International Law – Military Force and Armed Conflict

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The Increased Relevance of International Law to Warfare

This chapter is designed to provide an overview of the legal framework applicable to the use of military force and situations of ongoing armed conflict. Since it is a chapter on law, the bulk of it will set out what the law in the context of warfare actually is. However, it will also touch upon how the law is evolving and where controversies arise in the law (although it is worth noting that controversies arise much more in the application of law to facts than with respect to the content of the law itself). In subsequent chapters, certain key legal 'flashpoints' in the area will be examined in greater detail,[1] and, as such, these topics will only be briefly noted here. This chapter aims to underpin the more particular examinations that follow with a general outline of the topic.

Before turning to the substance of the international legal provisions in the context of war, force and armed conflict, it is important to note the relevance of that law to the reality of the use of military force (something that, we lawyers tend to forget, generally involves the systematic killing of human beings, often on a vast scale).

The concept of 'war' has traditionally been viewed as being something of such fundamental importance that it cannot realistically be subject to regulation through the

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[1] See the chapters in this volume by Steven Haines and Tom Kane respectively.

application of law. As former United States Secretary of State Dean Acheson famously put it during the Cuban Missile Crisis: '[L]aw simply does not deal with such questions of ultimate power….The survival of States is not a matter of law.'[2] In some quarters, this classical realist perception of the relevance of law (or lack of) in this crucial area persists. However, rather than being a bit-player, law now must be viewed as being central to the conduct of military operations. One only need think of the rise of the legal adviser in Western militaries – vetting bombing targets in Kosovo and subsequent operations – to note this phenomenon.

Some have resisted this legal creep, and suggestions have been made that operational effectiveness is reduced as a result of such 'legal encirclement'.[3] Yet others have suggested that law-making with respect to the military is an interactive process; the military is a player in determining, for example, the nature of the Armed Services Act or the relationship with humanitarian organisations in the delivery of emergency food aid.[4] Whether one welcomes or loathes the increased role of law in the conduct of military operations – and indeed with respect to various aspects of military life including recruitment and discipline during peacetime – it appears the law as one key framework for military decision-making is here to stay. Not surprisingly, given the pervasiveness of legal

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[2] Dean Acheson, speaking as part of 'Law and Conflict: Changing Patterns and Contemporary Challenges, Panel on the Cuban Quarantine: Implications for the Future: Remarks', *American Society of International Law Proceedings* 57 (1963): 10-15, at 14.

[3] Jenny Booth, 'Military Top Brass Attack Soldier Prosecutions', 14 July 2005, at: http://www.timesonline.co.uk/tol/news/uk/article544087.ece.

[4] Christopher P.M. Waters, 'Is the Military Legally Encircled?', *Defence Studies* 8 (2008): 26.

questions in Western military practice, British military officers have expressed the view that they have insufficient legal training and would like to receive greater familiarity with international law and its domestic implementation.[5]

The growing perception of law's relevance has various causes. The first of these is the strategic need to justify or defend operational decisions; States will use law strategically, as a tool to justify actions through an enabling legal framework.[6] Another is the requirement to explain to oneself and subordinates, as well as, outside of the military, civilians (both at home and in theatres of operation) and the press, the legal basis for a mission. The threat of personal liability for one's actions (or those of subordinates under the rubric of command responsibility) is also a natural motivator in wanting to know the law. To these reasons might be added the fact that law and order and rule of law reform are often central aspects of a mission. Officers may need to be familiar with the legal framework to successfully pursue mission goals. Unfortunately, at present, lack of training – and, arguably, failures in leadership in terms of setting out in unambiguous terms the need for strict compliance with law – have led to numerous misperceptions about what the

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[5] W.G.L. Mackinlay, 'Perceptions and Misperceptions: How are International and UK Law Perceived to Affect Military Commanders and Their Subordinates on Operations', *Defence Studies* 7 (2007): 111.

[6] As David Kennedy puts it in his masterful examination of the subject: 'Law now offers an institutional and doctrinal space for transforming the boundaries of war into strategic assets as well as a vernacular for legitimating and denouncing what happens in war.' David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006), p. 116. See also Dino Kritsiotis, 'When States Use Armed Force', in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge, Cambridge University Press, 2004), p. 45, at pp. 47-48.

law actually is. The unwarranted fear and confusion in some quarters over the International Criminal Court's mandate well illustrates this.[7]

Understanding International Law

The focus of this chapter is on international law rather than on domestic civilian or military law. There are numerous introductory writings on international law and no more than a superficial sketch can be given here of the nature of this body of law.[8] Suffice it to say for present purposes that, although linked with domestic legal systems, international law represents a separate and distinct legal system. It has different sources, actors, substantive rules, methods of interpretation and enforcement. International law is primarily created between States, which are sovereign and legally equal, and it may be made in one of two ways. The first is by way of treaties (or, as they are often called, conventions), which are binding agreements akin to contracts. In the modern world multilateral treaties relate to innumerable spheres of international life, from postal exchange to war crimes and from air travel to trade.

