Israel Yearbook on Human Rights

Volume 32

2002

Edited by

Yoram Dinstein and

Fania Domb

BRILL | NIJHOFF

ISRAEL YEARBOOK

ON

HUMAN RIGHTS

VOLUME 32

2002

MARTINUS NIJHOFF PUBLISHERS
THE HAGUE / NEW YORK / LONDON

A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISSN 0333-5925
ISBN 90 411 2194 3

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.
sales@kluwerlaw.com
http://www.kluwerlaw.com

Sold and distributed
by Turpin Distribution Services Limited,
Blackhorse Road, Letchworth, Herts,
SG6 1HN, United Kingdom

Publication of this volume was made possible by a grant from
The Anny and Paul Yanowicz Chair of Human Rights

Printed on acid-free paper

Printed in the Netherlands.

Editor

PROFESSOR YORAM DINSTEIN
Yanowicz Professor of Human Rights
Pro-President, Tel Aviv University

Associate Editor

DR. FANIA DOMB
Faculty of Law, Tel Aviv University

English Style

DAVID LEVINSON

The views expressed in contributions to the Israel Yearbook on Human Rights are those of the individual authors and are not to be taken as representing the views of the editors.

TABLE OF CONTENTS

ARTICLES

I. INTERNATIONAL CONFERENCE ON INTERNATIONAL LAW AND THE WAR ON TERRORISM

United States Naval War College
Newport, Rhode Island
26 - 28 June 2002

A. *JUS AD BELLUM* ISSUES

B. *JUS IN BELLO* ISSUES

II. ADDITIONAL *JUS IN BELLO* DIMENSIONS

BOOK REVIEW

JUDICIAL DECISIONS

SPECIAL SUPPLEMENT

JUS AD BELLUM AND INTERNATIONAL TERRORISM

*By Rein Müllerson**

I. LEGAL REGULATION OF USE OF FORCE: FAILURE OF NORMATIVE POSITIVISM

The central domain in international law is legal regulation of use of force. The nature, content and effectiveness of this branch of international law mirror much more clearly than any other branch the very character of international law. To help grasp the essence of current confusion and trends in this area of international law, it is advisable to have as short as possible, and as comprehensive as necessary, an overview of how the attitude of international law towards the use of military force has reached the current stage.

Thucydides' *History of the Peloponnesian War* demonstrates complete absence of any legal (or even legal-moral-religious) restrictions on recourse to war. As Thucydides writes, "the Athenians and the Peloponnesians began the war after the thirty-year truce" since "Sparta was forced into it because of her apprehensions over the growing power of Athens".[1] This sounds somewhat familiar and contemporary since there seems to have been a violation of balance of power that had caused one party – Sparta – to ally with smaller Greek city-States forming the Peloponnesian League to counter militarily the Delian League headed by Athens. But differently from today's or even from yesterday's world, Greek city-States did not have any need to justify their recourse to arms. Athenians believed that "it is an eternal law that the strong can rule the weak" because "justice never kept anyone who was handed the chance to get something by force from getting more".[2] Their ambassadors explained to the Melians that "those who have power use it, while the weak make compromises. ... Given what we believe about the gods and know about men, we think that both are always forced to dominate everyone they can. We didn't lay down this law, it was there – and we

* Professor of International Law, King's College, London (U.K.); Member, *Institut de Droit International.*

1 Thucydides, *The Peloponnesian War* 11-12 (1998).

2 *Ibid.*, 30.

Y. Dinstein (ed.), *Israel Yearbook on Human Rights 32*, 1-52

weren't first to make use of it"[3] and "each of us must exercise what power he really thinks he can".[4]

Starting from St Augustine, through St. Thomas Aquinas and other Christian theologians, various concepts of just wars developed. War had to be declared and waged by proper authorities, had to have just cause and just intention. What cause could have been just was, of course, open to debate. This was the period of the dominance of natural law doctrines in international relations, where legal arguments were indistinguishable from religious and moral reasoning. This period continued beyond the times of Hugo Grotius. Legal limits on use of force were drawn from the interpretation of religious texts or Roman private law and not from what States or other political entities actually did. If international law at all governed (i.e., limited or justified) use of armed force it was because its arguments were drawn from and supported by religious texts and their interpretation. Christianity was not the only religion that had something to say about use of force. Interpreters of the Old Testament and the Koran, similarly, tried to distinguish between just and unjust causes of resorting to arms. There are some striking similarities, though no doubt there are significant differences too, between the main monotheistic religions in that respect. For example, the Spanish Dominican professor, Franciscus Victoria, explained that, as the Indians in America, though not Christians, were nevertheless humans and as such endowed with reason, it was not possible to use force against them without just cause and "difference in religion is not a cause of just war".[5] At the same time, "the Indians had violated the fundamental right of the Spaniards to travel freely among them, to carry on trade and to propagate Christianity".[6] Hence, force could not be used to proselytise, it could be used only when proselytees refused to be proselytised. In 1948 Sheikh Shaltut of Al-Azhar University in Cairo justified the Muslim conquests of Byzantine and Persia on the grounds of the hostility by the Byzantines and Persians to communications calling them to convert to Islam. He wrote that "Moslems only attacked people when they showed a spirit of hostility, opposition and resistance against the mission and a contempt for it".[7] As Ann Elisabeth Mayer comments, "here religious reasons, resistance to converting to Islam and contempt for Islamic missionaries, apparently justify recourse to military force – at least where the

