1

Introduction

Investigating Law, War and the Penumbra of Uncertainty

Between these two points, indeed, the *is*, and the *ought to be*, so opposite as they frequently are in the eyes of other men, that spirit of obsequious *quietism* that seems constitutional in our Author, will scarce ever let him recognize a difference.

Jeremy Bentham, 'A Fragment on Government'[1]

INTRODUCTION

The law governing the resort to military force, the *jus ad bellum*, is the area of international law perhaps most critical to the very survival of states. It is also the field of international law that seeks to regulate how states initiate the kinds of military campaigns that have caused untold death and suffering throughout history. It is therefore unsurprising that this part of international law remains the subject of sharp controversy. Military interventions routinely provoke claims and counter-claims about their justification in law, as can be seen by the arguments about the legality of US-led military interventions in Iraq, Kosovo, Afghanistan and Syria, as well as around the lawfulness of Russia's interventions in Georgia and Ukraine. Such controversies persist in spite of the apparently clear rules in the UN Charter, and in the detailed further supplementary means of determining law provided by UN General Assembly declarations and International Court of Justice (ICJ) cases. This book examines such uncertainty and contestation, and specifically considers the effects of international lawyers' extra-legal political, strategic and ethical intuitions on their legal assessments of controversial cases engaging the *jus ad bellum*.

[1] Jeremy Bentham, 'A Fragment on Government', in James H. Burns and H. L. A. Hart, eds., *A Comment on the Commentaries and A Fragment on Government* (Oxford: Clarendon Press, 2008), 498.

I was motivated to write this book by my own perhaps naïve surprise, as an official in the United Kingdom's Foreign, Commonwealth and Development Office (FCDO), that even respected international lawyers had fundamental disagreements about the legality of the US-led military interventions in Kosovo in 1999, Afghanistan in 2001 and of course Iraq in 2003. Like many FCDO officials, I had a basic understanding of international law and experience of working with the FCDO's international lawyers. So I had some sense that international law had 'grey areas', and that plausible legal arguments could often be advanced for opposing positions. However, I assumed even difficult legal questions ultimately always had a single correct answer, which the FCDO's lawyers could be relied upon to discover after sufficient study of doctrine, precedent and the relevant legal materials. Underpinning this assumption was a sense that such legal questions would ultimately be decided by some authoritative tribunal or other dispute resolution mechanism. It was the sharp and ultimately formally unresolved debates between respected international lawyers around the legality of use of force in Kosovo, Afghanistan and Iraq that led me to realise the naivety of this assumption, and to seek to deepen my knowledge of international law.

My studies showed me that many respected scholars had already examined such controversies in the *jus ad bellum*, through analysis of legal doctrine in treaties and other textual legal materials, in more or less formal expressions of state practice and *opinio juris*, in the decisions of the ICJ and other tribunals and in the writings of other legal scholars. But these analyses seemed to fail to take sufficient account of important aspects of the controversies they examined. A key point that such studies identified was that many wars fought today are different to the wars that many believe the drafters of the UN Charter envisaged when they framed the key provisions of their foundational treaty. Overt invasion of one state by another state for straightforward acquisition of territory or economic resources is rare. Instead, those who use military force internationally today advance other justifications: to defend themselves against terrorists, to avert an imminent attack, to protect their own citizens or other civilians from slaughter, or to enforce UN Security Council (UNSC) resolutions. Many of the scholarly works I studied noted that such controversial justifications for resort to force pointed to intrinsic features of uncertainty in the law, the operation of competing rules of legal interpretation, the potential for partisan politicisation of legal assessment, and lawyers' own beliefs about politics, strategy and ethics to skew their legal assessments. But the legal studies I read devoted relatively little effort to investigating these aspects of controversy in the *jus ad bellum*.

I found explanations advanced by critical legal theorists and legal realists of the political and power-based nature of international law also incomplete. Self-interest, the struggle for power and the dominance of and resistance to hegemonic discourses did not seem sufficient explanation for what appeared to be sincere, deeply held disagreements between highly regarded international lawyers about what the law permitted and prohibited in general and in specific cases. And none of these studies said much about how uncertainty and contestation might be shaped by the *factual* uncertainty around military crises, and by the law's apparent requirement for lawyers to make *forecasts* or counter-factual conjectures of the consequences of using and not using force.

I found potential new ways of thinking about these controversies in other fields within and outside law. Legal philosophers and philosophers of knowledge have investigated vagueness in law. Socio-legal scholars have examined competing legal cultures in legal systems. Scholars of international politics, ethics, strategic culture and political psychology have considered how actors' competing underlying beliefs about the world can determine behaviour in international relations. And the literature around legal risk management, strategic intelligence analysis and political forecasting has considered techniques for dealing with similar dilemmas.