The second method of international law creation, customary international law, is more difficult to grasp but remains an enduring and evolving source of law even in an era

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[7] On widespread misunderstanding of the Court, see Mackinlay, 'Perceptions and Misperceptions: How are International and UK Law Perceived to Affect Military Commanders and Their Subordinates on Operations'.

[8] For a clear and recent introductory account of international law, see Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007). For further readings on the law governing the use of force and international humanitarian law, see respectively Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press) (3rd ed., 2008) and Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004).

where it is sometimes overshadowed by the rise of treaty law. It is created through State practice that is largely constant and uniform, combined with an acceptance that the practice is conducted as part of a legal right or obligation. Both the objective actions that constitute State practice and the subjective element (often referred to as *opinio juris*) – the understanding that the State practice is governed by law and is not merely habit – are needed for a practice to be considered customary *law*. For instance, while naval vessels may salute each other at sea with some consistency, there is no sense that there is a 'legal' obligation to do so and therefore no customary international law is created. By contrast, allowing free passage of ships on the high seas is both State practice and perceived as a binding legal norm by States themselves. The free passage rule thus represents customary international law. In addition to treaties and customs, it should be noted that general principles of law from around the world and the resolutions and practices of international organisations also contribute to our understanding of what international rules exist.

It will be evident that unlike the prototypical domestic legal system, which can be categorised as vertical (a legislature centrally passing binding laws on all citizen-subjects), international law is created 'horizontally' between States. There is, for example, no international legislative body capable of passing laws that will be automatically enforced by an international police force. Although the UN apparatus may play some of the roles played by domestic governance institutions, international law is primarily set, interpreted and enforced by States themselves. In other words, unlike in other legal systems, those that are bound by the law must *consent* to be bound by it. This is in one sense international law's weakness. Having said this, international law has huge impact on the relations between States, as well as on the individual lives of the citizen's living within those States.

International law may be rather different from traditional perceptions of what a 'legal system' is like, and it is undoubtedly far from perfect, but it is nonetheless a functioning and distinct normative system, and, moreover, one that is crucial for human development, particularly in the context of situations like the use of military force and the conduct of armed conflicts.[9]

The Two Branches of the Law: the When and the How

There are two generally recognised branches of international law that relate to military force and armed conflict. The first branch is the *jus ad bellum*, which may also be referred to as the law on the use of force. It is concerned with whether resort to force is lawful or unlawful. This is the 'when' of war: when – under what circumstances – is the use of military force lawful? The second branch is the *jus in bello*, which is sometimes also known as either international humanitarian law (IHL) or as the law of armed conflict. This branch deals with the manner in which hostilities can be conducted once force is being employed (regardless of whether or not the use of force was lawful or unlawful under the *jus ad bellum*). This, then, is the 'how' of war.

These two branches of international law are conceptually distinct, but inevitably interrelate to some extent: the two categories are far from watertight. For example, concepts of 'necessity' and 'proportionality' (as mechanisms for assessing lawfulness) are present in both the *jus ad bellum* and the *jus in bello*.[10] Nonetheless, these two branches of the law will be treated as separate sections of this chapter. Before moving on, it is worth

[9] James A. Green, 'An Unusual Silence', *New Law Journal*, 157 (2007): 1478-1479.

[10] See generally, Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004).

noting that it has also become fashionable to speak of the *jus post-bellum*, a third branch of law that deals with peace agreements and transitional justice. This post-conflict branch will not, however, be further discussed here.[11]

A. *Jus ad Bellum*

Legal limitation of a State's right to resort to war is a relatively new phenomenon. Traditionally, it has been the legal right of States to opt for warfare with total discretion. Admittedly, the modern legal rules have their roots in a long standing tradition that war was only legitimate if it was 'just'.[12] However, this doctrine – which can be traced back at least as far as Cicero, but which was significantly developed by later theologians – was essentially an issue of morality or righteousness: it was not until the twentieth century that the 'just war' doctrine resulted in any specific legal obligations. Moreover, it is questionable how ethical the avowedly 'moral' just war doctrine in fact was: one man's 'just war' is inevitably another's aggressive conquest.

In the early part of the twentieth century, the first attempts were made to limit the discretion of States in opting for war as a policy instrument. For example, the Covenant of the League of Nations allowed for a 'cooling off" period before resort to arms was permissible.[13] In reality, though, the Covenant did little more than place the legal restriction of the resort to warfare on the international agenda. More notably, the 1928

[11] For more, see Carsten Stahn, '*Jus ad Bellum*, *Jus in Bello*…Jus *Post-Bellum*? – Rethinking the Conception of the Law of Armed Force', *European Journal of International Law* 17 (2006): 243.

[12] See Jean B. Elshtain, 'The Just War Tradition and Natural Law', *Fordham International Law Journal*, 28 (2004-2005): 751.

[13] Covenant of the League of Nations (1919), Article 12.

Kellogg-Briand Pact explicitly sought – for the first time in human history – to outlaw war. This treaty stated: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.'[14] The ultimate failure of the League and the Pact are obvious, however, and, while of historical interest, these instruments only provide a backdrop to the post-1945 regime of the UN Charter.