3 *Ibid.*, 229.

4 *Ibid.*, 227.

5 Y. Dinstein, *War, Aggression and Self-Defence* 61-62 (3rd ed., 2001).

6 *Ibid.*, 61.

7 Quoted by A.-E. Mayer in her "War and Peace in the Islamic Tradition and International Law", in *Just War and Jihad. Historical and Theoretical Perspectives on War and Peace in Western and Islamic Tradition* 204 (J. Kelsay & J.T. Johnson eds., 1991).

States attacked are perceived to be a danger to Muslims or the spread of Islam".[8] Here too, only those who refused to adhere to the true faith were killed and their lands conquered.

After Emerich de Vattel positivism gradually started to prevail in international law. The differentiation between just and unjust wars based on God's laws or laws of nature (the human nature or the nature of the State) lost its meaning. Although this was not a return to the naked power politics of the ancient Greece it was only thinly veiled power politics where any offence, either real or perceived, even simply any pretext, may have been good enough to justify use of military force. In such a situation the *Caroline* incident and an exchange of letters between the Secretary of State Daniel Webster and the British Minister to Washington was more an aberration than a pattern of behaviour. As we will discuss further, the *Caroline* formula has become rather interesting for explaining some of today's conflicts but in the middle of the XIX century this was at best *opinio juris* of two States that was not confirmed by any practice. Let us recall that in 1914 during the Vera Cruz incident the US used military force against Mexico when the offence consisted in the refusal by the Mexican authorities to salute the US flag in a special ceremony. Apologies for the arrest by the Mexican authorities of three members of the crew of the U.S.S. Dolphin and their subsequent release were not considered by Washington as the adequate remedy for the offence.[9] Similarly, Great Britain and Germany used gunboats to force Venezuela to pay its debts to nationals of these States.[10]

In the domain of legal regulation of the use of force, positivism as States practice (i.e., were there were a few limits of use of military force; any offence against a State or its honour could be responded to by force), became diluted starting from the beginning of the XX century by positivism as normativism, i.e., law was not so much what States did to each other but what they had agreed they should or should not do. Using customary law terminology, it was not so much State practice as their *opinio juris* that mattered. Of course, here, I am using the term *opinio juris* in a wider sense that includes any authoritative statement by States what international law is, including those enshrined in international treaties. Whether a treaty that is formally in force but that is not implemented in practice is law or not is another issue. The same question may be asked about *opinio juris* not confirmed by practice.

This has been a controversial development. One may say that there has always been an immense gap between words and deeds and one is of course

[8] *Ibid.*, 205.

[9] I. Brownlie, *International Law and the Use of Force by States* 36-37 (1963).

[10] *Ibid.*, 35.

right. But words as well as notions and ideas expressed in these words, if repeated long enough and desired by many, have a tendency to impact on reality and though the gap may still be immense, today's reality on use of force is not any more what it was hundreds of years ago. Mentality of a few may change laws, while laws may change mentality of many and even force those whose mentality has not changed to act within the law. Here the relationship between law and behaviour is a kind of chicken-and-egg question. It is impossible to say whether European neighbours (e.g., Great Britain and Germany; France and Germany) who for ages had waged wars against each other do not do it any more because they had eventually come to the conclusion that they needed effective norms and institutions that would help them have good neighbourly relations instead of being at each other's throats all the time or today they do not attack each other because of these norms and institutions. Obviously, the change of mentality and the creation of norms and institutions went hand in hand.

Europe is not the only, though the most prominent place (having also been one of the bloodiest and having become the most peaceful), where such changes have taken place. The American continent has moved in the same direction.

