

EDITED BY

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WELLER



≡ The Oxford Handbook *of*
THE USE OF FORCE IN
INTERNATIONAL LAW

THE OXFORD HANDBOOK OF

THE USE OF
FORCE IN
INTERNATIONAL
LAW

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PREFACE AND ACKNOWLEDGEMENT

It is every child's dream: to enter a sweetshop and be allowed the freedom to pick the best and most tasty treats on offer. Putting together this *Handbook* has been a somewhat similar experience. Over the years, many issues of the law on the use of force were neglected throughout. Others have remained contested, leaving the status of the law on key issues unresolved. And, of course, since the end of the Cold War, the old certainties underpinning this field of study have been shaken to the core. This book offered the opportunity to address these issues, and to address them through a cast of the most highly qualified and sought-after contributors. Indeed, in most cases, our first choice of author responded favourably to the invitation to contribute on the topic proposed to them. I am most grateful for their cheerful collaboration over a period that turned out to be somewhat longer than expected.

The list of actual or imagined recent challenges to the established law on the use of force is long. First, there is the changing role of non-state entities as agents of conflict, including the ability of terrorist movements to mount armed attacks on a scale previously reserved for regular armed forces maintained by states. Then, there is the availability of new weapons technologies and their effects on warfare, exemplified by the debate about targeted killings, drones and autonomous weapons systems. The concept of 'cyber war' has gained some currency in the debate. The increased availability of weapons of mass destruction to a broader range of states, and even to non-state actors, was a prominent factor in the controversies surrounding the use of force against Iraq in 2003.

There were also claims that 'rogue states' and others have placed themselves outside of the legal framework on the use of force, or that a 'global war on terror' might be waged without specific reference to the well-established criteria relating to self-defence in each individual instance of the use of force. Moreover, significant pressure for forcible humanitarian action emerged in relation to circumstances of overwhelming humanitarian emergency, in part driven by the shock caused by the international failings in responding to the horrors of the situations in Bosnia and Herzegovina and Rwanda.

These developments had an impact on the discussion of legal doctrines relating to the use of force. The idea of negative exceptionalism concerning so-called rogue states was matched by a concept of positive exceptionalism. This would hold that certain states have to shoulder a disproportionate load of military operations to

maintain international peace and security. Hence their actions should be considered according to differing standards, chiefly informed by the supposedly beneficial aims of such operations for the international community as a whole, rather than judged according to the established legal criteria. Both types of exceptionalist explanations, negative and positive, threaten the universality of the very rules of the international system that have hitherto been regarded as indispensably universal.

The debate about forcible humanitarian action added a further conceptual challenge. The majority of commentators found, in the wake of the Kosovo operation of 1999, that forcible humanitarian action may not be strictly legal, but it is nevertheless legitimate. At least at first sight, this approach appeared to strain the view that one of the key conditions for political legitimacy must be compliance with law, or in this instance, with the legal rules on the use of force.

In addition, the content of some well-established rules on the use of force was challenged. This included, for instance, the criteria for self-defence. Over the decades since the advent of Article 51 of the UN Charter, a consensus had stabilized in practice and scholarly evaluation concerning the doctrine of anticipatory self-defence. This consensus was threatened by the argument that new threats require new measures and associated legal doctrines to counter them. In the ensuing debate the old controversy about preventative or pre-emptive uses of force was reopened. The debate carried over from the political/strategic level onto the tactical plane. The conditions for the use of self-defence shifted in the tactical rule of operation of some countries in certain instances of conflict from the protection of soldiers, airplanes or other assets from immediate, deadly threats to more abstract challenges that might manifest a latent threat.

Another aspect that appeared reminiscent of pre-UN Charter practice concerned, more generally, the apparently resurgence of the use of force as a means of national, or perhaps at least, international policy. 19th century concepts such as ultimata, threatening the use of force unless a state or other actor engages in certain conduct, resurfaced. In part, such ultimata were administered by the UN Security Council, for instance when it gave Iraq a certain number of days before the authorization to evict its forces from Kuwait would become operational. However, ultimata were also used in cases that were only loosely covered by a UN mandate, as was the case in relation to forcible operations concerning Bosnia and Herzegovina. In relation to Kosovo, a Contact Group composed of a small number of states, and NATO, threatened the use of force without formal cover from the Council.

There was also a return to arguments that force might be a means to enforce international obligations—an assertion of forcible self-help that had been thought to have been long overcome. The most famous case of this assertion was of course the US argument that it would be empowered to enforce militarily the obligations agreed to by Iraq when it accepted the cease-fire with coalition forces at the conclusion of the Kuwait conflict in 1991.

Other developments somewhat blurred important distinctions among legal categories determining what is and what is not lawful. Hence, it is clear that forcible reprisals or retaliation are no longer permitted in international law. Instead, unilateral forcible action requires the application of self-defence in relation to an actual or imminent armed attack. However, on several occasions force was used in response to past events, rather than current or imminent armed actions, sometimes with considerable delay. While justified as self-defence, the actions seemed more akin to forcible retaliation. An example is the 1993 US bombing of the Iraqi Intelligence Service headquarters that seemed like payback for an alleged plot to assassinate former US President George H.W. Bush.