This book is the first that seeks to synthesise approaches from these different disciplines to offer new ways of understanding and dealing with uncertainty, controversy and the role of extra-legal intuitions in hard cases engaging international law governing resort to military force. Unlike other studies of the *jus ad bellum*, this book does not try to identify what the law is, nor to prescribe *the* 'correct' method for framing and assessing legal arguments. Rather, this book explores how legal reasoning works in this area of law, using concepts from the philosophy of knowledge to explain what it is about the *jus ad bellum* that enables uncertainty and disagreement. This book casts light on why and how lawyers' political, ethical and strategic intuitions about how the world works and how it *ought* to work shape their legal assessments of hard cases engaging this law. The book considers how uncertainty about current and *future* facts feeds into legal uncertainty – how hard cases of force often require complex factual assessments, and *forecasting* of the immediate and long-term consequences of both using and not using force. This is the first book to investigate the *jus ad bellum* using interviews and a survey with UK-based international lawyers, alongside systematic textual analysis of ICJ judgments and scholarly writings. And this book is the first to draw on insights from legal risk management, strategic intelligence assessment and political forecasting to suggest techniques lawyers might use to help tackle such analytical dilemmas.

LEGAL AND EXTRA-LEGAL CONTROVERSY IN THE *JUS AD BELLUM*

International law governing the resort to military force has long been and remains the subject of sharp controversy. The Cold War is often seen as having restrained the major powers' willingness to use force for fear of catastrophic escalation, leaving 'international law looking like a frightened rabbit staring into the headlights of an approaching car, obsessed by the fear of an oncoming disaster which it was almost entirely powerless to prevent'.[2] Yet even then, lawyers and states often disagreed, perhaps not always sincerely, about the legality of specific instances of use of force, including by the United Kingdom and France in Suez, by the USSR in Czechoslovakia, by India in East Pakistan, and by the United States in Vietnam and Latin America, prompting one scholar to ask 'Who Killed Article 2(4)?'[3] Lauterpacht's famous description of the *jus in bello* might also be applied to the *jus ad bellum*: 'If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.'[4]

Such disagreements surprise some non-lawyers, because the *jus ad bellum* appears succinct and unambiguous. Three brief paragraphs in Articles 2(4), 42 and 51 of the UN Charter appear to prohibit all use of force by states internationally, except when authorised by the UNSC or in individual or collective self-defence against armed attack. Yet when assessing specific controversial instances – 'hard cases' – of force, even expert international lawyers often draw 'opposing conclusions regarding the state of the law'.[5] Such contestation can contribute to what Koskenniemi describes as 'the common feeling that international law is somehow "weak" or manipulable', that indeterminacy is a 'structural property' of international law, which is thus 'useless' for 'justifying or criticizing international behaviour'.[6] It can create suspicion that, since lawyers can 'plausibly take a number of different positions' when assessing the lawfulness of hard cases of force, their legal opinions tend to align

[2] Christopher Greenwood, 'Humanitarian Intervention: The Case of Kosovo', in *2002 Finnish Yearbook of International Law* (Helsinki: Kluwer, 2002), 141–2.

[3] Thomas M. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', *American Journal of International Law*, 64 (1970), 809–37.

[4] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War', *British Year Book of International Law*, 29 (1952), 360–82, 382.

[5] Christian Marxsen, 'A Note on Indeterminacy of the Law on Self-Defence Against Non-State Actors', in *Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War*, MPIL Research Paper Series No. 2017–07 (Heidelberg: Max Planck Institute, 2017), 79.

[6] Martti Koskenniemi, *From Apology to Utopia* (Cambridge: Cambridge University Press, 2005), 66, 62, 67.

with, and are 'in fact motivated by', their 'policy preferences' and 'political choices'.[7] Such contestation can even lead some to conclude that, since war is the ultimate contest of politico-military power and blind chance, it is exempt from legal reasoning, vulnerable to Cicero's claim about law and personal self-defence: 'Silent enim leges inter arma.'[8]

This book examines such debates by considering several interconnected, long-established, but still contentious propositions about international law governing resort to force, seeking to describe how far they are valid, with what limitations and under what conditions. This book seeks to develop these propositions using concepts from the philosophy of knowledge, from socio-legal theory and from international strategy, politics and ethics to describe the structure and sources of legal and factual uncertainty in this area of law. The book particularly examines how far this uncertainty is rooted in lawyers' underlying extra-legal intuitions – political, ethical and strategic presuppositions and beliefs about how the world works and how it ought to work.

