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The Persistent Advocate and the Use of Force

The Impact of the United States upon the *Jus ad Bellum* in the Post-Cold War Era

Christian Henderson

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Foreword

This impressive book considers the impact of the attitude and practice of the United States on the development of the laws governing the use of force and collective security in the post-Cold War and post-9/11 eras. By applying the theory of interpretive communities in a systematic way to key areas of the *jus ad bellum* where American influence is very strong, both in collective security and self-defence, the book makes a genuine contribution to knowledge.

After outlining his theoretical stance, the author considers the impact of the United States on Chapter VII of the UN Charter by analyzing the method of authorization of Coalitions of the Willing, the development of auto-interpretation of Security Council resolutions, and the arguments concerning enforcement of such resolutions. The conclusions drawn are sound in this regard, and the search for inter-subjective agreement on these matters is illuminating. The argument then turns to issues of self-defence by considering the attempt to expand the test of attribution that applies to the actions/presence of terrorists; and then the most controversial attempted extension of the right to allow for pre-emptive self-defence on the basis of a perceived threat.

The book represents a clear-sighted counter-weight to the rush to reconsider well-established and legitimate principles of international law on the basis that either the fall of the Berlin Wall or the events of 9/11 were turning points in international relations, replacing or rather necessitating the replacement of the old rules drawn up principally in the UN Charter of 1945. The basic rules governing violence agreed upon by representatives of states in 1945 took many centuries to achieve, but even so they are a product of a dated consensus and their enforcement depends on an alliance of powers in the Security Council that only enjoyed brief unity of purpose. This book develops a method which allows that consensus to be challenged, not by unilateral actions and re-interpretations of the rules, but by the development of a new and meaningful multilateral consensus. The argument of the author is not that of a formalist insisting upon the letter of rules drawn up in 1945, but is one based on the need to achieve real consensus if new and lasting rules are to be formulated.

Nigel D. White
Professor of Public International Law
University of Nottingham

Preface

The period of research from which the monograph emerged was embarked upon just over a year after the United States of America had used force against Iraq and toppled its Government in an enforcement action that was justified upon compelling this state to comply with its disarmament obligations. The central argument advanced by the United States was that it had the authority to do this under a United Nations Security Council resolution that had been adopted over a decade previously. This claim was made and persisted with despite the objections of the majority of other members of the United Nations Security Council, including several permanent members, and indeed large swathes of other states and actors within the international community at large. The apparent conviction with which this argument was made, along with the stated belief that its actions were lawful despite the objections of many, initiated an interest in whether, despite the undoubted power of this state, it could determine what the law was and as such have an impact upon the actions which the law permits or denies.

Whilst this was one example of the United States advocating a view that was perceived by others to lie outside of the contemporary interpretation of the law, thoughts turned to the question of whether it had made other such attempts and whether these had had an impact upon the law. Indeed, in connection with the *jus ad bellum*, was the United States a 'persistent advocate' and, more importantly, was it a successful one?

I wish to express my gratitude to the School of Law at the University of Nottingham for providing me with a place and the necessary funding to write this work. The School and the University more widely was an inspiring place in which to carry out research of this nature. During my time at Nottingham I also had the opportunity to spend time at The Hague Academy of International Law and the University of Virginia. These experiences widened my knowledge of international law and provided me with different resources to facilitate the writing of this work.

There are also many people whom I have to acknowledge for their help, support and inspiration during the course of this research and its subsequent transformation into this book. Firstly, I would like to express my thanks to Professor Robert Cryer (University of Birmingham) for his assistance and guidance over the years. I also wish to express my deepest appreciation to Professor Nigel White (University of Nottingham) and Dr Olympia Bekou (University of Nottingham) who made me think more deeply about the issues raised in my research and have thus made a substantial contribution to its transposition into this monograph. Others whom I would like to thank in regards to this process are Professor Ian Johnstone (The

Fletcher School of Law and Diplomacy, Tufts University) and Dr James Green (University of Reading) who kindly took the time to read and comment upon parts of various chapters. Discussions with Professor John Norton Moore (University of Virginia) were valuable and insightful and I appreciate the time that he gave me.

