
The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate

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Abstract

Controversies about the rule prohibiting the use of force have mainly focused on issues such as the conditions for self-defence or the existence of a right to humanitarian intervention. Beyond the question of the validity or relevance of each substantial argument, a comprehensive analysis of the doctrine reveals that the debate is actually more about methodology than substance. Hence, those who stand for an enlarged conception of the right to self-defence or who support a right of humanitarian intervention tend to adopt a particularly loose method in defining the content of the customary rule.

The prohibition of the use of force is first and foremost a treaty-based rule, inscribed both in the Charter of the United Nations and in numerous other treaties of regional scope. However, it is at the same time a rule of customary law, the evolution of which has been at the centre of lively debates, particularly in recent years. These debates can be broken down in the following manner. On one side, there is the extensive approach, which consists in interpreting the rule in the most flexible manner possible: in this way, doctrines such as 'preventive self-defence', the 'implicit authorisation' of the Security Council, or the right of 'humanitarian intervention', for example, can be accepted as conforming to the rules. On the other side is an approach, which can be categorized as restrictive, that favours a much stricter interpretation of the prohibition, making it much less likely that new exceptions will be viewed as acceptable.¹ Over and above the validity of the basic arguments that are advanced by both sides, an analysis of the scholarship reveals that the debate is taking place also, and perhaps

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¹ These two approaches are well illustrated by comparing the books by T. Franck, *Recourse to Force. State Actions Against Threats and Armed Attacks* (2002) and C. Gray, *International Law and the Use of Force* (2nd edn., 2004).

above all, on a methodological level.² More specifically, it is over the status and interpretation of the customary prohibition on the use of force that the most profound divergences appear. The extensive approach, unlike the restrictive one, tends to favour a very flexible method when it comes to the ascertainment of the place and content of the customary rule. In any event, it is this working hypothesis that will be tested in this article. Questions of the status and the constitutive elements of custom will be dealt with in turn, in order to illustrate the methodological differences separating the two approaches.

Before addressing the first of these two points, it is necessary to clarify a couple of methodological points. Firstly, it should be noted that, while the arguments that will be presented here are articulated in terms of these two opposite poles, the variety of doctrinal opinions in existence is considerably more complex and nuanced than this might suggest. This, however, does not prevent us from illustrating the two theoretical poles by using authors whose work cannot be reduced to either position, the objective being to present types of argumentation rather than to classify any given author as belonging to this or that category. It is in this spirit that a sample of recent works on the use of force, from the war in Kosovo to that in Iraq, has been selected. The following table, which will be explained in more detail below, provides us with an overall picture of the debate.

	<i>Extensive approach</i>	<i>Restrictive approach</i>
<i>Status of custom</i>	Privileged source Formal and material source Policy-oriented or objectivist tendencies	Equality between sources Formal source Voluntarist or formalist tendencies
<i>Understanding of the constitutive elements of custom</i>	Practice as the dominant element; the role of political organs 'Instant' or rapidly evolving custom Dominant role of major states	<i>Opinio juris</i> as the dominant element; the role of legal discourse Custom evolves gradually Equality between states

Even if it is impossible to be, or to even approach being, exhaustive in this regard, an attempt has nonetheless been made here to cover as wide a range of viewpoints as possible, in particular through integrating 'American' and 'European' works into the analysis, along with those from Third World countries. It may be possible to advance the hypothesis of a schism opposing scholars from the US to those from the rest of the world, with the former espousing the extensive approach, the latter the restrictive

² See, in this regard, Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq' 13 *EJIL* (2002) 21, at 22–23; Farer, 'Humanitarian Intervention before and after 9/11: Legality and Legitimacy', in J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003), at 53 ff.

one.³ In any event, it must be noted that the present author cannot claim to be totally exterior to the debate presented here. More specifically, my personal preference is for the restrictive approach. This, however, does not prevent us from describing, in an objective a manner as possible, the extensive approach (Section 1), before going on to specify the ways in which my preferred understanding differs from it (Section 2).

1 The Extensive Approach to the Customary Prohibition of the Use of Force

There are scarcely any authors today who are prepared to question the importance of custom in the debates surrounding the scope of the prohibition on the use of force. The core of the controversies that trouble the doctrine in terms of 'preventive war', 'implicit authorization' or 'humanitarian intervention' focuses on certain precedents that bear witness to the evolution of this rule, otherwise inscribed in the Charter of the United Nations. The extensive approach is characterized by the general status that it confers upon custom, seen as a means of adapting international law to the necessities of international life. This status implies a particular interpretation of the constitutive elements of custom, which brings us back above all to the practice of certain, 'major' states.

A Custom as a Means of Adapting International Law

Generally speaking, the extensive approach tends to move beyond the formalism of treaty texts in order to see them in relation to the particular factual circumstances of each case.⁴ From this perspective, it would be inconceivable to remain limited to the text of Article 2(4) or of Article 51 of the UN Charter, or even to Resolutions 2625 or 3314 of the UN General Assembly, as do those variously referred to as 'jurisprudes',⁵ 'European formalists'⁶ or even 'objective legalists'.⁷ Rather, the jurist should take into account each concrete situation; and it is in terms of each situation that he imparts meaning to the legal rule:

In the end, each use of force must find legitimacy in the facts and circumstances that the States believe made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it.⁸

A preventive war or a humanitarian intervention can only be judged in conformity or otherwise with international law according to the specificities of each case. It is thus necessary to take into account:

³ See, in this regard, Glennon, 'The UN Security Council in a Unipolar World', 44 *Virginia J Int'l L* (2003) 91, at 97–99.

⁴ Sofaer, 'On the Necessity of Pre-emption', 14 *EJIL* (2003) 209, at 212–213.

⁵ Gardner, 'Neither Bush nor the "Jurisprudes"', 97 *AJIL* (2003) 585, at 585 ff.

⁶ Koskenniemi, 'Iraq and the 'Bush Doctrine of Pre-emptive Self-Defense. Expert analysis', *Crimes of War Project*, 20 Aug. 2002.

⁷ Schieder, 'Pragmatism as a Path towards a Discursive and Open Theory of International Law', 11 *EJIL* (2000) 663, at 691.

⁸ Taft IV and Buchwald, 'Preemption, Iraq and International Law', 97 *AJIL* (2003) 557.

...the same general rule applicable to all uses of force: necessity to act under the relevant circumstances, together with the requirement that any action be proportionate to the threat addressed.⁹

Custom is precisely what enables us to link the abstract legal concept to the particular factual situation; this confers on it the status of a privileged source of law, in particular with regard to treaties.¹⁰ It is, in effect, easier to evaluate a situation in terms of comparable precedents than by reference to fixed, disembodied texts. Rather than, for example, arbitrarily ruling out all forms of ‘pre-emptive self-defence’ under the pretext that Article 51 only comes into play ‘if an armed attack occurs’, it is better to take into account precedents in which certain pre-emptive actions were viewed as admissible by the international community. Moreover, Article 51 itself was never intended to compromise the ‘natural’, thus customary, right to legitimate self-defence, either as it existed at the time or as it has evolved since. Custom thus permits us to free ourselves from the text of a treaty, or, at the very least, to interpret it in a very broad manner, and even to amend it without having to follow strict procedures.¹¹ In any event, the ‘narrow interpretation has already been modified by the practice of UN members’.¹²

Custom enables us, in this context, to relate the legal rule not merely to the facts of any given case, but also to moral and political values; values that we cannot pretend are excluded from the process of interpretation. We can flag, in this regard, notions such as: a ‘reasonableness standard’;¹³ ‘contextual reasonableness’;¹⁴ a ‘common sense of value – justice, morality, good sense’;¹⁵ a ‘reasonable objective’;¹⁶ a ‘teleological understanding’;¹⁷ or even a ‘common moral instinct’.¹⁸ It is in this regard that, through recourse to custom, we enable the interpreter to take non-legal considerations into account, and thus to bring together legality and legitimacy¹⁹ – and even to blur the boundaries between *lex lata* and *lex feranda*.²⁰ Most importantly, the United

⁹ Sofaer, *supra* note 4, at 220.