The collapse in August 2021 of the Afghan Government led by Ashraf Ghani in the face of the Taleban's military campaign came after this book had entered production, so is not discussed in the main text. However, those developments arguably support the relevance of this book's discussion of uncertainty, forecasting and the role of intuitions and biases in decisions about the resort to force.

First, this book argues that the *jus ad bellum*, like many areas of international and domestic law, is 'specifically indeterminate'. In at least some cases, what the law prescribes is vague, and displays specific forms of vagueness described by the philosophy of knowledge. The law relies on 'paradigms' – authoritative examples or 'plain cases' of lawful and unlawful behaviour.[9] These paradigms are vulnerable to 'supervaluationism', when lawfulness is determined by multiple tests that are overlapping, but not entirely co-incident, and may be evaluated using different values.[10] And the law operates not

[7] Marxsen, 'Indeterminacy', 80; Marko Milanovic, 'Accounting for the Complexity of the Law Applicable to Modern Armed Conflicts', in Michael N. Schmitt, Shane R. Reeves, Christopher M. Ford and Winston S. Williams, eds., *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford: Oxford University Press, 2019), 41.

[8] Marcus Tullius Cicero, 'Pro Milone', in Albert Curtis Clark, ed., *Oxford Classical Texts: M. Tulli Ciceronis: Orationes*, vol. 2, *Pro Milone*; *Pro Marcello*; *Pro Ligario*; *Pro Rege Deiotaro*; *Philippicae I–XIV* (Oxford: Oxford University Press, 1918), 5.

[9] H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), 127.

[10] Timothy Williamson, 'Vagueness in Reality', in Michael J. Loux and Dean W. Zimmermann, eds., *The Oxford Handbook of Metaphysics* (Oxford: Oxford University Press, 2009), 690, 692.

according to 'bivalent logic' but 'fuzzy logic' – lawful and unlawful behaviour is separated, not by a sharp boundary, but a fuzzy 'penumbra of uncertainty'.[11] These forms of vagueness facilitate uncertainty and contestation about the lawfulness of many wars fought today because these wars are different in multiple important ways to the overt invasion by one state to deprive another of its territorial integrity or political independence, which the UN Charter most clearly prohibits.

Second, this book argues that uncertainty about the law in specific cases is exacerbated by uncertainty about current and in particular *future* facts in such cases. Assessing the lawfulness of a potential decision to use force requires both assessment of the current facts of the military crisis that may justify force, and also *forecasts* of the future consequences of either using or not using force in that crisis. But there are usually multiple possible interpretations of the current facts in such cases, and there are always multiple possible forecasts of the future consequences of using or not using force. Different assessments of the present and future flow from different assessors' assumptions and implicit theories 'about how the world works', and 'how events would have unfolded' under different conditions.[12] Uncertainty about the future both in specific cases of force, and in the evolution of force more generally may even mean that vagueness in the *jus ad bellum*, like other law, is both necessary and inevitable.

Third, the *jus ad bellum*, like other law, might be described as 'partially autonomous'. Uncertainty and competing interpretations of law, fact and forecasting in specific hard cases of resort to force and the absence of authoritative legal rules for tackling such uncertainties, encourage lawyers to apply consistent, mutually reinforcing 'extra-legal' 'political and ideological viewpoints' and intuitions, including about strategy and ethics, to choose between competing interpretations of law and fact, and to reach conflicting legal conclusions.[13] Politico-strategic and ethical intuitions can act as forms of cognitive biases that shape choices about the interpretation of facts, expectations of consequences, methods of legal interpretation and thus about what the *jus ad bellum* requires. Uncertainty about the *jus ad bellum* as a system of prescriptive rules and principles may even encourage lawyers to practise 'strategic behaviour in interpretation', to use the *jus ad bellum* in its mode of

[11] Hart, *Concept of Law*, 127; Williamson, 'Vagueness in Reality', 690, 692.
[12] Philip Tetlock, *Expert Political Judgement* (Princeton: Princeton University Press, 2005), 145, 146.
[13] James Green, *The International Court of Justice and Self-Defence in International Law* (Oxford and Portland: Hart Publishing, 2009), 184.

a system of argumentative practices to justify or criticise the lawfulness of specific behaviour in accordance with their extra-legal beliefs and interests.[14]

