the balance of values of an old world and that they must be updated in order to accommodate emerging values and interests. This idea is based on the assumption that the international rules on the use of force are designed to protect the sovereign equality of states, a principle upon which the entire law of international relations revolved. Focusing on sovereignty as the only, or the main value protected by these rules, could lend some support to the argument that, at a time which has borne witness to its decline as overarching principle in the international legal system, the rigidity of rules prohibiting the use of force must bow to a greater flexibility. In particular, the need to protect the sovereign equality of states should be balanced with other values or interests, such as human rights or the need to combat terrorism, which have only recently emerged with full consideration in the legal sensitivity of the international community.[1]

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1 This perspective has notably been defended by C. Tomuschat, 'International Law: Ensuring the

According to this idea, which has gained constant ground, unilateral forcible intervention could be acceptable under certain conditions, namely when it is directed at effectively protecting human rights and preventing humanitarian crises, or when there is a urgent need to combat terrorism, provided that a reasonable measure of proportionality is maintained between the aim pursued and the means employed.[2]

It may be opportune to cast a fresh look at three instances of international practice, in order to discern what the advocates of this new methodological perspective have in mind when they refer to the relevance of values in the legal discourse on customary law regarding the use of force.

The first such example is the bombing campaign led by a number of NATO states in Kosovo and in the territory of the FRY in 1999, which still constitutes an important yardstick for testing the existence of a legal basis for the doctrine of humanitarian intervention in international law. The intervention, allegedly carried out in response to practices of ethnic cleansing and in order to pre-empt the emerging danger of humanitarian crisis, has given international scholars an excellent opportunity to re-examine the doctrine of humanitarian intervention as a consequence of the growing concern for human rights in the international society.[3] It is common knowledge that the events which occurred in the territory of the former Yugoslavia produced a sudden change of heart for some states concerning the doctrine of humanitarian intervention. Interestingly enough, a number of states who, in 1978, had still raised strong

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Survival of Mankind on the Eve of a New Century. General Course of Public International Law', 281 Rec. des Cours, 1999, p. 9, at 224, but he did abstain from drawing conclusions of general character. For a survey of the debate, see recently T. Meron, 'International Law at the Age of Human Rights. General Course of Public International Law', 301 Rec. des Cours, 2003, p. 21, at 478.

2 Among others, see M. Brenfors and M. M. Petersen, 'The Legality of Unilateral Humanitarian Intervention: A Defence', 69 Nord. J. Int'l L., 2000, p. 449; S. Blockmans, 'Moving to UNchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?', 12 LJIL, 1999, p. 759. Critical remarks on this perspective have been expressed, though the provocative title might suggest differently, by K. Bennoune, 'Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq, 13 EJIL, 2002, p. 243.

3 See, among the countless contributions, the Editorial Comments: NATO's Kosovo Intervention, 93 AJIL, 1999, by L. Henkin, 'Kosovo and the Law of "Humanitarian Intervention"', p. 824, R. Wedgwood, 'NATO's Campaign in Yugoslavia', p. 828, J. I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', p. 834, C.M. Chinkin, 'Kosovo: a "Good" or "Bad" war?', p. 841, R. A. Falk, 'Kosovo, World Order, and the Future of International Law', p. 847, T.M. Franck, 'Lessons from Kosovo', p. 857, W. M. Reisman, 'Kosovo's Antinomies', p. 860; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects, 10 EJIL, 1999, p. 1; A. Cassese, '*Ex iniuria ius oritur*: Are We Moving towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?', 10 EJIL, 1999, p. 23; P. Picone, 'La guerra del Kosovo e il diritto internazionale generale', 83 RDI, 2000, p. 309.

objections against the Vietnamese intervention in Cambodia, and had dismissed the doctrine of humanitarian intervention as devoid of legal basis in international law,[4] changed their mind in 1999, and argued that the need to prevent or to stop egregious humanitarian abuses could justify an armed intervention.[5] Seemingly, no instance of practice has taken place between the two events which justifies such profound change of perspective.

The view has therefore been sustained that the doctrine of humanitarian intervention has asserted itself in the absence of previous practice, and should be based on a balancing-of-values argument: the increasing emphasis of the international community on the need to protect basic human rights on the one hand; the declining value of territorial sovereignty on the other. When the two values clash, it is argued, the former outweighs the latter.[6]

At the root of this argument lies the idea that in an interdependent world there is no room for an absolute notion of sovereignty, at least not when sovereignty stands in the way of preventing or repressing the most inhuman and heinous acts.

The other two cases which may be considered, the unilateral intervention in Afghanistan and, a few months later, in Iraq, present analogous methodological features. In both situations, the need to pre-empt, or to respond to, terrorist attacks has been among the alleged reasons raised by the intervening states for justifying what would otherwise appear as a flagrant breach of the prohibition of the use of force. In both cases, a number of international legal scholars have supported the view that the emerging threat of terrorist groups, possibly equipped by WMD put at their disposal

4 Among the clearest examples, see the statement of the United Kingdom before the SC in 1978, SCOR 2110, para. 65.

5 See the debate in the British parliamentary Foreign Affairs Select Committee, available at: www.parliament.the-stationery-office.co.uk/pa/cn199900/cmselect/cmfaff/28/2813/htm.

6 See A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 AJIL, 2001, p. 757, at 787. A similar line of reasoning seems advocated by R. Wedgwood, 'NATO's . . .', *supra* n. 3. See also S. Zappalà, 'Nuovi sviluppi in tema di uso della forza armata in relazione alle vicende del Kosovo', 82 RDI, 1999, p. 978. The possible use of a balancing-of-values technique is pointed out by R. Uerpmann, 'La primauté des droits de l'homme: licéité ou illicéité de l'intervention humanitaire', and by J. F. Flauss, 'La primarité des droits de la personne: licéité ou illicéité de l'intervention humanitaire?', in: *Kosovo and the International Community. A Legal Assessment* (C. Tomuschat ed., The Hague/London/New York, Martinus Nijhoff, 2002), p. 65 and p. 87, respectively. See also F. R. Tesón, *Humanitarian Intervention. An Inquiry into Law and Morality* (New York, Transnational Publishers, 1997), who proceeds from the assumption that states are not much more than trustees of individual interests. For an overall assessment of the various arguments, see D. Kritsiotis, 'Reappreaising Policy Objections to Humanitarian Intervention', 19 MJIL, 1998, p. 1005.

by states who sponsor and harbour terrorism, renders inter-state rules on the use of force obsolete, and call for the law to be updated.[7]

Again, broadening the scope of rules enabling States to use force should be based not so much on previous practice, but rather on the need to balance the interest preserving state sovereignty from external interference with the need to secure protection against new forms of terrorism in an effective and expeditious manner.