Even where the right of self-defence could be applied, important additional issues arose. For instance, what is a proportionate response to an outrage like the attack on the World Trade Centre on 9/11? How far, and for how long, does the right of self-defence extend? How do we judge when a future attack mounted by a non-territorial terrorist group, operating underground, is imminent, and how can such a claim be internationally validated? And to what extent can self-defence be applied in relation to terrorist groups based in foreign states? Does that state have to be implicated in terrorist attacks at the very high level of attribution established by the International Court of Justice in the *Nicaragua* case before force can be used against terrorist actors based on its territory?

According to that test, self-defence could only be invoked against a state that is exercising overall control over an armed movement. In other words, the group must be virtually an agent of that state. Or does a state expose itself to the use of force by another by merely failing to remove such a group from its territory, or suppressing its activities. Or is there after all a kind of middle ground test, taking account the level of support granted to such a group falling short of the exercise of overall control?

To some, these kinds of questions seemed too difficult to answer within the known and accepted legal standards. A whole series of new exceptional doctrines were proposed, which, if accepted, would have significantly weakened the prohibition of the use of force. However, both in practice and in scholarship, cooler heads prevailed. At the 2005 United Nations World Summit, the organized international community committed itself to the existing legal framework on the use of force established in the UN Charter. It determined that this framework does provide the necessary flexibility to accommodate new challenges, while retaining the strong presumption against the use of force in international relations.

The challenge therefore is how the existing legal rules can be construed to reflect this balance in relation to specific situations. This book hopes to offer a range of perspectives addressing most of the well known, but unresolved areas of controversy in this area of international law, alongside those that have emerged in more recent practice.

As the dimensions of this work indicate, this has been a significant effort which has taken several years from inception to completion. In view of the high quality of

contributors, and their various other commitments, it is not surprising that there was a considerable gap between the first submissions of chapters, and the very last ones.

Some authors who submitted according to the original deadline have taken the opportunity to update their chapters in the final editorial round, which brought us up to September 2014. Others were unable to do so, leaving their contributions current as to the point of initial submission and the first round of editing, as may be evident from the footnotes.

I am most grateful to the two Assistant Editors who have borne a large element of the work involved with great efficiency and engagement. Ms Alexia Solomou supported the initial editorial rounds. She was replaced by Mr Jake Rylatt, who helped to steer the project through its final rounds of editing and proofing. Ms Rumiana Yotova contributed as well, most ably bridging the period between the tenure of the two. At the Lauterpacht Centre, the project also benefitted from the wonderful support provided, as ever, by Ms Anita Rutherford and Ms Karen Fachechi.

We are also very grateful for the steady support for this venture on the part of Oxford University Press. This includes in particular Mr John Louth, Ms Merel Alstein and Mr Anthony Hinton, who commissioned the work and kept faith with it, Ms Emma Endean who offered additional support, the production editor, Ms Catherine Cragg, and Ms Kumudhavalli Narasimhan and Ms Deepikaa Mercileen.

Marc Weller
Cambridge, November 2014

LIST OF ABBREVIATIONS

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AC	Appeal Cases
ADF	Allied Democratic Forces
AFISMA	African-led International Support Mission to Mali
AFL	Armed Forces of Liberia
AFRC	Armed Forces Revolutionary Council
All ER	All England Reports
AMC	American Maritime Cases
AMIB	African Mission in Burundi
AMIS	AU Mission in Sudan
AMISON	AU Mission in Somalia
ANZUS	Australia, New Zealand, United States Security
ARIO	Articles on Responsibility of International Organizations
ARISWA	Articles on the Responsibility of States for Internationally Wrongful Acts
AU	African Union
Bevans	Bevans' Treaties and Other International Agreements of the United States of America
CAR	Canadian Airborne Regiment
CERTS	Computer Emergency Response Teams
CIA	Central Intelligence Agency
CIS	Commonwealth of Independent States
CIWS	Close-In Weapons System
Cox CC	Cox's Criminal Cases
CTS	Consolidated Treaty Series
DFS	Department of Field Support
DLR	Dominion Law Reports
DPAA	direct participant in armed attacks
DPH	direct participant in hostilities
DPKO	Department of Peacekeeping Operations
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of the Congo
DUF	directives on the use of force
EASBRIG	East African brigade
EC	European Community
ECCAS	Central Africa brigade
ECHR	European Convention on Human Rights
ECOBRIG	West Africa brigade
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights

