PART I

Treaty versus Custom

INTRODUCTION

Disagreements about the content of international law, particularly in the field of *jus contra bellum*, often begin due to differently held assumptions about the legitimate process for identifying the content of the law.[1] 'Method, far from being a theoretical preoccupation, lays down the framework in which practice takes place.'[2] This part sets out the theoretical foundation and method for determining the meaning of a prohibited 'use of force' between States in international law. The prohibition of the use of force exists under two main sources of law: customary international law[3] and treaty (article 2(4) of the UN Charter). It is

[1] See Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22(4) *Leiden Journal of International Law* 651–76, 653 ff, who argues: 'The fundamental contention is that to agree on method could cure much of the current divergence of views about the content and scope of application of some of the international rules regulating the use of force.' See also Olivier Corten, 'Chapter 1: Methodological Approach', in *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010).

[2] Bianchi, n. 1, 676.

[3] Customary international law is referred to in article 38(1)(b) of the Statute of the International Court of Justice (ICJ) as 'evidence of a general practice accepted as law'. Although this definition is for the purposes of setting out the sources of international law that the ICJ shall apply, it has come to be widely accepted as a general definition of this legal concept. Michael Wood, 'First Report on Formation and Evidence of Customary International Law' UN Doc A/CN.4/663 (ILC, 17 May 2013), 96. Unlike treaty rules, which govern only the parties to the treaty in their mutual relations, rules of customary international law are binding on all States except persistent objectors (States that have 'objected to a rule of customary law while that rule was in the process of formation', and have clearly expressed the objection to other States and maintained it persistently) (Michael Wood, 'Third Report on Identification of Customary International Law' UN Doc A/CN.4/682 (ILC, 27 March 2015), 70, draft conclusion 15) and particular customary international law rules which apply only between a limited number of States. See also International Law Commission ('ILC'), draft conclusion 16(1). Although the UN Charter is almost universally ratified, the parallel existence of the customary prohibition of the use of force remains relevant – for example, in the event that an international tribunal does not have jurisdiction to apply the UN Charter but does have jurisdiction to apply customary international law (as in the *Nicaragua* case).

practically axiomatic that the prohibition of the use of force has an identical scope and content under both article 2(4) of the UN Charter and customary international law. Already in 1966, Sir Humphrey Waldock observed: 'Whatever may be their opinions about the state of the law prior to the establishment of the United Nations, the great majority of international lawyers consider that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force.'[4]

If the scope and content of the prohibition of the use of force under article 2 (4) and custom are identical, which source of law should one interpret or apply to determine the meaning of a prohibited 'use of force' between States under international law: article 2(4), customary international law, or both? This question raises several fundamental issues. Firstly, are the scope and content of the prohibition of the use of force under article 2(4) of the UN Charter and customary international law really identical? Secondly, is it even possible to adduce the content of the customary rule separately to the treaty rule? The novel contribution of this part is to analyse how the customary prohibition of the use of force arose, and its relationship to article 2(4) of the UN Charter. It argues that the customary rule reflects the pre-existing treaty rule and that due to the relationship between them, the preferable approach is to focus on interpreting the UN Charter to determine the meaning of a prohibited 'use of force' under international law.

[4] ILC, 'Report of the International Law Commission on the Work of Its Eighteenth Session' (4 May–19 July 1966) UN Doc A/CN.4/191, UN Doc A/6309/Rev.1, Chapter II Law of Treaties, 20, para. 7. See also ILC, 'Yearbook of the International Law Commission 1966, Vol. II' UN Doc A/CN.4/SER.A/1966/Add.l (1966), 247; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press, 2010), 18 with further citations.