Albeit sometimes confusingly, these constructions, and other similar ones, seem to posit the existence of an unusual form of establishing customary law. In this perspective, ascertaining a change in the law does not necessarily require a consistent pattern of practice, but can be based on the consideration of emerging values and interests insufficiently considered in the pre-existing legal balance, which may widen the set of cases in which unilateral recourse to force could be acceptable.

The interest of this methodological line of reasoning is quite obvious, and hardly needs to be re-emphasised. It reflects the idea that international law governing the use of force must not look, retrospectively, at previous practice; it must not look back. Rather, it must lean forward, prospectively, and take into account the emerging values and interests of individual states as well as those of the international community as a whole. This assumption strikes the traditional conception of customary law at its very heart and questions the usual explanations of the process of adapting the law to changes in social reality.

Nor can this approach be simply dismissed as having the political intent to find a justification for conduct which is *prima facie* inconsistent with the traditional law on the use of force. In fact, analogous conceptual schemes have been proposed at times in order to explain the sudden emergence of new rules bearing general character, without corresponding to previous practice. The possibility of conceiving a deductive method, logically opposed to the traditional inductive scheme, draws the attention of jurists, and can be considered as one of the recurrent ideas of international law.[8]

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7 See the various opinions collected in the two Agoras: Future Implications of the Iraq Conflict, 97 AJIL, 2003, p. 553, and 803; see also, among the most recent contributions, *Les nouvelles menaces contre la paix et la sécurité internationals* (SFDI, Paris, Pedone, 2004); *L'intervention en Irak et le droit international* (K. Bannelier, T. Christakis, O. Corten, P. Klein eds., Paris, Pedone, 2004). There are also many differences between these two cases, of course, the most important, for our purposes, being the diverse attitudes shown by the UN organs. It is common knowledge that in the aftermath of the terrorist attack of Sept. 11 to the twin towers in New York, organised and directed by the terrorist organisation Al Qaeda, which had its headquarters in Afghanistan and perhaps exerted on the Afghan territory a form of governmental control, the SC adopted Resolutions 1368 and 1373, condemning the attack and mentioning, although in quite ambiguous terms, the right to self-defence. Determining the impact of this reference on the customary law of self-defence remains outside the scope of the present contribution.

8 See, among others, C. Tomuschat, 'Obligations Arising for States Without or Against their Will', 241 Rec. des Cours, 1993, p. 209, at 292.

Thus, there are a wealth of reasons to consider the balancing-of-values method. Doing so, however, requires an in-depth analysis of the sustainability of such a scheme, both in the theory and practice of international relations. The following paragraphs are devoted to such analysis.

1. The Inductive Approach and Some of Its Pitfalls

The idea of customary law being created in the absence of an established practice might appear to be inherently self-contradictory, at odds with the theoretical foundation of the doctrine of customary international law.

Within the prevailing view, practice represents, indeed, the essential pre-condition for a customary rule to come into being. The very label of customary law vividly expresses the idea of a connection between practice and its legal effect. The vast majority of scholars and prevailing case law pay almost invariable tribute to practice as one of the constitutive elements of customary law, the other being *opinion iuris*.[9]

For our purposes, it is unnecessary to go beyond this easy and no doubt simplistic observation, and turn to a more in-depth analysis of the nature of the fascinating and yet mysterious process through which customary law comes into being. Therefore, no attempt will be made to determine if customary law is the product, in a formal sense, of practice, or rather if practice simply consists of conduct carried out in order to comply with the law. Nor is it necessary to determine the relation between practice and *opinio iuris*, a troubled relation indeed, which has been extensively studied

9 See, among many, the classical definition of customary international law contained in the Judgement of 20 February 1969, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark, Federal Republic of Germany/The Netherlands), ICJ Reports (1969), p. 3; and in the Judgment of 27 June 1986, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, ICJ Reports (1986), p. 14. On the definition of custom in the ICJ's case-law, see, among others, H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989' (Part Two)', 61 BYIL, 1990, p. 3, at 31; P. M. Dupuy, 'Le juge et la regle générale', 93 RGDIP, 1989, p. 569; K. Skubiszewski, 'Elements of Custom and the Hague Court', 31 ZaöRV, 1971, p. 810; L. Caflisch, 'La pratique dans le raisonnement du juge international', in: *La pratique et le droit international.* SFDI. *Colloque de Genève* (Paris, Pedone, 2004), p. 125. The shift from the classical conception of customary law, as law made by practice, to the conception of customary law as law whose content is negotiated in international fora, and permeates the conduct of states only at a later stage, is described, with different nuances, in some classical writings. See R. J. Dupuy, 'Coutume sage et coutume sauvage', in: *La communauté internationale. Mélanges offerts à Charles Rousseau* (Paris, Pédone, 1974), at 75; G. Abi Saab, 'La coutume dans tous ses états. Ou le dilemme du développement du droit international général dans un monde éclaté', in: *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Milano, Giuffré, 1987), at 53; G. Arangio Ruiz, 'Consuetudine internazionale', in 8 Enciclopedia Giuridica, 1988, p. 1.

in the past and which still remains at the centre of international scholars' attention.[10] Integral to our reasoning is the fact that this logical scheme encounters great difficulties when seeking to provide a convincing explanation for the process of legal evolution.

One of the virtues of customary law, which differentiates it from other rules produced through a formalised law-making process, lies in its extraordinary capacity to adapt continuously to changes in the underlying social environment. Due to the close interrelation between law and fact which features in its process of formation, customary law can be considered as a faithful mirror of the reality. Yet, its process of change, though continuous, is inevitably slow, as it must go hand in hand with the corresponding change in the conduct of the international actors. Moreover, as a mirror of the social reality, law cannot anticipate social change, but rather follows it. Registering a change in the law requires the lapse of a more or less lengthy span of time, during which uncertainty and confusion prevail regarding the precise content of a customary rule.[11]

Focusing on practice as a law-making or even as a law-ascertaining factor does not adequately explain the sudden change of the law following the emergence of new values and interests demanding legal protection, and considered by the international community as capable of altering the pre-existing legal balance. Thus, one is prompted to ask whether, past the familiar inductive schemes, an alternative approach could be considered, which focuses not so much on custom, as on the assessment of competing interests and values, and on balancing them against each other.

In the first part of the present paper we shall demonstrate that a balancing-of-values approach, far from being an absolute novelty, has been widely employed in judicial and diplomatic practice. Analyzing such practice will also shed light on certain technical features of this approach, to which the second part of the paper is devoted. In conclusion, attention will be turned to the particular field of the use of force with a view to verifying if, and under which conditions, the balancing-of-values approach can be applied.

