

CONTENTS

Introduction	<i>page</i> 1
Related Frameworks of International Law	4
The Sources of the Law on the Use of Force and the Question of Methodology	6
Legal and Procedural Issues Associated with the <i>Jus ad Bellum</i>	10
Subsidiary Means for Determining (and Shaping?) the Law	14
Aims, Limitations and Structure of the Book	16
Acknowledgements	18
PART I The Prohibition of the Threat or Use of Force	
1 The General Breadth and Scope of the Prohibition of the Threat or Use of Force	23
1.1 Introduction	23
1.2 Historical Attempts at Regulating the Use of Force in International Affairs	24
1.3 The Sources of the Contemporary Prohibition of the Threat or Use of Force	31
1.3.1 The Text of Article 2(4)	32
1.3.1.1 Lack of Express Mention of Exceptions to the Prohibition	33
1.3.1.2 ‘against the territorial integrity or political independence of any state’	33
1.3.1.3 ‘or in any other manner inconsistent with the purposes of the United Nations’	35
1.3.1.4 The Subjects of the Prohibition: ‘International Relations’	36
1.3.2 The Peremptory Status of the Prohibition	38
1.4 The ‘Threat’ of Force	40
1.4.1 The Element of a Demand or an Ultimatum	41
1.4.2 The Communicative Nature of Threats of Force	42
1.4.3 Threats of Force Not in a Verbal or Written Form	44
1.4.4 The Credibility of a Threat of Force	47
1.4.5 Uses of Force versus Threats of Force: Normative Relativity?	48

vi	Contents	
1.5	Accountability, State Responsibility and Responses to a Threat or Use of Force	48
1.5.1	Reparations	50
1.5.2	Countermeasures	51
1.5.3	Self-Defence	52
1.5.4	Institutional Involvement: The United Nations and Regional Organisations	53
1.5.5	Courts and Tribunals	54
1.5.5.1	The Actions of States	54
1.5.5.2	The Actions of Individuals: The Crime of Aggression	55
1.5.5.2.1	An Agreed Definition for the International Criminal Court	57
1.5.5.2.2	The Crime of Aggression as a ‘Manifest Violation’ of the Charter of the United Nations	58
1.5.5.2.3	The <i>Mens Rea</i> Element of the Crime of Aggression	60
1.5.5.2.4	The Potential Impact of the Jurisdiction of the International Criminal Court over the Crime of Aggression	61
1.5.6	Commissions of Inquiry	65
1.6	The Emerging Recognition of a Human Element to the Prohibition of Inter-State Force	66
1.6.1	The UN Human Rights Committee, the Right to Life and the <i>Jus ad Bellum</i>	68
1.6.1.1	Objections to the Approach of the UN Human Rights Committee	69
1.6.1.2	Implications of Providing the <i>Jus ad Bellum</i> with a Human Element	70
1.7	Questioning the Continued Relevance, Scope and Effectiveness of the Prohibition	72
1.7.1	State Practice and the Claimed ‘Death’ of the Prohibition of Force	72
1.7.2	Justifications for and Reactions to the Use of Force	76
1.7.3	Reaffirmation of the Prohibition in the Abstract	78
1.7.4	Reaffirmation of the Prohibition in the Context of Cyber Operations	79
1.8	Conclusion	86
	Questions	87
	Suggested Further Reading	88
2	The Meaning of ‘Force’	89
2.1	Introduction	89
2.2	The Principle of Non-intervention	90
2.3	The Type of ‘Force’ Envisaged in Article 2(4)	92
2.4	The Meaning of ‘Armed Force’	94
2.4.1	The Means Used	95
2.4.2	The Effects Created	97
2.4.3	The Indirect Use of Armed Force	102
2.5	The ‘Gravity’ Element of a Use of Force	105

vii Contents

2.5.1	Distinguishing ‘Use of Force’, ‘Armed Attack’ and ‘Aggression’	105
2.5.1.1	‘Armed Attack’	105
2.5.1.2	‘Aggression’	107
2.5.2	‘Minimal’ Uses of Force and the Possible Existence of a <i>De Minimis</i> Threshold	109
2.5.2.1	The <i>De Minimis</i> Gravity Threshold: Of a Quantitative or Qualitative Nature?	112
2.6	The <i>Mens Rea</i> Element of the Use of Force	125
2.6.1	Distinguishing General Motives for Action and Intention	126
2.6.2	Mistake	127
2.6.3	Discerning Hostile Intent	128
2.7	Conclusion	130
	Questions	130
	Suggested Further Reading	131

