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Public Issues Committee

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PRECIS

International law, the United Nations and Iraq

A United States-led war against Iraq would be a breach of international law if it is conducted without specific UN authorisation

The new strategic doctrine of the Bush administration is at the centre of an intense international debate. The US doctrine goes beyond the Cold War strategy of deterrence to Communist aggression to one which promotes pre-emptive attacks against terrorists and states with weapons of mass destruction. Yet international law has not changed. The world community prescribes only limited circumstances in which offensive military action may occur. This presents a critical problem for the US, the UN, and the world. What will President Bush do if an attack upon Iraq is not inherently permitted by international law, or authorised by the UN? Will the Americans act unilaterally, as the US Government has already asserted that it has the right to do?

The instigation and conduct of war has since the very earliest times been subject to some degree of regulation or control. In our own time the UN Charter enshrined the prohibition of all wars not waged in self-defence – though it does allow collective self-defence (that is a coalition acting together against an aggressor), and action to restore international peace. In 1945 and the years that followed almost all nations signed the UN Charter, thereby promising to '*refrain in their international relations 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 UN*'. Aggressive war, as such, has been eliminated from among the *lawful* means of conducting international relations. Any act of war that is not permitted is therefore unlawful. No country is above these legal restrictions, which are the product of centuries of jurisprudential evolution. Aggressive war is no longer a legitimate instrument of national policy.

The legality of any given action by the international community, or by an individual state or group of states, depends upon whether the action is justified by international law. A US-led attack on Iraq might be designed to force compliance with UN resolutions, but if it were not expressly authorised by the UN Security Council it would place the international security system in grave peril. No state may unilaterally commence a war in order to force compliance with its own interpretation of UN resolutions. The critical question is whether a US-led attack upon Iraq which had not obtained specific UN Security Council approval can be said to be an unjustified offensive

war? Force may be used, in the last resort, as a means of enforcing international law. This can include intervention, reprisals, or war. But these types of police action may only occur where international law clearly allows it. Many commentators have argued that current legal views of the UN Charter do not permit an immediate attack on Iraq. This was because the action would be neither based on a Security Council decision under Chapter VII of the Charter, nor pursued in self-defence under Article 51, the only two justifications for the use of force that are currently available under international law.

Military and air forces led by the US have been engaged in 'police' operations against terrorists and their allies in Afghanistan, the al-Qaeda and the Taliban. Though the links between these groups, those responsible for the World Trade Centre bombing, and Iraq, are at best unproven, Iraq undoubtedly has itself acted in violation of international law. If the UN Security Council condemns Iraq, and authorises the US or other nations to take military action against that country, so be it. But the US should refrain from unilateral or even multi-lateral action without such authorisation. The US has claimed that that there is no need for a new Security Council resolution, as Iraq has materially breached resolution 687 – the 1991 ceasefire resolution – and that this is implicit in resolution 1441. This view is not shared by the majority of members of the UN. If the USA attacks Iraq in the absence of UN approval, it will be doing so in violation of international law. The US will risk de-stabilising a system which has always relied upon the nations acting in conformity with generally recognised principles of behaviour.

In his State of the Union address last year President Bush announced that the US would use military force against any state the administration perceived to be hostile. This is fundamentally at odds with the UN Charter. By all means be firm with Iraq, but do not act contrary to principles of international law. For to do so will seriously harm the world security order. The UN must be permitted to decide what is the appropriate action to take against Iraq, as it did in 1990-91.

14 March 2003

International law, the United Nations and Iraq

Introduction

The new strategic doctrine of the Bush administration is at the centre of an intense international debate. The doctrine laid out in the document, "the National Security Strategy of the United States of America", marks a significant shift from beliefs that had dominated Cold War strategic thought. The new doctrine goes beyond the Cold War strategy of deterrence, to one which backs pre-emptive attacks against terrorists and states with weapons of mass destruction. The new doctrine makes the argument, "given the goals of rogue states and terrorists, the U.S. can no longer solely rely on a reactive posture as we have in the past... we cannot let our enemies strike first. As a matter of common sense and self-defence, America will act against such emerging threats before they are fully formed."