Starting from the beginning of the XX century through such developments as the 1919 League of Nations Covenant, the Kellogg-Briand Pact of 1928, the 1945 UN Charter and some other acts we have written norms that severely restrict use of military force in relations between States. On the one hand, this normative system has been violated so many times and often with impunity that it is hardly possible to call it an effective (even relatively effective) legal regime. On the other hand, peoples' desire to avoid the repetition of the two World Wars that within one generation had brought untold sorrow to mankind, and especially to Europe, is reflected in this rather ineffective normative system. It certainly has become internalised in the mentality of many people and therefore it also conditions their attitude towards the use of force.

The current UN Charter paradigm concerning use of force may be called a normative positivism since it is based on the consent (agreement) of States and not what they (or at least quite a lot of them) do in practice. It is normative since it is not premised on actual practice of States. It is positivist since it does not make distinctions between just, unjust, more justified, less justified etc. causes of use of force.

The Charter paradigm also sees use of force between States as an absolute evil (after the two world wars it is understandable) without distinguishing between causes of use of force. This paradigm, at least as it was understood by the founding fathers of the UN, did not provide for any legitimate use of force at all except against use of force (even the collective security paradigm

was meant to provide for possible pre-emptive use of force in collective self-defence). In 1945 threats to international peace and security were not considered as being able to stem, for example, from humanitarian crises or even from civil wars. The Cold War period was conducive to formal normative positivism since what was just for the West (e.g., the containment of the Soviet expansion) was most unjust from the point of view of the East and what was just in the eyes of the Soviet leaders (e.g., the advancement of socialism all over the world) was the thing most feared by the West. Here the law had to be what formal norms that the two antagonistic groups, led by the US and the USSR respectively, were able to agree upon. Naturally, it was difficult, if not impossible, to have an agreement on causes that would have justified use of force, except the use of force against the use of force.

Now the situation has changed, though no change is ever absolute. There are still, and there will remain in the foreseeable future, States with various interests. Religion may have replaced ideology as one of the main sources of confrontation, but is not religion one of the forms of ideology?

One of the things that have changed in the domain of use of force is the turn towards morality or ethics and away from strict positivistic formalism. Uses of force that have not been sanctioned by the UN Security Council have been justified by references to morality that may have legitimised if not made legal certain uses of force. Even the chief custodian of the UN Charter, Kofi Annan, speaking of Kosovo in Stockholm, said that "there is emerging international law that countries cannot hide behind sovereignty and abuse people without expecting the rest of the world to do something about it".[11] Although it may be still a far cry from just war doctrines, neither is it any more a formal positivism on which the UN Charter was premised. The Security Council itself has expanded the concept of threats to international peace and security to legitimise uses of force that would not have been justified in the eyes of the drafters of the UN Charter. Just war considerations have led to this bending of the Charter paradigm. And the National Security Strategy of the United States (NSSUSA) promulgated by President George W. Bush 20 September 2002 speaking of pre-emptive actions to counter a sufficient threat to US national security says that "the reasons for our actions will be clear, the force measured and the *cause just*" (emphasis added).[12]

[11] *Financial Times*, 26 May 1999.

[12] NSSUSA, at 16.

II. CHANGES IN WORLD'S POLITICAL CONFIGURATION AND *JUS AD BELLUM*

a) Jus ad Bellum in the Text and Practice

In 1963 young British scholar Ian Brownlie published an excellent monograph which even today may be considered as the best study of history of the legal regulation of use of force – *International Law and the Use of Force by States*.[13] Almost forty years later Professor Brownlie, CBE, QC and a Member of the International Law Commission, emphasising the continuing relevance of the ideas and conclusions developed in the 1963 book, observed: "whilst there have been obvious changes in the political configuration of the world, especially in the 1990s, these changes have not had any particular effect on the law".[14] What does this mean? First of all, is it true? And if it is true, what are the implications of the existence of such a hiatus between the "obvious changes in the political configuration of the world" and the absence of any particular effect of these changes on international law? Does not this mean that the world and the law exist as if in parallel universes without having any impact on each other?

Law, as one of the main stabilising factors in society, is indeed a relatively conservative phenomenon[15] and changes in all legal systems usually lag behind transformations in "real" life. This phenomenon, being a reflection of positive and negative sides of conservatism generally, is not of course wholly negative. Law not only cannot, but it must not, vacillate in zinc with every change in the life of society, react immediately to all political turmoils and social upheavals. Otherwise it would not fulfil its stabilising functions. At the same time, if economic, social or political transformations reflect longer-term tendencies, are substantial and lead to changes in political configuration of

[13] Brownlie, *supra* note 9.

[14] A Europaeum Lecture delivered at HEI, Geneva, on 1 February 2001, "International Law and the Use of Force by States", at 1.