The Charter was adopted explicitly to prevent further world war and it not only seeks to prohibit the threat and use of 'force' (a broader notion than the formal term of 'war' used in the Kellogg-Briand Pact) but provides for a centralised response to breaches of the prohibition. The basic rule on the use of force is contained in Article 2(4):

> All States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Despite the fact that there appears to be some ambiguity in the language of Article 2(4), which a small minority of States have sought to explore (Argentina in the Falklands dispute claiming it was not in breach of Article 2(4) because it was reclaiming its own 'territorial integrity'), the Article has been interpreted by most States and scholars as a broad prohibition on the use of force – all uses of military force[15] fall under the scope of the

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[14] General Treaty for the Renunciation of War (1928), Article 1. The treaty is colloquially known as the 'Kellogg-Briand Pact' after the American Secretary of State and his French counterpart at the time; it is also sometimes referred to as the 'Pact of Paris'.

[15] Although not 'economic' or 'political' force.

prohibition, at least *prima facie*.[16] For example, what may be called 'indirect force' is considered to be a breach of the prohibition: the use of armed militia groups to make incursions into another State would contravene Article 2(4).[17] The Charter, which is ultimately a treaty (albeit one that has a quasi-constitutional character) has been ratified by all members of the UN. It is also widely recognised that Article 2(4) represents customary international law on the subject of the use of force. Thus, if a State that is not a member of the UN were to embark on an aggressive war, such action would still be unlawful. As a legal norm, then, Article 2(4) may be said to be 'universal' both in terms of content and application. Indeed, it should be noted that not only is force prohibited under the Charter, but States are under a positive duty to seek to resolve their disputes peacefully.[18] It should always be borne in mind that the peaceful settlement of disputes – through negotiation, mediation, arbitration, adjudication and 'good offices' – is the usual course of action in the vast majority of international disputes that arise.

Although Article 2(4) essentially represents a blanket prohibition on the use of military force, there are two universally accepted exceptions to the prohibition that may be found elsewhere in the Charter. The first of these is the use of force pursuant to the

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[16] Though this perhaps has more to do with political acceptance of the prohibition following the Second World War than it does with the clarity of the legal language used in Article 2(4). See Kritsiotis, 'When States Use Armed Force', pp. 57-58.

[17] See generally, the principles adopted by the UN General Assembly, by consensus, in the Declaration on Principles of International Law Friendly Relations And Co-Operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 1970.

[18] UN Charter, Article 2(3).

collective security measures as part of the UN framework. When the 15-member Security Council decides that there has been a threat to the peace, a beach of the peace, or an act of aggression, it may order States to act (or desist from acting) in a certain manner. To implement its will in such matters, the Security Council may, if it feels it necessary, impose measures 'not involving the use of armed force.'[19] These measures can include economic or political sanctions (increasingly becoming 'smarter' and more targeted against individuals or elites within a State) or other measures such as a weapons inspection regime or the establishment of an international criminal tribunal (tribunals of this kind were established for both the former Yugoslavia and Rwanda). However, if such non-forcible measures are deemed inadequate, the Security Council may 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.'[20] In other words, the Council may lawfully sanction the use of military force.

As the UN as currently constituted has no standing forces, the Security Council may delegate enforcement action to a regional security organisation (such as NATO) or to a coalition of States. During the Cold War, with deadlock amongst the five veto-wielding permanent members on the Security Council, the enforcement provisions were largely 'dead letter'. However, with the end of the Cold War, more robust Security Council action was possible. Beginning with the grant of authority to the United States-led 'coalition of the willing' following the 1990 invasion of Kuwait by Iraq, an era of Charter sanctioned forceful intervention was ushered in (although this is not to imply that the Security Council

[19] UN Charter, Article 41.

[20] UN Charter Article 42.

is, in the post-Cold War world, immune to political deadlock and sporadic periods of ineffectuality, as inaction over the recent Russia-Georgia conflict shows).

The most controversial use of Security Council Resolutions to justify the use of force came with the 2003 intervention in Iraq by United States/United Kingdom led forces. Both the United States and the United Kingdom purported to find legal basis for their operations under Security Council grants of authority from the first Gulf War coalition, which, they argued, were automatically reinstated by Iraq's failure to comply with the weapons inspection regime put in place after the 1990 intervention in Iraq.[21] This legal argument has been condemned by most international lawyers in the United Kingdom who have argued that, among other things, such reasoning is contrary to the purposes and principles of the United Nations and represents a turning of backs of the historic 'transatlantic commitment to international law.'[22] What is clear is that whilst the dispute over the interpretation of the Security Council Resolutions was a body blow to the collective security system, it was not a lethal blow as was feared in many camps in 2003.

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[21] In brief, the argument goes that Resolution 678 (1990) authorised force against Iraq in part to 'restore peace and security to the area.' Resolution 687 (1991) set out ceasefire conditions which included Iraq's compliance with a weapons inspection regime. When those ceasefire conditions were breached by Iraq's non-compliance, as recognised by Security Council Resolution 1441 (2002), Resolution 678 was revived. For more detail see 'The Advice of the United Kingdom Attorney-General, Lord Goldsmith, on The Legal Basis For the Use of Force Against Iraq', 17 March 2003, at:

http://www.number-10.gov.uk/output/Page3287.asp. It should be noted that, unlike the United Kingdom, the United States also set out a secondary legal argument that was even more shaky, based upon a notion of pre-emptive self-defence (something that will be discussed below), see UN Doc. S/2003/351.