¹⁰ M.N. Schmitt, *Counter-Terrorism and the Use of Force in International Law* (2002), at 2.

¹¹ Buchanan, ‘Reforming the International Law of Humanitarian Intervention’, in Holzgrefe and Keohane (eds), *supra* note 2, at 134.

¹² Gardner, *supra* note 5, at 589.

¹³ Sofaer, *supra* note 4, at 213.

¹⁴ Franck, ‘Interpretation and Change in the Law of Humanitarian Intervention’, in Holzgrefe and Keohane (eds), *supra* note 2, at 204, 205.

¹⁵ *Ibid.*, at 229–230; see also Franck, *supra* note 1, at 98.

¹⁶ Koskenniemi, *supra* note 6.

¹⁷ Wedgwood, ‘The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense’, 97 *AJIL* (2003) 576, at 584.

¹⁸ Franck, *supra* note 14, at 229–230.

¹⁹ Wedgwood, *supra* note 17, at 578; see also Weckel, ‘L’emploi de la force contre la Yougoslavie ou la Charte fissurée’ [2000] *RGDIP* 19; Franck, *supra* note 1, at 94; Falk, ‘What Future for the United Nations Charter System of War Prevention?’, 97 *AJIL* (2003) 590, at 596; Weckel, ‘L’usage déraisonnable de la force’ [2003] *RGDIP* 377, at 387–389; and Bermejo Garcia, ‘El Debate sobre la legalidad internacional tras la crisis de Iraq y las Naciones Unidas’, XIX *Anuario de derecho internacional* (2003) 41, at 56 ff.

²⁰ See, e.g., Bermajo Garcia, ‘Cuestiones actuales referentes al uso de la fuerza en el Derecho Internacional’, XV *Anuario de derecho internacional* (1999) 3, at 14 and 59 ff.; Stromseth, ‘Law and Force After Iraq: A Transitional Moment’, 97 *AJIL* (2003) 628, at 629.

Nations Charter is a convention of a constitutional nature, which means that political considerations must be permanently taken into account in its interpretation. Article 2(4) 'is also intended to be perpetually evolving as the seemingly static norms are applied to practical situations through an essentially political process operating to solve real crises, instance by instance'.²¹ Moreover, it is for this reason that the Member States conferred upon the political organs, and upon the Security Council in particular, very extensive powers: 'the practice of a UN organ may be seen to interpret the text and thereby to shape our understanding of it'.²² Taking the decisions, but also the silences, of this organ into account is an essential element in enabling us to specify the meaning of the rule of law: 'the Council enjoys a normative authority that builds coalitions and musters public support'.²³ The fact that certain humanitarian interventions have not been condemned by the Security Council is testament to the legality of this type of intervention, provided that the circumstances are comparable to those of the precedents invoked.²⁴ The opinions and silences of the Secretary-General can also be taken into account.²⁵

Overall, custom can be considered as both a formal and material source of the international legal order. Of course, there exist many different versions and variants of this extensive approach. Nevertheless, it should be noted that it is possible to trace these variants to a common sensibility, well illustrated by the following passage:

the interpretative principles deployed in the application of a constitutive text may also depend on the nature of values and interests at stake – the theology of an instrument as much as its literal form. This is not to deny a claim of objectivity in interpretation, but at minimum, values and interests are likely to influence state practice, which in turn must inform the meaning given to a treaty understanding.²⁶

Custom should not be reduced to a purely formal source, but should be viewed as constituting a means of adapting the law to the evolving international sphere. The rule must be understood in relation to 'some useful purpose that the rule serves';²⁷ and the question that must thus be asked is, 'what human goals are at stake, and whether forcible interference is necessary for their preservation'.²⁸

Therefore, certain forms of unilateral pre-emptive wars must be viewed as acceptable due to their logically necessary character. In its classical formulation, namely, that characterized by the conditions of imminent threat and the absolute necessity of the response, the right of preventive self-defence is not in question. By definition, a state will defend its existence and its survival, which will lead it to make use of all

²¹ Franck, *supra* note 14, at 205.

²² Franck, *supra* note 1, at 174; Franck, 'Iraq and the "Bush Doctrine" of Pre-Emptive Self-Defense. Expert Analysis', *Crimes of War Project*, 20 Aug. 2002.

²³ Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 828, at 832.

²⁴ Franck, *supra* note 1, at 13 ff.; Franck, 'What Happens Now? The United Nations After Iraq', 97 *AJIL* (2003) 607, at 615; Wedgwood, *supra* note 23, at 830–832.

²⁵ *Ibid.*, at 831.

²⁶ Wedgwood, 'Unilateral Action in the United Nations System', 11 *EJIL* (2000) 349, at 352.

²⁷ Koskeniemi, *supra* note 6.

²⁸ Wedgwood, *supra* note 26, at 352.

means within its power to ensure that an imminent threat facing it will not come to fruition: ‘the formalist position, which insists on the occurrence of an armed attack, seem[s] like a ludicrous position’.²⁹ It could not be otherwise: the rule of law here only reflects a basic necessity of the political order: ‘the UN Charter is not a suicide pact’.³⁰ Above and beyond this classical assumption, pre-emptive action must also be allowed in situations in which the threats are more diffuse: ‘a strict reading of Article 51 is no longer tenable in the face of modern terrorism and aggression’.³¹ Developments in the international sphere have illustrated that terrorist groups can commit deadly, surprise attacks with the complicity, active or passive, of certain states.³² It is unthinkable in this context that those states targeted in these attacks wait patiently until the threats materialize.³³ Pre-emptive action then becomes legitimate, and thus legal, because it is necessary in the light of recent developments in the international sphere:³⁴ ‘reason suggests that self-help and countermeasures remain necessary remedies of last resort’.³⁵ This type of reasoning, which can be found in the work of very different authors, rests upon an objectivist theoretical viewpoint. Positive law can only correspond to objective law, that is, to that which reflects the necessities or mechanisms of social solidarity. It is logically and objectively impossible to refuse to allow pre-emptive anti-terrorist action, and this is in the interests of all. It is thus not surprising that states act in this manner, or pronounce themselves in favour of such an approach, which thus allows for the development of the customary rule. Custom appears here as at once a formal and a material source of law, with positive law not radically distinguished from the objective law that determines it.

From a related perspective, it can be argued that the ‘right to humanitarian intervention’ is acceptable in the light of the progress of the humanistic values at the heart of the international community. It is objectively necessary to allow certain unilateral actions in cases in which the collective security mechanisms have not functioned. Unlike the argument in favour of pre-emptive anti-terrorist action, which is often more strictly attached to the notion of social necessity and objective law, that of humanitarian intervention seems to return to certain currents that assume a radical deformalization of the rule of law, including

²⁹ Koskenniemi, *supra* note 6.