[15] Of course, law may be used not only for the stabilisation of existing relations and situations or for the enhancement of tendencies that are already discernible. Law can perform creative functions as well. Through treaty-making or decisions of international bodies international law may help create new relations and situations. However, even in such cases (or maybe especially in such cases), international law also tends to freeze (crystallize, to use the widely accepted term, but incorrect in my opinion, to describe the process of custom formation) relations that are created with the assistance of such legal mechanisms.

society, law's conservatism may create serious problems for both law and society.

Of course, international law has relatively recently (*e.g.*, during the last quarter of the previous century) overcome some radical and rapid changes. However, it is true that such changes have occurred mainly not at its core, but in some important and quite specific areas of international law. For example, the development of international space law was so speedy indeed that it even led to the emergence of the concept of "instant custom".[16] The Law of the Sea that had slowly developed over the centuries was codified in 1958 but so many of its basic norms had become outdated even before the four Geneva Conventions had entered into force that the 1982 Law of the Sea Convention had to be adopted to codify new developments. Equally, international environmental law emerged and rapidly developed within only a few decades.

However, the legal texts concerning the use of force have indeed undergone little, if any, change since the adoption of the UN Charter in 1945. Even General Assembly resolutions on the issue have not contained anything that could be even remotely defined as "progressive development of international law".[17] Why is this so? Why have international legal texts been so conservative in this domain while in some other areas they have shown, responding to transformations in society (including international society), considerable ability for change? Or, maybe the law on the use of force has changed but some experts and even States have not noticed it?

Aforementioned branches of international law (Space Law, the Law of the Sea, Environmental Law) have undergone significant changes following, or in parallel with, equally manifest transformations in respective areas of human activity. In the domain of the use of force, which is so central to international law that novelties in it may affect the very foundations of this legal system as a whole, significant changes have occurred only after most terrible conflicts that, using today's formula, have shocked the conscience of humankind. In such cases, changes in the political configuration of the world, in international law generally and in *jus ad bellum* in particular, have not only

[16] B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law", in *International Law: Teaching and Practice* 273 (B. Cheng ed., 1982).

[17] For example, the 1987 Declaration on the Enhancement of Effectiveness of the Principle of Non-Use of Force [G.A. Res. 42/22 (1987)] swearing allegiance to the UN Charter and confirming what had been already said in many previous UN resolutions, did not even touch upon any controversial issue. *See, e.g.*, T. Treves, "La Declaration des Nations Unies sur le Renforcement de l'Efficacité du Principe du Non-Recours à la Force", 33 *A.F.D.I.P.* 379 (1987); C. Gray, *International Law and the Use of Force* 5 (OUP, 2000).

coincided in time and space, but they have all been caused by the same set of factors and they all reflect different facets of the same process.

For example, the absence, existence, content or enforceability of rules concerning preservation of living resources in the Northern Atlantic are important political and economic issues for many countries. However, whether these issues are resolved in one way or another will not alter the structure or basic characteristics of international society or international law. At the same time, we would find ourselves in two completely different worlds depending on how the following question is answered: do States have the right, for example, to reclaim unpaid debts by using gunboat diplomacy or is it only the UN Security Council that can decide when and how to use armed force? This is because radical changes in *jus ad bellum* indicate that serious transformations are taking (or have taken) place in the very structure and basic characteristics of international society and these transformations have created shock waves necessary for overcoming States' inertia and traditional conservatism.

The Thirty Years War led to the emergence of the Westphalian international system that has served as the basis for the development of modern anarchical international system as well as international law including its fundamental principles such as sovereign equality of States and non-intervention in their internal affairs. World War I gave the impetus for considerable innovations in international legal texts generally and in clauses concerning the use of force, in particular. The "cooling-off" periods provided for in the 1919 Statute of the League of Nations and the 1928 Briand-Kellogg Pact outlawing wars of aggression have been significant landmarks in the development of legal texts on the use of force in international relations. The Second World War had the greatest impact on both *jus ad bellum* (the 1945 UN Charter) and *jus in bello* (the 1949 Four Geneva Conventions). Therefore, one may conclude that only general wars and shocks felt in their aftermath are able to change general international law on the use of force. Changes in *jus ad bellum* have always been accompanied by changes in the political configuration of the world; or rather they have been caused by the latter (e.g., by the rise of nation-States instead of feudal multi-layered authority in Europe; by the effect of the two World Wars; by the emergence and then the collapse of the Cold War bipolar world). If bilateral wars have usually ended with bilateral treaties on "eternal peace and friendship", general wars have ended with attempts to create general norms that purport to regulate, limit, or even completely prohibit the use of force between States.