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10 Accurate accounts of an ongoing doctrinal dispute are not lacking. See, for example, these given by M. Akehurst, 'Custom as a Source of International Law', 47 BYIL, 1976, p. 47, and P. Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale', 90 RGDIP, 1986, p. 13. More recently, see R. Kolb, 'Selected Problems in the Theory of Customary International Law', 50 NILR, 2003, p. 119; and the two reports by L. Boisson de Chazournes, 'Qu'est-ce la pratique en droit international?' and by M. Kohen, 'La pratique et la théorie des sources du droit international', both in: *La pratique et . . ., supra*, n. 9, at 13 and 81, respectively.

11 For an in-depth analysis of the 'ordinary' process of formation of an customary international rule, see the final report of the ILA Committee on Formation of General Customary International Law, *Report of the Sixty-Ninth Conference*, London, 25-29th July 2000, p. 712. See also M. H. Mendelson, 'The Formation of Customary International Law', 272 Rec. des Cours, 1998, p. 155.

2. The Balancing-of-Values Approach in International Practice

Judicial and diplomatic practice has heavily relied on a value-oriented approach as a methodological tool in order to fulfil three different functions: a) to fill a gap in the international legal order; b) to determine the scope of a plurality of pre-existing customary international rules overlapping with each other; c) to expand, or, respectively, curtail the scope of pre-existing rules with regard to emerging values.

2.1. *Filling in the Gaps within the International Order (Negative Conflicts)*

Judicial practice has at times balanced out values in order to identify the legal nature of a given conduct, which does not fall within the scope of a specific customary rule.

Probably the best example of this type of situation is the ICJ decision in the famous *Corfu Channel Case*,[12] where the Court's line of reasoning revolves entirely on a balancing-of-values approach.

The Court clearly applied this method in the famous passage where it found that Albania was under an obligation to give notice of a minefield in its territorial waters to approaching ships. Interestingly enough, the Court carefully avoided referring to a customary rule. Nor was the obligation based "on the Hague Convention of 1907, n. VIII, which is applicable only in times of war". Rather, the Court referred to

> "certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."

Even if the ICJ's reasoning seems convoluted, it is admittedly not devoid of methodological interest. Having ascertained that the conduct of the parties was not governed by any specific rule, the Court then proceeded in an unusual way: first it found that the rules contained in the 1907 Hague Convention n. VIII, inapplicable as such due to their narrow scope, were inspired by a principle of humanity. That principle was therefore used in order to construe a rule of conduct, imposing a duty on a coastal state to warn approaching ships of the imminent danger.

International scholars have largely debated the logic enabling the Court to deduce rules from principles which have a different scope and a different purpose. Our

12 Judgment of 9 April 1949, *The Corfu Channel Case* (United Kingdom v. Albania), Merits, ICJ Reports, 1949, p. 4.

reading of the case is that the Court ascertained that a certain rule of conduct, construed on the basis of the applicable legal regime in analogous situations, was the one which best reconciled the competing interests such as, on the one hand, the interest to secure the freedom of maritime communication, and interests of humanitarian character, and, on the other, the principle of territorial sovereignty.[13] In particular, placing the emphasis on the duty arising from the principle of sovereignty seems to entail that an absolute conception of sovereignty, relied upon by the Albanian authorities, be abandoned. Having determined that an obligation placed on a coastal state to prevent a danger to ships passing in the territorial sea serves an interest, namely the need to ensure free and unimpeded navigation, without unduly impeding on the sovereignty of the coastal state, the Court easily concluded that such a rule existed and decided the case accordingly.

There is another passage in the same decision in which the Court relied on a balancing-of-values methodology to ascertain the emergence of a new rule of international law. In this passage, the Court found that the operation undertaken by the British navy in order to sweep the minefields and reassert the right to passage in the straits had no legal basis in international law. Even here the Court refrained from referring to custom, which at the time could hardly be invoked as the source of a prohibition of forcible intervention. Rather, the Court alluded to the emergence of a principle of sovereign equality of states, considered as the keystone of the new post-WWII international legal order: "respect for territorial sovereignty is an essential foundation of international relations". In the eyes of the Court, such principle prevailed, in case of conflict, over the interest in maintaining open sea lanes, which, moreover, were not of primary importance to the freedom of communication.[14]

A comparative analysis of these two passages may give the impression that the Court has given different weight to the same value, namely the need to protect territorial sovereignty. In the first, the Court tended to narrow the protection afforded to territorial sovereignty by international law, not only by excluding the unfettered discretion of the coastal state in choosing the means of such protection, but also by establishing positive obligations on that state. In the second, the Court expanded the protection of sovereignty, by outlawing unilateral forcible measures taken by third States in order to secure the exercise of the right to free passage.

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13 See the ICJ's decision in the *Nicaragua Case, supra* n. 9, at 112, para. 215 and 218, and the advisory opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), p. 226, par. 79. See P. M. Dupuy, 'Les "considérations élémentaires d'humanité" dans la jurisprudence de la Cour internationale de justice', in: *Mélanges en l'honneur de Nicolas Valticos. Droit et justice* (Paris, Pedone, 1999), at 117.

14 In the same vein, the ICJ found, in the *Nicaragua Case*, that the principle of non-intervention is part of customary international law. See *Nicaragua Case, supra* n. 9, at 106, para. 202.

Upon closer scrutiny, however, these two propositions are not contradictory; they even complement each other. In both cases, the Court did not consider sovereignty in vacuo, as a concept with invariable legal content. Instead, the Court contextualised the social function of sovereignty in its dynamic interaction with the pre-existent and nascent principles of the international legal order.

What can be inferred from an historical reading of the decision is that the Court used the *Corfu Channel Case* as an opportunity for establishing a new role for sovereignty in the context of the emerging values of the new international order arising after World War II. In doing so, the Court has carefully refrained from relying on previous practice, either because it was scant or because it was inconsistent with the new order which the Court was committed to shaping.

2.2. *Establishing the Respective Scope of Overlapping Rules (Positive Conflicts) through an Analysis Based on Values*

This situation, opposing the former to an extent, occurs when a certain conduct, albeit not specifically governed by a rule, falls nonetheless within the scope of a plurality of other rules, overlapping with each other. In order to determine the legal nature of such conduct, a process of harmonisation must take place. First, the values and social function served by the different rules must be identified. Second, these diverse values must be balanced with each other to determine which rule constitutes the most balanced expression of the social will as applied to a given conduct.