³⁰ Benvenisti, ‘Iraq and the “Bush Doctrine” of Pre-Emptive Self-Defense. Expert Analysis’, *Crimes of War Project*, 20 Aug. 2002; Franck, *supra* note 1, at 98.

³¹ Franck, ‘What Happens Now? The United Nations After Iraq’, 97 *AJIL* (2003) 607, at 619; see also Wedgwood, ‘Responding to Terrorism: The Strikes Against bin Laden’, 44 *Yale J Int’l L* (1999) 559, at 559 ff.

³² Yoo, ‘International Law and the War in Iraq’, 97 *AJIL* (2003) 563, at 575–576; Sofaer, *supra* note 4, at 209–210.

³³ Wedgwood, *supra* note 17, at 583; see also Y. Dinstein, *War, Aggression and Self-Defense* (2001), at 210, 215–216.

³⁴ Stromseth, *supra* note 20, at 634; Biggio, ‘Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism’, 34 *Case Western Reserve J Int’l L* (2002) 1; Schmitt, *supra* note 10.

³⁵ Franck, *supra* note 1, at 110.

a comprehensive assessment that includes an embrace of complementary norms, as well as an appraisal of what has been done in the name of law and an evaluation of whether preferable policy alternatives were available to those with the authority to make decisions.³⁶

The extensive approach here provides an illustration of the predominantly Anglo-Saxon theoretical current that favours a 'policy-oriented' perspective, which tends to justify a very broad range of grounds for the use of force, resting, it is accepted, upon political considerations: 'one central ingredient is the moral necessity of action – the credible invocation of shared community purposes'.³⁷ It is therefore necessary to evaluate the legality of military action

not simply in terms of certain rules, that are supposed to form part of a black-letter code of international law, but in terms of the acceptability of those responses in different contexts, to the contemporary international decision process.... Trends must then be tested against the requirements of world public order as a means of assessing their adequacy.... Scholars should take the responsibility of proposing alternative arrangements so that a better approximation of political and legal goals can be achieved in the future.³⁸

Without always acknowledging their affinity with this particular approach, many authors seem to share this sensibility; rejecting 'legalism',³⁹ they insist that certain problems cannot be resolved 'by reliance on positivist styles of legal appraisal'.⁴⁰ Such theorists insist upon the aporia of the positivist, formalist method. In its most radical version, this method in effect implies that a rational interpretation of the legal rule, into which no value judgement intervenes, is not only possible but also inherent in the scientific character of legal science. This somewhat naïve vision of an absolute distinction between law and politics (or morality) has been called into question by all contemporary legal theories, which view interpretation as a constructive task into which value judgements always intervene. In this context, legal interpretation cannot claim to be removed from political and moral considerations.⁴¹ Assuming a 'policy-oriented' perspective, rather than denying the fact of these value judgements (which in practice amounts to trying to hide them), then represents the only truly objective position. There is thus no need to feel uneasy about modifying the texts of treaties by taking into account values or objectives that supposedly lie behind the rules, or even in referring to natural law notions such as that of the 'just war'.⁴² This brings us back to the link between law and fact, or between law and values, that custom allows us to weave. Such a conception of custom carries with it certain consequences when it comes to determining its content.

³⁶ Falk, 'Kosovo, World Order, and the Future of International Law', 93 *AJIL* (1999) 847, at 848–849; Franck, *supra* note 31, at 615 and 619.

³⁷ Wedgwood, *supra* note 17, at 578.

³⁸ Reisman, 'International Legal Responses to Terrorism', 22 *Houston J Int'l L* (1999) 3, at 5 and 6; see also Schmitt, *supra* note 10, at 56.

³⁹ Falk, *supra* note 36, at 852–853.

⁴⁰ *Ibid.*, at 854.

⁴¹ Franck, *supra* note 14, at 207–214; Franck, *supra* note 1, at 176 ff.

⁴² Bermejo García, *supra* note 20, at 68, n. 165; Sofaer, *supra* note 4, at 225; Stromseth, 'Rethinking Humanitarian Intervention: the Case for Incremental Change', in Holzgrefe and Keohane (eds), *supra* note 2, at 232, 268; Biggio, *supra* note 34, at 20–22.

B *The Dominant Role of the Practice of Major States*

It is traditionally held that custom is composed of two constitutive elements: practice and *opinio juris sive necessitatis*. The extensive approach does not in principle deny this proposition. The second condition, and more specifically the Latin expression *sive necessitatis*, encourages taking social necessities into consideration. These necessities also allow, should the case arise, for justifications of military action based upon a teleological interpretation of the texts of treaties: ‘the answers turns on whether the intervention can be reconciled with the purposes that animate the international order’.⁴³ A more detailed analysis, however, suggests that, in this context, *opinio juris* is not a dominant element of custom, in any event to the extent that the term obliges the interpreter to verify that the international community of states had accepted the legal character of the customary rule. Thus, rather than embarking upon a textual analysis of certain UN General Assembly resolutions, more emphasis is placed on state practice, and on the practice of certain states in particular: ‘state practice remains key to the shaping of legal norms’.⁴⁴ For it is this practice that demonstrates how the social necessities are embedded and expressed in legal norms.

Essentially, it is practice that matters, and not the declarations of principle issued by public authorities. What is crucial is to show that, on the facts, the rule has evolved in this or that manner. Official speeches are of little import, the only truly legal rule being that which is applied in practice and accepted, willingly or otherwise, by the other actors in the international community: ‘the Charter is what the principal organs do’.⁴⁵ From this perspective, customary rules can change in a very rapid manner, with the law adapting itself instantaneously to the facts as they evolve. The war against Afghanistan, for example, immediately rendered obsolete the conception according to which a military action against another state could be launched only if it could be demonstrated that it had participated in a substantial manner in an armed attack. As was demonstrated at the time, action taken against terrorist groups is legitimate on the territory of any state that shelters them, whether or not that state has participated in an armed attack against another.⁴⁶

Which are the states whose practice more than any others dictates the interpretation of the customary rule? The answer is not always clear, no definitive list has been drawn up.⁴⁷ At most, ‘major’ or ‘leading’ states are cited, an obvious reference to the United States and some of its allies. The expressions used in this context vary, from ‘Western governments’⁴⁸ to the ‘community of democracies’⁴⁹ or even the

⁴³ Roth, ‘Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the post-Cold War Era’, in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (2003), at 232, 256; Thürer, ‘Comments on Chapters 7 and 8’, in *ibid.*, at 277, 278.

⁴⁴ Wedgwood, *supra* note 23, at 828.

⁴⁵ Franck, *supra* note 14, at 206.

⁴⁶ Franck, *supra* note 1, at 53–54.

⁴⁷ See, however, the examples given by Yoo, *supra* note 32, at 573.

⁴⁸ Farer, *supra* note 2, at 80.

⁴⁹ Glennon, ‘Time for a New “Inquiry”’ [2003] *International Law Forum de droit international* 283, at 286–287; Wedgwood, *supra* note 17, at 578.

