

## **International Law and the Use of Force: Ares Enchained**

Book project

Giovanni Distefano\* and Etienne Henry†

The contemporary legal regime governing the use of force by States, also known as *ius ad bellum*, or perhaps more accurately *ius contra bellum*, finds its proximate historical origins in legal and institutional developments that took place in the aftermaths of the First World War, most notably with the conclusion of the Covenant of the League of Nations and of the General Treaty for Renunciation of War as an Instrument of National Policy, signed at Paris, August 27, 1928 (the so-called ‘Briand-Kellogg Pact’)<sup>1</sup> and, most importantly, at the end of the Second World War with the adoption the Charter of the United Nations adopted in San Francisco on 26 June 1945 (hereinafter the “UN Charter”). These are the *dramatis personae* that will stage the most revolutionary advancement in contemporary public international law, the ostracization of force from international relations.

During the Cold War, the standoff between the USSR and the USA led, in most cases, to the paralysis of the organs supposed to guarantee the collective security of UN member States. This situation resulted, in turn, to a considerable weakening of the effectiveness of the fundamental norm of the system envisioned by the UN Charter, namely, the prohibition of the use and threat of force.<sup>2</sup> The easing of relations ensuing from the end of the Cold War, provoked major changes, especially as regards the practice of the UN Security Council, soon sparking unrealistic expectations as to the role of the UN Security Council in a world increasingly plagued with internal strife and mass atrocities. Such hopes were too soon frustrated as a result of the lack of action by the international community when faced with the genocides of Rwanda and Srebrenica.

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\* Professor of International Law, University of Neuchâtel and Academy of International Humanitarian Law and Human Rights (Geneva).

† Associate Legal Officer, International Court of Justice and Lecturer of International Humanitarian Law, University of Neuchâtel. The bulk of the contribution of Etienne Henry to this book project was researched and written during academic stays funded by the Swiss National Science Foundation at the Centre de droit international at the Université libre de Bruxelles as well as at ANU College of Law, in Canberra between late 2016 and mid-2018.

<sup>1</sup> 94 LNTS 57.

<sup>2</sup> This led some authors to affirm that the whole regime of *ius contra bellum* was on the verge of falling in desuetude. See Thomas M Franck, ‘Who Killed Article 2(4)?’ (1970) 64 American Journal of International Law 809.

Consequently, ‘Western States’ under US leadership increasingly resorted to force on the basis of unilateral decisions, notably in the context of the aerial bombardment of Yugoslavia during the Kosovo War in 1999. After the turn of the millennium, this trend was accentuated with the raise of international terrorism – culminating with the attacks of September 11, 2001 – as well as the US-led aggression against Iraq in 2003, and, more recently, with the ascent and fall of the Organization of the Islamic State (also known as ISIS or ISIL). By 2011, in the wake of the debacle of the UN-authorized intervention in Libya, such tendency caused the crumbling of mutual trust among the permanent members of the Security Council, taking the Organization back to a state of chronic apathy. Western States were soon to be followed on the path of unilateralism by other States, such as for instance Russia (with the annexation of Crimea in 2014) or Turkey (with its repeated armed interventions on Syrian territory), hence imperiling the effectiveness of the rule prohibiting the threat and use of force in international relations.

In this context, and in the face of an increasingly pervasive practice, it has been claimed that the regime of *ius contra bellum* has undergone major shifts as regards the permissibility of certain categories of unilateral coercive actions. These may include cases of: (sometimes preventive) armed interventions against non-State actors on the territory of third States allegedly unable or unwilling to prevent hostile acts imputable to such non-State actors; preventive use of force with a view to ensuring security interests (for instance in the case of possession of weapons of mass destruction); armed interventions in the name of the protection of victims of mass atrocities (the so-called ‘humanitarian intervention’, sometimes rebranded under the heading of an abusive and one-sided interpretation of the doctrine of the responsibility to protect).<sup>3</sup>

The ensuing debates have constantly been, somewhat frivolously, depicted as the consequence of fundamental and theoretical disagreement between so-called ‘restrictivist’ and ‘expansionist’ ‘approaches’, as if points of legal methodology are only the result of choices made on the basis of theoretical (if not political) preferences among a range of equally valid options offered to the international lawyer. One of the basic tenets of this book project is rather that the determination of the scope and interpretation of obligations resulting from rules of *ius contra bellum* is not a matter left to the intellectual leanings – or even whims – of academics or decision-makers but must be assessed through the faithful application of the relevant rules and principles of

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<sup>3</sup> See generally, arguing that the whole regime of *ius contra bellum* is on the verge of futility, Michael J Glennon, ‘The Emerging Use-of-Force Paradigm’ (2006) 11 *Journal of Conflict and Security Law* 309, 315-6.

international law (such as the rules on the identification of rules of customary international law or the rules applicable to the interpretation of treaties as codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, to name only the most important).

Representing the continuation of research work already conducted in the field by Giovanni Distefano and Etienne Henry, either jointly or individually,<sup>4</sup> this book project ambitions to embrace the entirety of the legal regime applying to the use of force in international law in a single volume. In addition to the abovementioned positivistic approach, the book project is not limited to a purely legalistic endeavour, but also encompasses – wherever deemed appropriate – an historical dimension, tracing back the intellectual origins of the field and situating the rules and the related practice in their historical and political context.

Apart from the general introduction and conclusion as well as the usual bibliographical and critical resources, the book project is constituted by twelve chapters, divided into five parts.