The question of the legality of the apparently imminent US-led attack upon Iraq is one which is central to the development of the world order in the first half of the twenty-first century. For, despite its justification as a police action to prevent the spread of weapons of mass destruction – or any of the other reasons given for attacking Iraq, the US has acted largely outside the international legal order. This is illustrated by the US Defence Secretary Donald Rumsfeld, in the journal *Foreign Affairs*, wrote that defending the US required both prevention and, sometimes, pre-emptive action.[1] Yet international law prescribes limited circumstances in which offensive military action may occur.

The scope of the law of war

The instigation and conduct of war has since the very earliest times been subject to some degree of regulation or control. In the 13th century Thomas Aquinas wrote that, 'in order that a war may be just three things are necessary. In the first place, the authority of the prince, by whose order the war is undertaken ...'[2] His second and third requirements for a just war, like those of his predecessor St Augustine, Bishop of Hippo, were a just cause, and right intent. However, the law of war has advanced much since St Thomas lived, and ironically, the UN Charter, designed to promote peace, enshrines a growing tendency to prohibit all wars not waged in self-defence[3] – though it does allow collective self-defence,[4] and the restoration of international peace.[5] This has left little room for the 'just war', a concept which has nevertheless increasingly reared its head in the law of war.[6]

The legality of any given action by the international community, or by an individual state or group of states depends upon whether the action is justified by international law. A US-led attack on Iraq might be designed to force compliance with UN resolutions, but it would not be expressly authorised by the UN. Nor would this resemble traditional peacekeeping missions, or defensive military actions, such as the British action for the recovery of the Falkland Islands in 1982.[7] That is not to say, however, that the US would act unlawfully in attacking Iraq. But what would be the legal basis for its action?[8] Are there any lessons for other military campaigns, such as those conducted recently by the US and its allies in Afghanistan, as part of a global 'war' on terrorism?

Traditionally the law of war was concerned with the regulation of warfare;[9] usually, though not exclusively, interstate warfare.[10] Additionally, since the 19th century there has been significant growth in the laws of humanity, or human rights.[11] It has been said that these two strands have joined.[12] There has been much concentration on humanitarian law, and especially the punishment of war criminals.[13] But the basic question of when it is lawful to start an offensive war has been largely ignored.[14]

The basic sources of the law of armed conflict are written and unwritten rules, treaties, agreements, and customary law. A treaty is an agreement between entities, both or all of which are subjects of international law possessed of international personality and treaty-making capacity. All sovereign states enjoy the right to make treaties. Some self-governing colonies, protectorates, and international organisations have the capacity to enter into agreements, though their right to do so is usually limited.[15]

Custom is general state practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent state authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations. The existence of custom, unlike treaty-law, depends upon general agreement, not unanimous agreement.[16]

It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.[17] They have now been extended to the modern phenomenon known as wars of national liberation. These revolutions are defined as armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the UN and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN.[18]

There have long been efforts to codify the rules of war, generally those relating to the conduct of hostilities (*jus in bello*), but also those dealing with the legality of the use of force (*jus ad bellum).* One early modern attempt was by Francis Lieber, whose *Instructions for the Government of Armies of the United States in the Field*, was promulgated by President Abraham Lincoln in 1863.[19] But articles of war, governing the army in the field, had been issued since early times, and reached their culmination in England in the 17th century.[20]

The first major international attempt at codification was the Hague Peace Conference in 1899, where a number of conventions on the law of war were adopted. Then in 1907, another conference at The Hague revised the rules and made them more detailed. It also gave greater emphasis to the legality of the use of force. The resulting Law of The Hague recognised that the total avoidance of war should be the ultimate goal. But it recognised that war is sometimes unavoidable, and was to this extent a legitimate means of settling disputes between nations.[21]

The Kellogg-Briand Pact 1928 (Pact of Paris) codified the customary law of war with respect to *jus ad bellum.* It was signed by 65 countries, including the US, who all thereby renounced aggressive war as an instrument of national policy.[22] In Article 1, 'the high contracting parties 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'. The Treaty had the effect of outlawing war as an instrument of national policy (with respect to the signatories), and advanced the concept of aggressive war as being contrary to international law – though it did not give rise to it – as this could be traced to Thomas Aquinas if not earlier.