I am also indebted to friends and colleagues at all stages of my academic career so far and to my colleagues within the Department of Law at Oxford Brookes University for their patience and understanding during my first weeks of work there which happened to coincide with the final weeks of finishing this research.

The publishing process was made as smooth as possible by Alison Kirk, Jude Chillman, Sarah Horsley and Adam Guppy at Ashgate Publishing, so my thanks to them.

Lastly, my mother and father have been a constant source of support and encouragement and my wife, Sanna, has been an avenue of strength and inspiration throughout the years of writing this work. I would not have been able to complete it without her and so it is to her that it is dedicated.

It has been the intention to state the material found in this book to be current as of December 2009. Any errors are my sole responsibility.

Christian Henderson
Oxford
January 2010

List of Abbreviations

9/11	The terrorist attacks of 11 September 2001
AMIS	African Union Mission in Sudan
ANZUS	Australia, New Zealand, United States Security Treaty
AU	African Union
BFSP	British and Foreign State Papers
CIA	Central Intelligence Agency
DASR	Draft Articles on State Responsibility
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EU	European Union
FRY	Federal Republic of Yugoslavia
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
KLA	Kosovo Liberation Army
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NILR	Netherlands International Law Review
NSS	National Security Strategy
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe

PCIJ	Permanent Court of International Justice
PKK	Kurdistan Workers' Party
PLO	Palestine Liberation Organization
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNIFIL	United Nations Interim Force in Lebanon
UNIKOM	United Nations Iraq-Kuwait Observation Mission
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
UNSG	United Nations Secretary-General
UNYB	United Nations Yearbook
US	United States of America
VCLT	The Vienna Convention on the Law of Treaties
WMD	Weapons of Mass Destruction

Journals and Publications

AJICL African Journal of International and Comparative Law
AJIL American Journal of International Law
Aust YBIL Australian Yearbook of International Law
BYBIL British Yearbook of International Law
Cal.W.Int'l L.J. California Western International Law Journal
Cal.W.L.Rev. California Western Law Review
Cardozo J.Int'l & Comp.L. Cardozo Journal of International and Comparative Law
Chicago J.Int'l L. Chicago Journal of International Law
Chinese J.Int'l L. Chinese Journal of International Law
Colum.J.Transnat'l L. Columbia Journal of Transnational Law
Cornell Int'l L.J. Cornell International Law Journal
Duke J.Comp.& Int'l L. Duke Journal of Comparative and International Law
EJIL European Journal of International Law
Fletcher F. World Aff. Fletcher Forum of World Affairs
Ga.J.Int'l.& Comp.L. Georgia Journal of International and Comparative Law
Geo.Int'l Envtl.L.Rev. Georgetown International Environmental Law Review
Geo.L.J. Georgetown Law Journal
German Y.B.Int'l L. German Yearbook of International Law
Hague Yrbk Int'l L. Hague Yearbook of International Law
Harv.Int'l L.J. Harvard International Law Journal
Harv.J.L.& Pub.Pol'y Harvard Journal of Law and Public Policy

ICLQ International and Comparative Law Quarterly
Indian J.Int'l L. Indian Journal of International Law
Iowa L.Rev. Iowa Law Review
Israel Y.B.Hum.Rts. Israel Yearbook on Human Rights
JCSL Journal of Conflict and Security Law
Keesing's Keesing's Record of World Events
LJIL Leiden Journal of International Law
Max Planck Yrbk UN L. Max Planck Yearbook of United Nations Law
Mich.J.Int'l L. Michigan Journal of International Law
Mich.L.Rev. Michigan Law Review
MLR Modern Law Review
Stan.J.Int'l L. Stanford Journal of International Law
Syracuse L.Rev. Syracuse Law Review
Tex.Int'l L.J. Texas International Law Journal
Transnat'l L.& Contemp.Probs. Transnational Law and Contemporary Problems
Tul.J.Int'l & Comp.L. Tulane Journal of International and Comparative Law
Tul.L.Rev. Tulane Law Review
Tulsa J.Comp.& Int'l L. Tulsa Journal of Comparative and International Law
U.Chi.L.Rev. University of Chicago Law Review
U.Pitt.L.Rev. University of Pittsburgh Law Review
UNYBILC United Nations Yearbook of the International Law Commission
W.Va.L.Rev. West Virginia Law Review
Yale J.Int'l L. Yale Journal of International Law
Y.B.N.Z.Juris. Yearbook of New Zealand Jurisprudence

