Introduction: The Jus Contra Bellum and the Power of Precedent

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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 interwoven 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’ 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’, 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).

In light thereof, some have created labels, seeking to distinguish between ‘restrictionists’ and ‘expansionists’, between ‘strict constructionists’ and ‘expansivists’, between ‘bright-liners’ and ‘balancers’, or between ‘purists’ and ‘eclectics’ (sometimes even categorizing scholars accordingly). More imperceptibly, when dealing with the law on the use of force, members of the ‘invisible college of international lawyers’ often find it difficult to set aside their own values, allegiances, and perceptions of what is ‘fair’ in international relations.

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’)—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 Nicaraguan axiom. 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 concern both large-scale military interventions involving ground forces, but also more small-scale incidents including hostage 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 arbitrary 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 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.13 Entire monographs have even been devoted to some cases.14 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.15

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,16 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 Tunisia 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—as much 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

References

Footnotes:

2 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, [79].
5 Ruys (n 3) 514.
7 Nicaragua (n 1) [198], ‘If a State acts in a way prima facie incompatible with a recognized rule, but defends it 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.’
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).