It seems that for States' representatives to sit down and draft new rules of *jus ad bellum* it is not sufficient that the political structure the world changes radically but such a change has to be accompanied by a Bang that would be Big enough to shock the world to such an extent that most nations would

believe, at least for some time, that things cannot go on any more like that, that enough is enough. Such conferences took place after the Thirty Years War, after the Napoleonic Wars, after World War I and World War II. However, even after WW II the consensus concerning the prohibition to use force was only temporary and conditional on unrealistic expectations (that they were unrealistic we understand, of course, only with hindsight) that the Chapter VII collective security mechanism would work. Unfortunately, not only bilateral treaties on eternal friendship but also general limitations on the use of force have been honoured more in the breach than in the observance. Of course, things are not completely hopeless and at least in one region – in Western Europe, where both World Wars started as well as many earlier bloody conflicts had taken place – the consensus to do away with the use of force has been quite genuine and the Europeans have made it work at least in their mutual relations.[18]

Since the end of the 1980s the political structure of the world has indeed undergone considerable changes but this has happened without any single shocking event that would have implicated vital interests of the most powerful nations in the world to the extent or in the manner similar to the two World Wars of the last century. Rather, changes have been more gradual, and some of the most significant ones have not been bloody. Neither the genocide in Rwanda, nor crimes against humanity committed in the former Yugoslavia nor even the 11 September 2001 terrorist attacks, though the last directly affecting by far the most powerful State in the world, have forced the States to sit down and draft new rules that would have corresponded to the changed political configuration of the world and that would have been necessary for responding to new threats. These developments have not had the same effect on the evolution of international law texts, including those concerned with its core – *jus ad bellum*, as the two World Wars had. However, the 9/11 attacks due to the character of the main victim-State and the particularly tragic nature of attacks witnessed by millions on TV screens, as a result of which terrorists may have become victims of their own one-off spectacular success (from the

[18] The European experience, as well as various examples from other parts of the world, shows that there is no such thing as inherently peaceful nations or regions (or *vice versa*, inherently bellicose ones). Even smaller and weaker nations have historically been generally more peaceful only because of their inability to successfully carry out more aggressive foreign policy. As the European experience testifies, institutions and rules that become a part of political culture are necessary to make peace durable. Peaceful relations between nations, like human rights in society, are not natural or inherent. Rather, war and human wrongs are natural. For nations and peoples to enjoy peace and human rights it is necessary to fight and constantly work for them since they are rather fragile results of the long and difficult development and acculturation of humankind.

point of view of terrorists) may have shocked the world enough to open the way to radical reappraisal through customary process of some basic principles of *jus ad bellum*.

Consequently, we have a new political structure of the world. We have new threats that can be effectively dealt with only by using, *inter alia*, military force in circumstances not foreseen in 1945 and therefore not provided for (at least explicitly) in the UN Charter. However, States have not been, and will hardly be, able to draft new rules that would correspond to the new political structure and would allow to adequately respond to new threats. There is no consensus on how to deal with new global threats such as civil wars, humanitarian emergencies, international terrorism and proliferation of weapons of mass destruction, including into the hands of terrorists. The near impossibility of having consensus on these issues is dependent, *inter alia*, on the co-existence in the contemporary world, as will be discussed further in this article, of three different categories of States and societies – pre-modern, modern and post-modern – with different characteristics, values, interests and perceptions of security threats. Of course, societies and States with different levels of societal development have co-existed in the world before but never before have they co-existed in the world that is so interdependent and shrinking.

Taking into account the fact that the texts attempting to govern the use of force, which were adopted after World War I and World War II, created unrealistic expectations and noting the absence of consensus on some important issues concerning use of force, the difficulty of drafting new rules of *jus ad bellum* may not be so dramatic after all. The customary process may be not only more natural and flexible but in today's circumstances even quicker in consolidating emerging tendencies into law, though such a process, inevitably, has its shortcomings too.

Brownlie observes that the main reason for a huge gap between the dynamism of political changes and consistency in law lies in the fact that "the interests of individual States continue to have a fairly conservative view of the law". And he is critical of those academics, who think that the law has changed, and especially of those who, for instance, "are beginning to believe that there is a right to use force for humanitarian purposes".[19]

However, even if many States are conservative, or I would rather say, inertial, in the sense of the absence of political will to draft new rules on the use of force and intervention, this does not necessarily mean that law, too, is as inertial as are these States. The recent practice in this area, as we will discuss further, has certainly had an effect on *jus ad bellum*.

[19] Brownlie, *supra* note 14, *id.*