In the context of this complex operation, applying the balancing-of-values approach requires a high degree of sophistication. Due to the incomplete nature of customary international law, as well as the precarious coherence of its legal propositions, this method seems particularly adapted to securing consistency and unity in the international legal order.

This methodology seems to have been considered, at least implicitly, in the reasoning that led the ICJ to determine the conditions for the legality of the threat or the use of nuclear weapons, in the well known advisory opinion rendered in 1996.[15]

As a preliminary step, the Court ruled out the existence of a norm designed to govern that particular conduct. However, this finding did not exhaust the judicial assessment. The Court went on to verify whether the threat or the use of nuclear weapons fell within the scope of the rules prohibiting the use of means and methods of warfare by virtue of the indiscriminate effect that such use is likely to produce. The Court

15 Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons, supra* note 13.

therefore found that the use of nuclear weapons, albeit not the object of a specific prohibition, is nonetheless prohibited by rules which do not concern a given conduct, but involve the effects which might be produced by an open class of conducts.

Thus, the prohibition of nuclear weapons derives not so much from a rule banning specified behaviour, as from the principle of humanity, which bears, in the eyes of the Court, peremptory character. The Court did not stop there either. It went on to recall that international law affords protection to a different principle, which, in certain circumstances, is likely to clash with the principle of humanity: namely the principle of the survival of the State, to which the notion of self-defence is intimately related. The Court then concluded that the rule governing the threat and use of nuclear weapons emerges from a balancing of values: humanitarian values, which prohibit the use of weapons producing indiscriminate effect and incapable of distinguishing military from civilian objectives; and the principle of self-defence, which implies the right for the defending state to use the means necessary for repelling attacks. This conclusion is embodied in the famous passage of the advisory opinion, where the Court, having reasserted that:

> "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law,"

concluded that:

> "it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."[16]

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16 I am well aware that the prevailing view regards the opinion of the ICJ as a case of *non liquet*. See, for instance, M. Kohen, 'L'avis consultatif de la CIJ sur la *Licéité de la menace ou de l'emploi d'armes nucléaires* et la fonction judiciaire', 7 EJIL 1997, p. 236, and the contributions collected in the volume *International Law, the International Court of Justice and Nuclear Weapons* (L. Boisson de Chazournes and Ph. Sands eds., Cambridge, CUP, 1999). My understanding of the case is, however, quite different. In the advisory opinion, the Court did not decline to say what the law is. Quite the contrary, it stated the methodology for establishing the law in concrete situations, based on the necessity of combining overlapping rules which claim to govern that conduct, and which impose obligations incompatible with each other. The apparent refusal of the Court to give a definite answer thus depends on the nature of the rule governing the use or the threat of nuclear weapons. Since it is not a general rule, having invariable content, but, rather, it is a rule whose content must be established on a case-by-case basis, depending on the contingencies of the case, and on the mutual interconnection between the various principles claiming to govern that conduct, it cannot be determined in an advisory opinion, whose aim is not to decide the legality of a specific conduct, but to state the law at an earlier stage than its actual application. I have further developed this reasoning in my book *Il principio della proporzionalità nell'ordinamento internazionale* (Giuffrè, Milano, 2000), at 323.

2.3. *Expanding or Curtailing the Scope of a Rule in order to Update the Law and Accommodate Emerging Interests and Values*

This type of situation, the broadest category by far, includes cases in which a rule, generally deemed to govern a certain normative field, retracts from part of it due to the emergence of new values and interests which were not contemplated by the old rules.

Judicial and diplomatic practice resorts to balancing values in a recurrent fashion, in order to justify conduct inconsistent with a previous rule. The paradigmatic example of this argument lies in the advisory opinion of the ICJ in the *reservation to the genocide convention Case.*[17] Though it admittedly does not involve the use of force, this case is of utmost importance to our purpose; it contains the basic conceptual scheme of a balancing-of-values approach.

The facts of the case are well known and it is not useful to dwell on them. The ICJ was requested to state the law concerning the possibility for a State to be regarded as a party to a treaty, having made reservations not explicitly envisaged by the treaty itself, and not accepted by all the parties thereto.

To answer that question, the Court ascertained, as a preliminary step, that the old rule was nothing more than the expression of a general principle aimed at preserving the integrity of the treaty.[18]

However, the Court did not end its assessment there. It went on to verify whether that principle still expressed the actual needs of the international community, and should therefore be considered in its entirety, or rather if it should be combined with other emerging values and interests. The Court took the latter stance and found that, regarding treaties of a universal character such as the genocide convention, the interest in maintaining the integrity of the convention bowed before the need to attract the consent of the multitude of states. The relevant passage of the decision reads:

> "As regards the genocide convention it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Art. XI of the Convention."

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17 Advisory Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), p. 15.

18 In the Court's words: "the notion of the integrity of the convention . . . in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception . . .".

From the combination of these two principles, integrity and universality, the Court deducted the rule applicable to the case at hand, a rule which, though it referred to previous international practice, significantly departed from it and unfolded its content through a constant reference to the two competing principles.[19]

This methodology, based on constant consideration to the dynamic of values as a tool for determining, by way of deduction, the mutual curtailing and broadening of the scope of pre-existing rules is amply illustrated by the saga over the delimitation of maritime zones.

In the Anglo-Norwegian *Fisheries Case*,[20] the ICJ took a ground-breaking step in this direction. The Court used the balancing-of-values approach, in the absence of specific rules, in order to settle a dispute arising from the claim made by Norway, who wished to extend the base-lines for the delimitation of its territorial sea outwards.[21] The Court first appraised the interests underlying the legal regime of the territorial sea and then balanced these interests with the overall value of the freedom of the high seas.[22]

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19 In the same advisory opinion, the Court addressed the rules on the effect of reservations not expressly admitted by the convention through a process of balancing the consensual regime with the need to preserve the object and purpose of the Convention. It may be noted that the Court's findings have been severely criticised in the joint dissenting opinion by Judges Guerrero, Sir McNair, Read and Hsu Mo (*ibid.*, p. 31), who, inter alia, emphasise the lack of pre-existing practice which could have served as evidence of the new rules ascertained by the Court. According to these learned judges, the decision "propounds a new rule for we can find no legal basis. We can discover no trace of any authority in any decision of this Court or of the Permanent Court of International justice, or any other international tribunal or in any text-book, in support of the existence of such a distinction between the provisions of a treaty for the purpose of making reservations, or of a power being conferred upon a State to make such distinction and base a reservation upon it. Nor can we find any evidence, in the law and practice of the United Nations, of any such distinction or power".