PART II The Use of Force in the Context of Collective Security

3	The Use of Force under the Auspices of the United Nations	135
3.1	Introduction	135
3.2	The Maintenance of International Peace and Security: The Division of Competence within the United Nations	137
3.2.1	The Security Council	137
3.2.2	The General Assembly	140
3.2.3	The Secretariat	142
3.3	The Forcible Powers of the Security Council in the UN Charter	143
3.3.1	Article 39: The ‘Gateway’ Provision to Chapter VII	143
3.3.1.1	Threats to the Peace	144
3.3.1.2	Breaches of the Peace and Acts of Aggression	147
3.3.2	Envisaged Measures under Chapter VII	148
3.3.3	Limits to the Forcible Powers of the Security Council	149
3.4	The Chapter VII Powers of the Security Council to Use Force in Practice	153
3.4.1	The Cold War Era (1945–89)	153
3.4.2	The Post–Cold War Era (1989–)	156
3.4.2.1	The Development of the ‘Authorisation’ Method	156
3.4.2.2	Subsequent Practice in the Use of the Authorisation Method	158
3.4.2.3	Concerns Regarding the Authorisation Method	161
3.4.2.4	The General Assembly and the Use of Force	165
3.5	Chapter VIII and the Authorisation of ‘Regional Organisations’	167
3.5.1	The African Union	169
3.5.2	The North Atlantic Treaty Organization	171
3.6	Conclusion	172

viii	Contents	
	Questions	173
	Suggested Further Reading	174
4	Issues in Relation to Authorisation by the United Nations Security Council	175
4.1	Introduction	175
4.2	Striking the Balance between Unilateralism and Multilateralism	176
4.3	The Revival of Past Authorisations	179
4.3.1	The Mandate Contained within Resolution 678 (1990)	182
4.3.2	The Concept of ‘Material Breach’ in the Practice of the Security Council	183
4.3.3	The Authority to Determine a ‘Material Breach’ and the Consequences	185
4.3.4	The Legacy of the Revival Argument	187
4.4	Determining the Breadth and Scope of an Authorisation	189
4.4.1	Libya (2011)	189
4.4.1.1	Assistance to Opposition Forces	191
4.4.1.2	Regime Change	194
4.4.2	Côte d’Ivoire (2011)	195
4.5	The Doctrine of ‘Implied’ Authorisation	196
4.5.1	Unilateral Enforcement of the ‘Collective Will’ of the UN Security Council	197
4.5.1.1	Iraq (1991–2002)	197
4.5.1.2	Kosovo (1999)	199
4.5.1.3	Assessing Claims to Unilaterally Enforce the ‘Collective Will’	201
4.5.2	Retrospective Authorisation or Approval	202
4.5.2.1	Liberia (1990–7)	203
4.5.2.2	Sierra Leone (1996–9)	204
4.5.2.3	Assessing Claims of Retrospective Authorisation or Approval	206
4.6	Implementing the ‘Responsibility to Protect’	207
4.6.1	Enforcement of the Secondary Responsibility to Protect	208
4.6.2	R2P: Old Wine in New Bottles?	211
4.6.2.1	Darfur (Sudan) (2003–20)	212
4.6.2.2	Libya (2011)	213
4.6.2.3	Syria (2011–)	216
4.7	Conclusion	217
	Questions	218
	Suggested Further Reading	219
5	United Nations Peacekeeping and the Use of Force	220
5.1	Introduction	220
5.2	Attempting to Define UN Peacekeeping	222
5.3	The Legal Basis for UN Peacekeeping Operations	224
5.4	The Basic Principles of UN Peacekeeping	226
5.4.1	Consent of the Parties	227