Fourth, this book argues that lawyers tend to conform to varying degrees to competing 'interpretive' and 'strategic cultures' concerning the *jus ad bellum*. Different 'interpretive–strategic cultures' consist of lawyers who share similar, mutually reinforcing intuitions, assumptions and beliefs about legal interpretation and about extra-legal factors, such as politico-strategic causation and ethical justification.[15] Lawyers in such cultures thus reach similar conclusions about the law and facts in specific cases. These competing cultures vary along a continuum from 'restrictivists', likely to see few legal, politico-strategic and ethical justifications for force, to 'expansionists', likely to see more such justifications.[16]

This book argues that 'restrictivists' adopt approaches to legal interpretation that might be grouped under the heading of 'formalist'. In assessing the lawfulness of resort to force, formalists emphasise the ordinary meaning of the words of the UN Charter and other formal sources of the *jus ad bellum*, hold that the law has evolved little since 1945, accept only explicitly legal statements as evidence of *opinio juris*, require clarity and overwhelming quantity of state practice for new custom, and regard only the UNSC as permitted to authorise force in situations where the law is unclear. 'Expansionists' prefer legal interpretation techniques that this book groups under the heading of 'dynamist'. In assessing the lawfulness of resort to force, dynamists take account of the UN Charter's wider purposes and other law, arguing the law has evolved significantly since 1945, accepting a wider variety and smaller quantity of *opinio juris* and state practice for new custom, and seeing more discretion for states and bodies outside the UNSC to authorise force when the law is unclear.

In terms of extra-legal strategic, political and ethical reasoning, this book argues that 'restrictivists' adopt approaches that might be grouped under the

[14] Koskenniemi, *From Apology to Utopia*, 67–9; Duncan Kennedy, *Legal Reasoning: Collected Essays* (Aurora, CO: The Davies Group Publishers, 2008), 159.

[15] Michael Waibel, 'Interpretive Communities in International Law', in Andrea Bianchi, Daniel Peat, Matthew Windsor, eds., *Interpretation in International Law* (Oxford: Oxford University Press, 2015), 148; Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, 46 (1992), 1, 3; Theo Farrell, 'World Culture and Military Power', *Security Studies*, 14:3 (2005), 450; Colin Gray, 'National Style in Strategy: The American Example', *International Security*, 6:2 (1981), 22; Alastair Iain Johnston, 'Thinking About Strategic Culture', *International Security*, 19:4 (1995), 46.

[16] Anne Peters and Christian Marxsen, 'Editors' Introduction: Self-Defence in Times of Transition', in *Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War*, MPIL Research Paper Series No. 2017–07 (Heidelberg: Max Planck Institute, 2017), 7.

heading of 'pacificist' – effectively viewing the *jus ad bellum* as a *jus contra bellum*.[17] They tend to choose the interpretation of law that they assess minimises potential for future legal uncertainty and abuse, best protects the interests of less powerful states while distrusting more powerful states, and treating the prohibition on force as always the most important decision-making principle. When assessing different interpretations of uncertain facts, and constructing forecasts of potential consequences of using or not using force, pacificists tend to proceed on the basis that unilateral force almost always causes more harm than it prevents for the state using force and for the international system, that only self-interested states use force unilaterally, and only a narrow range of interests and ethical values are sufficiently widely shared to guide decisions about unilateral force. 'Expansionists' adopt approaches to politics, strategy and ethics that this book groups under the heading of 'interventionist'. They tend to choose the interpretation of law that fits with changes in conflict since 1945, and hold that principles such as human rights, preventing genocide, stopping terrorism or the proliferation of weapons of mass destruction (WMDs), can be more important than the prohibition on force. When assessing different interpretations of uncertain facts, 'interventionists' tend to proceed on the basis that unilateral force can often prevent more harm than it causes for the state using force and the international system, states using force unilaterally can advance common interests as well as self-interest, and a range of interests and ethical values can be sufficiently shared internationally to guide decisions about unilateral force.

It is important to note that theorists of interpretive culture and strategic culture do not claim that individuals necessarily conform to cultures consciously, or deliberately coordinate or act collectively. A lawyer's alignment with an interpretive or strategic culture may reflect deeply internalised, unconsciously held intuitions and preferences, the product of both an individual's socialisation and inherent cognitive characteristics. Interpretive and strategic cultures may reflect coherent patterns of what psychologists term 'cognitive biases', 'motivated biases' and 'heuristics' – intuitions, presuppositions and rules of thumb that simplify 'the complex tasks of assessing probabilities and predicting values', and are usually economical and effective, but sometimes 'lead to severe and systematic errors'.[18]

[17] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (London: Hart Publishing, 2010), 2.

[18] Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases', *Science*, 185:4157 (1974), 1124–31, 1124.