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Chapter 1
Introduction

The formal notion of sovereign equality provides that all states are equal before the law.[1] However, whilst this notion is deeply ingrained at the theoretical level within the international system it might not appear so clearly visible in practice. Indeed, states are of differing wealth, size, and power which could be viewed as creating varying possibilities to make and shape international law as well as varying possibilities to evade its enforcement.[2] In this respect the United States of America, which since the end of the Cold War in 1989 and the collapse of the Soviet Union has been recognized as the world's 'sole remaining superpower',[3] may be viewed as being in the possession of greater powers than any other state. Whilst this status is subject to change, or to be challenged by other states such as China or India, since the end of the Cold War we have arguably been living in a 'unipolar moment'.[4]

During this period of superior power, the US has been a 'persistent objector' to the development of international law on many contemporary issues.[5] In particular, under the administration of former President George W. Bush international efforts to combat climate change through international law and the establishment of an International Criminal Court have been persistently objected to and, whilst the US has not ultimately been able to prevent them from being realized, it has remained outside of these regimes thus inhibiting their effectiveness.[6] However, during this period, which has witnessed the US moving from a war fought using the principles

1 I. Brownlie, *Principles of Public International Law*, 7th edn (Oxford: Oxford University Press, 2008), 289; M. Shaw, *International Law*, 6th edn (Cambridge: Cambridge University Press, 2008), 214–15.

2 M. Byers, *Custom, Power, and the Power of Rules* (Cambridge: Cambridge University Press, 1999), 5.

3 See, for example, J. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004), 7.

4 C. Krauthammer, 'The Unipolar Moment' (1991) 70 *Foreign Affairs* 23, 24.

5 Whilst this notion is found in the rules governing the formation of customary international law, it is used here in a general sense to depict the way in which the US has approached many international legal issues. See, generally, J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYBIL* 1.

6 See, generally, R. Wedgwood, 'The International Criminal Court: An American View' (1999) 10 *EJIL* 93; C. Kormos, B. Groskos, and R.A. Mittermeier, 'US Participation in International Environmental Law and Policy' (2001) 13 *Geo.Int'l Envtl.L.Rev.* 661.

of containment and deterrence[7] to the adoption of a pre-emptive strategy,[8] it has used force both unilaterally and collectively in a number of situations.[9] In contrast to its objections to any changes to the legal regime in other areas, in its justifications for these uses of force, or occasionally in the abstract, it has interpreted, applied and, in many cases, attempted to modify the law governing when force is permitted under international law (the *jus ad bellum*).[10] Indeed, in connection with many aspects of this particular branch of international law the US may be termed a 'persistent advocate'.[11]

Given the US's power, one may be led into thinking that it has thus been able to modify and develop the law to suit its present and future interests. Indeed, some have claimed dramatic changes to the *jus ad bellum*, or even the death of the prohibition of the use of force completely,[12] as a result of the actions and discourse of the US, especially since the terrorist attacks of 9/11 and the subsequent declaration of a 'war on terror'.[13] The aim of this book is to provide a sober and dispassionate analysis and assessment of the impact of not only the key actions taken, justifications provided and policies adopted since 9/11 now

7 See, generally, J.L. Gaddis, *Strategies of Containment: A Critical Appraisal of Post-War American National Security Policy* (New York: Oxford University Press, 1982).

