1 Introduction: The Jus Contra Bellum and the Power of Precedent

Tom Ruys, Olivier Corten, Alexandra Hofer

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Edited By: Tom Ruys, Olivier Corten, Alexandra Hofer

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(p. 1) 1 Introduction: The *Jus Contra Bellum* and the Power of Precedent

The international law on the use of force, also known under its Latin epithet of *jus ad bellum*, or, perhaps more accurately, *jus contra bellum*, is one of the oldest branches of international law. Its emergence is closely intertwined with the birth of international law itself. More than any other domain of international law, it is an area where law and power politics collide. Notwithstanding the International Court of Justice's bold assertion that there exists 'general agreement'[1] as to what constitutes an 'armed attack' for purposes of triggering the right of self-defence, and notwithstanding the reaffirmation in the 2005 World Summit Outcome that the Charter provisions on the use of force 'are sufficient to address the full range of threats to international peace and security',[2] it is no secret that the interpretation and application of the *jus contra bellum* has given rise to, and continues to give rise to, fierce debates and disagreement among legal scholars and, more importantly, among states. A closer look at legal doctrine reveals that different views on the interpretation of the rules governing the use of force between states often reflect different underlying methodological approaches (with authors according different weight, for instance, to 'physical' or 'verbal' state practice).[3] In light hereof, some have created labels, seeking to distinguish between 'restrictionists' and 'expansionists', between 'bright-liners' and 'balancers', or between 'purists' and 'eclectics' (sometimes even categorizing scholars accordingly).[4] More imperceptibly, when dealing with the law on the use of force, members of the 'invisible college of international laywers' often find it difficult to set aside their own values, allegiances, and perceptions of what is 'fair' in international relations.[5]

At the same time, a common thread in legal doctrine is the importance attached to previous precedents to interpret the *jus contra bellum*. The power of precedent is not limited to legal doctrine, but is also recognized by states themselves, as can be inferred from numerous Security Council debates. Reliance on precedent—understood here as referring not to *judicial* precedents, but rather to precedents from state practice and their reception at the international level (or, what Michael Reisman would call 'international (p. 2) incidents'[6])—is indeed an important and unavoidable element of the argumentative process from which the *jus contra bellum* derives its compliance pull. It can have a beneficial effect in that it can contribute to ensuring consistency and to clarifying the precise meaning and scope of the relevant rules, thus resulting in greater legal certainty. Conversely, it also entails evident risks. Precedents have often been interpreted in completely different ways (by scholars or states), and have sometimes been interpreted in ways which substantially depart from the arguments invoked by the intervening states themselves or from the general appraisal of the international community at the time of the events. Such approach may reflect a deliberate methodological approach, in particular a denial of the relevance of 'verbal' practice or a rejection of the *Nicaragua* axiom.[7] Yet, it may also result from a lack of awareness of the precise factual circumstances of past incidents or of the concomitant exchanges of claims and counterclaims by the protagonists and other states. On a different note, excessive reliance on certain precedents to the detriment of others risks creating a distorted image. More concretely, it is clear that scholars and states have often tended to focus on cases involving interventions by a small number of western states (particularly the United States) to sketch the contours of the *jus contra bellum*.

Against this background, the present volume provides a collection of sixty-five case studies pertaining to specific incidents involving the cross-border use of force, all written by experts in the field of *jus contra bellum*. The incidents have all occurred *after* the adoption of the UN Charter in 1945, save for the 1837 *Caroline* incident, which, in light of its omnipresence in legal doctrine and state discourse, could not be ignored. The volume has sought to comprehensively map the important *jus contra bellum* precedents throughout the Charter era. The cases concerned include both large-scale military interventions involving ground forces, but also more small-scale incidents including hostile encounters between individual military units, targeted killings (eg through air strikes or commando raids), and hostage rescue operations. Moreover, the volume covers both military operations that have been debated at length within the UN Security Council and/or the UN General Assembly, as well as operations that have hardly evoked any international reaction and/or legal scrutiny at all. It addresses military interventions involving both western and non-western states, great powers and smaller states alike. The editors readily acknowledge that the overview is not exhaustive—readers, we fear, will not receive a refund for identifying precedents that are missing. Indeed, as is clear, for instance, from the periodic Digests of State Practice featured in the *Journal on the Use of Force in International Law* (JUFIL), border incidents and isolated clashes between military units are an aspect of daily life in many regions of the world. It follows that the volume necessarily presents a selection of case studies, albeit one that, we believe, is not arbitary in nature but the result of careful deliberation. Case studies are ordered chronologically, starting with the 1950 Korean War and ending with the 2017 ECOWAS intervention in the Gambia.

