Introduction

No topic is more emotive or attracts more attention in international law and relations than the use of force. The reasons and conditions for using force have been subject to extensive moral, religious, philosophical, political and legal inquiries since ancient times. From the perspective of international law, it was in the 20th century that concerted efforts were made to regulate the use of force among States. The contemporary international legal framework regulating the use of force – often referred to as the *jus ad bellum*¹ – evolves around the United Nations (UN) Charter 1945 but it is a composite regime insofar as its rules and principles are drawn from different sources.²

The UN Charter establishes a political and legal framework that is oriented by the values of peace and justice and, with regard to the use of force, its guiding principles are the peaceful settlement of disputes, non-use of force and collective security. More specifically, Article 2(3) imposes an obligation upon States to settle their disputes peacefully and Article 2(4) prohibits the threat or use of force in international relations. The UN system permits the use of force when it is in the common good and, to this end, Chapter VII of the Charter confers upon the Security Council (SC) the power to authorise the use of force where necessary to maintain or restore international peace and security. The use of force under the UN Charter system is thus centralised and institutionalised. The unilateral use of force is exceptionally permitted but only in the case of self-defence and only to the extent necessary to halt and repel an armed attack.

Although the UN Charter provides the umbrella framework, it is not the exclusive source of international law on the use of force. A number of treaties deal with the use of force such as the North Atlantic Treaty and the Constitutive Act of the African Union. These treaties operate within the UN system and questions arise as to how they interact. Customary international law is another source of law on the use of force. Customary law forms on the

¹ The *jus ad bellum* must be distinguished from the *jus in bello*, which refers to the law of war and is generally known as international humanitarian law. An assessment of the *jus in bello* is beyond the scope of this book.

² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits) [1986] ICJ Rep. 14, paras 172–182.

back of State practice combined with a sense of legal obligation (*opinio juris*)³ and it allows States to adapt the rules on the use of force to reflect changes in circumstances, security needs and moral and political standards. But customary law poses certain challenges.⁴ First, it is often difficult to identify whether there is a sufficient amount of State practice and *opinio juris* to support the formation of customary law. Second, the customary law on the use of force is not static; it precedes the law established by the UN Charter and continues to evolve in the post-Charter era. The critical issue, then, is to determine whether customary and UN law on the use of force converge or diverge and, if it is the latter, to pinpoint where divergence occurs.

From the above, it becomes apparent that the *jus ad bellum* is a complex legal framework. Moreover, as with any legal system, some of its rules contain broad and ambiguous terms that are open to different interpretations. Ascertaining the precise meaning of its rules is a difficult task given that States have different values and priorities and are faced with multifaceted threats that also vary between them. These factors place existing rules under considerable stress and give rise to questions concerning their content, scope, legitimacy and adequacy.

To give a number of examples, the UN Charter does not define the concept of force even though the non-use of force principle is central to the UN system and critical to its effective functioning. Difficult questions therefore emerge as to what conduct qualifies as ‘force’. Does economic coercion constitute a prohibited use of force? Do cyber attacks amount to a use of force even if they do not produce physical harm or where they cause harm indirectly? Other questions concern the legality of the use of force for humanitarian purposes, the use of force to attain self-determination, the use of force by invitation and whether force can be used to compel recalcitrant States to comply with their obligations under international law. These legal questions are complicated further by the fact that they are often intertwined with political and moral considerations.

Likewise, the use of force by way of self-defence gives rise to a host of difficult questions. These questions include: how do customary and UN Charter rules on self-defence interact; what is the meaning of the concept of ‘armed attack’; can small-scale individual attacks be aggregated when determining whether the armed attack threshold has been met; can non-State actors author armed attacks and thus become the target of self-defence action; can defensive measures be deployed pre-emptively to neutralise threats before they materialise; and how do the principles of necessity and proportionality limit the use

³ Article 38(1)(b) of the Statute of the International Court of Justice 1945.

⁴ For a flavour of these difficulties see Daniel H. Joyner, ‘Why I Stopped Believing in Customary International Law’ (2019) 9 *Asian Journal of International Law* 31.

of defensive force. All these questions have acquired contemporary pertinence in the face of the proliferation of weapons of mass destruction, the emergence of powerful non-State actors such as international terrorist groups and the exploitation of modern technologies for malicious purposes.

The use of force as part of the UN collective security system is also fraught with difficulties. Certainly, the SC's interpretation of the concepts of peace and security has evolved over time to include not only threats of inter-State violence but also non-military threats such as human rights abuses, refugee flows, environmental degradation, pandemic health crises and malicious cyber activity. This inevitably raises questions as to what measures are appropriate to respond to such threats and whether the use of force is actually appropriate. While the SC's role and competence in this respect have expanded, the antagonism between its members (and especially its veto-wielding permanent members) means that it does not always act promptly or consistently. When the SC is deadlocked, questions emerge as to whether the General Assembly (GA) or regional organisations have a residual right to use force. Moreover, the UN does not have its own forces and is dependent on member States for resources. This has led the SC to authorise member States to use force and this raises questions about the scope of such authorisations as well as the extent to which the SC can exercise oversight. The UN has also created the institution of peacekeeping as a tool to maintain international peace and questions arise as to the conditions under which peacekeeping operations can use force and the limits of such use of force. As was said, regional and subregional organisations are part and parcel of the UN system and controversies emerge as to when these organisations can use force and who has the ultimate authority to sanction it. In recognition of threats to human security, the UN has recently introduced into its mandate the doctrine of a responsibility to protect. Yet, questions abound as to which circumstances trigger this responsibility, upon whom this responsibility falls and when force should be used and by whom.

