NEW SECURITY CHALLENGES
Series Editor: Stuart Croft

Governing the Use-of-Force in International Relations

he Post-9/11 US Challenge n International Law

iden Warren and Ingvild Bode

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The Post-9/11 US Challenge on International Law

Aiden Warren
RMIT University, Australia

Ingvild Bode
United Nations University, Japan

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New Security Challenges Series

General Editor: **Stuart Croft**, Professor of International Security in the Department of Politics and International Studies at the University of Warwick, UK, and Director of the ESRC's New Security Challenges Programme.

The last decade demonstrated that threats to security vary greatly in their causes and manifestations, and that they invite interest and demand responses from the social sciences, civil society and a very broad policy community. In the past, the avoidance of war was the primary objective, but with the end of the Cold War the retention of military defence as the centrepiece of international security agenda became untenable. There has been, therefore, a significant shift in emphasis away from traditional approaches to security to a new agenda that talks of the softer side of security, in terms of human security, economic security and environmantal security. The topical *New Security Challenges series* reflects this pressing political and research agenda.

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book and for making the process of its writing so inspiring and informative. I very much appreciated it.

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Abbreviations and Acronyms

ASIL	American Society on International Law
BWC	Biological Weapons Convention
CBRN	Chemical, Biological, Radiological and Nuclear
CIA	Central Intelligence Agency
CWC	Chemical Weapons Convention
DCI	Director of Central Intelligence
DOD	Department of Defense
DOE	Department of Energy
DOJ	Department of Justice
DOS	Department of State
DOT	Department of Treasury
DMZ	Demilitarized Zone
DPRK	Democratic People's Republic of Korea
EPA	Environmental Protection Agency
FRY	Federal Republic of Yugoslavia (FRY)
G20	Group of 20
HDBTs	Hardened and Deeply Buried Targets
HIL	Hegemonic International Law
IAEA	International Atomic Energy Agency
IAF	Iraqi Armed Forces
ICBMs	Intercontinental Ballistic Missiles
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IED	Improvised Explosive Device
IHL	International Humanitarian Law
ILC	International Law Commission
IMF	International Monetary Fund
IRBM	Intermediate Range Ballistic Missile
JCS	Joint Chiefs of Staff
MOU	Memorandum of Understanding
MRBM	Medium Range Ballistic Missile
MTCR	Missile Technology Control Regime
NIE	National Intelligence Estimate
NPR	Nuclear Posture Review
NPT	Non-proliferation Treaty
NSC	National Security Council

NSPD	National Security Presidential Directive
NSS	National Security Strategy
OAS	Organization of American States
OSD	Office of the Secretary of Defense
QDR	Quadrennial Defense Review
RNEP	Robust Nuclear Earth Penetrator
ROK	Republic of Korea
SNIE	Special National Intelligence Estimate
SRBM	Short-Range Ballistic Missile
TPP	Tehreek-e Taliban Pakistan
UHI	Unilateral Humanitarian Intervention
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
UNSCR	United Nations Security Council Resolution
UNSYG	United Nations Secretary General
WMD	Weapons of Mass Destruction

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Introduction

State recourse to the use-of-force has long been considered the main threat to international peace and security. In extending back to the horrific human devastation and calamitous economic consequences of World War I, it is evident that there were some attempts to restrain the still-accepted right of states to use war in attaining their national interests. The *Covenant of the League of Nations* proscribed in broad terms the option to force and instituted several mechanisms, including "an arbitration, a judicial framework in the Permanent Court of International Justice, and elaborate disarmament processes as confidence-building measures."[1] The focus on disarmament was enhanced by the League's attempt to put "collective security" at the core of its powers. Of course, the League's inability to ultimately prevent World War II engendered extensive questioning of both its rationale and the very notion that war could be mitigated through reliance on law and international norms. Many in the international community argued that this in itself was a dangerous approach, given the natural propensity of states to utilize force as the foundation of their self-defense. Conversely, others contended that the disaster was the result of the League being insufficiently resourced and supported, most notable in the absence of its erstwhile champion, the United States, as a member. This latter insight proved the inspiration for US President Roosevelt's planning and President Truman's execution of the post-World War II international order.[2]

