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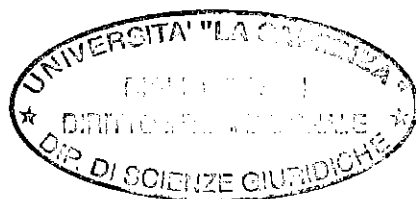
Customary International Law on the Use of Force

A Methodological Approach

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Introduction

CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE . . . AT A TIME OF PERPLEXITY

Enzo Cannizzaro and Paolo Palchetti

It is certainly not easy, even for specialists, to follow the threads of the abundant, and perhaps overflowing, debate over the legality of the intervention of the US and the UK in Iraq, in the spring and early summer of 2003. This debate has not remained confined to academic circles, nor to legal arguments. On the contrary, it has spilled over into the political organs of states, international governmental and non-governmental organisations, and public opinion at large; delved into the realm of ethics, morality, and policy; struck at the heart of fundamental questions concerning the role of the law in international relations and underscored to which extent the international community is subject to bewilderment and disquiet.

In this context, scholarly debate appears, in turn, unsurprisingly deprived of certitudes, swinging from hyper-realism to hyper-formalism, at a crossroads where potentially infinite avenues depart.

This premise may explain the reasons underlying the decision of the Institute of International and EU Law of the University of Macerata to organise a workshop, in the early summer of 2004, on the methodology of ascertaining customary law in the specific field of the law governing the use of force, the proceedings of which are collected in this book. The decision to focus on methodology reflects the deep-seated conviction of the convenors that a frank and open-minded exchange of views about the way in which one should proceed when attempting to determine what the law is, can ultimately contribute to improving our understanding of the substantial questions involved.

The main focus of this book therefore hinges on the intersection between the process of creating customary law and the law on the use of force, an issue which indeed appears very promising for legal research, though fraught with problematic issues.

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As international law textbooks almost uniformly repeat, the coming into being of a customary rule requires the concomitance of an established practice plus *opinio iuris*. Despite this apparent unanimity, however, authors are much divided on the identification of customary law's creating factor, and a variety of opinions has been suggested, ranging from spontaneism to voluntarism.

Beyond the obvious differences among such views, there is an overarching tendency to present each approach as exclusive, i.e. as a theoretical model capturing all the subtleties of the law-making or, respectively, of the law-determining process. This claim to exclusivity probably lies at the origin of the weaknesses and shortcomings of each approach: while these models might address how a particular category of rules comes into being, they fail to fully explain the coming into existence of the plethora of customary rules.

Instead of insisting on the unity of the process of creating customary law, the idea has at times been put forward that a multiplicity of law-making processes are hidden under the general and facile formula of customary international law. Following this approach, different categories of customary rules may be identified. Thus, while certain customary rules have slowly emerged over the centuries, through conduct which gradually proved to serve most appropriately the needs of the international community, and to balance accordingly the respective interests of the various actors, others appear to be the product of the claims of certain actors, usually the most powerful among them, implicitly or expressly put forward in order to provoke a change in the law which better accommodates their interests, and which is accepted, or acquiesced to by other actors convinced of the necessity or of the ineluctable character of such change.

Rules of the first type are the expression of the more or less spontaneous convergence of the conduct of relevant actors towards certain behavioural schemes; they emerge and evolve slowly, through a process of mutual adjustment of conduct and reaction thereto, and which, comprehensively considered, continuously adapt the law to the changing social needs. For these rules, traditional modes of ascertaining the law, based on the lengthy and patient research of practice and *opinio iuris*, remain the most appropriate. This category of rules mirrors the communitarian spirit of customary international law. On the other hand, rules falling within the other category are more the product of an act of law-making in strict sense than an expression of *opinio iuris*, and the process of their formation resembles a consensualist scheme more than any other theoretical one. This process of creating law is therefore one which emphasises the antagonistic character of the process of customary law-making.