EECC	Eritrea–Ethiopia Claims Commission
EEZ	exclusive economic zone
EFTA	European Free Trade Association
EITI	Extractive Industry Transparency Initiative
EU	European Union
EUFOR	European Union Force
EWCA Civ	England and Wales Court of Appeal, Civil Division
F3d	Federal Reporter, Third Series
FARC	Revolutionary Armed Forces of Colombia
FOMUC	Force Multinationale en Centrafrique (Multinational Force in the Central African Republic)
FRY	Federal Republic of Yugoslavia
FSA	Fish Stocks Agreement
FSupp	Federal Supplement
GAOR	General Assembly Official Records
HCPR	Humanitarian Policy and Conflict Research
HJRes	House [of Representatives] Joint Resolution
HL	House of Lords
HRC	Human Rights Council
HSC	Convention on the High Seas
IAC	international armed conflict
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICoC	International Code of Conduct
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEMF	Interim Emergency Multinational Force
IFOR	Implementation Force
IGAD	Intergovernmental Authority on Development
IGASOM	IGAD Peace Support Mission in Somalia
IHL	international humanitarian law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMO	International Maritime Organization
IMT	International Military Tribunal
INTERFET	International Force for East Timor
ISAF	International Security Assistance Force
ITLOS	International Tribunal for the Law of the Sea
JCC	Joint Control Commission
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
LAS	League of Arab States

Lloyd's Rep	Lloyd's Law Reports
LN	law of nations
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
LOAC	law of armed conflict
MAES	AU Electoral and Security Assistance Mission
MEZ	maritime exclusion zone
MILS	mainstream international legal scholarship
MINUCI	United Nations Mission in Côte d'Ivoire
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MINUSTAH	UN Stabilization Mission in Haiti
MIO	maritime interception operations/maritime interdiction operations
MNF	Multinational Force
MONUC	Mission de l'Organisation de Nations Unies en République Démocratique du Congo (United Nations Observer Mission in the Democratic Republic of the Congo)
MONUSCO	Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo (United Nations Stabilization Mission in the Democratic Republic of the Congo)
NAM	Non-Aligned Movement
NASBRIG	North Africa brigade
NATO	North Atlantic Treaty Organization
NFZ	no-fly zone
NGO	non-governmental organization
NIAC	non-international armed conflict
NSA	non-state actor
OAS	Organization of American States
OAU	Organisation of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OECS	Organisation of Eastern Caribbean States
OFOF	orders for opening fire
OIC	Organisation of Islamic Cooperation
ONUB	Opération des Nations Unies au Burundi (United Nations Operation in Burundi)
ONUC	Opération des Nations Unies au Congo (United Nations Operation in the Congo)
OPANAL	Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean
OSCE	Organization for Security and Co-operation in Europe
P5	five permanent members of the UN Security Council
PCASP	Privately Contracted Armed Security Personnel
PCIJ	Permanent Court of International Justice
PMC	private military company

PMSC	Private Military and Security Company
POC	protection of civilians
PPP	perpetual peace projects
PSC	private security company
PSI	Proliferation Security Initiative
PSNR	Permanent Sovereignty over Natural Resources
QB	Queen's Bench Reports
R2P	Responsibility to Protect
RAMSI	Regional Assistance Mission to Solomon Islands
RIAA	Reports of International Arbitral Awards
ROE	rules of engagement
RPA	remotely piloted aircraft
RUF	Revolutionary United Front
SADC	Southern African Development Community
SADCBRIG	South African brigade
SAS	Special Air Service
SCOR	Security Council Official Records
SCR	Supreme Court Reports
SEATO	South East Asia Treaty Organization
SFOR	Stabilization Force
SI	Statutory Instrument
SOLAS	Safety of Life at Sea
SOMA/SOFA	Status of Mission/Status of Forces Agreement
Stat	Statutes at Large
SUA	Suppression of Unlawful Acts
TCC	troop contributing countries
TEZ	total exclusion zone
TFG	Transitional Federal Government
TS	Treaty Series
TWAIL	Third World Approaches to International Law
UNCLOS	United Nations Convention on the Law of the Sea
UKHL	UK House of Lords Reports
UKTS	UK Treaty Series
UN	United Nations
UNAFIL	United Nations Interim Force in Lebanon
UNAMID	African Union/United Nations Hybrid Operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNCIO	United Nations Conference on International Organization
UNDOF	United Nations Disengagement Observer Force
UNEF	United Nations Emergency Force
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNGA	United Nations General Assembly
UNIFIL	United Nations Interim Force in Lebanon
UNISFA	United Nations Interim Security Force for Abyei
UNITA	National Union for the Total Independence of Angola
UNITAF	Unified Task Force

UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNMISSET	United Nations Mission of Support in East Timor
UNMISS	United Nations Mission in South Sudan
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNOC	United Nations Operation in the Congo
UNOCI	United Nations Operation in Côte d'Ivoire
UNOMIL	United Nations Observer Mission in Liberia
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment Force
UNPROFOR	United Nations Protection Force
UNRRA	United Nations Relief and Rehabilitation Administration
UNSMIL	United Nations Support Mission in Libya
UNSMIS	United Nations Supervision Mission in Syria
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UNTSO	United Nations Truce Supervision Organization
US	US Supreme Court Reports
UST	United States Treaties
VCLT	Vienna Convention on the Law of Treaties
VPD	Vessel Protection Detachment
WEU	Western European Union
Wheat	Wheaton's US Supreme Court Reports
WHO	World Health Organization
WLR	Weekly Law Reports
WMD	weapons of mass destruction
WTO	World Trade Organization

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