Indeed, with the end of one of the most devastating conflicts the world has ever seen in 1945, the newly created United Nations on 24 October of the same year declared that its foundational aim was to "strive to save succeeding generations from the scourge of war."[3] While this in itself was a defining moment in international relations, its significance was based on the inclusion of the general prohibition of the use-of-force in Article 2(4) of its Charter. Yet, even more surprising is that the language of this article was originally drafted by the delegation of the United States, which had just asserted itself as a global superpower through its leadership in the victorious alliance that brought World War II in Europe to an end. Seen in the world context at the time, US President Harry Truman's address to the *United*

Nations Conference on International Organization on 26 June 1945 was notable: "We all have to recognize – no matter how great our strength – that we must deny ourselves the license to do always as we please. No one nation, no regional group, can or should expect, any special privilege which harms any other nation."[4]

Despite the positive sentiments of Truman's rhetoric, however, the actualization of peace has not been easy to attain. Moreover, it is obvious that Truman's statements did not apply to the special privileges of the United States itself, evident in his administration's subsequent use of military force in its most extreme form in the cities of Hiroshima and Nagasaki on 6 and 9 August 1945, respectively. The great ambivalence inherent in both Truman's words and, broadly, the US use-of-force policy are illustrative of the level of commitment to international peace and security the United States has displayed over the course of the last 60-plus years. In simple but dynamic terms, *Pax Americana* has seen the regulation of the use-of-force, but with special privileges for the way in which the United States undertakes its *own* use-of-force. Indeed,

> US impulses have been paradoxical, even when not strictly contradictory: On the one hand, throughout the twentieth century the United States sought to shape (when not actually creating) multilateral architecture on a broad range of issues; on the other, it often either stayed out of the ensuing organizations or worked, intentionally or unwittingly to undermine them.[5]

In fast-forwarding to the devastating terrorist attacks of 11 September 2001, it is evident that like the conclusion of World War II, the United States again stood at an "international constitutional moment."[6] As a significant driver in this book's discussion, it will be argued that the decisions of the two post-9/11 administrations of Bush and Obama, in fact, have also shared the aforementioned ambivalent tendencies in their own approaches to the use-of-force, long since characteristic of US policy in this area. In this regard, the question of how the Bush and Obama administrations reacted to the challenges posed with regard to the recourse to military force in the post-9/11 era will be the book's central focus. In simple terms, it will evaluate and assess the extent to which both administrations crossed the threshold toward legitimizing the greater use-of-force in their efforts to thwart the threat of non-state actors, terrorism and weapons of mass destruction (WMD) proliferation.

For the Bush administration, the core and most contentious strategy with regard to the use-of-force pertained to the concepts of preventive/preemptive military action. The international legal foundation of the administration's *jus ad bellum* paradigm in the global "War on Terror" was articulated in the "Bush Doctrine" – a philosophy, a set of speeches and grouping of

policies – that encouraged the early use-of-force in self-defense against imminent (preemptive) and developing (preventive) threats. Although there is some justification – at least in principle – under the UN Charter *jus ad bellum* regime for a counterproliferation strategy of preemption that adheres to the balance of necessity and proportionality, the Bush doctrine's form of preemption was in reality preventive in character, and therefore, clearly outside the limits of international law.

With the election of Obama in 2008, "hopes were raised of a dramatic shift in the US attitude towards international law, but subsequent appraisals of that shift have been cautious in their optimism."[7] Indeed, as this book will argue, Obama appears to have, for the most part, merely adjusted rather than reversed Bush's stance toward the use-of-force. This is particularly visible in his administration's increased reliance on drones since 2009. The manner in which these military devices are used and described by senior officials as "invaluable tools" suggests that they fulfill the self-defense conditions of necessity and proportionality by definition – due to their supposed surgical precision. While the Obama administration has been more open and frequent in offering legal justifications for their use-of-force, the content of these justifications point to a continued stretching of the self-defense article in the direction of mixing preemption and prevention; particularly in regard to its promotion of an increasingly diffused concept of imminence. Despite removing references to the "War on Terror" from its public pronouncements, the Obama administration has arguably continued the Bush administration's war on international law.

