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Preface

Although the idea for this book was conceived well before the Iraqi invasion of Kuwait in August 1990, that armed conflict highlighted the need for an accurate dissemination of the rules governing resort to force by states and international organizations, as well as those laws governing the actual conduct of hostilities. As far as possible the authors have included a full analysis of the impact of the Gulf Crisis on these areas of international law. On the whole, whilst the Crisis has perhaps developed or helped to clarify the law in some areas, from the international lawyer's perspective, it generally involved the application of established law to the events in question. Indeed the basic method adopted in this book is to attempt to give a clear description and, where necessary, clarification of the law governing armed conflict in international relations, and in so doing we have referred to most of the instances of the use of force in the modern era. To this end, the authors rely on the accepted sources of international law, treaties, custom, judicial decisions and the writings of jurists, while emphasizing the historical and theoretical development of the law.

An important feature of the book, one that perhaps distinguishes it from other works, is the analysis of both facets of the law in the area of armed conflict, namely the *jus ad bellum* and the *jus in bello*. The authors have been careful to give equal space to each, while emphasizing the links between the two areas. Nonetheless it is true to say that, to a great extent, the two facets are distinct. If the laws of the UN Charter which delimit the recourse to armed force in international relations break down, then the laws that regulate the actual conduct of hostilities play an essential role in controlling the excesses of war. This simple division of the law is reflected in the layout of the book, although more sophisticated discussion of the division occurs in Chapters 1 and 13.

Part I of the book examines the *jus ad bellum*, starting with a historical discussion in Chapter 2. An attempt is then made to assess the legal implications of the various levels of armed force used in the modern era, starting with the concept of aggression in Chapter 3 and ending with the established response available to combat aggressors,

namely the right of self-defence, in Chapters 6 and 7. Chapters 8–11 are then concerned with the other exception to the ban on force contained in the UN Charter, namely the use of forcible measures by, or on behalf, of the United Nations, and the relationship between that centralization of force and the customary right of self-defence. Throughout Part I, an attempt is made to analyse the functioning of the international legal system and to assess the impact of the relative ineffectiveness of the United Nations, at least until recently, on the *jus ad bellum* as a whole.

Despite the prima facie ban on the use of armed force in international law, that ban, like its counterpart in municipal law, is breached on a regular basis. The devastating breaches of the *jus ad bellum* are often pointed to in order to attempt a drastic modification of the law on the basis that it would be more 'realistic' to recognize that the behaviour of states does not conform to the 'paper' rules of the UN Charter. In Part I, the authors address these arguments and dismiss them on the basis that, despite the seemingly frequent breaches of the prohibition on the use of force, most states act in conformity with it, and more importantly profess their fidelity to it. It is hoped that accusations of idealism or formalism often made against this approach are met in the course of exposition of the law. Furthermore one can point to the fact that international law is realistic enough to recognize that armed conflicts do occur and sets about regulating those conflicts in a practical and humane manner.

Part II of the book examines the *jus in bello*, the law *in* war, which seeks to regulate and to mitigate the conduct of hostilities in armed conflicts actually arising, a necessity which could not safely be ignored in the context of modern international relations. In Chapters 12 and 13, the criteria for the application of the modern law are analysed, including the concepts of 'war' and 'armed conflict' and the significance of the formal distinction drawn between the 'Hague' and 'Geneva' sectors of the provision. The substantive provision for international armed conflicts, covering methods and means of warfare, controls upon weapons types, international humanitarian protection for the 'victims' of armed conflicts, legal control of belligerent occupation and the law of neutrality, is considered in Chapters 14–18. The law is treated as a practical prescription which acknowledges the particular exigencies of warfare while seeking to impose limits upon its conduct founded upon civilized expectations which operate even in an ultimate dissolution of 'normal' international relations.

The importance of the functional utility of prescription is emphasized throughout. Such law and its application inevitably involves a number of practical difficulties and controversial issues, which are analysed in the text. These include the questions of selection of targets in bombardment, the status of nuclear weapons, entitlement to 'com-

batant' status, the extent of the administrative 'authority' of the occupying power and the control of 'contraband' trade as an aspect of economic warfare. The reduced provision for non-international armed conflicts is considered in Chapter 19, including highly controversial modern developments in the categorization of such conflicts. The final chapter of the book deals with enforcement of the *jus in bello*. It is emphasized that the efficacy of the law largely rests upon factors other than the uncertain processes of 'enforcement', but important questions arising in the definition and treatment of offences, including available defences, are considered in appropriate detail.

