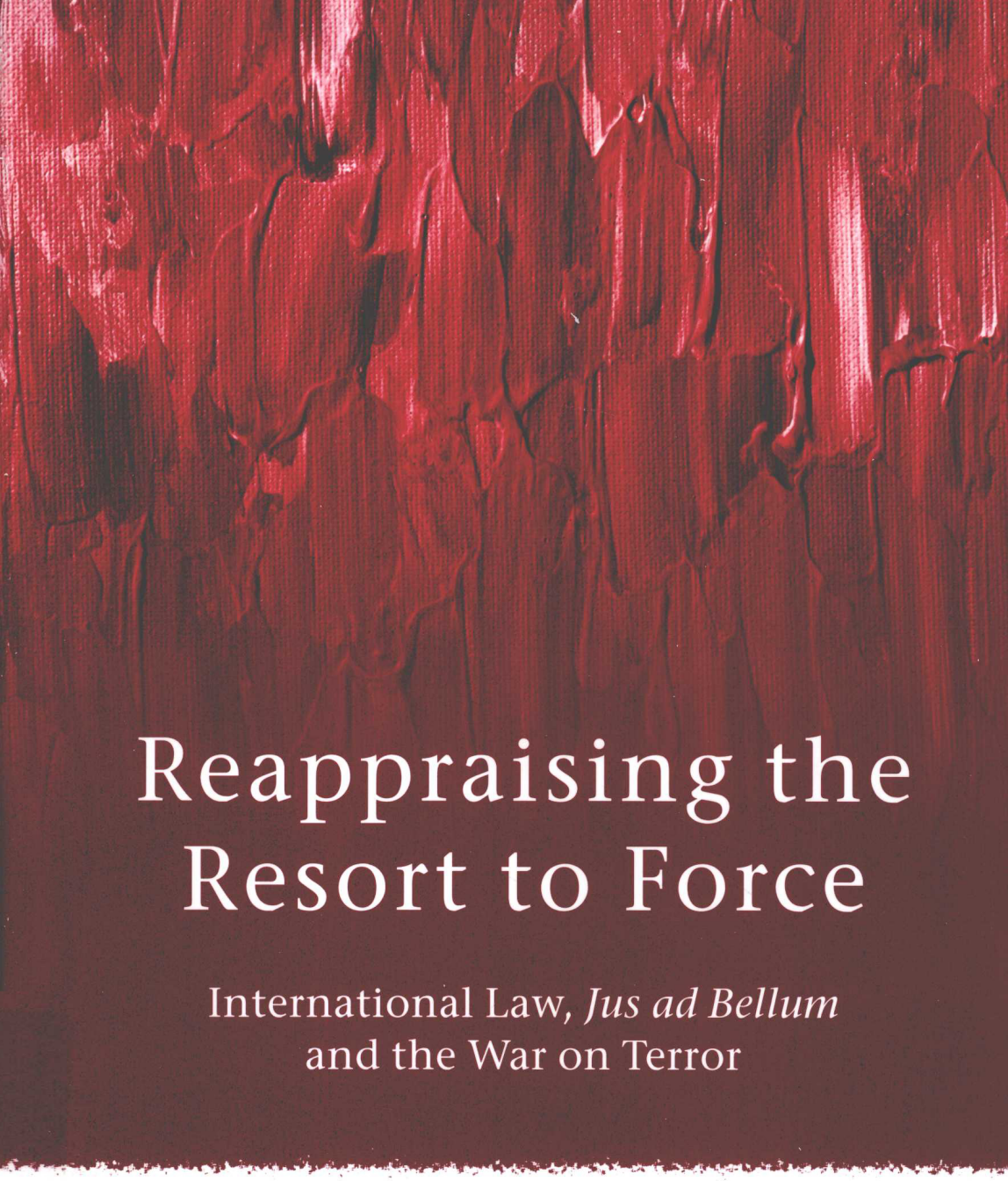

Reappraising the Resort to Force

International Law, *Jus ad Bellum* and the War on Terror

Lindsay Moir

STUDIES IN INTERNATIONAL LAW

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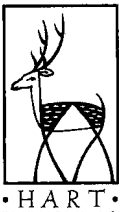