20 Judgment of 18 December 1951, *Fisheries Case* (United Kingdom v. Norway), ICJ Reports (1951), p. 116.

21 The Court has preliminarily recognised that "in this connection, the practice of states does not justify the formulation of any general rule of law". However, the Court went on to state: "it does not follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law . . . certain basic considerations inherent in the nature of the territorial sea bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question".

22 The Court identified three principles from which it extracted the criteria for its decision and settled the case: a) the close dependence of the territorial sea upon the land domain, from which the Court deduced the need that the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast; b) the close relations between certain seas areas and the land formation; from which the Court deduced the legal regime of bays, c) the need to take into account certain economic interests peculiar to a region. The balancing of these interests with the overall value of the

In the two *Fisheries jurisdiction Case*,[23] the ICJ proclaimed that "a court of law cannot render judgement sub specie *legis ferendae*, or anticipate the law before the legislator has laid it down". Having said that, the Court went on to establish a complex legal regime for balancing the needs of the coastal state in having preferential access to living resources in the maritime zone close to its coasts, with the traditional fishing rights of other states.

This methodology found an explicit conceptualisation in the *Gulf of Maine Case*:[24]

> "A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the opinio iuris of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas. It is therefore unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of states to areas which were until yesterday zones of the high seas, to look to general international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise. A more useful course is to seek a better formulation of the fundamental norm, on which the Parties were fortunate enough to be agreed, and whose existence in the legal conviction not only of the Parties to the present dispute, but of all States is apparent from an examination of the realities of international legal relations."

This conclusion also flows from interesting instances of diplomatic practice, highlighting the manner in which the dynamics of values are referred to, in order to instantaneously adapt the law to emerging interests.

A better example comes from two cases concerning the law of the sea. The first involves the well known Truman proclamation, by which the President of the United States, Truman, asserted the jurisdiction of the United States over the natural resources of the continental shelf under the high seas, and provided for the establishment of conservation zones for the protection of fisheries in certain areas of the high seas contiguous to the coasts of the US. The nature of the claim to the exclusive

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freedom of the seas then produced the result that the method employed by Norway for the delimitation of the fisheries zone was found to be in conformity with international law, though not significantly supported by states practice. As the Court has pointed out, "all that the Court can see therein is the application of general international law to a specific case".

23 Judgments of 25 July 1974, *Fisheries Jurisdiction case* (United Kingdom v. Iceland), (Federal Republic of Germany v. Iceland), ICJ Reports (1974), p. 3 and p. 175, respectively.

24 Judgment of 12 October 1984, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine* (Canada / United States of America), ICJ Reports (1984), p. 246.

apportionment of the continental shelf's resources was presented by that proclamation as a combination of the legal regime for the territorial sea, with that of the high seas. The coastal state's interest in exploiting the seabed off its coast, enabled by technological developments, was protected by shifting the legal regime of the territorial sea out seaward. The interest of other states in freely engaging in activities in that zone, which did not unduly impede upon the right to exploit natural resources, was secured by spelling out that the legal regime of the high sea continued to apply to such activities.[25]

As is well known, the Truman proclamation did not encounter substantial objections from other states and it soon became an essential point of reference for construing the new customary framework of the law governing the continental shelf.

Under the prevailing view, the Truman proclamation simply triggered the change in the law, which took place after a process of claim and acquiescence.[26] This view tends to acknowledge that customary law's process of evolution may occur in a very rapid fashion. If a conduct inconsistent with the pre-existing law meets with large consent of other international actors, and is considered as an appropriate balance of old and new interests, it expresses the awareness of the international community as to the obsolescent nature of the existing law, and the need for a change.

There are, however, good reasons for assuming that these two elements (the claim made by the US and the acquiescence of the other states) did not create the law, but rather constituted the acknowledgement of such change, which, to a certain extent, had taken place before the proclamation, on the basis of the balancing of competing interests: the interest in maintaining the free and unimpeded use of the high seas, and the interest of the coastal state in asserting its jurisdiction over the resources of the seabed adjacent to its coasts.[27]

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25 The relevant passage of the proclamation reads: "the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize and conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal state to keep close watch over activities off its shore which are of the nature necessary for utilization of these resources . . . The character as high seas of the water above the continental shelf and the right to their free and unimpeded navigation are on no way thus affected".

26 See, for example, M. H. Mendelson, 'The Subjective Element in Customary International Law', 66 BYIL, 1995, p. 177, at 184; Z. J. Slouka, *International Custom and the Continental Shelf* (The Hague/Boston/London, Martinus Nijhoff, 1968).

27 In an article which appeared many years later, when the principles of the Truman proclamation were universally accepted as the new law, J. Crawford and T. Vilas, *International Law on a Given Day*, in: Völkerrecht zwischen normativem Anspruch und politischer Realität. Festschrift für Karl Zemanek

This is even clearer in the *Torrey Canyon Case*, which illustrates the emergence of a rule of customary international law connected to a conduct based on a balance of values perceptibly different from those the previous rules relied on.

The facts of the case were the following. After an accident occurred on a Liberian oil cargo ship off the coast of Cornwall, a considerable amount of oil was spilt and threatened the ecosystem of the coasts. The British authorities decided to bomb the ship, previously abandoned by the crew, in order to set fire to the oil remaining on board and avoid an environmental catastrophe. The flag state did not protest, and the action even met with the approval of the entire international community. The conditions under which the operation was carried out were later codified in *ad hoc* conventions and, in more general terms, in the UN conventions on the law of the sea.

In this case, one can hardly assume that the British conduct simply triggered the process of changing the relevant law, which took place, supposedly, after the occurrence of such conduct. It was carried out, rather, as lawful *ab initio*, and, under all appearances, was considered as such by the international community.

3. Technical Aspects of the Application the Balancing-of-Values Approach

The analysis of the technical aspects of the application of a value-oriented methodology is integral to demonstrating whether it is a reliable conceptual tool for ascertaining customary law. At first glance, in fact, this approach can be criticized for not representing much more than an argumentative device useful to conceal a subjective assessment of what the law should be. However, an in-depth analysis proves that, on the contrary, it provides a highly sophisticated method for determining the law and is endowed with a certain degree of objectivity and predictability.

A retrospective look at the cases presented above shows that the application of the balancing-of-values approach has proceeded on the basis of a three-fold analysis.

- identifying interests and values whose protection represents the social function of the pre-existing rules;

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zum 65. Geburstag (Duncker & Humblot, Berlin, 1994), p. 45, tried to determine what the law was on the very day that the proclamation was issued. Their analysis argues that on the day the Truman proclamation was delivered, it stated in fact the law which already existed, even though gathering evidence of this new law took some time. In other words, whereas a certain lapse of time may be necessary in order to collect clear evidence of the change of the law, this process can only improperly be seen as the process of law-making.