A constant theme in both Parts will be the discussion of the development of the law, particularly how it has expanded from regulating what could be called 'traditional' types of warfare, the direct international armed conflict between two or more states, to being equally concerned with the more modern type of warfare, in which an internal conflict is supported in a variety of ways by outside states. Chapters 5 and 19 illustrate how international law is attempting to regulate such conflicts, both in the *jus ad bellum* and in the *jus in bello*. It is hoped that the authors will be able to shed some light on this as well as the other areas of law governing armed conflict.

N.D. White,
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List of Abbreviations

AC	Law Reports, Appeal Cases
AJIL	*American Journal of International Law*
All ER	All England Law Reports
BPIL	British Practice in International Law
BYIL	*British Yearbook of International Law*
CLJ	*Cambridge Law Journal*
CTS	Consolidated Treaty Series
GAOR	General Assembly Official Records
GYIL	*German Yearbook of International Law*
Hansard	Debates of the United Kingdom Parliament
ICJ Rep.	Reports of the International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
IJIL	*Indian Journal of International Law*
ILC	International Law Commission
ILM	*International Legal Materials*
IMT	International Military Tribunal
Int. Leg.	Hudson, International Legislation
KB	Law Reports of the King's Bench Division
Keesing's	*Keesing's Record of World Events*
MAT	Mixed Arbitral Tribunals
Lloyd	Lloyd's List Reports
LNTS	League of Nations Treaty Series
LQR	*Law Quarterly Review*
LR	Law Reports
M&S	Maule and Selwyn's Reports
MAT	Mixed Arbitral Tribunals
NILR	*Netherlands International Law Review*
RIAA	Reports of International Arbitral Awards
SCOR	Security Council Official Records
SCR	Southern Cape Reports
UKTS	United Kingdom Treaty Series
UNCIO	United Nations Conference on International Organizations
UN doc. A	United Nations Document (General Assembly)

UN doc. S	United Nations Document (Security Council)
UNTS	United Nations Treaty Series
USGPO	US Government Printing Office

Contents

1 Law and War: The Theory of Constraint

War, or armed conflict, the technically preferable general term,[1] represents a major breakdown of the 'normal' conduct of international relations. It is also, tragically, a recurrent feature of the modern world and provision is accordingly made for its potential occurrence in public international law. This provision comprises principally the *jus ad bellum*, relating to resort to armed force in the conduct of international relations, and the *jus in bello*, relating to constraints upon the actual conduct of hostilities, and forms the subject matter of this book. It is appropriate before considering the substance of the law to examine as a preliminary issue its theoretical bases. In the particular case of the laws of armed conflict this is especially important since its very existence involves an apparent paradox.

The post-1945 world legal order enshrined in the Charter of the United Nations proscribes, by article 2(4) of the Charter, the threat or use of force against the territorial integrity of a state, building upon and strengthening earlier principles and provisions which failed at the onset of the Second World War.[2] The Charter does however, by article 51, admit resort to armed force in the exercise of an 'inherent right of individual or collective self-defence' in the event of an 'armed attack', pending 'measures' being taken by the UN Security Council. Under Chapter VII of the Charter the Security Council itself may authorize forceful measures to restore peace and security. These principles involve in application a complex canon of interpretation which is considered in detail in the following chapters, but the broad conceptual base is clear enough. Discounting bizarre and unlikely circumstances of error, armed conflict will generally result from prima facie unlawful acts by one or more of the states involved and may to that extent be considered an unlawful condition of international relations. In this context the making of regulatory provision, beyond a simple ban, in anticipation of such a situation has a strongly paradoxical appearance and requires explanation. Beyond this there must also be considered the practical viability of such regulation, a matter which is perhaps most problematic in the context of the *jus in bello*.

The Logic of Formal Limitations upon Armed Force

The great Prussian military theorist Karl von Clausewitz stated in his classic work *Vom Kriege* that 'War ... is an act of violence intended to compel our opponent to fulfil our will,'[3] adding the elaboration that 'War is ... a real political instrument, a continuation of political commerce, a carrying out of the same by other means. All beyond this which is strictly peculiar to War relates merely to the peculiar nature of the means which it uses.'[4] These statements may of course be greatly elaborated, but the essential depiction of armed conflict as a pursuit of policy objectives, including national self-defence, by means of military force leading to actual hostilities may surely be accepted as accurate. Once armed conflict has actually commenced its limitation presents difficulties. Clausewitz makes the point succinctly in the following comment:

> He who uses force unsparingly, without reference to the bloodshed involved, must obtain a superiority if his adversary uses less vigour in its application ... . From the social condition both of States in themselves and in their relations to each other ... War arises, and by it War is ... controlled and modified. But these things do not belong to War itself, they are only given conditions; and to introduce into the philosophy of War itself a principle of moderation would be an absurdity.[5]