'civilized world'.⁵⁰ As this terminology implies, the decision to confer privileged status upon certain states is based upon a double justification. Firstly, and in conformity with the US notion of 'manifest destiny', it is legitimate that democratic states are recognized as having an increased role in the development of customary rules, which enables them to translate into law the progress of certain humanistic values. Thus, in order to justify the war against Yugoslavia, the practice of the NATO member states, and the fact that these states were all democracies, was emphasized; the reticence and protests of other states (such as members of the non-aligned movement), on the other hand, were minimized; ignored, even.⁵¹ Furthermore, it is important to note that these very states are at the same time the ones with the power to ensure respect for the rule of law. Unless we view international law as being nothing more than empty formal incantations, we must take stock of the particular status of these 'major states'. Put otherwise, between an international law that is formally egalitarian (an equality that results, moreover, in dictatorships and democracies being conceived of identically) but not applied, and an international law that is controlled (by democratic states only) but effective, the most elementary realism leaves us with no choice, as 'the operational legal order is the only legal order'.⁵² Military interventions are thus justified by reference to the fact that those involved in them are 'highly influential on the international stage',⁵³ or 'represent a significant cross-section of the international community'.⁵⁴ From this perspective, custom is to be found first in concrete and material acts, not in diplomatic statements or in principles detached from all practical application. The rule of law implies sanction, and sanction implies authority. International law does not exist in the abstract; it is rather what states make of it. It is thus both desirable (based on the criterion of democratic legitimacy) and inevitable (through the application of a qualified 'legal realism') that we recognize that 'major states' have a specific status in the elaboration of customary law.

One last characteristic of the extensive approach is to acknowledge a certain role for actors other than states in the formation and development of customary rules. As already noted, this is the case for certain political organs such as the Security Council or Secretary-General of the UN, and even, it seems, for certain regional organizations such as NATO and the Economic Community Of West African States (ECOWAS).⁵⁵ It also can be said of scholars, with the positions of certain specialized authors (essentially Anglo-Saxons, if we refer back to the sources cited) being accepted as particularly pertinent in ascertaining the evolution of a rule. In the domain of the 'right of humanitarian intervention', we are also referred occasionally to the positions of certain non-governmental organizations in support of the progress of the doctrine.

⁵⁰ Sofaer, *supra* note 4, at 209.

⁵¹ Wedgwood, *supra* note 23, at 833.

⁵² Farer, *supra* note 2, at 67.

⁵³ Currie, 'Humanitarian Intervention in Kosovo: Making or Breaking International Law?' 36 *Columbia Yearbook Int'l L* (1998) 303, at 304.

⁵⁴ *Ibid.*, at 325–326.

⁵⁵ Franck, *supra* note 1, at 155 ff.; Franck, *supra* note 14, at 223.

The whole is sometimes referred to as an ‘international jury’, the composition of which it has never been easy to establish with precision.⁵⁶

Lastly, this very flexible conception of the constitutive elements of custom allows those who favour the extensive approach to justify a large number of unilateral armed actions, whether ‘anti-terrorist’ preventive wars or ‘humanitarian’ interventions:

artificial rules cannot bear the burden of the real world pressures that underlie use-of-force issues. Today, moreover, the need to enforce rules to advance human rights and to limit the power of tyrants and terrorists is greater than ever. To deprive the international community of a reasoned basis for using force threatens Charter interests and values, rather than supporting and advancing them.⁵⁷

This is without doubt the essential reason for which this approach is criticized by those who prefer to adopt a more restrictive stance, which leads to an altogether different method of understanding customary law.

2 The Restrictive Approach to the Customary Prohibition of the Use of Force

Those authors who favour the extensive approach often tend to portray the restrictive approach as excessively rigid, consisting in adherence to the letter, and only the letter, of the rule prohibiting the use of force. The scholars who can be considered as preferring the restrictive approach refute this critique. In their view, it is certainly advisable to take as a point of reference the relevant treaty texts, and in particular Articles 2(4) and 51 of the UN Charter; this allows us to construct a ‘textually-oriented, hierarchical series of rules set out in Articles 31 and 32 of the Vienna Conventions’.⁵⁸ The object and purpose of the rule (which consists in profoundly altering the regime that existed before 1945 by bringing about a stricter prohibition of the use of force) is, however, also taken into account, in order to justify a restrictive interpretation.⁵⁹ In this context, subsequent developments in the rule, and consequently the role of practice and of the customary prohibition on the use of force, are neither rejected nor even minimized. It is therefore not *a priori* relevant to seek to oppose the two approaches by presenting the first as the only one that is open to taking custom

⁵⁶ Franck, *supra* note 1, at 67.

⁵⁷ Sofaer, *supra* note 4, at 225.

⁵⁸ Byers, *supra* note 2, at 25; see also Bothe, ‘Terrorism and the Legality of Pre-emptive Force’, 14 *EJIL* (2003) 227, at 229.

⁵⁹ Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, 10 *EJIL* (1999) 1, at 2–3; A. Constantinou, *Right of Self-Defense under Customary International Law and Article 51 of the United Nations Charter* (2000), at 22; Hofmann, ‘International Law and the Use of Military Force Against Iraq’, 45 *German Yearbook Int’l L* (2002) 9, at 30; Sicilianos, ‘L’autorisation par le Conseil de sécurité de recourir à la force: une tentative d’évaluation’ [2002] *RGDIP* 5, at 47; Randelzhofer, ‘Article 51’, in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2nd edn, 2002), at 788, 803; Bothe, *supra* note 58, at 229; Byers and Chesterman, ‘Changing the Rules about Rules? Unilateral Intervention and the Future of International Law’, in Holzgrefe and Keohane (eds), *supra* note 2, at 177, 181; Christakis, ‘Vers une reconnaissance de la notion de guerre préventive?’, in K. Bannelier *et al.* (eds), *L’intervention en Irak et le droit international* (2004).

into account. What is fundamentally different, on the other hand, is the conception of the status of custom, and the method used to understand its constitutive elements.

A Custom as a Formal Source of the International Legal Order

From the restrictive perspective, the prohibition on the use of force is viewed as having its source at once in a treaty regime and in a customary rule, without either one prevailing over the other. On one hand, the UN Charter provides a certain number of clarifications on the content of the rule, for example through specifying that self-defence can only be invoked in cases of an 'armed attack' (Article 51). On the other hand, this same provision recognizes that it 'shall not impair' the existence of the customary right of self-defence. The only manner in which these two statements can be reconciled is by acknowledging that the customary rule and the treaty rule have the same content,⁶⁰ which excludes the possibility of preventive self-defence.⁶¹ Custom does not occupy a position of dominance that allows it to ignore the texts of treaties; indeed, Article 103 of the Charter could be interpreted as conferring upon treaties a preferential status.⁶² However, at the same time, the Charter itself cannot be understood without taking into account the manner in which the parties to it interpret it (Article 31(3) of the Vienna Convention on the Law of Treaties), which brings us back to the interpretation of the customary rule. This is the methodology used by the International Court of Justice in the *Nicaragua* case, to which authors favouring the restrictive approach very frequently refer: just as a treaty cannot be interpreted independently of the custom that is generated by its application, a custom cannot be interpreted independently of the treaties that define the rule concerned and that express, at the same time, an *opinio juris*.⁶³ We thus cannot ignore the texts that define the elements of the rule in an abstract fashion (whether the text of the Charter itself, or General Assembly resolutions such as Resolutions 2625 or 3314), even if it is evident that these elements must be taken into consideration along with others, in particular state practice.⁶⁴

In this context, it is not accurate to claim that custom in particular allows us to make a link between law and facts (all kinds of particularities), or even between law and values (considerations of justice and politics). Custom is a formal source of the international legal order, on the same level as treaties, both of which can – and must – be considered from a 'strictly legal perspective'.⁶⁵ In both cases, we are con-

⁶⁰ Bothe, *supra* note 58, at 232.