[22] Philippe Sands, *Lawless World* (London: Allen Lane, 2005), p. 225.

The taste for open-ended 'peace enforcement' missions may have subsided somewhat, but the Security Council maintains a busy agenda and has taken action on such matters as terrorist financing and peacekeeping. Indeed, the Western European public reaction to the intervention in Iraq may be seen as actually strengthening the position of international law – a breach of the law in Iraq has had significant political ramifications for the Labour government, for example.

The second exception to the prohibition on the use of force is the right to self-defence, which the Charter itself refers to as an 'inherent' right. Article 51 provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The most crucial aspect of this passage is that it holds that the use of force in self-defence is only lawful if taken in response to an 'armed attack.' This means that political or economic pressure does not give rise to the right to use military force; a State claiming self-defence must have suffered military force against it. Moreover, an armed attack constitutes a

qualitatively grave use of force.[23] In other words, it is not merely the case that a State may meet force with force. Only the gravest uses of force ('armed attacks') allow the victim State to use military force in response. Of course, this begs the question: how grave is grave? In general, though, this simply means that comparatively minor instances of force (such as an isolated border skirmish, for example), will not trigger the right of self-defence in and of themselves.[24]

It is clear that an armed attack may be 'indirect', in that it may come from 'non-regular' forces. A good example of this would be an attack by mercenary forces directed by a State, as occurred in the Seychelles in 1981. It is argued by some that this concept extends to wholly non-State actors, such as terrorist forces operating from within the territory of a 'host' State. Thus, it was claimed by the United States following 9/11 that an attack by al-Qaeda constituted an armed attack allowing for a lawful military response against Afghanistan. Operation Enduring Freedom was generally accepted as a lawful action of self-defence; however, most international lawyers would argue that there must be at least some level of involvement by a State in the conduct of the non-State actor before

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[23] As the International Court of Justice (ICJ) has put it, an armed attack constitutes 'the most grave form of the use of force', *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States of America*) merits, (1986) ICJ Rep. 14 (hereinafter '*Nicaragua*'), para. 191.

[24] However, it is possible that numerous 'minor' attacks may be taken cumulatively to constitute a 'grave' armed attack, see Derek W. Bowett, 'Reprisals Involving Recourse to Armed Force', *American Journal of International Law* 66 (1972):1, p. 5.

this action can constitute an armed attack. How much State involvement is necessary, however, remains open to debate.[25]

Article 51 also holds that self-defence can be collective; that is to say that a State may use force to aid another State that has suffered an armed attack against it. This permits, for example, NATO-style agreements that provide that an attack on one State is an attack on all. Similarly, it allows for an individual State of superior military might to come to the aid of a weaker State under attack. However, a 'white knight' State cannot make the decision to intervene on behalf of another unilaterally. The State that has suffered the grave use of force against it must declare itself to be the victim of an armed attack, and, moreover, it must specifically request military aid from the responding State in repelling that attack.[26]

Additionally, there are what might be called procedural aspects to Article 51 in relation to Security Council action. First, States have an obligation to report any self-defence actions to the Security Council (something that initially was poorly maintained, but in the last twenty years has become common practice). Second, and perhaps more

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[25] For example, contrast the views expressed by Kimberley N. Trapp, 'Back to Basics: Necessity, Proportionality and the Right of Self-Defence Against Non-State Terrorist Actors', *International and Comparative Law Quarterly*, 56 (2007): 141 with the position taken by Ian Scobbie, 'Words My Mother Never Taught Me: In Defence of the International Court', *American Journal of International Law* 99 (2005): 76, pp. 80-81.

[26] *Nicaragua*, merits, paras. 195 and 199.

importantly, the right of self-defence is terminated once the Security Council has taken measures to deal with the situation.[27]

Article 51 alone does not tell the whole story with regard to the law concerning self-defence actions, however. Crucially, this area is also governed by customary international law. Indeed, there are fundamental legal criteria for self-defence that are not present in Article 51, but instead can only be found in custom. The traditional starting point for understanding these customary legal rules on self-defence is the *Caroline* incident of 1987, which occurred in the context of the Canadian rebellion against British rule. The *Caroline* was a privately owned American steamer that had been used to supply munitions and American nationals to support attacks against British assets in Canada. Whilst it was docked at Schlosser, in United States territory, it was attacked by British-Canadian forces, who set fire to the vessel, and towed it over Niagara Falls.

A protracted diplomatic exchange ensued, which culminated in a number of correspondences between the new United States Secretary of State Daniel Webster and the British special representative to the United States, Lord Ashburton. The formulation that came out of that exchange of letters was that – for a military action to constitute lawful self-defence – there had to be 'a necessity of self defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation' and that the response could not be

[27] Although whether these 'measures' need to be effective or simply in existence is debateable, see DW Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?', *International and Comparative Law Quarterly*, 40 (1991): 366, pp. 389-399.