This seemingly brutal passage must be read carefully and upon examination can be seen not only to state a problem but to resolve it. Whether or not armed conflict could upon an absolute level be made subject to 'a principle of moderation', such conflicts do in practice take place in the political society of the community of nations. That 'society' embodies certain expectations which are in part enshrined in public international law and these expectations determine the 'given conditions', even under the ultimate stress of armed conflict. Expectations are not of course necessarily fulfilled and it would be foolish to pretend that legal moderation of hostilities is invariably successful. Nonetheless the pressures for compliance with communal expectation are by no means negligible for any person, or in this case state, which aspires to be a fully participant member of the society concerned. An analogy is sometimes sought to be drawn between the community of nations and 'primitive', meaning non-technological, human societies. Such an analogy must be treated with great caution, but in the sense of the relative weakness of central institutions *vis à vis* the periphery and the importance of customary norms and the role of 'self-help' in the performance of 'legal' tasks it is not without value. In the context of legal anthropology Simon Roberts has written:

> Some degree of order and regularity must be assured if social life in any community is to be sustained. This state need not be one of quiet harmony, and indeed societies differ widely as to the amount of friction and disorder which their members seem able to tolerate; but conditions must be such that ... an element of order [can] ... endure over time within the group.[6]

The analogy with violent resort in the international community may here be considered of some value in so far as the point is made that communal expectations do not terminate at the point of resort to violence but reach even into it.

If law may be accepted as having a role even in the collapse of international relations, the question then becomes one of the nature of the limiting 'given conditions' implicit in the expectations of the international community. Although Clausewitz directed his observations largely to what is now termed the *jus in bello*, the same general issue arises in the context of the *jus ad bellum*. The 'given conditions' derive ultimately from perceptions of armed conflict and here a broad spectrum of thought exists.

Philosophies and Wars

There are those who in various ages have considered armed conflict a positive benefit. Before the First World War Field-Marshal von Mackenson was reported to hold the view that each generation should have a war to toughen it. The more general opinion, across a range of times and cultures, has been that hostilities may on occasion be 'necessary' to avert a yet worse evil, but are not in themselves desirable. Warfare was far from being condemned in either ancient Greece or Rome, but in the *Nichomachaean Ethics* Aristotle wrote, in a discussion of the relation of happiness and leisure:

> We make war in order that we may live at peace. ... Nobody chooses to make war or provokes it for the sake of making war; a man would be regarded as a bloodthirsty monster if he made [friendly states] ... into enemies in order to bring about battles and slaughter.'[7]

This is certainly reflected by political rhetoric in cases of armed conflict and those who, like Adolf Hitler, transparently did manoeuvre in order to engender war have indeed emerged with the reputation of 'bloodthirsty monsters'. On the other side of the planets classical Chinese thought was more overtly 'pacific', including both the 'official' Confucianism adopted as the imperial ideology by the Han and later dynasties and Taoism, which on many other issues diverged sharply

from Confucian orthodoxy. The second great Confucian thinker, Mencius (Meng K'e), wrote:

> Confucius rejected those who enriched [evil] rulers ... . How much more would he reject those who do their best to wage war on their behalf. In wars to gain land, the dead fill the plains; in wars to gain cities, the dead fill the cities. ... Death is too light a punishment for such men.[8]

The Taoist classic, *Tao-Te Ching*, attributed to Lao Tzu, states more concretely that,

> One who assists the ruler of men by means of the way does not intimidate the empire by a show of arms. ... [A good commander] aims only at bringing his campaign to a conclusion ... but only when there is no choice; bring it to a conclusion but do not intimidate.[9]

These views involve, variously, both *jus ad bellum* and *jus in bello* concerns, but clearly treat warfare as, at most, an evil necessity. Against this background military endeavours in classical China was, at least until the Ch'ing (Manchu) conquest in 1644, in theory accorded lower status than civil activity. In practice, however, this by no means necessarily inhibited military initiatives.[10]

Judaeo-Christian thought has contributed a rather different strand of theory which, notwithstanding the vision of Christ as 'Prince of Peace', includes a somewhat misunderstood concept of 'Holy War', Islamic thought includes the parallel concept of *jihad* or war of duty. From the same general sources comes an idea of 'just warfare', the detailed impact of which is considered in subsequent chapters,[11] but which requires comment also in the immediate context. Ideas of *bellum justum*, or just war, have acquired an evil reputation, summarized by Jean Pictet in his description of

> the well known and malignant doctrine of the 'just war' ... [which] did nothing less than provide believers with a justification for war and all its infamy. ... Every effort has been made on every occasion to justify aggression ... [and] to justify the cruelties which abounded in [a] ... sanguinary age.[12]

