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Book Review

REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, *JUS AD BELLUM* AND THE WAR ON TERROR, by Lindsay Moir[1]

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OBSERVERS OF DEVELOPMENTS in international law norms over the past decade or so—specifically in the realm of *jus ad bellum*—have formed an impression that the legal restraints on waging war have been loosened, particularly since the catastrophic events of the morning of 11 September 2001 ("9/11"). This period coincides with George W. Bush's tenure in the White House and the so-called War on Terror. While the full extent of the Bush government's actions has yet to be determined, Moir argues that the widely held belief that 9/11 served to loosen the restrictions on *jus ad bellum*—the established and recognised legal bases for engaging in armed conflict with another nation—is not true. To prove this, he provides a detailed examination of international and non-international conflict since 9/11. In doing so, Moir is clear that he will not speculate on the future of the United Nations, despite the organization's pivotal role in controlling both state and non-state aggression.

The author sets out this short book in four compact and comprehensive chapters. Moir begins his reappraisal of the resort to force by reviewing the state of *jus ad bellum* as of the morning of 9/11. This first chapter, entitled "General Legal Framework 1945-2001: The UN Charter Paradigm and the *Jus ad Bellum*," is a straightforward and useful refresher on the prohibition against the use of force. Through a judicious and weighted use of case and treaty law, as well as academic writing, Moir reviews the historical development of the prohibition and the self-defence exception. He breaks down the exercise of self-defence into

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1. (Oxford: Hart, 2010) 156 pages.
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two recognized, but controversial, variations: anticipatory self-defence and self-defence against non-state actors. The latter category necessarily includes an analysis of the case law defining "armed attack," the legal threshold for the exercise of national self-defence.

Moir then provides a detailed overview of self-defence based on the *Charter of the United Nations*,[3] the role and authority of UN Security Council Resolutions, and the distinct doctrine of anticipatory self-defence under customary international law. The international community derives a key statement of this doctrine, known as the Webster Formula, from the seminal "Caroline Affair."[4] This Formula provides that anticipatory self-defence is permissible in cases where the threat to one's own nation is "instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation."[5]

Regarding the other form of self-defence—intervention in a sovereign state harbouring an armed group that is threatening the intervening state—Moir reviews the principles set out in a seminal international law decision, the *Case Concerning Military and Paramilitary Operations in and Against Nicaragua (Nicaragua v. United States of America)*.[6] This decision set the bar for the exercise of self-defence fairly high by defining "armed attack" in such a way as to exclude the provision of arms and minor border incursions as sufficient grounds to legitimize armed intervention. According to *Nicaragua*, the aggressor's acts must be of "such gravity to amount to (*inter alia*) an actual armed attack conducted by regular forces of the state."[7] As Moir explains, the decision has been criticized widely for limiting offended states' responses where armed groups of non-state rebels may be equipped, trained, and prepared for aggression in a host state, and subsequently carry out low-level, incessant raids.

The *Nicaragua* case, however, has been overtaken by events. The changes in the nature of state versus non-state warfare allow non-state actors to operate within a host or rogue state without reaching the threshold for their opponents to legally justify an armed attack. As Moir correctly points out, the relatively

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3. 26 June 1945, Can. T.S. 1945 No. 7 [*UN Charter*].
4. U.K., "The Caroline Affair" in *British and Foreign State Papers*, vol. 29 (London: James Ridgeway and Sons, 1857) at 1137; vol. 30 at 195.
5. *Supra* note 1 at 12.
6. [1986] I.C.J. Rep. 14 [*Nicaragua*].
7. *Supra* note 1 at 23.

recent rise in armed attacks by non-state actors has hardened the resolve of the international community. He quotes Michael Schmitt's suggestion that the international community has become "more tolerant of forceful responses to terrorism."[8]

Moir also reviews the decision in *The Corfu Channel Case* (*United Kingdom of Great Britain v. Albania*),[9] which examined the interpretation of the prohibition against the international use of force as set out in Article 2(4) of the *UN Charter*.[10] The case involved a situation where the armed forces of a sovereign state crossed the boundary of another state but did so, arguably, without "violating the territorial integrity" or "political independence"—the precise wording of the prohibition in Article 2(4) of the *UN Charter*—of the offended state.[11] The debate revolved around the provision's interpretation: is it an absolute prohibition or can a nation take aggressive action that does not amount to a stated violation?