- identifying emerging values and interests to be deduced from objective normative trends of the international community;
- identifying a new legal regime which accommodates the various interests and values at stake.

The ICJ's decision in the *reservations to the genocide convention* case clearly illustrates how the process of deducing rules from values unfolds along this pattern, and, in many respects, constitutes the logical paradigm of reasoning based on the balancing of values.

The Court's legal reasoning prompts two observations. First, curtailing the scope of the original rule is tantamount to establishing a new legal regime, which, instead of giving priority to one interest over the other, tends to harmonise a plurality of competing interests. However, by shifting the reasoning from rules to values, the Court was able to present the new framework as the logical evolution of the old, despite the obvious differences between the two. Second, this operation of manipulation did not take place in a vacuum; rather, in order to identify the emerging values and interests the Court did not refer to its subjective assessment. These values were extracted from pre-existing legal regimes which, though they did not apply to the conduct in question, did nevertheless constitute an important source of inspiration for establishing the new applicable law.

In other words and in order to function properly, the balancing-of-values approach cannot be only conceived as a process of deducing rules from values. First and foremost, it implies the deduction of values from rules. The balancing test therefore requires the existence of values, which have already materialised in rules of behaviour though they are not, as such, applicable to the conduct at hand. This point is of crucial importance: the balancing-of-values approach, as applied in judicial and diplomatic practice, is a positivist methodology of determining customary law, and not, as it is sometimes presented, a way to mitigate the harsh nature of positive law by resorting to ethical propositions.

Moreover, the legal regime emerging from such approach often consists in applying, in whole or in part, a legal regime which is already part of international law to a given conduct. In that respect, applying this approach can at times be confused with applying analogy in customary law.

In order to further bolster this assumption, we may recall the aforementioned cases. In the *Corfu Channel Case*, the elementary considerations of humanity were deduced from the law of war, and applied to the law of peace. In the case concerning *reservations to the genocide convention*, the principle of the universality of conventions possessing humanitarian character was deduced from Art. XI of that Convention, and from the Charter of the UN, under whose auspices it was concluded.

The jurisdiction of the coastal state was seen, in the Truman declaration, as a seaward extension of powers at the disposal of the coastal state in the territorial seas, mitigated by the acknowledgement that, in other respects, the legal regime for the zone remained that of the high seas.

4. Theoretical Implications of Adopting a Balance-of-Values Approach

In a theoretical perspective, the relevance of an approach seeking to determine international law through a balancing of values and interests lies in mitigating, at least in part, certain inherent pitfalls of the more traditional doctrine of customary international law.

Despite numerous efforts made in order to clarify the concept of law formed by practice, explaining all the steps through which the conduct of the actors of international law gives rise to a new rule remains an unattained objective. In particular, a conceptual scheme centred on practice as a law-making factor fails to address changes in the law made to incorporate the shift in the underlying balance of interests. If one accepts that in order to explain changes in the law, a corresponding evolution of practice must be observed as a preliminary step, the conclusion seems unavoidable that behaviour which does not conform to a pre-existing rule is a breach of the law, though conforming to a different, and perhaps socially more adequate balance of interests. In other words, a scheme centred on practice entails that a breach of the law is a necessary pre-requisite for a change in that law. Even if the process of change triggered by this conduct is successful, and a change of the law accordingly occurs, this does not provide a retrospective remedy for the unlawful nature of the conduct leading to such change.

It is precisely in this perspective that the utility of a balancing-of-values approach can be appreciated. If one accepts that the evolution of customary international law can be concluded to, under certain conditions, even in the absence of pre-existing practice, there is no need to consider that unlawful conduct is necessary to trigger the process of revision and adaptation of the law to developments occurring in the underlying social reality. Once it is ascertained that a certain conduct, which does not conform to a previous rule, nevertheless constitutes the expression, in behavioural terms, of a new, reasonable and acceptable balance of interests, such conduct is lawful *ab origine*. Thus, the balancing-of-values approach maintains its utility for a limited span of time, lapsing between the occurrence of the first conduct and the establishment of consistent patterns of practice, which in turn serve to embody the new course the international community has embarked upon.

Evidently, the balancing-of-values approach rests on a conception of customary international law which differs from that underlying the inductive approach. Whereas the latter tends to identify the source of customary law as practice, and conceives of customary law as law based on instances of conduct, searching for a supposed source makes little sense, if any, in the former.[28]

However, this difference must not be exceedingly emphasised. True, the process of balancing values is not a law-making process. It might rather be considered as a method for identifying the law. Ascertaining the contours of rules of customary international law is, in that context, a logical operation consisting in the aggregation of principles and values.

Determining the law by way of deduction inevitably implies the possibility for a rule to come into being, without the support of a factual element. This idea is not, however, as revolutionary as it may appear at first glance. The assumption is widely shared among legal authors, that a small group of rules exists, which is not created by conduct, but inherent to the structure of the international legal order.[29] It does not seem illogical to unfold this assumption and to admit more largely, that, in accordance with the evolution of the social setting, and to the inevitable process of dis-aggregation and re-combination of pre-existing values and interests, a correspondent process of dis-aggregation and re-combination of the pre-existing legal setting may occur. In other words, what can inferred from the previous analysis is the assumption that rules of this type are not only inherent to the basic principles of the international order, but

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28 Though one might be inclined to draw a certain analogy between this approach and the theory of spontaneous law developed by a number of authoritative Italian scholars, among them R. Ago, *Scienza giuridica e diritto internazionale* (Milano, Giuffré, 1950), the difference outweighs the similarities. The theory of spontaneous law is a full-fledged doctrine, with deep philosophical underpinnings, which aims at explaining how customary international law is formed. By describing the balancing-of-values approach, the current article pursues a more limited purpose by far: that of explaining how, under certain conditions, a rule of general application can be ascertained by observing the dynamics of interests and values of the international order. Though this study provides some clues as to how law comes to being and evolves, it does not attempt to construct a comprehensive theory of the formation of customary international law, and certainly not an exclusive one.