⁶¹ Randelzhofer, *supra* note 59, at 805.

⁶² Simma, *supra* note 59, at 3–4; Byers, *supra* note 2, at 37–38; Christakis, *supra* note 59.

⁶³ Laghmani, 'La doctrine américaine de la "preemptive self-defense": de la guerre par "mesure de prevention" à la guerre par "mesure de précaution"', in R.B. Achour and S. Laghmani (eds), *Le droit international à la croisée des chemins* (2004), at 16–17, para. 17.

⁶⁴ Constantinou, *supra* note 59, at 120; Charney, 'Anticipatory Humanitarian Intervention in Kosovo', 93 *AJIL* (1999) 834, at 837; Randelzhofer, *supra* note 59, at 134–135; Bothe, *supra* note 58, at 230; see also, more generally, the methodology used by E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) at ch. 7, 25 ff.

⁶⁵ Gill, 'War in Iraq and the Contemporary *Jus ad Bellum*', 5 *International Law Forum de droit international*, (2003) 241, at 245.

fronted with a source that, by definition, can only refer back to abstract and general formulas. Whether they are expressly reproduced in a treaty or deduced from an analysis of existing custom, these formulas must always be the objects of interpretation whenever they are to be applied to specific circumstances. It is this interpretation, and not the law itself, that brings about the connection between law and facts. The fact that custom leaves *a priori* a greater margin for the discretion of the interpreter, with practice substituted for texts, changes nothing; as what is important is not the practice itself, but the manner in which it is interpreted. In this sense, it is not practice (nor, as a result, custom) in itself that allows us to bring the rule closer to the facts or values that surround it; rather, it is the reasoning developed by the interpreter of the legal rule.

Interpretation, however, is a deeply subjective process. Arguments according to which pre-emptive self-defence is indispensable as it is 'logically' or 'objectively' necessary present as inevitable a solution that has arisen from a political choice. We could equally logically claim that the struggle against terrorism necessitated the reinforcement of cooperation, either by means of traditional international criminal law or through use of collective security mechanisms.⁶⁶ The solution of unilateral pre-emptive action is no more 'objective' or 'logical' than another.⁶⁷ Those favouring the restrictive approach thus distinguish themselves fundamentally from the objectivist tendencies that often underlie the extensive approach. There exists no 'objective law' that expresses social necessities or the solidarity mechanisms that characterize the international community. It is the interpreter, and the interpreter alone, who gives sense to what is required in a particular case by those necessities or that solidarity. This power of the interpreter is even more evident when we place ourselves within a 'policy-oriented' perspective. What is not clear, on the other hand, is why this or that author should be more capable than another of determining which political path is best suited to the international community, the 'requirements of world public order'. On the contrary, 'reasonableness and proportionality are concepts which are difficult to operationalize in the context of a decentralized system. They open the door to arbitrariness and subjectivity'.⁶⁸ The appeals to 'common sense', 'logic' or 'reason' simply seek to present subjectively-charged claims as objective. It seems self-evident, from within the restrictive perspective, that the recognition of a right of unilateral humanitarian intervention can certainly never claim to represent objectively the progress of the humanistic values of the international community.⁶⁹ The debate is an ethical and political, and thus an open, one; and it is difficult to see how the jurist can claim to settle it through use of authoritarian notions such as 'common sense' or 'reason'. The rhetoric of objectivism or of the 'policy-oriented' perspective (that there exists one reasonable,

⁶⁶ Corten and Dubuisson, "'Liberté immuable": une extension abusive du concept de légitime défense' [2002] *RGDIP* 51, at 76.

⁶⁷ Christakis, *supra* note 59.

⁶⁸ Bothe, *supra* note 58, at 239; see also Verhoeven, 'Les "étirements" de la légitime défense' [2002] *Annuaire Française de Droit International* 49, at 61–62.

⁶⁹ Corten, 'La référence au droit international comme justification du recours à la force: vers une nouvelle doctrine de la "guerre juste"?' in A.M. Dillens (ed.), *La guerre et l'Europe* (2001), at 69.

objective solution that the jurist is responsible for discovering, above and beyond the texts themselves) is thus at best naïve, and at worst purely instrumental and strategic – the jurist trying to hide his attempts to legitimate his own particular positions behind appeals to supposedly universal formulas.

This critique of the subjectivism of the extensive approach resembles a critique of natural law theories, to which this approach can ultimately be traced back.⁷⁰ Can we deduce from this, however, that the restrictive approach must for its part be traceable back to some form of legal positivism? In many ways, the answer to this is an affirmative one. Denouncing the political decisions of the interpreter for their lack of legitimacy brings us back to the need to respect the rule of law as it was conceived by its creators, which has obvious voluntarist connotations.⁷¹ Moreover, the need to maintain a clear distinction between law and politics or morals is strongly reaffirmed, in conformity with one of the essential characteristics of formal positivism: 'Kelsen's insistence on the strict autonomy of the law ... constitute[s] an attempt to save the law from destruction through its instrumentalization for political purposes'.⁷² From there, one is compelled to endorse the classic argument that 'any specific use of force can be lawful only if it can be based on an exception to this rule which is valid as a matter of law'.⁷³ At the same time, the autonomy of law does not mean its independence; both the creation and the interpretation of law inevitably give rise to value judgements, and thus to a cognitive opening to the political and moral spheres. Put simply, autonomy refers to the fact that these judgements will only be accepted as legitimate if they are based, methodologically speaking, on a reference to the relevant legal rule as it appears in the formal sources. The diversity of possible interpretations is not denied, but this relativism is limited by the need to justify choices in terms of the common reference framework that positive law represents.⁷⁴ Legality and legitimacy must be conceptually distinguished.⁷⁵ The validity claims of each interpretation can then be decided between as a result of procedures that allow for rational debate: 'It is traditional wisdom of legal theory that where substantive law cannot bring about a sufficient degree of legal certainty, procedural rules must be used to obtain results which are socially or politically acceptable.'⁷⁶ These procedures have proved to be particularly decisive in the area of the non-use of force in which, most especially, 'the claim of better knowledge, better morals or the like does not create sufficient legitimization

⁷⁰ *Ibid.*

⁷¹ Holzgrefe, 'The Humanitarian Intervention debate', in Holzgrefe and Keohane (eds.), *supra* note 2, at 15, 36.

⁷² Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of United Nations Peace Maintenance', 11 *EJIL* (2000) 361, at 381.

⁷³ Bothe, *supra* note 58, at 228.

⁷⁴ Corten, 'Les ambiguïtés de la référence au droit international comme facteur de légitimation: Portée et signification d'une déformalisation du discours légaliste', in O. Corten and B. Delcourt (eds), *Droit, légitimation et politique extérieure: l'Europe et la guerre du Kosovo* (2001), at 223, 256.

⁷⁵ Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23, at 25; Corten and Dubuisson, 'L'hypothèse d'une règle émergente fondant une intervention militaire sur une "autorisation implicite" du Conseil de sécurité', 104 *RGDIP* (2000) 873, at 876; Christakis, *supra* note 59.