'unreasonable or excessive.'[28] These phrases have since been distilled into two universally accepted key criteria: self-defence must be both *necessary* and *proportionate*.[29] It is here that debates most often arise as to whether a response – say the United States-led intervention in Afghanistan of 2001 – was necessary and proportionate and often there can be no mechanical or formulaic response to that question.

One further area of controversy in the area of self-defence is with respect to responses against apparent threats of force that have not yet materialised. Must the attack have actually occurred, as suggested by a strict reading of Article 51, or can a response be taken against an attack that is merely 'imminent'? What about pre-emptory attacks against non-imminent threats, as suggested by the so called 'Bush Doctrine', which was first set out by the United States in 2002?[30] There is a volume of scholarly literature on this topic, but State practice suggests that anticipatory self-defence in the face of imminent attack will in certain circumstances be lawful, while a broader pre-emptory right taken in response to a non-imminent threat – such as a 'preventative' attack on an installation in State A that might be making weapons to be used at some point in the future against State B – would be

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[28] Letter dated 27 July 1842, from Daniel Webster to Lord Ashburton, *British and Foreign State Papers*, Vol. XXX (1841-1842) pp. 193-194, extract taken from Webster's earlier letter to Henry S. Fox dated 24 April 1841, *British and Foreign State Papers*, Vol. XXIX (1840-1841) pp. 1137-1138.

[29] James A. Green, 'Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence' *Cardozo Journal of International and Comparative Law* 14 (2006): 429.

[30] National Security Strategy of the United States of America, September 2002, at:

http://www.whitehouse.gov/nsc/nss.html

unlawful. Thus, the Israeli strike on the Iraqi nuclear reactor at Osiraq in 1981 was broadly condemned as unlawful, on the basis that the perceived threat could not be considered to be imminent. Quite clearly, claims of a broad pre-emptory right of self-defence are open to unilateral abuse and threaten the basic Charter regime on the use of force. It is primarily for this reason that States have rejected the doctrine as being contrary to international law.[31]

In addition to the two universally accepted exceptions to the prohibition contained in Article 2(4), there are a number of other proposed exceptions to the restriction on the use of force. Some of these are of highly dubious merit, such as the use of force to promote democracy, or the support of 'national liberation movements' in internal conflicts. A more credible, albeit controversial, contender is so-called 'humanitarian intervention'. That the Security Council can intervene on humanitarian grounds is now uncontroversial, but whether States may unilaterally use force to protect the human rights of non-nationals in another State in instances where the Security Council is unwilling or unable to take action – such as was the situation in Kosovo in 1999 – has been a long standing academic hot potato. Humanitarian intervention will be discussed further in the following chapter by Professor Haines, so we will not dwell on it any more here.

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[31] A rather stark example of the general rejection by States of the doctrine of 'non-imminent' pre-emptive self-defence is the categorical rejection of the concept by the 114-member Non-Aligned Movement in the declaration that emerged from that organisation's fourteenth summit in Havana in September 2006, 14th Summit of Heads of State or Government of the Non-Aligned Movement, Final Document, Havana**,** 11-16 September, 2006, NAM 2006/Doc.1/Rev.3, at:

http://www.cubanoal.cu/ingles/index.html.

Before concluding this section, it is necessary to turn to an organisation that has been previously unconcerned with the *jus ad bellum*: the military. While traditionally an active participant in the creation and development of the *jus in bello*, Western militaries under the doctrine of civilian supremacy have essentially not concerned themselves with the question of whether or not a conflict is lawful. For the most part, it is fair to say, military forces will simply adopt the view on the *jus ad bellum* held by civilian overseers, and the extent to which commanders must grapple with the *jus ad bellum* will be limited to an interpretive rather than decision-making role. This limited, though important, engagement may involve interpreting the mandate of a military presence as set out in a Security Council resolution, advising on the proportionality of using particular tactics after a decision to engage in self-defence has been made, or, in cases where soldiers are in a foreign State with the latter's consent – such as in classical peacekeeping missions – interpreting the agreement that makes the visiting forces' presence lawful. The latter agreements are typically called status of forces agreements (SOFAs) and govern a variety of matters ranging from the geographical and territorial scope for military activities to criminal jurisdiction over soldiers and compensation to civilians for damage caused by the visiting forces.[32]

Moreover, the traditional 'hands off' approach of the Western military to wider legal issues concerning the *jus ad bellum* is slowly being replaced by a somewhat more critical stance, as evidenced by reports that the British Chief of Defence Staff at the time of

[32] The leading book on this subject is Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001).

the invasion insisted on a government legal opinion that the war was legal before committing his armed forces to action.[33] At a 'grass roots' level, lawfulness matters as well, as suggested by calls for the Military Covenant to be rethought. For example, in an open letter to the Prime Minister published in the *Independent on Sunday*, the signatories – who include family members of active and deceased service people – demanded 'the right [of British service people] to expect any war to be lawful.'[34]