29 See, for various positions on this topic, R. Quadri, *Diritto internazionale pubblico* (5th edn., Napoli, Liguori, 1968), according to whom "la più gran parte del c.d. diritto consuetudinario in realtà non è costituito da consuetudini ma da principi"; more recently, K. Zemanek, The Legal Foundation of the International System. General Course on Public International Law, 266 Rec. des Cours, 1997, p. 9, at 165; C. Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century, *supra*, note 1, at 355. In a masterful analysis, B. Simma, P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law*, 1992, p. 82, effectively dismiss the idea that human rights are vested with the status of customary law by virtue of a new theory of custom, and advocate the view that their belonging to general law derives from a " 'modern' method of articulating and accepting general principles of law".

can also constitute the product of a combination of its rules of conduct. In this perspective, an apparently unlawful conduct, but one which appropriately accommodates competing values and interests, crystallises the normative evolution of the international community and gives behavioural form to a rule emerging from a diverse combination of pre-existing legal regimes. It is this process of composition, and not certainly the balancing of values, which could be reasonably considered as a law-creating factor. Therefore, this approach does not consider values to be abstract ethical or sociological forms.[30] It does not create the law by way of deduction from "pre-conceived ideas". Rather, it considers values as legal structures, *i.e.*, values which have already assumed a legal form and crossed the threshold of normativity.[31]

Thus, the balancing of values approach can be considered as one among other existing techniques for identifying the law. It is assuredly one which, instead of looking at customary law in a static perspective, as law created by conduct, and whose evolution must be explained ex post uniquely on the basis of conduct, tends to observe the dynamics of that law, and offers us insights into the ways in which customary international rules interact, combine and evolve according to the shifting interests of the international community.

In the light of this observation, one can appreciate the main virtue of the balancing-of-values approach, based on a dynamic and evolutionary conception of customary law, where it is conceived as law stemming from the social balance of interests, and continuously reflecting it. Therefore, in this conceptual approach a connection between law and practice must equally be maintained, *i.e.* that customary law has such character only if it corresponds to practice; if it proves capable of governing legal relations among international actors.[32] However, there is no fixed temporal correspondence between these two elements. While the conduct of states usually precedes the formation of customary law, as the establishment of a social balance precedes and conditions the establishment of a legal one, there may be cases where the opposite occurs, for the simple fact that legal equilibrium is not found gradually, and through

30 This is, seemingly, the perspective advocated by F. R. Tesón, *Humanitarian Intervention . . ., supra* n. 6, at 11, who tends to suggest that the normative force of custom ultimately relies on moral values.

31 In this sense, values are not "pure" sociological values, but rather ones which have already materialised in a legal regime: they are "normativised" values. Thus, there is a certain analogy between values and general principles of the international legal order, considered by some authors as a powerful factor for promoting the evolution of international law. See the groundbreaking pages devoted to this concept by M. Virally, 'Le rôle des "principes" dans le développement du droit international', in: *Recueil d'études de droit international en hommage à Paul Guggenheim* (Genève, Imprimerie de la Tribune, 1968), p. 531, at 542.

32 I owe this observation to L. Condorelli, 'Consuetudine internazionale', 3 *Digesto delle discipline pubblicistiche*, 1989, p. 490, at 496.

a variety of conducts and reactions thereto, but very rapidly, and even instantaneously, in reaction to a sudden evolution in the international community's values and interests.[33]

Further issues prompted by these considerations, such as a more precise identification or the very existence of the source of the new law, cannot be addressed in the present contribution, as it must limit itself to exploring the existence of a value-oriented approach in the doctrine of customary law, and the consequences which can be drawn within the specific field of international law governing the use of force.

5. The Balancing-of-Values Approach and the Legal Regulation of the Use of Force

The previous analysis leads us to conclude that there may be situations in which the existence of a rule can be ascertained by deduction when practice is scant or inconsistent. However, due to the inherent subjectivity in the process of deducing rules from values, diplomatic and judicial practice demonstrate that this methodology can only be applied under very strict conditions.

Moving forward in the analysis, we must verify whether, and under which conditions, an argument based on the dynamics of values can be relevant and contribute to a better reconstruction of the law governing the unilateral resort to force.

A preliminary remark is in order. As has been previously underlined, international legal literature on the use of force frequently refers to the dynamics of values. The reason for this probably lies in the fact that practice in this area, though certainly not scant, is quite controversial and lends itself to a variety of interpretations. A number of studies contained in this volume offer ample evidence of difficulties encountered in coherently explaining the multiform manifestations of international practice concerning the use of force. Thus, one can be tempted to use values as a rhetoric device

33 The idea that customary law can be established instantaneously is commonly traced back to B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian Journal of International Law*, 1965, p. 23, who notoriously referred to the formation of custom in correspondence to the stance taken by resolutions of the General Assembly. The idea that, under certain conditions, the process of formation of customary law can be very rapid, and even instantaneous, is however shared more largely in the international literature. See, for example, L. Condorelli, 'La Cour pénale internationale: Un pas de géant (pourvu qu'il soit accompli . . .)', 103 RGDIP, 1999 p. 7, at 12, who mentions, among the factors which have contributed to the rapid formation of custom in the field of international criminal law, "(les) réactions de l'opinion publique face aux atrocités inouïes qui étaient perpétrées dans les Balkans et au Rwanda . . . la jurisprudence courageuse et innovatrice du Tribunal Pénal international pour l'Ex-Yougoslavie, (et) la faveur de la doctrine".

for justifying conclusions which cannot be easily reached through traditional inductive methodology. Values would therefore become an easy avenue for circumventing methodological problems connected to the inductive method, and for advocating a wider set of cases in which unilateral use of force is permitted. Who could deny that human rights have acquired a particularly prominent rank in the international community's set of values? Who could doubt that the threat of terrorism and the development of new and unconventional weapons demand that the classical law of interstate relations be updated?

However, the rhetoric of values can hardly be confused with the proper application of the balancing-of-values methodology. The previous analysis clearly shows that balancing values does not simply entail referring to the dynamics of values as a substitute for international practice. Rather, due to the aforementioned inherent subjectivity in such reasoning, the logical process underlying this approach is quite sophisticated and requires very strict conditions of application.

A more detailed analysis of the application of such methodology in order to determine rules of international law governing the use of force goes beyond the current study, which is devoted to analyzing the general framework for such approach. It may nonetheless be useful to highlight a number of general principles which could offer guidance in future analyses.

First, the law governing the use of force is not immune to the application of this particular methodology. It may be worth noting that three of the leading cases in which the ICJ used this approach involve the legal regulation of the use of force: the *Corfu Channel Case*, the *Nicaragua Case*, the *Legality of the threat or use of nuclear weapons Case*. In the first two the ICJ used the balancing-of-values approach in order to limit the unilateral resort to armed force. In the third the balancing-of-values approach, albeit used to broaden choices of weaponry, concerns an extreme case of self-defence, where the very survival of the attacked state is at stake. One could be inclined to conclude that the ICJ considered such methodology to curtail, and not to broaden, the range of the situations in which the unilateral resort to force is permitted.[34]

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34 In its decision on the merits in the *Oil Platforms Case*, Judgment of 6 November 2003, *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Merits, ICJ Reports (2003), n.y.r., the Court was asked to determine the scope of a saving clause in a FCN treaty allowing either party to disregard the provisions of that treaty in order to protect its essential interest. The Court has interpreted the clause as not intending to operate independently of customary international law, and has therefore limited the power to use force unilaterally to the sole case of action taken in self-defence. Though the Court has not unveiled the ultimate consequence of this reasoning, it seems safe to assume that a different interpretation would have led it to conclude that the clause runs counter to a rule of *ius cogens*, and therefore that the entire treaty would be invalid.