These two categories do not exhaust the variety of the law-making processes. Many authors have, in the past, underlined the existence of a further category of customary

law, whose coming into being is not explained by the existence of a well settled practice, nor by the will of states. These rules, whose creation may be very rapid indeed, can be ascertained by way of a deductive process, looking at the *opinio iuris* of the actors of international law, at the structure of the international system, or at a combination of principles and values in this legal order. Whereas some might find it more appropriate to refer to them as principles rather than customary rules, they are not rarely labelled as such, perhaps in order to escape the difficult task of explaining their establishment.

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The difficulties related to the determination of customary law increase dramatically in fields where legal arguments have deep ethical and political implications, such as the international regulation of the use of force. Furthermore, international law governing the use of force is not only composed of rules originating from diverse sources, but it also hosts the coexistence of a plurality of planes – conventional, institutional and customary – which interact with each other and create a highly enmeshed normative network.

For decades, after World War II, the international regulation of the use of force rested on two pillars: the prohibition of unilateral action, with the notable exception of self-defence, and the legitimising effect of institutional action. This basic frame of reference emerged from the *Nicaragua* case, which provided international lawyers with a form of codification of the law in this field.

In this case, as is well known, the ICJ stated a principle which was to remain a methodological guide in international legal doctrine. By stating that a breach of the rule prohibiting the use of force – if it is not presented as such but as a permitted exception thereto – confirms rather than weakens the existence of such rule, the Court sanctioned a methodological approach where *opinio iuris ac necessitatis* plays a decisive role.

Along this line of reasoning, one could plausibly argue that when determining the existence of a rule prohibiting the use of force, the assessment of its effectiveness, i.e., its capability to govern the conduct of states, plays a considerably inferior role than it did with regard to “ordinary” rules. This construction is not as convoluted as it might appear at first glance. In the international legal order, which is characterised by a decentralised structure, the prohibition of the use of force has discharged the function of an instrument of social control of individual action, and surely the only one capable of avoiding abuses and preventing conflicts from escalating to an extent that could endanger the stability of the system as a whole. The social function of the prohibition of the use of force might explain why States seem ready to proclaim the normative force of a rule which they are not otherwise disposed to abide by strictly, and whose

breach is considered as a possible occurrence in the conduct of international relations.

However, this view raises a number of issues concerning the identification of the minimum degree of effectiveness that law must preserve in order to govern social phenomena. Can a given rule be considered necessary though (at least partially) ineffective? What is the balance that must be struck between effectiveness and *opinio necessitatis* for a rule to preserve its normativity? How many breaches can a rule withstand without losing its normativity? If we follow this methodological path down to its extreme consequences, are we not slowly but inevitably sliding towards a law which has no grasp of social reality, towards a sort of « imaginary » law?

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The intersection between customary international law and the international regulation of the use of force reveals additional mysteries and raises other misgivings. For sake of clarity, one could attempt to group them in three categories.

First, although State practice still remains an essential yardstick for assessing customary rules on the use of force, its nature and role remains uncertain. In particular, it is unclear which elements contribute to forming a custom: active conduct, acquiescence, verbal acts, manifestation of political will, voting within the UN bodies, and so on. Moreover, due to the highly political character of the law governing the use of force, one could hardly expect States' conduct to be inspired by coherence and consistency. It frequently occurs that a State expresses reproof for conduct which it itself has adopted or would be ready to adopt, or, on the contrary, that a State abstains from condemning a flagrant breach of the law for policy reasons. Establishing an order of priority for the various manifestations of practice constitutes a difficult task, which, if it is not carefully carried out, may fall prey to subjective preference and result in arbitrary determinations. Giving precedence to conduct considered as unlawful by a large majority of States, but nonetheless carried out by powerful States, in the absence of a centralised sanctioning body, may seem an expression of crude realism. To construe customary rules on the base of opinions deprived of factual support might resemble a manifestation of abstract formalism.