It is important to be realistic about the weakness of the international legal regime governing the use of military force. Some scholars, from the classical realist perspective, understandably view this area of the law with cynicism. It is largely agreed – at least outside of the United States – that the use of force in Iraq was unlawful. This unlawfulness did not stop the intervention from occurring, however, nor did it lead to much in the way of tangible recriminations for the United States or the United Kingdom. Yet it is also important to keep in mind that breaches of the prohibition on the use of force have become the exception, not the rule. We now have a legal prohibition on the use of military force for the first time in human history – this in itself sets the UN system apart as a monumental step in the right direction, irrespective of its imperfections. No State has ever claimed to be exempt from the Charter regime on the use of force. When States do use force, justification is always sought under an exception to the basic prohibition. The Charter regime has

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[33] Antony Barnett and Martin Bright, 'British Military Chief Reveals New Legal Fears over Iraq War', *The Observer*, 1 May 2005, at: www.guardian.co.uk/politics/2005/may/01/uk.iraq.

[34] Terri Judd, Sophie Goodchild, Andrew Johnson, Lauren Veevers and Kim Sengupta, 'The Betrayal of British Fighting Men and Women', *The Independent*, at: http://news.independent.co.uk/uk/politics/article2347537.ece.

shaped the way States perceive their options. For example, aggressive war for territorial conquest is now a non-starter. The influence on State behaviour may or may not be affected by perceptions of legitimacy, or the law's 'compliance pull'. It may be mostly that States take the view that their long-term self-interest is tied up with a predictable and stable world order. However, it is no longer the case that States may ignore the *jus ad bellum* entirely.[35]

B. *Jus in Bello*

In a broad sense, IHL is the body of law that seeks to protect the 'victims' of warfare (or, more accurately, of *armed conflict*). Be it civilians caught up in a conflict, or combatants that have been wounded or captured, IHL sets down legal requirements that such persons be treated with reference to basic humane standards. As such, for all its complexity, the key principle of IHL is that people who – for whatever reason – are not engaged in active fighting must be treated humanely, and that conflict must be conducted in a manner that reflects this.

The ideas underlying IHL find resonance in ancient notions such as chivalry and a warrior's honour. Most cultural and religious traditions can be plumbed for examples of 'proto-IHL' protection afforded to civilians (such as women and children) or special classes of fighters (such as those carrying a white flag). The origins of its modern and multilateral incarnation, however, can be traced to the latter half of the nineteenth century in Europe.[36]

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[35] Take, for example, the situation following the Israeli raid on Tall al-Abyad in Syria in September 2007. See James A. Green, 'An Unusual Silence'.

[36] Though the first modern codification of humanitarian law is often credited to the Leiber Code issued to Union troops during the United States civil war.

In fact, the story of IHL is most often – somewhat simplistically – grounded in a particular European battlefield. In 1859, during the Battle of Solferino in the war for Italian unification, a travelling Swiss businessman, Henri Dunant, witnessed battlefield carnage on a massive scale. Together with local citizens he collected and cared for the wounded who had been left on the battlefield. Touched by what he had seen and convinced of the need for action, Dunant wrote a tract entitled *A Memory of Solferino*, in which he suggested the need to create a relief group to address the inadequacy of army medical services. He also asked the militaries of various countries whether they could formulate 'some international principle, sanctioned by a convention and inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries?'[37] The group formed in 1863 to continue the agenda suggested by Dunant was the International Committee of the Red Cross (ICRC), an organization that remains the guardian of much of IHL. At the urging of the ICRC, the Swiss government agreed to convene a diplomatic conference which resulted in the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and set the stage for a multilateral treaty regime that continues to evolve to this day.

The most important IHL treaties today are the four Geneva Conventions (GCs) of 1949 and the additional protocols to the GCs.[38] The GCs are almost universally ratified

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[37] ICRC, 'From the Battle of Solferino to the Eve of the First World War' (2004), at: http://icrc.org/web/eng/siteeng0.nsf/html/57JNVP

[38] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Convention (III) relative to the

(ratification is a process whereby a State formally agrees to be bound) with 194 States party. They cover victims of land (GC I) and sea (GC II) warfare, prisoners of war (GC III) and the treatment of civilians (GC IV). In 1977 two additional protocols (APs) were created to fill gaps left by the 1949 set of treaties and to recognise the evolving nature of warfare. AP I more clearly addresses the conduct of hostilities (for example, prohibiting weapons that cause superfluous injury) and additional types of combat (notably aerial warfare). AP II addresses civil wars (or to use the language of IHL, 'non-international armed conflicts') and supplements the minimal protections provided for victims of civil wars in the GCs themselves.[39] Given that a clear majority of the victims of warfare are victims of civil wars, AP II is perhaps particularly important, though it has been ratified by

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Treatment of Prisoners of War. Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); 8 June 1977, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005. The text of these and all other IHL treaties can be found on the ICRC's website, at: www.icrc.org.