8 The doctrine of pre-emptive self-defence will be the focus of Chapter 7.

9 The US's military, diplomatic, political, and economic assets have provided it with the capabilities 'to be a decisive player in any conflict in whatever part of the world it chooses to involve itself'. Krauthammer, supra n. 4, 24. Michael Byers has commented that '[i]n terms of its military strength relative to other countries, the United States is more powerful than any state since the Roman Empire. With a diversified air, sea and land-based nuclear arsenal, twelve aircraft carriers, thousands of advanced warplanes and substantial stocks of precision-guided missiles and bombs, it has little reason to fear any other country'. See M. Byers, 'Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *Journal of Political Philosophy* 171, 171.

10 The *jus ad bellum* is the body of rules of international law which govern *when* force can be used in international affairs and is the focus of this book. The *jus in bello*, that is the rules of international law which govern *how* military force should be used during times of armed conflict, is not covered here.

11 This term is used in this work to depict the relative persistence by which the US has either implicitly or explicitly advocated changes to the *jus ad bellum*.

12 See, for example, T.M. Franck, 'What happens Now? The UN After Iraq' (2003) 97 *AJIL* 607; M.J. Glennon, 'Why the Security Council Failed?' (2003) 82 *Foreign Affairs* 16; M.J. Glennon, 'How International Rules Die' (2005) 83 *Geo.L.J.* 939.

13 In the President's Address to a Joint Session of Congress and the American People on 20 September 2001, President Bush stated that '[o]n September 11th, enemies of freedom committed an act of war against our country ... Americans are asking: how will we fight and win this war? ... this war will not be like the war against Iraq a decade ago ... it will not look like the air war above Kosovo ...' President George W. Bush, 'Address to a Joint Session of Congress and the American People' (20 September 2001). Available at: http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html [Accessed: 15 December 2009].

that the dust has had a chance to settle, but also in the time since it became endowed with the title of 'sole remaining superpower'. A comprehensive and up to date analysis and assessment of the impact of the US upon the *jus ad bellum* in this time period has not as yet been produced. Furthermore, the book does not fail to address the recent changing of the guard at the White House and the taking up of residence by President Barack Obama. Given that this was hailed by many at the time as being a momentous event, it is thus perhaps a good time to take stock of the impact of the US's persistent advocacy up to the end of the second Bush administration, but at the same time consciously looking forward to the future. Consequently, the Postscript to this book has sought to discern the approach to the *jus ad bellum* that appears to have been initially adopted by the Obama administration and address whether, and if so how, this is proving to be any different from previous US administrations, particularly that of his predecessor.

In attempting to gauge any impact upon this fundamental area of international law, the book has drawn upon insights from the theory of interpretive communities in constructing a framework of analysis. This has as one of its key tenets the importance of discerning 'intersubjective agreement' amongst those with authority for interpretation within the international community. Under this framework it becomes clear that whilst in certain areas of the *jus ad bellum* a widening of the terms of the debate is recognizable, modifications to the *lex lata* are generally not. This is due essentially to a lack of intersubjective agreement between the US and other relevant actors as to the proposed interpretations either at the time or as exhibited through subsequent practice. Given that the position of the US as 'sole' superpower could be viewed as being under threat from other competitors,[14] this book provides a comprehensive reaffirmation of the robustness of international law governing the use of force to superpower manipulation, regardless of which state happens to be given this label. Whilst it is not possible to predict the future, it is hoped that the conclusions formed in this book will provide at least some reassurance.

It should be made clear at the outset that this book does *not* attempt to provide a complete account of the US's relationship with the *jus ad bellum* in the post-Cold War era. It does not, for example, examine the influence of the law upon decisions of the US to use, or to refrain from using, force, which is a study perhaps best left to be dealt with by international relations theorists.[15] Furthermore, this book is not a comprehensive assessment of changes to the *jus ad bellum* over this time period, which would of course involve an assessment of the practice of all states. There are

14 See, for example, J. Kynge, *China Shakes the World: A Titan's Rise and Troubled Future – and the Challenge for America* (Boston, MA: Mariner Books, 2007).

