# *Acknowledgements*

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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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