In order to provide a substantive evaluation of the Bush and Obama administration's use-of-force policies in the post-9/11 era, the book is organized in two main parts: the first part encompassing chapters 1–3 presents the foundational intricacies of the UN Charter's *jus ad bellum* regime; the second part, chapters 4–6, analyzes the extent to which the Bush and Obama administration's use-of-force policies relate to international law as established in the Charter era.

At the center of the UN Charter's *jus ad bellum* regime regulating state recourse to force is Article 2(4)'s general prohibition of the use-of-force. As such, Chapter 1 seeks to develop a legal understanding of this core article in assessing its essential components of "force" and the phrase "territorial integrity or political independence." The chapter also examines two interpretive debates that have arisen in the Charter era surrounding the scope of potential exceptions to the prohibition enshrined in Article 2(4) – pro-democratic intervention and humanitarian intervention. Although Article 2(4) has been subject to differing interpretations, it is found to contain a solid normative core. In fact, as will be argued, when UN member states' behavior has not been consistent with the general prohibition of the use-of-force, they have tended to justify their actions with reference to Article 51 of the UN Charter, rather than putting Article 2(4) into question.

Chapter 2, therefore, follows directly from this assessment in closely examining the purview of Article 51, the self-defense article, and the main exception to the prohibition of the use-of-force. The history of its interpretation has shown two distinct readings of its provisions: one linear and restrictive, the other expansive and broad. The differences in these readings pertain mainly to the legal standing of the preemptive and preventive variants of self-defense. Preemptive and preventive measures relate to different standards of imminence with regard to threats. While preemptive reactions are designed to counter immediate and concrete threats, the preventive recourse to force deals with those threats that are longer in range and less definitive. As the chapter will illustrate, the linear reading of Article 51 rejects both of these expansions to the right of self-defense, arguing that the wording of the article only allows the use-of-force in response to an actual armed attack that has already occurred. By contrast, the expansive reading provides legal space for the preemptive use-of-force in response to imminent threats based on the article's qualification of the right to self-defense as "inherent," thus referencing customary international law valid in the pre-Charter period as defined by the "Caroline incident." Here, preemptive self-defense is considered legal if the threat is imminent in a temporal sense, the recourse to force is strictly necessary, and the eventual use-of-force is proportional. As such, in comprehending any preemptive right to self-defense, the chapter will necessarily examine the requisite principles of imminence, necessity and proportionality in great detail. At this point it will hold that while a right to preemptive self-defense may find legal support in both Charter provisions, historical legal discourse and customary international law, preventive self-defense is – practically – universally considered to be outside the scope of international law.

Additionally, the chapter will also assess how the self-defense provisions of Article 51 relate to the use-of-force against non-state actors, in this case, terrorist actors. Applicable international law in this area is generally characterized by a substantial lack of clarity – especially as terrorist actors invariably use the territory of states for planning their attacks, who may or may not be supporting these actors. The chapter will outline the complex legal scenarios and draw attention to a consensus position supported by rulings of the International Court of Justice, which holds that the use-of-force on the territory of sovereign states is permissible if the state "hosting" terrorist actors is found to be supporting or sponsoring these acts. The legal assessment is more complicated in the event of "host" states which are unwilling or unable to fulfill their counterterrorism obligations *vis-à-vis* terrorist actors. As we will outline, the use-of-force in this scenario may still be lawful if it is based on compelling evidence, is only aimed at terrorist targets or the "host" state provides consent.

Building on the historical US ambivalence toward the use-of-force as discussed at the beginning of this introduction, Chapter 3 puts US recourse

to preemptive and preventive self-defense, in particular, into historical perspective. It will argue that the use-of-force of both the preemptive and preventive variant featured continuously and prominently in policy deliberations and decisions of several US administrations from Kennedy to Reagan and Clinton. Although deliberation was extensive, the Kennedy administration's decision-making processes in the 1961 Cuban Missile Crisis eventually showed reluctance to engage in the use of preemptive force. This also applied to the Clinton administration during the 1994 North Korean crisis. Aside from these examples of restraint, the chapter will point to examples in which force was *actually* undertaken in response to terrorist threats, revealing how the Reagan and Clinton administrations' preemptive use-of-force positions precariously rode the line of prevention, that is, they were responding to distant, less concrete threats of attack. Indeed, the Clinton administration's multiple air strikes on Iraq throughout the 1990s are clear examples in which the preventive use-of-force was used to thwart that country's alleged development of WMDs.