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The fact that it has taken quite so long for this book to appear can be put down to a number of factors, including 14 months of severe personal disruption for my family following the extensive flooding that affected Beverley, Hull and the surrounding area in June 2007, and our subsequent, all-consuming battle with unreasonable, incompetent and intransigent insurers. I will not name them here, but they know who they are! The end result stands as a testament to the patience of Richard Hart and Rachel Turner, neither of whom (at least openly!) began to question whether the manuscript would ever arrive, and both of whom somehow managed to remain extremely supportive throughout the entire process. Thanks are also due to Melanie Hamill and Joanne Ledger of Hart Publishing for their assistance.

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Foreword

The suggestion that the world changed on September 11th, 2001 has become a bit of a cliché. Yet, in the field of security affairs generally, and that of the public international law governing the use of force specifically, it certainly seems to have done so. On that day, a determined band of suicide terrorists hijacked four commercial airliners, flying two into the World Trade Center twin towers and one into the Pentagon, as a fourth crashed in a Pennsylvania field following a heroic attempt by passengers to overpower their captors. Thousands perished. The world economy suffered billions of dollars in losses. National security policies shifted overnight. And the consequent impact of the attacks—from heightened air travel security practices to often questionable intelligence practices—continues to tangibly affect the daily lives of the global populace.

A shadowy terrorist network with loosely affiliated cells in some 60 nations had attacked the world's most powerful State. The United States and its closest allies responded by launching Operation Enduring Freedom against not only al Qaeda bases in Afghanistan, but against the Taliban regime of the country. Sadly, the military operations did not prevent further transnational terrorist attacks. Bali, Madrid, London, Amman, Algiers, Baghdad. The list continues to grow and the death toll mounts. And the conflict in Afghanistan has now spread to the tribal areas in Pakistan, where al Qaeda and Taliban forces have sought sanctuary, and where US forces have conducted controversial air strikes against them.

Within two years, attention turned to Iraq as the United States and United Kingdom saber-rattled over Saddam Hussein's alleged development of weapons of mass destruction and continued resistance to UN weapons inspections. Assertions of a nexus with transnational terrorism heightened the angst. Unable to secure a United Nations Security Council mandate to take action, in March 2003 a US led coalition launched Operation Iraqi Freedom against the country. In contrast to Operation Enduring Freedom, Iraqi Freedom engendered widespread condemnation on grounds of both legitimacy and legality, including from some of the United States' and United Kingdom's closest friends.

Today, hundreds of thousands of international troops remain engaged in Operation Enduring Freedom, Operation Iraqi Freedom, and the NATO-commanded International Security Assistance Force. The operations continue to draw attention from experts in global and regional security, counter-terrorism, counter-insurgency, stability operations and

humanitarian relief. Similarly, legal experts continue to debate the fallout of the operations in the context of the *jus ad bellum,* that facet of public international law that governs when a State may resort to force as an instrument of its national policy.

Prior to 9/11 it all seemed so simple. When non-State actors engaged in violence, of whatever scale, the appropriate legal paradigm was law enforcement, informed in its execution by human rights law and domestic norms. Instances of robust military operations against such terrorist groups located in another State's territory typically resulted in international condemnation. As enunciated by the International Court of Justice in its 1986 *Nicaragua* judgment, only when said groups were 'sent by or on behalf' of a State (or when 'substantially involved' in the attacks) was the *jus ad bellum* implicated such that the terrorists and their State sponsors became liable to a forcible response in self-defense.