Part I is a purely historical and sets the stage for the emergence of the contemporary regime on the use of force in international law, tracing its historical and intellectual origins throughout human history, starting, in chapter 1, with the doctrine of the just war (*bellum iustum*). The following two chapters treat of what is truthfully described as Vattel's paradigm of 'war in due form' (*guerre en forme*) from the 18<sup>th</sup> onwards up to the late 19<sup>th</sup> century and the 20<sup>th</sup> century with the emergence of a genuine *ius contra bellum*, especially thanks to the revolutionary Briand-Kellogg Pact.

Part II provides a comprehensive exposé of the law as it applies to unilateral use of force by States, be in breach of the fundamental prohibition of the use of force – the scope of which is

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<sup>4</sup> See, e.g., Giovanni Distefano, 'La crise libanaise de l'été 2006 à l'aune du *ius ad bellum*' (2008) 36 *Journal of Sharia and Law* 25; Giovanni Distefano, 'Use of Force' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014); Giovanni Distefano, 'La longue marche vers l'abrogation du droit de mener la guerre en tant que moyen d'auto-protection: *happy end* ou *remake en vue?*' in Denis Alland and others (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff Publishers 2014); Giovanni Distefano, 'Wither Away State Right to Wage War Unilaterally' (2014) 57 *Journal of Shariah and Law* 23; Giovanni Distefano and Etienne Henry, 'The International Court of Justice and the Security Council: Disentangling Themis from Ares' in Karine Bannelier, Théodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the 'Corfu Channel' Case* (Routledge 2012); Etienne Henry, 'The Sukhoi Su-24 Incident between Russia and Turkey' (2016) 4 *Russian Law Journal* 8; Etienne Henry, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (with Special Reference to the *Jus Contra Bellum* Regime)' (2017) 18 *Melbourne Journal of International Law* 260; Etienne Henry, 'The Falklands/Malvinas War – 1982' in Olivier Corten and Tom Ruys (eds), *International Law and the Use of Force: A Case-Based Approach* (Oxford University Press 2018), 361-378; Etienne Henry, 'The Road to Collective Security: Soviet Russia, the League of Nations, and the Emergence of the *Ius Contra Bellum* in the Aftermath of the Russian Revolution (1917–1934)' (2020) 22 *Journal of the History of International Law* 355.

elucidated and delineated in chapter 4 – or in the only exceptional situation where unilateral use of force is tolerated, namely in cases of self-defence against a prior armed attack (chapter 5). In addition, chapter 6 is dedicated to refuting allegations of further circumstances, or grounds, triggering to a right to a unilateral use of force: armed counter-measures, self-defence lite, intervention for the protection of nationals abroad, hot pursuit on land, broad self-help, ideological or humanitarian interventions, or the invocation of a state of necessity.

Part III aims to situate the *ius contra bellum* regime within the international legal order. Chapter 7 explores the points of contact of *ius contra bellum* with other ramifications of general international law, including the law of treaties (coercion as a cause of nullity of treaties) as well as the modes of acquisition of territory by States (with the paramount principle of the inadmissibility of acquisition of territory by force and its corollaries in terms of recognition and effectiveness) and the law of state responsibility. Chapter 8 details the relations (or lack thereof) between the regime of the law of armed conflict (or *ius in bello*) and *ius contra bellum*. In spite of the validity of the fundamental principle of the separation of *ad bellum* and *in bello* issues, the distinction between these two regimes is sometimes obscured by the fact that they apply in parallel to similar (if not entirely identical) sets of facts. The application of the principles of necessity and proportionality in the two regimes is a perfect illustration of this interlacement: similarity but having separate scopes and aiming at different purposes.

Part IV deals comprehensively with the system of collective security. Chapter 9 discusses the role of the UN Security Council and of the UN General Assembly in this regard. Chapter 10, on the use of force in the context of peacekeeping operations, carefully scrutinizes the practice in this field since the inception of such operations in the 1950s to the present practice of ‘robust’ peacekeeping operations endowed with a mandate of protection of the civilian population under chapter VII of the UN Charter and the ensuing theoretical and practical difficulties and puzzles.<sup>5</sup>

Part V, finally, focuses more specifically on two current challenges to the legal regime of *ius contra bellum*, that may shake up the whole edifice of *ius contra bellum*. First (chapter 11), the phenomenon of international terrorism and the alleged emergence of a right to intervene on the territory of third States against terrorist organizations (or, more neutral, “Armed Non-State

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<sup>5</sup> A draft version of this chapter is available online at the following address: [https://www.academia.edu/37018831/Use\\_of\\_Force\\_and\\_Peacekeeping\\_Operations](https://www.academia.edu/37018831/Use_of_Force_and_Peacekeeping_Operations).

Actors”). Second, the question of interpretation and application of *ius contra bellum* rules in the context of the use of information and communication technologies (chapter 12).<sup>6</sup>

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<sup>6</sup> A draft version of this chapter is available online at the following address: [https://www.academia.edu/37620231/Chapter\\_13\\_Cybersecurity\\_and\\_Jus\\_contra\\_Bellum](https://www.academia.edu/37620231/Chapter_13_Cybersecurity_and_Jus_contra_Bellum).

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**Commenté [HE1]:** Je crois que nous avons envisagé (comme je te l'avais suggéré) de consacrer un chapitre entier à la question des droits de l'homme (droit à la paix, rôle éventuel du *ius contra bellum* dans le contexte des restrictions et dérogations aux droits de l'homme etc.). D'où la disparition du chapitre 9.

A la réflexion je crois que ce serait excessif (surtout au vu du fait que j'ai si peu de temps disponible). Peut-être quelque chose pour la deuxième édition ? 😊 A ce stade, on pourrait peut-être simplement ajouter quelques paragraphes à ton chapitre 7, pour attirer l'attention du lecteur sur la question ?

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