This book grapples with these complex international law questions and is structured as follows. Chapter 1 sets the scene for the rest of the book by mapping the historical efforts of the international society to regulate the use of force. In particular, this chapter explores the extent to which just war theory, the Treaty of Westphalia, the League of Nations and the Pact of Paris sought to regulate States' competence to use force.

Chapter 2 examines the nature, content and scope of the prohibition on the threat or use of force under the UN Charter and customary law. Among other issues, this chapter unpacks the meaning of the concepts of 'force' and 'threat of force', explains the criteria and conditions under which a threat or use of force violates the referent rules and considers whether the use of force has become so prevalent within international relations that the prohibition contained within Article 2(4) UN Charter has fallen into desuetude.

Chapter 3 analyses the right of self-defence and clarifies the conditions that must be met in order for self-defence to be lawful. This chapter tackles a number of controversial issues such as the meaning of the term ‘armed attack’ under Article 51 UN Charter and customary law, whether non-State actors can author an armed attack and therefore be made the direct target of self-defence action and whether defensive force can be used to avert emerging threats. This chapter also discusses the scope of the principles of necessity and proportionality in relation to self-defence. Other issues considered in this chapter include the permissibility of collective self-defence and the role of the SC when the right of self-defence is engaged.

Moving beyond the UN system, Chapter 4 considers whether international law provides States with other legal bases for the use of force. More specifically, this chapter examines whether humanitarian intervention and armed reprisals are accepted by contemporary international law as well as considering whether and to what extent external actors can use force within a State when they are invited to do so by that State.

Chapter 5 considers the application of the use of force regime to cyber attacks by first explaining whether international law applies to cyberspace and cyber operations. It then considers whether cyber attacks can amount to a use of force or an armed attack. Next, this chapter zeros in on the thorny question of attribution, which is an important issue given that cyber attacks may be committed by non-State actors acting independently or in collaboration with States. This chapter also discusses the application of anticipatory and preventive self-defence to cyber attacks and, finally, it examines the legal framework surrounding automatic cyber defence and the concept of ‘defend forward’.

Chapter 6 focuses on the UN’s collective security system. First, it examines the triggers of the collective security system under Article 39 UN Charter and discusses the non-forcible as well as the forcible measures that the SC can adopt under Articles 41 and 42 UN Charter. Next, this chapter explains the scope and limits of SC authorisations to use force. It also explores the role of the GA in the UN collective security system and in particular in relation to the use of force. Finally, it examines whether SC resolutions and the veto can be subject to legal review.

Chapter 7 evaluates the place and role of regional arrangements within the UN’s collective security system. This chapter provides a definition of what is a regional organisation and, with a specific focus on the African Union, European Union, North Atlantic Treaty Organization, League of Arab States and Organization of American States as well as subregional organisations such as the Economic Community of West African States, South African Development Community and Economic Community of Central African States, it examines the competence of these organisations in peace and security.

Furthermore, this chapter assesses the interaction between and among regional organisations and the UN in relation to the use of force and peacekeeping.

Peacekeeping is one of the main tools employed by the UN and regional security organisations for maintaining international peace and security. Chapter 8 assesses the nature and legal basis of peacekeeping. The principles of consent, neutrality/impartiality and use of force in self-defence represent the normative matrix that guides the conduct of peacekeeping operations and this chapter traces the evolution of these principles and outlines their content and scope as they currently stand in international law.

Chapter 9 widens the aperture by considering the future direction of the use of force regime. This chapter looks at certain variables such as the return of morality in international law and relations, the rise of non-State actors, the development of new technologies and the prevalence of security risks in order to make projections as to how the use of force regime will evolve and develop.

Overall, the objective of this book is to provide an insightful, systematic and analytically sophisticated account of the law and practice of the use of force in international relations. The book does this by drawing on jurisprudence, State practice, official documents and literature. It is also written by two authors who have extensive knowledge of this area as researchers and teachers and who understand the implications of their legal arguments as well as the challenges the law faces.

Particular features of this book that are worth highlighting include its examination of contemporary phenomena such as the emergence of non-State actors and cyber technologies and how they impact on the use of force regime; its consideration of how morality and the notion of risk can affect the regime on the use of force; its comprehensive account of the security provisions of regional and subregional organisations and of their mutual relations and their relations with the UN; and its assessment of contemporary approaches to the use of force such as ‘defend forward’ and automatic cyber defence.

We hope this book will make a significant contribution to understanding the content, scope and direction of the use of force regime in contemporary international law.

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