As to State-on-State conflict, the rules were equally clear cut. Pursuant to Article 2(4) of the UN Charter, the threat or use of force by one State against another was prohibited, save in two instances specified in the Charter itself. The first comprised the issuance—following a finding by the Security Council that a particular situation amounted to a threat to the peace, breach of the peace, or act of aggression—of a Council mandate to use force under Article 42. Article 51 contained the second, the right to engage in individual or collective self-defense in response to an armed attack. As then understood by most scholars and practitioners, the source of the armed attack was necessarily another State.

But then 9/11 shook the *jus ad bellum* to its very foundations. Although conducted by transnational terrorists, States and international organizations quickly discarded law enforcement as the exclusive response paradigm. For instance, the Security Council adopted numerous resolutions citing the law of self-defense, NATO activated Article V of the North Atlantic Treaty (which is expressly based on Article 51 of the UN Charter), and many States offered assistance in the form of troops or other support in collective self-defense. It was therefore unsurprising that when Operation Enduring Freedom began the United States and its key partners informed the Security Council that they were acting pursuant to their right of self-defense. The attacks directly against the Taliban, who could hardly be accused of offering support to al Qaeda to the degree previously deemed necessary to subject them to an attack in self-defense, complicated legal analysis. Yet despite these departures from the accepted prescriptive architecture, nary a whimper in opposition was heard, even from the staunchest opponents of the United States and United Kingdom. International law scholars furiously sought to discern the legal implications of the events, often in ways that were counter-factual and counter-normative. Their explanations—ranging from delicate parsing of Charter text to claims of 'instant custom'—evidenced great creativity, but little consensus.

This legal fog was dramatically exacerbated with the issuance by the United States of a National Security Strategy in 2002 that claimed the right to engage in preemptive self-defense. Was this merely reasonable adaptation of the concept of anticipatory self-defense to current realities or rather the embrace of a new right, perhaps one more accurately labeled 'preventive' self defense? Ongoing counterterrorist strikes into Pakistan, some conducted without that government's consent, have added further fuel to the *jus ad bellum* dialogue. Are such operations consistent with the law of self-defense or do they violate Pakistan's territorial integrity? Lawful or unlawful?

Operation Iraqi Freedom similarly challenged the extant *jus ad bellum*. The rhetoric as to a basis for using force rose precipitously in the months leading up to the invasion. Could action be justified on the basis of self-defense against weapons of mass destruction and terrorism? Regime change? Humanitarian intervention? Democratization? Most of the lay debate either wildly contorted the law or was extra-legal. While consensus existed that the Security Council possessed the authority to sanction the use of force against Iraq, no such resolution proved possible in the face of unyielding opposition from various members of the Council, including, inter alia, P-5 heavyweight France. The United States and United Kingdom ultimately justified their operations on a hyper-legal confluence of the law of cease-fire and certain Security Council resolutions dating back to the First Gulf War of 1990–91. Although the explanation was legally credible to some (including this writer), it sold poorly to academia, foreign governments and the international public. Even if the operation was legal, it appeared illegitimate to many observers.

Matters have become even more confused in light of recent International Court of Justice opinions, particularly *Oil Platforms* (2003), *The Wall* (2004), and *Armed Activities* (2005). With regard to the law of self-defense, and especially that bearing on actions by non-State actors, the Court seems to have ignored the impact of State practice in the aftermath of 9/11. Is this because it rejects contextual approaches to the interpretation and application of international law or because it finds that the practice in question has not matured into customary law? Perhaps the Court is uncomfortable with the practical implications of a contrary finding. Or perhaps it simply 'got it wrong', a possibility suggested by numerous distinguished commentators, including several members of the Court itself.

Finally, State practice, in the form of uses of force and State reactions thereto, continues to shape post-9/11 understandings of the *jus ad bellum*. Thus, instances of conflict such as the Israeli actions in Syria and Lebanon, Russian counter-terrorists strikes along its border with Georgia, the Russia-Georgia war, and Ethiopian military operations in Somalia are of normative import in understanding the state of the law today, as well as its likely vector.