Chapter two is an examination of Operation Enduring Freedom, the 2001 armed incursion into Afghanistan by a US-led coalition. In this context, Moir poses three fundamental questions that bear directly on the legitimacy of armed intervention in self-defence: (1) Was there an armed attack on the United States? (2) Was the response necessary? (3) Was the response proportionate? Through a review of the case law and academic literature, Moir concludes that the 9/11 attacks met the standard of an "armed attack" under Article 51 of the *UN Charter*.[12] Difficulty arises, however, with regard to the distinction between responses to an armed attack by Al-Qaida and responses to an armed attack by the state of Afghanistan. Moir points out that, while the international jurisprudence requires the United States to show attribution to the host state for the acts of non-state actors originating from that host state's territory, state practice is less clear.[13] Nonetheless, immediately after the attacks, the UN Security Council ("UNSC") adopted UNSC Resolution 1368, which explicitly

8. *Ibid.* at 30, citing Michael Schmitt, "US Security Strategies: A Legal Assessment" (2004) 27 Harv. J.L. & Pub. Pol'y 737 at 747.

9. [1949] I.C.J. Rep. 4 [*The Corfu Channel Case*].

10. *Supra* note 3.

11. *Ibid.*

12. *Ibid.*

13. *Supra* note 1 at 52.

references the inherent right of individual and collective self-defence.[14] It also acknowledges that the events of 9/11 were an armed attack, thereby legitimizing the subsequent intervention. Having concluded that the events of 9/11 met the threshold of an armed attack, the consequential requirements for the legitimate exercise of self-defence—necessity and proportionality—were met by the subsequent actions of the United States and its coalition partners.

Following the pattern set out in chapter two, chapter three uses Operation Iraqi Freedom—the 2003 invasion of Iraq—as another example of the use of armed force against a state. Here, Moir poses two different threshold questions: (1) Was the action taken in self-defence? (2) Was the military action authorized as a lawful response to the violation of the ceasefire agreement? While there was widespread international support for the Afghanistan intervention, the criticism of the Iraq invasion indicates that the international community conversely did not accept the United States' justification for its use of force. Central to the Iraq invasion was the 2002 US National Security Policy.[15] Known colloquially as the Bush Doctrine, the policy stated that the United States would resort to pre-emptive self-defence in the face of terrorist threats where and when it chose and without awaiting an imminent threat to the nation. This doctrine has been criticized as reaching well beyond its original application—that the United States reserved the right to act pre-emptively against the threat of the use of weapons of mass destruction by rogue states and their terrorist clients. The declaration caused concern because it exceeded the limits set by the Caroline Affair; the Bush Doctrine appeared to remove the requirement for an imminent threat. However, Part V of the policy clearly enunciated that the traditional indicia of imminent threat (mobilization of armies, navies, and air forces in anticipation of invasion) needed to be re-cast in modern terms that reflected the preparatory acts of terrorists.[16]

Chapter four, the book's core chapter, builds on the author's previous positions by reappraising whether there have been substantive changes in state practice in the resort to the use of force by sovereign states. Moir begins the analysis with several recent cases decided in the International Court of Justice

14. SC Res. 1368, UN SCOR, 2001, UN Doc. S/RES/1368 (2001).

15. U.S., President of the United States of America George W. Bush, *The National Security Strategy of the United States of America* (Washington: The White House, 2002).

16. *Ibid.* at Part V.

("ICJ"). He uses the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*,[17] the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*,[18] and the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[19] to conclude that the court re-affirmed *Nicaragua*'s narrow interpretation of the permissibility of the use of force in self-defence. Interestingly, the *Nicaragua* principles' application to the *Oil Platforms* case drew attention because the Iranian regular armed forces, not non-state actors, were suspected of perpetrating the incident. Thus, it remains unclear whether the threshold test for "armed attack" now applies to state actors as well as non-state actors; Moir concludes, however, that the ICJ has not changed its jurisprudence on anticipatory self-defence since 9/11, despite having an opportunity to adapt to the changing face of international conflict.