⁷⁶ Bothe, *supra* note 58, at 239.

in the international legal system'.⁷⁷ The rule according to which any military action can only be legitimate if authorized by a Security Council resolution is in effect based on a form of procedural legitimacy; the just and legal war being that which has been recognized as such as the result of a debate and vote on particular and often opposing conceptions.⁷⁸ In this context, the political orientation that guides the application of the rule will not be decided upon by any particular interpreter, but by means of a strongly institutionalized procedure, which alone seems capable of tending towards universality: 'the UN continues to be the only existing forum that can accommodate and protect the diversity of cultures and claims'.⁷⁹

Lastly, the restrictive approach conceives of custom within a very particular framework, refusing to incorporate practice to the exclusion of texts, and, more generally, of the rule of positive law. Custom, like treaties, is a formal legal source, which does not in itself make it easier to take non-legal, value judgements into account. Such conception of custom results in a particular manner of understanding its constitutive elements.

B The Dominant Role of the *opinio juris* of All States

Whereas the extensive approach tends to emphasize the practice of states as the dominant constitutive element of custom, the restrictive one privileges rather *opinio juris*. It is precisely this latter element that allows for the transformation of the facts, to which practice corresponds, into law, and into a fully-fledged customary rule. The importance of practice is not denied, but practice only takes on significance if and to the extent that we can deduce a conviction, on the part of states, that a legal rule exists.⁸⁰ In the same manner, the fact that there exist issues of social necessity or solidarity mechanisms that express the progress of the international community is not called into question. It remains necessary, however, in order for us to claim the existence of a customary rule, that this necessity or solidarity has led states to express a specific, legal conviction. Similarly, taking into account the object and purpose of a rule is fully incorporated into this approach, provided nevertheless that this object has been expressed by states in one manner or another, and is not merely subjectively determined by an interpreter.⁸¹ This methodological doctrine is based upon the jurisprudence of the International Court of Justice, specifically the *Nicaragua* case, in which it is affirmed that practice is only significant to the extent that it is accompanied by official legal justifications.⁸²

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, at 239–240.

⁷⁹ Gowlland-Debbas, *supra* note 72, at 383.

⁸⁰ Dubuisson, 'La problématique de la légalité de l'opération "Force alliée" contre la Yougoslavie: enjeux et questionnements', in O. Corten and B. Delcourt (eds), *Droit, légitimation et politique extérieure: l'Europe et la guerre du Kosovo* (2001), at 149, at 176; Randelzhofer, 'Article 2(4)', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2nd edn, 2002), at 112, 130–131; Lagerwall, 'Kosovo, Afghanistan, Irak: le retour des guerres d'agression', in O. Corten and B. Delcourt (eds), *Les guerres antiterroristes, Contradictions* (2004), at 81, 90.

⁸¹ Christakis, *supra* note 59.

⁸² Gray, *supra* note 1, at 18–19; Corten and Delcourt, 'La guerre du Kosovo: le droit international renforcé?', 8 *L'Observateur des Nations Unies* (2000) 133, at 134.

As is well known, one consequence of this is that a practice contrary to a rule can, paradoxically, serve to reinforce it, provided that the practice is accompanied by legal arguments that make reference to the rule. Thus, the fundamental issue is to determine:

how the deviant describes and rationalizes its conduct. It may, for instance, attempt to obscure the real nature of its activities. In doing so, the deviant implicitly recognizes the authority of the established interpretation.⁸³

In this sense, it can be argued that, in terms of the numerous precedents for military intervention, *'les tentatives des uns et des autres de justifier juridiquement leurs comportements a constitué le meilleur hommage que le vice rend à la vertu'*.⁸⁴

From this perspective, what is important is less the material act itself than the speeches and the legal texts produced at the time of the performance of the act. It is necessary 'to look at international law in terms of the language used by States'.⁸⁵ General Assembly resolutions, and official state declarations or, indeed, meaningful silences, are thus the dominant elements that enable us to give sense to each precedent.⁸⁶ To stress this point once again: a practice is not by itself meaningful or relevant. In order to transform fact into law, the legal position of states is of fundamental importance. For every state declaration, therefore, it is necessary to take great care to distinguish political or moral elements from the strictly legal ones.⁸⁷ Here we find once again an entirely different perspective from that of the extensive approach, which, as noted above, considers this distinction to be artificial, and that justificatory statements can be determining even if a strictly legal element is not evident. If, for example, a state affirms that it has intervened militarily in order to save the population of another state from inhumane repression, an advocate of the restrictive approach would not necessarily see in this any element supportive of recognizing a right of humanitarian intervention.⁸⁸ For this, it would be necessary for the official discourse to be accompanied by a more strictly legal reference, such as an explicit appeal to a 'right of humanitarian intervention', to a 'state of necessity', or to some legal source or institution.⁸⁹ *A fortiori*, it is necessary to exercise the most extreme caution when seeking to draw consequences from the silence of one or more states: 'Is failure to condemn evidence of legality? Not necessarily so, for there are many reasons for a failure to condemn'.⁹⁰ Therefore, 'reluctan[t] tolerance does not evidence

⁸³ Farer, 'The Prospect for International Law and Order in the Wake of Iraq', 97 *AJIL* (2003) 621, at 622.

⁸⁴ Kohen, 'L'emploi de la force et la crise du Kosovo: vers un nouveau désordre juridique international', 32 *RBDI* (1999) 122, at 148 ('the attempts made by those involved to justify legally their behaviour constitutes the greatest tribute that vice pays to virtue'); see also Laghmani, *supra* note 63, at 24, para. 28.

⁸⁵ Gray, *supra* note 1, at 22.

⁸⁶ Holzgrefe, *supra* note 71, at 47–48; Christakis, *supra* note 59.

⁸⁷ Corten and Delcourt, "Droit, légitimation et politique extérieure: précisions théoriques et méthodologiques" in O. Corten and B. Delcourt (eds), *Droit, légitimation*, *supra* note 80, 26–27.

⁸⁸ Cassese, 'A Follow Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*', 10 *EJIL* (1999) 791, at 791–795; Charney, *supra* note 64, at 836; Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq', 13 *EJIL* (2002) 1, at 11.

⁸⁹ Corten, *supra* note 71.

⁹⁰ Gray, *supra* note 1, at 16.

opinio juris'.⁹¹ On the contrary, 'In order to prove acquiescence, there must be a "consistent and undeviating attitude" a "clear", "definite" and "unequivocal" course of action, showing "clearly and consistently evinced acceptance", to use the wording of the ICJ on different occasions.'⁹²

Taken together, this leads to taking no account of official positions unless these reflect the existence of a genuine legal conviction, which leads to a number of consequences. Firstly, the position of a state must have been expressed freely, which excludes those that are essentially explained by political or diplomatic pressure.⁹³ In this sense, criticism of an intervention by an ally of the intervening state would have more significance than a lack of criticism, as the latter could easily spring from a political desire not to break the alliance.⁹⁴ It has been noted in this context that '[t]he end of the cold war and the United States's position as the world's sole and unchallenged superpower renders opposition to United States actions even more difficult in the absence of some strong interests motivating other States'.⁹⁵ As a result, we can only determine the legal position of any given state by taking into account many different precedents that involve various intervening states, allied or otherwise. It is only if a regular legal position emerges from this array of facts that we can conclude the existence of an *opinio juris*.