In this book, Professor Lindsay Moir, Director of The University of Hull Law School, has taken on the herculean task of deconstructing and construing the *jus ad bellum* in the face of these complex events. He cautiously notes that 'it may be dangerous, or premature, to conclude that any enduring change in international law has occurred', and that 'the UN Charter paradigm regulating the use of force is not dead'. While some may disagree with these assertions, it is unquestionable that Professor Moir offers a surgically precise analysis that lends clarity to a topic which has thus far generated heated debate and no small amount of confusion. His contribution in this regard cannot be over estimated. Professor Moir's work will surely prove of great value to scholars and students. Much more important, however, will be its impact on State practice, for *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* offers practitioners in the field a sophisticated, yet accessible, resource for understanding the *jus ad bellum* as they provide advice to decision-makers on the most momentous calculation they can make in international affairs—whether to employ force in pursuit of national interests.

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June 2009

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Introduction

Since the creation of the United Nations in 1945, the ability of states to resort to armed force without violating what is, perhaps, the most fundamental principle of modern international law has been severely limited. Article 2(4) of the UN Charter renders the use of force unlawful, unless such force can be demonstrated to come within the ambit of the two exceptions to the prohibition contained elsewhere in the Charter, namely the inherent right of individual and collective self-defence, as provided for in Article 51, or force that has been authorised by the United Nations Security Council acting under Chapter VII of the Charter.

Despite these limitations, the use of force by states has remained a constant in international relations, and continues to permeate international society. Much of the relevant body of law—that is, the *jus ad bellum*—is the subject of widespread agreement, at least at the doctrinal level. Whilst relatively easy to state, however, the rules have not always been as easy to apply. Naturally, there have always been (and continue to be) areas of disagreement between states and commentators, good examples being the difficult questions of how and/or whether anticipatory self-defence and self-defence in response to terrorist attacks fit within the existing legal paradigm. Nonetheless, disagreement as to the legality of the unilateral resort to force by states has tended to focus as much on questions of how the particular facts of any given situation can best be reconciled with the framework of international law as it has on the scope and content of the *jus ad bellum* itself.

Recent developments, such as the increased importance of non-state actors, and their corresponding capacity to carry out large-scale acts of international terrorism in and against states across the world, have combined to place the traditional rules restricting armed force under considerable strain. In this respect, what has become known somewhat imprecisely as the 'War on Terror' has served as the catalyst (or perhaps, in some cases, the excuse) for a number of states to seek a loosening of the relevant legal constraints.[1] Although arguments relating to the use of force

[1] C Gray, *International Law and the Use of Force*, 3rd edn (Oxford, Oxford University Press, 2008) at 1, suggests that the phrase may simply have become a 'rhetorical device', designed to legitimate a number of other policy goals.

against non-state actors responsible for terrorist attacks had been made by states previously, there can be little doubt that attacks launched against the United States by international terrorists on 11 September 2001, the subsequent forcible response against Afghanistan, and the virtually universal levels of support and approval for the military response in question represented the main turning point in this area.

It is certainly true that 'September 11 generated a new dimension in legal and political discourse'.[2] Indeed, the heightened awareness—if not fear—of the threat of future similar terrorist acts has had an enormous impact on many aspects of domestic law and daily life in numerous states, resulting in a significant erosion of civil liberties. At the same time, it appeared that the use of armed force against terrorists and those states in which the terrorists were based was becoming more widely seen as an acceptable option by the international community, impacting in equal measure on international law and, in particular, the *jus ad bellum*. It even led the United States to claim an extensive right to take military action against threats to its national security *before* those threats had actually materialised. Not only did this approach seek to assert that a much broader notion of self-defence was possible than that of traditional 'anticipatory' self-defence (that is, self-defence against a threat that was *imminent*—a concept that was, and still is, considered rather controversial by some), it also apparently sought to assume much of the role assigned to the Security Council by Article 24 of the Charter of the United Nations.