Moir then turns to state practice, using Israeli operations in Lebanon and Syria, the 2002 Russian strike against Chechen rebels in Georgia, and the 2006 Ethiopian military incursion into Somalia as contemporary examples. The Ethiopian example is slightly off point, as the military intervention appears to have been an effort to bolster the Somalian government rather than a response to a threat of armed attack by non-state actors from Somali territory. The Israeli and Russian examples of self-defence, however, are properly on point. They are both examples of actions taken in self-defence against non-state factions harboured within another state. In particular, Israel claimed that Lebanon and Syria not only harboured Hezbollah, but also provided the non-state armed group with active support;[20] if so, Israel's action against both Hezbollah and its host states did not vary from the *Nicaragua* standard. In summary, Moir concludes that Operation Iraqi Freedom had no effect on the standard of application of a "resort to force" because the widespread opposition to the invasion demonstrates that state practice did not change. Accordingly, the norms of *jus ad bellum* remain unmodified.

In the final section of chapter four, Moir weaves the jurisprudence, states' practices, and academic literature together to describe the contemporary state of

17. [2003] I.C.J. Rep. 161 [*Oil Platforms*].

18. [2005] I.C.J. Rep. 168.

19. [2004] I.C.J. Rep. 136.

20. *Supra* note 1 at 141.

jus ad bellum. The author highlights the limitations of the current state of the law and canvasses the academic positions on events since 9/11. He reviews the authors who posit that there has been both rapid change in the notion of state responsibility for an armed attack and a general lowering of the necessary extent of host state involvement that would trigger an armed response. Moir rejects the notion that customary international law can be created instantly; instead, he reviews relevant developments in international law (since the Afghanistan intervention) to determine if there has been any impact on the right to intervene—particularly as to what constitutes an "armed attack" and what level of activity is required to trigger a response against non-state actors.[21]

But what reasonable option is left to the victim state once the authority for the use of force under the *UN Charter* or by UNSC resolution is removed and the incidents are less grave than the justifiable threshold of intervention under customary international law? Moir states that both common sense and realpolitik dictate that military action may well be necessary against non-state actors, as there is no reasonable or effective alternative to the use of force where their host state is either unable or unwilling to take preventive action.[22] So the analysis returns to an examination of state practice. Moir quotes Gerry Simpson, who states that "while the classic or traditional norms of collective security and self-defence will continue to operate on the plane of sovereign equality, the unequal sovereignty regime will predominate wherever there are other Great Powers or outlaw states involved."[23] Clearly, where the powerful states wish to use force when their interests are threatened, international legal norms are severely limited in their ability to curtail it. Indeed, there is no shortage of examples in the post-9/11 era that could be applied to the analysis; but as Moir so ably demonstrates, the book's key conclusion remains that none of the actions taken by the United States (or any other state) since 9/11 have changed the principles and thresholds of *jus ad bellum*.

In summary, this book is a thorough account of the international uses of force that have occurred, in part, as a response to the 9/11 attacks. It is logically constructed and its analyses are coherent. The one minor weakness in

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21. *Ibid.* at 117.

22. *Ibid.* at 151.

23. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge, UK: Cambridge University Press, 2004) at 350-51.

the author's argument, however, may lie in the lack of differentiation between the relative weight of the ICJ jurisprudence, state practice, and UNSC resolutions. It would have been valuable to the reader if Moir had assessed the ICJ's reactions to the various uses of force since 9/11. The court passed up several opportunities to refresh the law of self-defence by updating the *Nicaragua* case within the context of new methods of warfare. In addition, Moir's reliance on predominately academic sources to explain state practice could be improved by a detailed examination of states' actual words and deeds and their importance in setting international humanitarian law norms.

This concise volume is part of the larger body of international law studies and, in particular, the intersection of international relations and international humanitarian law. More specifically, it is situated four-square in the body of works examining *jus ad bellum*. Overall, *Reappraising the Resort to Force* is a portable and digestible read for students of international law and international relations alike. It has an outstanding and topical bibliography and is an excellent addition to comprehensive studies in international law.