One result of all this is that, even if it can be rapid, it is difficult to conceive of the development of custom as instantaneous.⁹⁶ To use an example referred to above, the widespread acceptance of the war against Afghanistan is insufficient to support the conclusion that there has been a relaxation in the definition of indirect aggression contained in Article 3(g) of General Assembly Resolution 3314. This acceptance, which resulted in large part from both the emotional climate that followed the attacks of 11 September 2001 and the nearly unanimous political opposition to the Taliban regime, would only become significant in legal terms if it was confirmed in other cases.⁹⁷ Thus,

même si certains n'hésitent pas à faire appel à une coutume 'spontanée', on ne voit pas comment une modification de la Charte pourrait sérieusement être tirée du seul assentiment, même large, qui est donné à une action particulière... Tout au plus y a-t-il là l'expression d'une interprétation et du fait et du droit, dans un cas particulier.⁹⁸

⁹¹ Byers, *supra note 2*, at 36; see also Constantinou, *supra note 59*, at 22.

⁹² Kohen, 'The Use of Force by the United States after the End of the Cold War, and its Impact on International Law', in Byers and Nolte (eds), *supra note 43*, at 197, 224.

⁹³ Byers, *supra note 2*, at 36.

⁹⁴ Gray, *supra note 1*, at 15.

⁹⁵ Lobel, 'The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan', 44 *Yale J Int'l L* (1999) 537, at 557.

⁹⁶ Cf. Byers, *supra note 2*, at 33.

⁹⁷ Corten and Dubuisson, *supra note 75*, at 53; Kohen, *supra note 92*, at 222; Gutierrez Espada, 'La "contaminación" de Naciones Unidas o las Resoluciones 1483 y 1511 (2003) del Consejo de seguridad', 19 *Anuario de derecho internacional* (2003) 71, at 76; Lagerwall, *supra note 80*, at 93.

⁹⁸ Verhoeven, *supra note 68*, at 64 ('Even if some don't hesitate in appealing to a "spontaneous" custom, it is difficult to see how a modification of the Charter can seriously be drawn from the approval, however widespread, given to one particular action... At most, it represents the expression of an interpretation of both fact and law, in a particular case').

This strict interpretation also expresses itself in an inter-state conception of custom. The political organs of the UN, NGOs, scholars or other actors certainly play an essential political role in the evolution of the rule, to the extent that they influence official state positions. It is, however, these positions themselves that must be analysed when seeking to determine whether or not a custom has evolved.⁹⁹ In this context, Security Council resolutions take on significance only in certain well-defined circumstances. Firstly, it is necessary to demonstrate that the Council has expressed itself on a strictly legal level, which is neither its role nor its habit.¹⁰⁰ Secondly, even if certain strictly legal pronouncements have been made, it is then necessary to demonstrate that the relevant resolutions have gained much more general legal approval: 'the views of the member states are important because it is necessary for interpretations of the Security Council to be generally acceptable to the member states in order to give such interpretations binding force'.¹⁰¹

The restrictive approach, contrary to the extensive one, does not confer any special status on a group of states in interpreting or elaborating customary rules. In the field of interpretation, in which it is assumed that the rule always has a determinate meaning, the application of the principles of interpretation codified in the Vienna Conventions on the Law of Treaties implies that practice must reveal the agreement of *all* states party to the rule in question.¹⁰² If, on the other hand, it is claimed that a rule has evolved, or has been modified by subsequent significant practice, it is necessary to demonstrate the agreement of 'the international community of States as a whole', in conformity with Articles 53 and 64 of these same conventions.¹⁰³ Those authors who can be viewed as favouring the restrictive approach frequently insist, in effect, on the fact that the prohibition on the use of force is the archetype of a peremptory norm of international law, a *jus cogens*.¹⁰⁴ This status implies not only that all evolutions of the rule must be based upon near-unanimous agreement, involving the most varied groups of states,¹⁰⁵ but also that there cannot exist derogations from the rule. It is thus impossible to conceive of a sort of 'right of humanitarian intervention' or 'pre-emptive self-defence' on a regional or other particular scale, based on the claim that these doctrines, if they are not endorsed unanimously or even by a large majority, are nonetheless accepted by certain states¹⁰⁶ Therefore, all alterations to the rule:

require the support of most, if not all, states, as expressed through their active or passive support, coupled with a sense of legal obligation. Given the public policy and peremptory character

⁹⁹ See, e.g., Gray, *supra* note 1, at 27.

¹⁰⁰ Gowlland-Debbas, *supra* note 72, at 377; Kohen, *supra* note 92, at 217.

¹⁰¹ Blokker, 'Is the Authorization Authorized? Powers and Practice of the United Nations Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"', 11 *EJIL* (2000) 541, at 567; see also Arcadi, 'L'intervention armée contre l'Iraq et la question de l'autorisation du Conseil de sécurité', 19 *Anuario de derecho internacional* (2003) 5, at 28; Kohen, *supra* note 92, at 225.

¹⁰² Dubuisson, *supra* note 80, at 179; Corten and Dubuisson, *supra* note 75, at 877.

¹⁰³ Dubuisson, *supra* note 80, at 179; Corten and Dubuisson, *supra* note 75, at 877.

¹⁰⁴ Charney, *supra* note 64, at 837; Dubuisson, *supra* note 80, at 173; Corten and Dubuisson, *supra* note 66, at 53; Hofmann, *supra* note 59, at 11; Kohen, *supra* note 92, at 228; Corten, *supra* note 71.

¹⁰⁵ harney, *supra* note 64, at 837; Gowlland-Debbas, *supra* note 72, at 377; Kohen, *supra* note 92, at 225.

¹⁰⁶ Simma, *supra* note 59, at 3.

of these rules, the threshold for their development is necessarily very high: higher than that for other customary rules.¹⁰⁷

It is clear from this that nothing is more foreign to the restrictive approach than the idea of ‘major’ or ‘leading’ states. The *opinio juris* that must be established necessitates as broad an analysis of state positions as possible, which explains the privileged status accorded to the major UN General Assembly resolutions. In addition, certain organizations that boast a large membership can be analysed; organizations like NATO, but also the ‘Group of 77’ (132 states), the ‘Non-Aligned Movement’ (115 states), the ‘Organization of the Islamic Conference’ (57 states), or even regional organizations such as the Organization of American States, the Rio Group, the European Union, the African Union, the Association of Southeast Asian Nations, etc.¹⁰⁸ On the contrary, limiting the analysis to powerful states, and neglecting or even ignoring the position of those in the Third World, has been denounced as a ‘hegemonical approach to international relations’,¹⁰⁹ with certain states proclaiming themselves to be the sole representatives of the ‘international community’.¹¹⁰ These states can in no way be reduced to those ‘whose interests were specially affected’ by the customary rule in question. The choice is essentially ideological, as is attested to by the fact that such states are peremptorily characterized as democracies, which is accompanied by a disqualification of all states who oppose the developments as dictatorships.¹¹¹ Can it, for example, be taken for granted that all of the members of NATO are democracies, whereas those of the Rio Group, which condemned the military intervention against Yugoslavia, are all dictatorships? Can we also present the schism between the advocates and opponents of the war against Iraq from this angle? It is only too obvious that the debate over democracy is neither objective nor, in any event, legally relevant when it comes to establishing the existence of a customary rule; no state can demand a privileged status in this regard. The argument that such a status must be accorded from a realist perspective, that those states capable of ensuring respect for the law must have particular influence over its elaboration, is equally ruled out. For, by definition, international law can draw its legitimacy only from its autonomy in relation to powerful states, to the extent that the legal order is intended to embody a common language that connects groups of states with different ideologies and cultures.¹¹² From this

¹⁰⁷ Byers and Chesterman, *supra* note 59, at 180; Byers, *supra* note 2, at 35; see also Ranzhofer, *supra* note 59, at 806.