Buoyed by the level of international approval for the military action taken against Afghanistan in 2001 (and seeking to place the desirability, necessity and legality of their actions in the context of a post-9/11 world and legal order), the United States and United Kingdom undertook further military operations against Iraq in 2003. Despite American attempts to broaden the right of self-defence, however, both states asserted that Operation Iraqi Freedom came within the pre-existing *jus ad bellum* framework, having been authorised by a combination of previous Security Council resolutions. In contrast to the widespread acceptance of the use of force against Afghanistan, the use of force against Iraq met with an extremely hostile reception. Indeed, Maogoto has suggested that international support not only for the United States, but also for any new discourse relating to the use of armed force against international terrorism, 'fizzled away when the US chose to squander the legal and moral capital it had gained in the action against Afghanistan by invading Iraq on a mish-mash of justifications that were generally met with international scepticism'.[3]

[2] JN Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Aldershot, Ashgate, 2005) at 4.

[3] ibid.

The level of international popular protest against Operation Iraqi Freedom was both massive and unprecedented.[4] Of particular interest and importance, however, was the fact that criticism of the United States and United Kingdom was not limited to the political or moral sphere. Rather, criticism repeatedly hinged on the perceived *illegality* of their actions. Thus, international law was clearly seen as having a central role to play in the debate. For a generation of international law scholars perhaps more used to defending the validity and relevance of their subject in the face of an apparent disregard for the law by states, such widespread and popular invocation of the rules of international law was as innovative as it was startling. Of course, Operation Iraqi Freedom continued regardless.[5] This perhaps provided confirmation, should it have been needed, that powerful states still feel relatively unconstrained by the rules of international law where those rules cannot easily be reconciled with national policy. Nonetheless, the military operations also resulted in the position whereby, 'international law on the use of force, its content and effectiveness, is now the object of more speculation than ever before'.[6]

Faced with both of these outcomes, Thomas Franck has asked what role the lawyer is to play. He concluded that

> it is to stand tall for the rule of law. What this entails is self-evident. When the policymakers believe it is to society's immediate benefit to skirt the law, the lawyer must speak of the longer-term costs. When the politicians seek to bend the law, the lawyers must insist that they have broken it. When a faction tries to use power to subvert the rule of law, the lawyer must defend it even at some risk to personal advancement and safety. When the powerful are tempted to discard the law, the lawyer must ask whether someday, if our omnipotence wanes, we may not need the law.[7]

Academic (and, indeed, popular) debate on the lawfulness or otherwise of both Operation Enduring Freedom and Operation Iraqi Freedom remains widespread and ongoing, and it is within this broad context, reflecting Franck's view of the role of international lawyers, that this book seeks to play its part. Chapter one accordingly sets out, in necessarily concise terms, the relevant rules of the *jus ad bellum* as they stood at the moment of the 11 September 2001 attacks. Chapters two and three then assess the extent to which military operations in and against Afghanistan and Iraq

[4] See D McGoldrick, *From '9–11' to the Iraq War 2003: International Law in an Age of Complexity* (Oxford, Hart Publishing, 2004) at 15.

[5] Or, perhaps, not quite 'regardless'—the states involved did bow (to a greater or lesser extent) to considerable public pressure with regard to the publication of formal legal justifications for their resort to force. Both the content of and process behind the legal advice received by the UK government in particular remains a continuing source of controversy.

[6] Gray, above n 1 at 4.

[7] TM Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *American Journal of International Law* 607 at 620.

respectively can be brought within the confines of that legal framework. In neither case is this particularly easy.