ix	Contents	
5.4.2	Impartiality	227
5.4.3	Non-use of Force Except in Self-Defence	228
5.5	Peacekeeping Operations: 1945–89	230
5.5.1	UNEF I (1956–67)	230
5.5.2	ONUC (1960–4)	232
5.5.3	Other Notable Cold War Peacekeeping Operations	233
5.6	Peacekeeping Operations: 1990–2022	234
5.6.1	UNPROFOR (1992–5)	235
5.6.2	UNOSOM II (1993–5) and AMISON (2007–)	236
5.6.3	UNAMSIL (1999–2005)	238
5.6.4	UNAMID (2007–21)	239
5.6.5	MONUC (2000–10) and MONUSCO (2010–)	240
5.6.6	MINUSMA (2013–)	242
5.6.7	MINUSCA (2014–)	243
5.7	The Evolution in the Use of Force by UN Peacekeeping Operations	245
5.7.1	Non-use of Force Except in Self-Defence	246
5.7.2	Consent	249
5.7.3	Impartiality	250
5.7.4	Peace Observation, Peacekeeping, Peace Enforcement or War Fighting?	251
5.8	Conclusion	253
	Questions	255
	Suggested Further Reading	256
PART III The Use of Force in Self-Defence		
6	General Aspects of the Right of Self-Defence	259
6.1	Introduction	259
6.2	The Concept of an ‘Armed Attack’	261
6.2.1	The Perpetrators of an Armed Attack	262
6.2.2	The Targets of an Armed Attack	267
6.2.2.1	The Armed Forces of a State	267
6.2.2.2	State Interests	269
6.2.2.3	Embassies	269
6.2.2.4	Targets within Cyberspace	271
6.2.3	Issues of Proof	272
6.2.4	The <i>Mens Rea</i> Element: Does an Armed Attack Need to Be Intended?	274
6.2.5	A Gravity Threshold Distinguishing ‘Armed Attacks’ from ‘Uses of Force’?	276
6.2.5.1	The Threshold in the General Practice of States	281
6.2.5.2	The Gravity Threshold in the Context of Cyber Operations	285
6.2.5.3	The ICJ’s Concept of ‘Proportional Forcible Countermeasures’	290

x	Contents	
6.2.5.4	Gravity and the ‘Accumulation of Events’ Theory	290
6.3	The Customary Requirements of Necessity and Proportionality	296
6.3.1	Necessity	299
6.3.1.1	No Reasonable Alternatives to the Resort to Armed Force	299
6.3.1.2	The Use of Force for the Attainment of Defensive Objectives	305
6.3.1.2.1	The Formal Illegality of ‘Armed Reprisals’	306
6.3.1.2.2	The Fine Line between Armed Reprisals and Self-Defence	308
6.3.2	Proportionality	316
6.3.2.1	Proportionality and the ‘Accumulation of Events’ Theory	321
6.4	The Protection of Nationals Abroad	322
6.4.1	Attacks on Nationals as an Armed Attack	324
6.4.2	Attacks or Threats to Nationals by a Foreign Government	327
6.4.3	Attacks or Threats to Nationals that a Foreign Government Is Either Unwilling or Unable to Prevent	333
6.4.3.1	Operations to Extract Nationals	335
6.5	The Right of Collective Self-Defence	336
6.5.1	The Nature of Collective Self-Defence	337
6.5.2	The Regulation of the Right of Collective Self-Defence	338
6.6	The Role of the UN Security Council	343
6.6.1	The Reporting Requirement	344
6.6.2	The ‘Until Clause’	349
6.7	Conclusion	354
	Questions	355
	Suggested Further Reading	356
7	Preventative Self-Defence	357
7.1	Introduction	357
7.2	Intercepting an Armed Attack	359
7.3	Anticipating an Armed Attack: The Concept of ‘Imminence’	360
7.3.1	The Academic Debate: ‘Expansionists’ versus ‘Restrictionists’	361
7.3.2	International Jurisprudence	362
7.3.3	Cold War State Practice on the Right of Anticipatory Self-Defence: The 1967 Six-Day War	363
7.4	Pre-empting the Development of a Threat of an Armed Attack: Moving beyond ‘Imminence’?	364
7.4.1	Cold War State Practice on the Right of Pre-emptive Self-Defence	365
7.4.1.1	The 1962 Cuban Missile Crisis	365
7.4.1.2	The 1981 Israeli Strike on the Osiraq Nuclear Reactor (Iraq)	367
7.4.2	Attempts to Adapt the Concept of ‘Imminence’ in the Aftermath of 9/11: The ‘Bush Doctrine’	368
7.4.2.1	Test Cases for the Bush Doctrine of Pre-emptive Self-Defence?	371
7.4.2.1.1	Iraq (2003)	371