This was undoubtedly the effect of abuse of the doctrine in its various forms, but in its origin it was an attempt to limit resort to armed force to justified causes. This became necessary when Christianity was adopted by Constantine the Great as the official religion of the Roman Empire and the Church was obliged to develop a conceptual framework for its relations with the secular life of the Empire. The

true intent can be seen in the much later, thirteenth-century, criteria for a just war set out by St Thomas Aquinas, who wrote in part:

> Videtur quod bellare semper sit peccatum. Poena enim non infligitur nisi pro peccato. Sed bellantibus a Domino indicitur poena: secundum illud, *Omnis qui acceperit gladium gladio peribit.* Ergo omne bellum est illicitum. ... requiritur causa justa: ut scilicet illi qui impugnantur propter aliquam culpam impugnationem mercantur. ... requiritur ut sit intentio bellantium recta: qui scilicet intenditur vel et bonum promoveatur, vel ut malum vitetur.[13]

Which is to say, in summary, that war is in principle a sin because punishment is ordained only for sin and Scripture tells us that all who draw the sword shall die by it. War may, however, be just where it is used to remedy wrongdoing by those intending to advance virtue and avert evil.

The currency of this particular form of just war theory may be considered to have ended with the 1648 Treaty of Westphalia, which concluded the Thirty Years War. In the succeeding era less emphasis was placed upon the justification of causes, in law if not in practice. The incident of the Ems telegram used by Bismarck to elevate a heated dispute over the Hohenzollern candidature for the throne of Spain into the 1870 Franco-Prussian War may serve as an illustration of the continuing practical importance of 'causes'. The *jus ad bellum* as it has developed since the First and Second World Wars has to some extent returned to a concern with causes – not to 'just war' concepts *stricto sensu* but at least to formalized concepts of 'justifiable' exceptions to a prima facie general proscription of resort to armed force in the conduct of international relations. Modern concepts of 'self-defence' and 'national liberation', the latter owing some of its modern shape to post-1917 developments in 'socialist' thought, fit this mould. Such ideas, like the earlier *bellum justum* theories, are of course open to abuse. In the earlier part of the modern era the use by Hitler of the *auslanddeutsch* population in post-1918 Czechoslovakia as a cover for aggression provides a clear illustration, even granted that self-determination was at the time more a 'political' than a juridical concept.

In both its essential aims and its attendant problems the basic doctrines of the modern *jus ad bellum* may perhaps be considered to represent a revised and strict form of a well established view of armed conflict as an evil occasionally 'necessary' for the aversion of some yet greater peril. Such a view conflicts, of course, with any idea of a human right to peace, advanced by a number of writers in the field of the laws of armed conflict.[14] An unqualified right to peace raises serious and extra-legal questions as to whether warfare is the worst conceivable evil in international society or whether some con-

sequences of non-resistance might exceed it, the spectre of the Third Reich and other atrocious regimes being obviously an important element in such vexed debates. Whatever view of that issue may for the time being be taken, the focus of continuing contention in the modern *jus ad bellum* rests, and it is here suggested rests properly, upon the particular nature of the 'necessities' for military action which are to be recognized and their vulnerability to abuse.

The Viability of Constraints upon the Conduct of Hostilities

Whatever view is taken of resort to armed force in the conduct of international relations, it is an inescapable fact of the modern world that armed conflicts continue to occur. The legal constraints imposed upon their conduct by the *jus in bello* are clearly subject to the serious practical difficulties outlined more than a century and a half ago by von Clausewitz. Geoffrey Best has written: 'The passionate and chancy business of war has never been and can never be helpful to the practice of that coolness and self-control which respect for any sort of law ideally requires.'[15] One may agree that moderation in the use of armed force can never be prescribed with perfect effect and much may depend upon the extent of a particular conflict, for example whether or not continued national existence depends upon the outcome. A much more extreme viewpoint was expressed by the novelist Leo Tolstoy in his account of Napoleon's 1812 campaign against Russia. In a brief discussion of the relevance of 'rules' of warfare, published, interestingly, at about the time of the negotiation of the highly significant 1868 Declaration of St Petersburg, Tolstoy wrote in relation to the resistance 'guerilla' warfare that followed the occupation of Moscow:

> From the time [Napoleon] ... took up the correct fencing attitude in Moscow and instead of his opponent's rapier saw a cudgel raised above his head, he did not cease to complain to Kutuzov and to the Emperor Alexander that the war was being carried on contrary to all the rules, as if there were any rules for killing people.[16]

This rather crude statement of the primacy of force, which goes very far beyond anything which Clausewitz argued, was made by a proponent of broad pacifism. As to the rules of warfare in the early nineteenth-century, the ideas of 'guerilla' warfare, the phrase derives from the Napoleonic occupation of Spain, and the *levée en masse* received little or no recognition but were in practice not unknown. The evidence suggests that the Russian army as such in the 1812 campaign was not markedly different in formal 'rectitude' from that of