[39] Common Article 3 of the GCs has been described by the ICJ as setting out 'elementary considerations of humanity', *Corfu Channel* (*United Kingdom* v. *Albania*), merits (1949) ICJ Rep. 4, p. 22. It requires that those not taking part in hostilities – including non-combatants and detainees – should be treated humanely. Acts such as torture, murder and the passing of sentences without guarantees of judicial fairness are specifically prohibited. The United States Supreme Court recently held that Common Article 3 is the appropriate IHL framework to be applied by American forces in the 'War Against Terrorism': *Hamdan* v. *Rumsfeld* 126 S.Ct. 2749 (2006).

fewer States than AP I and certainly than the GCs themselves. AP III of 2005 was made to deal with the discrete issue of the emblem of protection. The red crystal – a symbol without possible religious connotations – was adopted to stand beside the red cross and red crescent as internationally recognised symbols to be used on, among other things, medical transport vehicles.

In addition to the GCs, there are roughly twenty additional important IHL treaties – on issues ranging from child soldiers to cultural property to laser-blinding weapons – including, most recently, the Convention on Cluster Munitions of 2008. They have been subscribed to with varying degrees of support. In addition to the IHL treaty regime, customary international law also provides IHL content. The ICRC in 2005 completed an exhaustive review of customary international law – by among other things, surveying military manuals – to determine the customary rules.[40] The ICRC study had more than two hundred contributors, and comprised two volumes that together ran to over five thousand pages of text. This should go some way to illustrating the vast scope of the customary IHL rules.

Finally, it is worth briefly noting that international human rights – rights guaranteed to individuals *vis à vis* governments through a separate though overlapping treaty regime from IHL – may also apply. Rights do not automatically cease to exist in times of armed

[40] J-M Henckaerts and L Doswald Beck (eds), *Customary International Humanitarian Law: Vol. I, Vol. II* (*Parts 1 and 2*), ICRC Study (Cambridge: Cambridge University Press, 2005).

conflict. For example, while in national emergencies States may derogate from some rights, others, such as freedom from torture, are non-derogable.[41]

The modern IHL regime – rooted in the GCs, but expanded across numerous other treaties and in customary international law – is large and complex. There is certainly not space here to even begin to delve into the specific protections provided for under the GCs or elsewhere. Given this complexity, mastering the body of IHL and related areas is, in practical terms, a challenge for any military or civilian lawyer and, clearly, non-legally trained officers and enlisted personnel are not expected to have a detailed knowledge of the law. In modern militaries, Rules of Engagement (ROE) will have been vetted by lawyers to ensure compliance with IHL principles and, for the most part, will provide an adequate guide to some basic questions, notably, 'when to shoot and when not to shoot.' However, rules of engagement – no matter how comprehensive – cannot cover the many detailed aspects of IHL or anticipate all the eventualities that may arise on the battlefield. Officers must therefore be alert to legal issues that may arise. What if, for example, in a multi-national force, rules of engagement differ on the treatment of detainees differ? Military

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[41] A good primer on the overlap of the two regimes is ICRC, 'International Humanitarian Law and International Human Rights Law: Similarities and Differences', 2003, at: http://www.icrc.org/web/eng/siteeng0.nsf/html/57JR8L. Another debate has been over the exact territorial reach of human rights. Does, for example, the European Convention of Human Rights apply to the actions of British soldiers in Iraq? The House of Lords recently held that European Convention Rights did apply in a case where an Iraqi civilian was killed while in British custody, though not where civilians were killed by British soldiers on patrol: *R* (*on the application of Al-Skeini and others*) v. *Secretary of State for Defence*, 13 June 2007 (HL).

Manuals (such as the United Kingdom's *Manual of the Law of Armed Conflict*),[42] specialised personnel (for example Military Police specifically trained to handle prisoner of war matters) and legal advisers (who are being increasingly deployed operationally) are among the resources to which a commander might turn where there is uncertainty. There is no substitute, however, for a commander's mastery of key IHL concepts as ultimately it will be commanders and not advisers who take decisions for which they are answerable.

While quite properly insisting that a distillation of the rules cannot act as a substitute for the text of the treaties themselves, the ICRC has put forward seven basic rules that go a long distance towards sketching the crux of IHL. They are as follows:[43]

> 1. Persons *hors de combat* [in other words those taken prisoner or wounded/injured] and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
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> 2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat.*
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> 3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical

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[42] Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004).

[43] ICRC, Basic rules of the Geneva Conventions and their Additional Protocols, 1988, at: http://icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0365/$File/ICRC_002_0365_BASIC_RULES_GENEVA_CONVENTIONS.PDF!Open

> personnel, establishments, transports and equipment. The emblem of the red cross or the red crescent [and now the red crystal] is the sign of such protection and must be respected.
>
> 4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
>
> 5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
>
> 6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
>
> 7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

Many points of clarification could be made here, but let us content ourselves with just one, albeit a clarification that goes to the heart of the internal tensions within IHL. Underlying several of the seven rules is the principle of distinction; the notion that fighters should distinguish between civilians and combatants and between civilian and military objects. To

the extent that this means that civilians should never be specifically targeted, the rule is unambiguous. What if, however, in pursuing a legitimate military target, civilians will be harmed? The rule is that the harm to civilians cannot be unnecessary or excessive – in other words, *disproportionate* – to the military importance of the military objective. To put it another way, military logic or military necessity is to be balanced against the principle of distinction, with 'proportionality' acting as the fulcrum. When one civilian night-watchman will be killed in an attack on a major munitions dump, the harm to civilians will obviously not be disproportionate. Similarly, an air strike that will kill dozens of civilians as the price for killing one mid-ranking enemy officer will be disproportionate.