xi	Contents	
7.4.2.1.2	Syria (2007)	373
7.4.2.2	General Reaction to the Bush Doctrine of Pre-emptive Self-Defence	374
7.4.2.3	Pre-emptive Self-Defence and the International Court of Justice	378
7.4.3	The Obama Doctrine of 'Necessary Force'	379
7.5	Reassessing 'Imminence' in the Light of Contemporary Threats: The 'Bethlehem Principles' and Beyond	381
7.5.1	From 'Temporal' to 'Contextual' Imminence	384
7.5.1.1	The Expected Timing of the Attack	384
7.5.1.2	Capabilities of the Potential Attacker	385
7.5.1.3	Gravity of the Threatened Attack	386
7.5.1.4	Intent of the Potential Attacker	386
7.5.1.5	The Occurrence of Previous Attacks	387
7.5.2	Imminence and the Drone Strike on Iranian General Soleimani (2020)	389
7.5.3	The Impact of 'Contextual Imminence' upon the Necessity Criterion	395
7.6	Conclusion	398
	Questions	398
	Suggested Further Reading	399
8	The Use of Force against Non-state Actors	400
8.1	Introduction	400
8.2	General Considerations of the Right of Self-Defence against Non-state Actors	401
8.3	Self-Defence against Non-state Actors and Their Host State	404
8.3.1	The 'Effective Control' Standard of Attribution	404
8.3.2	The 'Harbouring' Standard of Attribution	407
8.4	Military Action Restricted to the Non-state Actors	408
8.4.1	Lowering the Standard of Attribution	413
8.4.2	The 'Unable or Unwilling' Doctrine	414
8.4.2.1	Theoretical and Practical Problems of the Doctrine	420
8.4.2.1.1	Unable (and Unwilling?) States	420
8.4.2.1.2	Failed States	422
8.4.2.1.3	Unable Yet Willing States	423
8.4.2.1.4	Able Yet Unwilling States	424
8.4.2.1.5	Other Relevant Factors	426
8.4.2.1.6	The Legal Status of the Doctrine	427
8.5	Targeted Killings	428
8.6	Conclusion	439
	Questions	440
	Suggested Further Reading	441

PART IV Forcible Intervention in Situations of Civil Unrest

9	Consent to Intervention and Intervention in Civil Wars	445
9.1	Introduction	445
9.2	Identifying Authority to Consent	447
9.2.1	The General Framework: Governments and Non-state Actors	448
9.2.2	Effective Control	452
9.2.3	Recognition	455
9.2.4	The Principle of Self-Determination	459
9.3	Intervention in Civil Wars	461
9.3.1	The ‘Negative Equality’ Principle	462
9.3.2	The Purpose-Based Approach	466
9.3.3	Counter-Intervention	469
9.4	The Form of the Consent or Invitation to Intervene	472
9.5	The Limits of the Consent or Invitation to Intervene	479
9.6	Conclusion	484
	Questions	485
	Suggested Further Reading	485
10	The Doctrine of Humanitarian Intervention	486
10.1	Introduction	486
10.2	The UN Charter and Humanitarian Intervention	487
10.3	Humanitarian Intervention in the Practice of States	494
10.3.1	Cold War	494
10.3.2	Post-Cold War: From Iraq to Kosovo	497
10.3.2.1	Iraq (1991–2002)	497
10.3.2.2	ECOWAS Intervention in Liberia (1990)	499
10.3.2.3	ECOWAS Intervention in Sierra Leone (1997–8)	500
10.3.2.4	Kosovo (1999)	501
10.3.2.5	Humanitarian Intervention in the Aftermath of Operation Allied Force	504
10.3.2.5.1	Humanitarian Intervention and the ‘Thin Red Line’ from Legality	506
10.3.2.5.2	Justified by a Failure of the UN Security Council?	507
10.3.2.5.3	Genocide: A Legal Requirement to Save Lives?	508
10.3.2.5.4	The Operation of a Possible Right of Humanitarian Intervention in Practice	511
10.4	The Civil War in Syria and Humanitarian Intervention	512
10.4.1	The Debate Regarding Air Strikes in 2013	513
10.4.2	The April 2017 Air Strikes	515
10.4.3	The April 2018 Air Strikes	516

xiii	Contents	
10.5	Humanitarian Intervention and the Responsibility to Protect	520
10.6	Conclusion	521
	Questions	522
	Suggested Further Reading	522
	Concluding Remarks	523
	Index	527