15 Although this is not to say that international lawyers have not approached such questions. See, for example, A. Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974).

already works which provide a more general assessment of this nature.[16] Rather, it focuses on the substantive areas of the *jus ad bellum* with which the US has most often and significantly engaged with through either its actions, justifications for actions, or adopted policies.

The book is divided into two main Parts. After having addressed in more detail the framework of how it will assess impact in Chapter 2, the first Part goes on to examine the US's engagement with, and impact upon, the collective use of force. In particular, it focuses upon the uses of force by the US which, at least appear to, come under the authority of the UNSC. Chapter 3 addresses the US's role in the contemporary functioning of the collective security system. Whilst this has not functioned as envisaged in the UN Charter, the US has played a pivotal role in its development which began with the response to Iraq's invasion of Kuwait in 1990. More specifically, the chapter addresses the development of what has been termed in this work the 'authorization technique'.

Building on this, Chapter 4 is the first of two connected branches of the authorization technique. In particular, given the legitimacy with which this technique came to be viewed, the US took to arguing that the authorization provided could be unilaterally 'revived' on subsequent occasions. Chapter 5 then addresses a related, yet more controversial, argument that states are able to unilaterally enforce what can be viewed as the collective will, either that which is contained in resolutions of the UNSC, or connected with a major concern of the international community; the violation of human rights.

The second Part of the book focuses on the US's practice in connection with self-defence, the sole unilateral exception to the prohibition of the use of force found in the UN Charter. Since 11 September 2001 global terrorism has been a concern not just for the US but for the international community as a whole, as witnessed, for example, by the adoption of the 'legislative' UNSC Resolution 1373 (2001).[17] However, the US has attempted to push the boundaries of the traditional law governing responses to attacks by non-state actors, in particularly by adopting a 'harbouring' standard in the attribution of these attacks to states for the purposes of self-defence. The impact of this is addressed in Chapter 6, the penultimate chapter.

As part of its anti-terror strategies after 9/11, the Bush administration also attempted to expand the permissible norms of behaviour so as to incorporate the

16 See, for example, C. Antonopoulos, *The Unilateral Use of Force by States in International Law* (Athens: A.N. Sakkoulas, 1997); A.C. Arend and R.J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (New York: Routledge, 1993); J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004); C. Gray, *International Law and the Use of Force*, 3rd edn (Oxford: Oxford University Press, 2008); T. Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester: Manchester University Press, 2005).

17 See, generally, P. Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 90.

possibility of taking pre-emptive forcible defensive measures. Chapter 7, the final chapter, focuses on the doctrine of expanded self-defence that has been championed by the Bush administration during this time. Finally, the book will attempt to draw some conclusions as to the impact of the US upon international law governing the use of force since the end of the Cold War and what the implications are for the future.

Chapter 2
Assessing Impact upon the *Jus ad Bellum*

Introduction

There is no distinct prescribed method of measuring the impact that a state has had upon international law. Therefore it is important to set out in this chapter how this will be undertaken prior to commencing the main substantive analysis in Part I of the book. Before this is done, however, it is necessary to say a few words about the nature and content of the object of assessment for impact; the *jus ad bellum*. The purpose of this chapter is not to be exhaustive in its treatment of these issues, but aims instead to establish a suitable basis from which to carry out the substantive analysis in the book.

The Sources of International Law with Special Reference to the *Jus ad Bellum*

The *jus ad bellum* is the *lex specialis* of international law governing the use of force. Thus, to gain a picture of the sources of the *jus ad bellum*, it first needs to be determined what the sources of international law *lex generalis* are.[1] A common starting point for an examination of the general sources is Article 38(1) of the Statute of the International Court of Justice which states that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;

1 On the sources of international law see, generally, C. Parry, *The Sources and Evidences of International Law* (Manchester: Manchester University Press, 1965); G.J.H. van Hoof, *Rethinking the Sources of International Law* (Hague: Kluwer, 1983); M.E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd edn (Hague: Kluwer, 1997); V.D. Degan, *Sources of International Law* (Hague: Martinus Nijhoff, 1997).