Second, the state of customary law can be hardly determined without duly addressing the activity carried out within the UN legal order. Indeed, these two normative systems are so strictly intertwined that it is very difficult to separate one from the other. The impact of institutional action on the customary plane remains a point of great controversy. Acts adopted by the UN organs may deeply influence how notions belonging simultaneously to the planes of UN and customary law, such as the concept of aggression or that of self-defence, are constructed. Moreover, the practice of the UN organs may produce a subtler, but no less pervasive, effect on the respective scope of unilateral and institutional action. Throughout the UN's existence, the view has been

conspicuously sustained that the prohibition of the individual use of force, enshrined in Art. 2, par. 4, of the Charter and in customary law, is legally conditioned upon the efficiency of the system of collective security established by Chapter VII. Much ink has been spilled over this troubled relation, yet, no definite conclusions have been reached. Those who deny that the inefficiency of the UN system has the legal effect of broadening the scope of unilateral action must convincingly demonstrate that in contemporary international law the two sets of norms – the centralisation of the use of force in the hands of the UN and the customary prohibition of the use of force – serve different functions and different purposes. If these two sets of norms are functionally independent, one could hardly argue that the shortcomings of the former could impinge upon the latter. Those who argue that the failures of the system of collective security enable states to act unilaterally face the difficulty of defining the legal conditions for States to use force individually. It does not seem entirely coherent to attribute to a centralised organ, expression of the common will, the exclusive power to ascertain the conditions justifying the use of force, if states can unilaterally determine this organ's failure as a pre-condition for repatriating the power thus transferred.

Third, and finally, a theory of customary law, as applied to the specific field of the law governing the use of force, must convincingly demonstrate such law's capacity to change and continuously adapt to developments in the social environment and the emergence of new needs and values. In particular, a change in the international legal framework concerning the use of force has been recently advocated, on the basis of an emerging sensitivity to humanitarian interests and the evolving nature of the terrorist threat. Issues related to human rights or terrorist threats are certainly no novelty in international law. An evolution might, however, occur in a profound way concerning the nature and degree of protection which international law is willing to afford to the protection of human rights or, respectively, to the need to combat terrorism. Methodologically, they raise the question of how international law addresses legal conflicts, i.e. conflicts between norms which have different nature and character and which impose apparently contradictory obligations. If, according to certain views, the consideration of the values and interests protected by conflicting rules plays a crucial role in settling such conflicts, one could not expect the usual normative dynamics to be completely set aside by a dynamic of values, which might produce results highly influenced by the subjective preferences and sensitivities. Among the virtues of custom as a law-making process lies the capacity to maintain a link between law and social facts, between the coming into being of a rule and its capacity to control social conduct. The identification of the proper balance between dynamics of conduct and dynamics of values seems therefore integral to ascertaining the evolution of customary law.

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In the end, a methodological analysis of the state of the law can hardly fail to consider the structure of international relations at a time of change. The prohibition of the use of force arose in a multipolar world, and resisted the long phase of bipolarisation, insofar as it was deemed to be a workable legal instrument for governing conflicts. Will it survive changes in the structure of the international political order, left with a sole remaining superpower which ultimately tends to secure a political control of conflicts throughout the world by counting, prevalently or exclusively, on its own economic and military power? If a cost-benefit balance, i.e. the expectation of advantages, in individual and social terms, arising from compliance with the law, provides the ultimate motivation for an actor to abide by the law, what is the current motivation for the only remaining superpower to count on a legal regulation of the use of force, which can be viewed as hindering its pursuit of subjectively assessed interests? Does the never-ending Iraqi crisis not teach the lesson that no State, mighty as it is, can exercise absolute control over conflicts likely to erupt in the most remote parts of the earth?

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Such is the conceptual turf upon which this book rests: it seems almost natural that it ultimately aims not so much at providing answers as appropriately stating the countless questions which arise in every corner of this continuously obscure field. This book has an object, it hardly has a thesis. It does not follow the lines of pre-conceived doctrines about what the law governing the use of force actually is. It follows threads of methodological discourse, which might lead to many possible ends. It is composed of ideas and fragments of ideas, brought together by the shared conviction that a frank and open-minded discussion over methodology might, in one way or in the other, contribute to enlighten the path each scholar is called to go along when undertaking the study of this mysterious and multifaceted phenomenon.