Second, there are technical reasons for shaping a particularly narrow role for the balancing-of-values approach concerning the use of force.

The main reason relates to the nature and the rank of the interest protected by the prohibition of the use of force. As has been said before, many doctrinal views pleading in favour of broadening the conditions for unilateral forcible intervention as a means to protect emerging values tend to assume, explicitly or implicitly, that the prohibition of unilateral use of force is designed to protect the territorial sovereignty of States. It may seem safe to conclude that, in an era witnessing the increased emphasis placed on the need to protect human dignity, and the corresponding decline of the myth of exclusive rule by the territorial sovereign, the former value tends to outweigh the latter.

However, the idea that the prohibition of the use of force is a corollary of the principle of territorial sovereignty appears to be an over-simplification. A look at international practice abundantly proves that the rule prohibiting the unilateral resort to force discharges a plurality of functions, and therefore serves a plurality of interests: the interest of the individual state in shielding its territorial sovereignty from foreign interference, but also the collective interest in avoiding the risk of abuse inherent to unilateral action, in keeping international conflicts at a manageable level and in preventing retaliatory escalation which could imperil the stability of the entire international system.

Consequently, expressions such as "sovereignty vs. human rights", and the like, must be taken with care. Evocative as they undoubtedly are, such formulae fail to capture the technical complexities of the balancing-of-values approach, and trivialise what is otherwise an important achievement in legal discourse.

Third, a further element which must be considered to apply properly the balancing-of-values approach to the law governing the use of force concerns its structural limits. As has been observed above, the balancing of values approach can be used in order to accommodate the emergence of new values and interests with pre-existing ones in a legal regime which appropriately protects both. It follows that, in the absence of practice, a framework for balancing values is appropriate to observe a gradual evolution of the law, but not to account for a dramatic change in it

This view was upheld by the ICJ in the *Nicaragua Case*. In paragraph 206 of its decision on the merits, the Court addressed the problem of unilateral intervention in a foreign state with a view to supporting the struggle of internal opposition "whose cause appear(s) particularly worthy by reason of political and moral values". When identifying the law applicable to such conduct, the Court considered it inappropriate to rely on a balancing of values approach, but expressly requested "indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force". And this because, "for such a general right

to come into existence would involve a fundamental modification of the customary law principle of non-intervention".

In other words, the Court found that when the emergence of political and moral values is not invoked to update, but rather to disrupt the pre-existing normative equilibrium and to impede on fundamental principles of customary international law, a well established practice is required.

Fourth, one hardly needs to recall that a value-oriented approach is, by nature, based on balancing values: those which are respectively protected and compressed in the new legal regime. In order to demonstrate this assumption, attention must be turned again to the Nicaragua *Case*. In the famous paragraph 268 of the decision the Court ruled out that forcible measures taken against Nicaragua could be justified as a means for enforcing human rights. The ICJ held that the alleged violations committed by Nicaragua took place in a conventional framework, which also provided the means for monitoring and securing its respect. However, the Court went on to state that:

> "in any event, the use of force could not be the appropriate method for monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installation, or again with the training, arming and equipping of the contras."

Even if the reasoning halted before its furthest consequence, this passage offers interesting perspectives both in the part where it rules out the legality of massive forcible measures directed against the political regime of a foreign state, and in all evidence, aimed at provoking its fall, as a means for protecting human rights, but also for what it implies. A plausible reading of the decision suggests that the Court seemingly expressed its readiness to consider the legality of conduct implying a minor use of force necessary to lending humanitarian assistance and strictly directed at the achievement of this aim.

Final Remarks

There is, at the turn of the last page, a question which remains unanswered. If the balancing-of-values approach can only be employed in order to register an adaptation of the law to the emerging values of the international society, how can conduct be justified, when it is not in accordance with the core values of the international community but nonetheless appears necessary for ethical or moral reasons? How can the legality of actions conducted on a large scale be assessed, when they aim to overthrow regimes which are irremediably connected with egregious and repeated human rights abuses?

Addressing these issues goes well beyond the limited purpose of the present paper, which is solely devoted to determining how a certain methodology for ascertaining the existence of customary law should be used in the context of international law governing the use of force.

It is clear, however, that such an approach is certainly not the only one which can explain legal change. What emerges from the current analysis is that in order to avoid the trap of subjective assessment, and to possess a relevant conceptual tool for explaining the process of evolution of customary international law in legal terms, it is necessary to maintain a link between the emergence of new values and the persistence of the pre-existing foundational basis of international law. It is that link which confers legitimacy upon an international Court when it is tasked with ascertaining the existence of a rule, absent previous practice, or upon a State when it resorts to unilateral conduct apparently inconsistent with the pre-existing law. The balancing-of-values approach requires a gradual insertion of new values into the well-established framework of the previous ones.

In other words, the balancing-of-values approach provides an appropriate avenue for assessing the legality of conduct which gives behavioural form to a balance of values shared by the entire international community, and, in this respect, emphasises the *communitarian* character of this process of legal evolution. On the other hand, this approach seems inadequate when assessing the legality of conduct which upsets the pre-existing system and produces profound cleavages in the international community. Such irruption in the international normative system of interests and values which, by nature, requires a revolutionary undermining of the normative foundations of the international legal system, is quite a different matter. To determine the legality of such conduct, one must turn to other methods, based not so much on the identification of values shared by the entire community, as rather on the capacity of a state, or a group of states, to assert its course of action vis-à-vis others. According to this scheme, which emphasises the *antagonistic* character of the process of legal change, a certain conduct, irremediably unlawful, can nonetheless be carried out in order to effectuate a change in the law. Evaluating whether this attempt has been successfully performed remains a question pertaining primarily to the political process. It then entails a more or less lengthy lapse of time, during which legal uncertainty reigns.

The balancing-of-values approach does not constitute a panacea for justifying conduct which does not otherwise fit into the current framework of international law. Despite its inherent indeterminacy, this approach is not a metaphysical methodology, but rather a positivistic methodology. Its proper role lies in grasping the emergence of new values, which have already intruded into the realm of the law and are ripe for becoming rules of conduct.