Fifth, this book argues that fields outside the *jus ad bellum* offer insights that might help lawyers manage these uncertainties and subjectivities. Legal risk management, international humanitarian law, strategic intelligence analysis and political forecasting suggest techniques to manage uncertainties and assumptions, and systematically develop and evaluate multiple alternative interpretations and forecasts of fact and law. International lawyers can use such techniques to enhance their assessment of hard cases engaging the *jus ad bellum*.

INVESTIGATING LEGAL AND FACTUAL UNCERTAINTY ABOUT RESORT TO WAR

This book is the first to examine controversies in the *jus ad bellum* using an innovative combination of theoretical concepts and qualitative and quantitative methods.[19] For analytical focus, this book examines the *jus ad bellum* as it applies to states, not considerations for resort to force by non-state actors, nor the *jus in bello* – the law governing military behaviour within armed conflict. This book uses the term '*jus ad bellum*' to describe international law governing resort to force by one state in or against another state. It takes as the main sources of the *jus ad bellum* the UN Charter, the *Caroline* criteria or Webster formulation, which is widely accepted as describing customary international law governing self-defence, and other interpretations of the law that are widely accepted as authoritative, such as UN General Assembly (UNGA) declarations and ICJ jurisprudence. Although states and non-legal commentators still often use the term 'war' to describe international military conflict, this book generally uses the terms 'resort to force', 'use of force' or 'armed attack' – the UN Charter includes the latter two terms.[20] The term 'unilateral use of force' is used to mean resort to force that does not have unambiguous UNSC authorisation.

This book seeks to analyse how international lawyers use competing theoretical frameworks when they apply the *jus ad bellum*, while not intending to endorse any of those frameworks, to the extent that any analysis can exclude theoretical presuppositions. Nevertheless, to provide an intelligible narrative, this book uses terms associated with specific theoretical approaches, although

[19] Denis J. Galligan, 'Legal Theory and Empirical Research', in Peter Cane and Herbert Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010), 966–1001; Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship', in *American Journal of International Law*, 106:1 (2012), 1–47.

[20] Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2008), 9.

that does not mean the book endorses those approaches. For example, many legal scholars see a distinction between what Dworkin described as 'hard cases', which may have 'a unique answer that is either not obvious or is subject to disagreement', and situations where the law is indeterminate – 'it fails to justify a unique answer to an intelligible legal question'.[21] However, this book uses the term 'hard case' to describe any case that provokes significant disagreement between international lawyers and states about what the *jus ad bellum* requires, both 'when no settled rule dictates a decision either way', and also where knowledgeable lawyers cannot readily 'discriminate between two or more interpretations' of the relevant legal materials, since the two kinds of case usually appear identical to an external observer.[22]

Similarly, some scholars argue 'there is no neat distinction between the political factors inherent in law and the political views (conscious or unconscious)' of legal decision-makers.[23] Dworkinian and other contemporary natural law approaches may integrate such factors into legal reasoning, seeking the interpretation of law that best advances those 'principles and policies' providing 'the best political justification for the statute at the time it was passed'.[24] Nevertheless, this book uses the term 'extra-legal' to denote forms of reasoning widely accepted as separate from law, '(in the sense of not-doctrine based) background assumptions'.[25] Even Dworkinian jurists usually seek some legal anchoring – for example, a UNSC resolution, another existing body of international law, a UNGA declaration or other authoritative expression of collective international will – for political and other principles that can be legitimately invoked when interpreting the *jus ad bellum*.[26]

This book regards such extra-legal reasoning as including politics and strategy, concerning the ways and means states and other actors use to pursue their interests, involving 'bargaining and persuasion', 'threats and pressure, psychological as well as physical', 'words as well as deeds' and 'the art of creating power'.[27] It also includes ethical or normative theories about when force might be considered right or wrong, when it might ultimately help 'enable us to live together well in communities and so flourish as human

[21] Leslie Green, 'Notes to the Third Edition', in Hart, *Concept of Law*, 319.
[22] Ronald Dworkin, 'Hard Cases', *Harvard Law Review*, 88:6 (1975), 1057–109, 1060; Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998), 255–6.
[23] Green, *Self-Defence*, 176.
[24] Ronald Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1985), 145, 129.
[25] Marxsen, 'Indeterminacy', 80.
[26] Sean D Murphy, 'Protean *Jus Ad Bellum*', *Berkeley Journal of International Law*, 27 (2009), 36, 26.
[27] Lawrence Freedman, *Strategy: A History*, Kindle ed. (Oxford: Oxford University Press, 2013), xii.