The crux of the matter, however, is that—at least, in simple terms—it can be argued that international law is simply reflective of what states are prepared to accept as being binding upon them, usually best evidenced by what states say, and what states do. The attitudes of states to developments in international relations and the international legal system are not static, and the rules of international law therefore possess an innate capacity to develop organically, and to change. Conduct which may have been difficult to reconcile with a pre-existing body of rules, when allied with a favourable response on the part of the international community to such conduct, and to the legal justifications advanced for it, can serve to modify the content of existing law. In this way, many commentators have contended that the international community's response to the 'War on Terror', taken in this context to encompass that military action taken against Afghanistan and Iraq, has significantly impacted upon the rules of international law regulating resort to armed force.

Some scholars have suggested that the operations in Afghanistan and Iraq could herald a sea-change in terms of when states may—or will—resort to force, possibly even risking the very future of the United Nations system as we know it.[8] As Christine Gray has indicated, the present discussion 'may be seen as part of the wider—and sometimes rather apocalyptic—debate as to whether the USA now feels itself free from any constraint of international law and the implications of this for the UN and for other states'.[9] Whether subsequent practice and the recent change of American administration will have a significant, long-term and calming influence in this area remains to be seen. At any rate, a detailed examination of the political impact of these military operations on the future of the United Nations and the UN Security Council is beyond the scope of this volume.

As far as international law is concerned, however, it is certainly possible that the use of force against Afghanistan, in particular, has resulted in some level of change to the *jus ad bellum*. In light of the conclusions reached in chapters two and three, and the continuing debate in this area, chapter four goes on to assess subsequent developments and treatments of the relevant questions, as expressed since 2003 by the International Court of Justice, by states and by commentators alike. It concludes with an examination of whether and/or the extent to which the rules regulating the resort to force in international law have undergone (or, indeed, may still be undergoing) a radical transformation.

[8] See eg, Franck, ibid; RA Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97 *American Journal of International Law* 590; TJ Farer, 'The Prospect for International Law and Order in the Wake of Iraq' (2003) 97 *American Journal of International Law* 621; JE Stromseth, 'Law and Force After Iraq: A Transitional Moment' (2003) 97 *American Journal of International Law* 628.

[9] Gray, above n 1 at 252.

1

General Legal Framework 1945–2001
The UN Charter Paradigm and the Jus ad Bellum

THE POINT OF origin for any discussion relating to the rules of the *jus ad bellum*—that is, that branch of international law regulating the resort to armed force by states—must be the universally accepted truth that international law clearly prohibits the use of force by states in their international relations. Many scholars have sought to address the historical nature and development of the prohibition in considerable detail.[1] The purpose of this book is simply to assess whether the military response to the 'War on Terror' (which, for present purposes, is taken broadly to comprise the military operations launched against Afghanistan in the wake of the 11 September 2001 terrorist attacks, and against Iraq in 2003) has brought about any change in the relevant legal regime. An examination of the international legal system's various attempts to limit and/or outlaw the use of force by states is not accordingly necessary. Rather, it will suffice to begin with a brief examination of the *jus ad bellum* as it stood on the morning of 11 September 2001.[2]

I THE PROHIBITION OF THE USE OF FORCE

The prohibition on the use of force in international law crystallised in 1945, and is articulated in Article 2(4) of the United Nations Charter, in the following terms:

[1] See eg, I Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963) at 3–122; SC Neff, *War and the Law of Nations: A General History* (Cambridge, Cambridge University Press, 2005) at 285–356; Y Dinstein, *War, Aggression and Self-Defence*, 4th edn (Cambridge, Cambridge University Press, 2005) at 63–85; AC Arend and RJ Beck, *International Law and the Use of Force* (New York, Routledge, 1993) at 11–25; L C Green, *The Contemporary Law of Armed Conflict*, 3rd edn (Manchester, Manchester University Press, 2008) at 1–25; A Randelzhofer, 'Article 2(4)' in B Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd edn (Oxford, Oxford University Press, 2002) Vol I, 112 at 114–16.

[2] Hence, reference to several works in this chapter will be to those editions that were current at that date, rather than to the most recent edition.