Clearly, most of the case studies included in this volume have previously been the subject of scholarly analysis. This is certainly true for well-known cases such as the US intervention in Afghanistan or the 1999 Kosovo crisis, which have given rise to numerous

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(p. 3) academic articles in various international law journals, but also for many other, if somewhat less 'high-profile', incidents, such as the Belgian operation in Stanleyville, Congo in 1964 or the Ethiopian intervention in Somalia.[8] Entire monographs have even been devoted to some cases.[9] Furthermore, various monographs exist of course, whether general *jus contra bellum* handbooks or more thematically focused works, that touch upon a large number of cases within a single volume.[10]

However, the distinguishing features of the present volume are twofold. First, to the editors' knowledge, this is the first attempt to systematically bring together the main *jus contra bellum* precedents since 1945 into a single work of reference,[11] including moreover various cases that have largely escaped from academic attention (such as the Turkish intervention in northern Iraq in 2007–08 or the killing by Israeli commandos of Khalil al-Wazir in Tunis in 1988).

Second, in order to ensure consistency and transparency, and to maximize the value of the volume as a work of reference, all case studies follow a common approach. Specifically, every chapter starts with a brief overview of the factual background and the political context against which the case is set. Subsequently, the chapters detail the exchange of legal arguments and counter-arguments, by identifying the positions taken by the protagonists involved in the cross-border use of force concerned as well as the reactions from third states and international organizations. The third and fourth sections of each chapter are devoted respectively to the appraisal of the legality of the incident/operation concerned, and to an appraisal of the broader implications of the precedent (or lack thereof) for the evolution of the international law on the use of force. As editors, we have tried to steer clear from influencing the substantive analyses of the contributing authors on controversial *jus contra bellum* issues (issues on which the editors themselves at times hold conflicting views). Yet, we have insisted—perhaps somewhat obsessively—that authors rigidly respect the abovementioned template. Furthermore, as far as the legality assessment is concerned, we have urged the authors to not only provide their personal legal assessment of the case, but to adopt—inasmuch as possible—a broader perspective and to examine how legal doctrine in general has assessed the legality and the broader legal ramifications of each case, while, where appropriate, clearly identifying personal views as such. Thus, while academic articles focusing on specific incidents at times tend to primarily reflect the author's appraisal of the legality of the intervention concerned, the approach chosen here

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(p. 4) has sought to ensure that the case studies provide a balanced appraisal of the legality of the incidents (reflecting opposite views where appropriate) and of the precedent's place and relevance in the realm of the *jus contra bellum*.

We are deeply grateful to all of the authors for integrating the abovementioned approach into their respective chapters (and apologize for any nuisance caused along the way). We believe it has contributed to largely achieving the stated objective and to establishing the value of this volume as a work of reference for legal scholars, practitioners, and civil servants alike. We can only hope the reader will agree.

Footnotes:

1 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 1986 14, [195].

2 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, [79].

3 Further: Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' (2005) 16 European Journal of International Law 803–22; Olivier Corten, 'Breach and Evolution of Customary International Law on the Use of Force', in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Nijhoff 2005) 119–44; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 29–52.

4 See, eg, Matthew C Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013) 24 European Journal of International Law 151–89; Tom Farer, 'Can the United States Violently Punish the Assad Regime? Competing Visions (Including that of Anthony D'Amato) of the Applicable International Law' (2014) 108 American Journal of International Law 701–15. See also the contributions by Kammerhofer, De Hoogh, and van Steenberghe in the Leiden Journal of International Law, Issue (2016) 29:1.

5 Ruys (n 3) 514.

6 W Michael Reisman, 'The Incident as a Decisional Unit in International Law' (1984) 10 Yale Journal of International Law 1–20.

7 *Nicaragua* (n 1) [186]: 'If a State acts in a way prima facie incompatible with a recognized rule, but defends it conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.'

8 See, eg, Alain Gérard, 'L'opération Stanleyville-Paulis devant le parlement belge et les Nations Unies' (1967) Revue belge de droit international 242; Olivier Corten, 'La licéité douteuse de l'action militaire de l'Ethiopie en Somalie et ses implication sur l'argument de l'"intervention consentie"' (2007) 111 Revue générale de droit international public 513.

9 See, eg, John Quigley, *The Six-Day War and Israeli Self-Defense* (CUP 2013).

10 See, by way of illustration, Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008); Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011); Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP 2002); Olivier Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* (2nd edn, Pedone 2014); *The Law against War* (Hart Publishing 2010); Mary Ellen O'Connell, *International Law and the Use of Force, Cases and Materials* (2nd edn, Foundation Press 2008); Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010); Michael Scholz, *Staatliches Selbstverteidigungsrecht gegen terroristische Gewalt* (Duncker & Humblot 2006); Christiane Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* (Duncker & Humblot 2006); Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Ashgate 2005); Kinga J Tibori-Szabó, *Anticipatory Action in Self-Defence: Essence and Limits under International Law* (TMC Asser Press 2011); Arthur R Kreutzer, *Preemptive Self-Defense: Die Bush-Doktrin und das Völkerrecht* (M Press 2004); Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010); Linos-Alexandre Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense* (Librairie générale de droit et de jurisprudence 1990).

[11] To our knowledge, the only work that shares some resemblance in this respect is Mark Weisburd's *Use of Force: The Practice of States Since World War II* (Pennsylvania State University Press 1997).