¹⁰⁸ Notably, it is through the application of this method that the Kosovo precedent can be interpreted as in no way affirming the progress of a ‘right of humanitarian intervention’: see, e.g., Dubuisson, *supra* note 80, at 180–181; Lagerwall, *supra* note 80, at 95–97. The same reasoning was also applied to the military operations against Iraq in the 1990s: Gray, *supra* note 88, at 16; Kohen, *supra* note 92, at 203–204; Corten, ‘Opération Iraqi Freedom: peut-on admettre l’argument de l’“autorisation implicite” du Conseil de sécurité?’, 36 *Revue Belge de Droit International* (2003) 205, at 232–241; Lagerwall, *supra* note 80, at 93–95.

¹⁰⁹ Byers and Chesterman, *supra* note 59, at 194.

¹¹⁰ Lagerwall, *supra* note 80, at 98; Klein, ‘Les problèmes soulevés par la référence à la “communauté internationale” comme facteur de légitimité’, in Corten and Delcourt (eds.), *Droit, légitimation*, *supra* note 80, at 261; see also Chinkin, ‘Kosovo: A “Good” or “Bad” War?’, 93 *AJIL* (1999) 841, at 846–847.

¹¹¹ O. Corten, *Le retour des guerres préventives: Le droit international menacé* (2003), at 25–27 and 86–87.

¹¹² Corten, *supra* note 74, at 249.

standpoint, the doctrine of ‘major states’ serves, on the contrary, to reduce law to a simple instrument of power and thus, ultimately, to fact. If it is to be combined with the recognition of a genuine legal order, realism compels us to acknowledge only that certain rules, even the most fundamental, can be violated by powerful states; provided precisely that these violations can be denounced on the basis of law.¹¹³ International law thus essentially fulfils a ‘declaratory function’.¹¹⁴ It is conceived of as a framework of reference that allows for an evaluation of the facts of a given case, and not as the simple translation of these facts into a legitimating legal language: ‘After all, law is an intersubjective prescriptive consensus about the world of brute fact’.¹¹⁵ Even if it encounters limits in terms of its effectiveness, international law ‘*est un régulateur social destiné à créer un dénominateur commun de comportement... et à empêcher dans tout la mesure du possible le règne de la “justice privée”*’.¹¹⁶

Lastly, the extensive approach is criticized as leading to an almost complete confusion of fact and law. The stress on practice as the dominant constitutive element of custom, the refusal to formally separate law from non-law, and the privileged role accorded to major powers are all elements that lead in this direction. Contrary to this, from the restrictive perspective, the autonomy of international law dictates a radical separation between the *rule* prohibiting the use of force and the *fact* that this rule is regularly violated.

3 Conclusion

Critiques of the international legal order, which have become particularly manifest in the context of the Iraq crisis, have essentially focused on institutions, in particular the UN, accused of being ‘inadequate’.¹¹⁷ Custom, for its part, is not at the centre of the critique; unless, of course, it targets more generally international law itself, from a radical realist perspective according to which ‘there [is] no international law governing use of force, and in the absence of governing law, it [is] impossible to act unlawfully’.¹¹⁸ However, within the legal discipline at least, this position seems relatively isolated, with authors generally confronting the issue of the interpretation, and not the very existence, of international law.

Beyond this common sensibility, specialists in international law are radically opposed to each other on the methodological level, in particular when it comes to making sense of customary rules. The extensive approach assumes that moral and other non-legal considerations will be taken into account, and emphasizes the practice of major states, which are considered better able to satisfy the demands of legitimacy and effectiveness. The restrictive approach denounces this method as subjective, even ideological, preferring instead to insist on the necessity of differentiating law from

¹¹³ Byers and Chesterman, *supra* note 59, at 203; see also Randalzhofer, *supra* note 80, at 136.

¹¹⁴ Gray, *supra* note 1, at 21.

¹¹⁵ Farer, *supra* note 83, at 622.

¹¹⁶ Kohen, *supra* note 84, at 124 (international law ‘is a social regulator intended to create a common denominator for behaviour ... and to prevent to the greatest extent possible the rule of “private justice”’).

¹¹⁷ Glennon, *supra* note 49, at 283 ff.; Glennon, *supra* note 3, at 91 ff.

¹¹⁸ *Ibid.*, at 100.

politics or morality. From this perspective, the customary rule outlawing the use of force can evolve only by means of the intentional acceptance of the international community of states as a whole, the prohibition on the use of force being considered as a foundational rule of international public order.

It is not surprising that, all other things being equal, the use of the first of these two methods ultimately results in a relatively broad recognition of a certain number of exceptions to the prohibition on the use of force, whereas the second generally leads to a rejection of them. From the same perspective, it can be noted that the US authors tend to situate themselves more within the first current, the others (most notably the Europeans) the second. The correspondence is by no means absolute. It is sometimes possible to find authors to whom we could ascribe a more extensive approach, but who basically defend a restrictive position.¹¹⁹ Moreover, even if it does seem more delicate, it is not inconceivable that the adoption of a restrictive approach could lead to an acceptance of the relaxation of the prohibition on the use of force, in any event in certain areas.¹²⁰ Furthermore, certain European authors favour the extensive approach, and some US writers seem to prefer a more restrictive one. More generally, it is possible to question the coherence of several US authors, who seem to adopt an extensive approach in terms of the use of force, but who prefer a more rigorous and classical methodology when engaged in the related debate over the evolution of international criminal law.¹²¹

Be that as it may, the study of this methodological schism illustrates the advantages of moving beyond an impression of the ‘dialogue of the deaf’ that characterizes the recurrent debates over the legality of military interventions. More precisely, it allows us to frame the debate in terms of methodology and, moreover, in terms of the theoretical conceptions of international law that are brought into play over the use of force:

the future shape of the international legal system will depend, above all, on how we interpret Security Council resolutions and treaties, on how we create and change rules of customary international law, and on how we understand the relationship between customary international law and treaties.¹²²

¹¹⁹ See, in this sense, the work of R. Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix* (2003); see also Nguyen-Rouault, ‘L’intervention armée en Irak et son occupation au regard du droit international’ [2003] *RGDIP* 835.

¹²⁰ It is possible to interpret in this sense the works of Pellet, ‘Brief Remarks on the Unilateral Use of Force’, 11 *EJIL* (2000) 385; Eisemann, ‘Attaques du 11 septembre et exercice d’un droit naturel de légitime défense’, in K. Bannelier *et al.* (eds), *Le droit international face au terrorisme* (2002), at 239; O’Connell, ‘Lawful Self-Defense to Terrorism’, 63 *U Pittsburgh LR* (2002) 889 and ‘The Myth of Preemptive Self-Defense’, *ASIL*, Aug. 2002; or Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the United Nations’, 43 *Harvard Int’l LJ* (2002) 41.

¹²¹ See, e.g., Estreicher, ‘Rethinking the Binding Effect of Customary International Law’, 44 *Virginia J Int’l L* (2003) 5.

¹²² Byers, *supra* note 2, at 41.