Therefore, the positions included in the so-called Bush doctrine formulated during the course of the Bush administration's two terms in office from 2000 to 2008 have to be seen in the context of these historical precedents. Rather than representing a substantial departure, to some extent Bush followed on from tendencies of previous US administrations, albeit in an amplified fashion. As Chapter 4 will reveal, the main tenets of the Bush doctrine, as formalized in the *National Security Strategy of 2002*, placed a special emphasis on "pre-emptive"/preventive options, and although the imminence concept underlying these two variants of self-defense is dissimilar, they were used interchangeably during Bush's tenure in office. Aside from the preemption/prevention prevarication, the chapter will argue that the events of 9/11 became the driving force for the systematic disregard of established international rules on human rights, the treatment of combatant prisoners, the use of military force and provided the ideal opportunity to redefine the global legal order. In this light, international law for the Bush administration was perceived as an impediment on the United States' capacity to defend itself, execute its "War on Terror" and protect its economic and military interests around the world. Indeed, the four *Geneva Conventions*, the *International Covenant on Civil and Political Rights* (1969), the *United Nations Convention against Torture* (1984) and the *UN Charter's* prohibition on the use-of-force all became obsolete in the post-9/11 paradigm. In linking back to the core premise of this book, the Bush administration's *jus ad bellum* approach to the global "War on Terror" can be viewed as an attempt to dismantle the regime governing the use-of-force – the very regime that the United States played an integral role in defining after World War II.

Building on these arguments, chapters 5 and 6 will look at the Obama administration's propagated stance and decisions with regard to the use-of-force. Chapter 5 examines the broad tenets of Obama's use-of-force policy,

which is generally characterized by a great dualism, or to return to the terminology used with relation to President Truman, a great ambivalence. Obama made change the central purview of his presidency, especially in relation to re-taking the United States' global leadership role in support of international peace and international law through living up to its ideals in rhetoric and practice. As a consequence, the Obama administration professed a specific emphasis on the multilateral rather than the unilateral side of its use-of-force policy. Concurrently, official statements of President Obama and senior officials suggested that the United States would retain the right to use force unilaterally, if necessary, especially in relation to non-state actors and terrorist threats. Thus, while Obama rhetorically dropped Bush's "War on Terror" from the security paradigm, he continued to characterize the US counterterrorist effort as a war against Al Qaeda and its affiliates and adherents. Chapter 5 underlines this point in particular with a detailed treatment of the Bin Laden raid.

Moreover, the chapter illustrates the extent to which the "necessary" characterization of the use-of-force has taken a specific position in Obama's rationale and force disposition, particularly in regard to the use-of-force for humanitarian purposes. Drawing on the just war tradition, his administration has promoted humanitarian intervention as a necessary recourse to force – to be used both on a multilateral and unilateral basis. In this regard, the just war line of thinking espoused by Obama has proven to be a particularly useful reference point in relation to unilateral humanitarian intervention, that is, humanitarian intervention without a Security Council mandate, so as to legitimize this recourse to force inconsistent with international law. Notwithstanding such rhetoric, the chapter will specifically contend that the administration's actions did not follow these clear-cut convictions in its responses to the crises in Libya and Syria. Of course, in the context of "adjusting" international law, the chapter will also consider the extent to which the Obama administration has challenged the legal threshold in its apparent continuation of rendition.

Finally, Chapter 6 will provide a detailed critical assessment of the Obama administration's drone policy in relation to international law. The use-of-force in the form of drone attacks has become a regular staple of the administration's counterterrorism drive both inside and outside declared theaters of conflict, that is, both in Afghanistan and in Iraq, but also outside combat zones in Pakistan, Yemen and Somalia. Following an overview of US drone practice, the chapter evaluates the legal arguments put forward by Obama and senior officials in support of the administration's drone policy. It will be revealed that these arguments come in *jus ad bellum* and *jus in bello* categories, that is, those supporting when and if force may be used and those supporting the manner of its usage.

As to *jus ad bellum*, administration officials argue that using drones to target terrorist leaders is lawful because the United States is in a state of