The problem comes in the grey areas, with different militaries taking different approaches. What is clear for most observers is the essential permissiveness of IHL itself as it now stands. As the British MOD *Manual on the Law of Armed Conflict* puts it, 'The Law of Armed Conflict is consistent with the economic and efficient use of force. It is intended to minimise the suffering caused by armed conflict rather than impede military efficiency.'[44] While some specific acts or weapons are prohibited, in general the 'balancing' is often tipped towards military necessity, at least in current practice. Whether the generally permissive nature of IHL is *desirable* is essentially a non-legal question; as such, it is one major reason why ethics remains an important part of the military decision-making calculus; what is legally permitted may be unethical or simply, especially in the context of counter-insurgency, imprudent.

Having sketched out the nature of IHL, a fair question remains: is there any way of enforcing it? The answer is that, for the most part, IHL is difficult to enforce. Therefore,

[44] See *The Manual of the Law of Armed Conflict*, p. 21.

the most important means of ensuring the successful implementation and application of the law is the training and dissemination of IHL, particularly amongst the military personnel that deal with decision-making on the ground.

Similarly, of the – far from comprehensive – methods of enforcement that do exist, perhaps the most important is what may be termed 'political enforcement'. It is in States' interests to be seen to be acting in conformity with the law, especially when the law requires the State to act in a humane manner. This may not sound as desirable as humanitarian protection for its own sake, but to some extent it is the reality. Political pressure on States to conform with the law comes from all manner of sources, including 'naming and shaming' type activities on the part of non-governmental organisations, judicial complaints against States by individuals or other States and, not by any means least, the individual citizens of the State concerned.

A more concrete method of enforcement is the concept of a 'protecting power' – a neutral State that essentially undertakes to ensure, so far as possible, that the rules of IHL are being upheld by the parties in conflict or by an occupying power. Both Switzerland and Sweden performed this role in Europe during the Second World War. The obvious drawback with this method is that it requires a neutral State to come forward to perform the protecting power role, and also requires that the States in conflict allow it to effectively do so. As such, this method of enforcement has to a large extent fallen into disuse. Today, the ICRC essentially takes on an equivalent role where possible, through processes of monitoring and reporting.

Another way to enforce IHL is through individual criminal accountability. Thus, war crimes trials of individuals can be conducted by national authorities or by an

international *ad hoc* criminal tribunal (such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda). Those committing war crimes, genocide or crimes against humanity may also be tried by the International Criminal Court (ICC), a permanent, independent court created by a 1998 treaty with 106 States participating. If there is a national or territorial connection of a suspected individual criminal to a State party, and that State has proven unwilling or unable to investigate or prosecute, the ICC may take that case over. As important as the ICC is in the fight against impunity, however, it only has a mandate to go after 'big fish'; in the words of the treaty establishing the Court, '[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.'

Thus, whilst problems with the enforcement of IHL remain, there are methods in place to ensure compliance. However, the success of IHL currently rests more on its wider implementation through education and dissemination, and through the political capital that is generated through adherence, rather than any specific enforcement mechanism.

Conclusion

For the most part, international law is followed by States. On the rare occasions where it is breached, the consequences are usually comparatively minor, and legal disputes are, in the vast majority of instances, resolved through peaceful means. Adherence to the norms of the twin systems of the *jus ad bellum* and the *jus in bello* is – as with international law more generally – the rule and not the exception; breaches of the law are much rarer than is commonly perceived. Unfortunately, in the case of the particular areas of international law we are here discussing, the failures of the law that do occur have dramatic (and deadly) consequences. When considering international law, we think of Gaza, or the abuses of Abu

Ghraib, or – perhaps most appallingly – recent failures in Africa: take Rwanda or Darfur as two examples amongst many. We do not think of how international law allows us to fly to Moscow, or how we receive post from a friend in Vancouver. This perception is quite correct, because it is at the fundamental margins – in the areas such as the use of force and conduction of armed conflict – that the most work needs to be done. It is here that breaches do the most harm.

This chapter has sketched out how international law seeks to minimise such harm. We have examined international law's prohibition on the use of force and the scope of the exceptions to that prohibition. We then turned to the tools provided by international law that can be used to protect victims of armed conflict, should the prohibition be breached or should an exception to it apply. In both the *jus ad bellum* and the *jus in bello* the core rules themselves are generally clear, albeit that they can at times be rather dense. Moreover, law is playing an ever increasing role in the reality of military force and armed conflict. There remain significant concerns with regard to the application of the law and, importantly, its enforcement. Nonetheless, international law is here to stay as a major factor in the conduct of warfare.