In 1945 and the years that followed, almost all nations signed the UN Charter, thereby promising to 'refrain in their international relations 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 UN'. Hence, aggressive war, as such, has been eliminated from among the lawful means of conducting international relations. Yet, the use of armed force has not ceased. International law has recognised this. In particular, the law of armed conflict applies not only to situations of declared war, but to any situation of international armed conflict and, to a more limited degree, armed conflicts which are not of an international character. Furthermore, armed force may be used pursuant to a decision or recommendation of the UN, in accordance with Article 42 of its Charter, and yet is not 'war' in the strict technical sense.

Offensive war?

Could a US-led attack upon Iraq be classified as an unjustified offensive war? This is an important question, for if so, it would be contrary to the law of war. The London Charter of 1945, establishing the International Military Tribunal at Nuremberg, contained the first definitions of crimes against peace and of crimes against humanity.

Article 6(a) defined crimes against peace:

> namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

Article 6(b) defined war crimes:

> namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to,... wanton destruction of cities, towns and villages, or devastation not justified by military necessity;

Principle VI of the International Law Commission in 1950 confirmed the criminality of the acts defined in Article 6 of the London Charter. But the Pact of Paris had already made waging an aggressive war potentially subject to international sanctions, though it did not become a crime for which individual criminal liability could arise until after World War II.[23]

The UN and the waging of offensive war

Article 1 of the UN Charter states that:

> The Purposes of the UN are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2 states in part:

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

> 4. All members shall refrain in their international relations 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 UN.
> 5. All Members shall give the UN every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the UN is taking preventive or enforcement action.
> 7. Nothing contained in the present Charter shall authorize the UN to interfere in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The General Assembly has power to discuss, consider, and recommend. The Security Council alone has the power of making binding decisions. According to Article 39:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 provides for a range of non-military measures and, if they prove ineffective, Article 42 allows more direct action:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the UN.

However, while the UN itself can take or authorise military action, the Charter does not necessarily exclude the possibility of unilateral action by individual states. This is recognised in Article 51:

> 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 UN, 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.

Thus the threat or use of force may be used, in the last resort, as a means of enforcing international law. This can include intervention, reprisals, or war. But these types of police action may only occur where international law clearly allows it. Aggressive war is no longer a legitimate instrument of national policy, but nor is the use of force limited or reserved to the UN.

Many international lawyers have argued that current legal views of the UN Charter do not accommodate an attack on Iraq.[24] This was because the action was neither based on a Security Council decision under Chapter VII, nor pursued in collective self-defence under Article 51; the only two justifications for the use of force that are currently available under international law.[25] Whether this view of international law is correct depends on whether the

law of war has now accommodated, or is in the process of accommodating, wars conducted for humanitarian purposes or to reduce the risk of widespread war.

The use of force without the approval of the UN

The exercise of independent action by the US and its allies is not necessarily contrary to the UN Charter. Article 1 of the UN Charter allows, or even requires that member nations:

> take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

However, such police actions are only allowed to suppress a breach of international law. What had Iraq done? It had not invaded or threatened a neighbour.

Pre-emptive action by the US

This was in reliance on Article 51 of the UN Charter. According to James Baker, former Secretary of State to Bush senior, self-defence. The international law standard for whether a particular use of force is self-defence comes from an 1837 incident where British subjects destroyed an American ship, the Caroline, in a US port, because the Caroline had been used in American raids into Canadian territory. The British claimed the attack was self-defence. Through an exchange of diplomatic notes, the dispute was resolved in favour of the Americans. US Secretary of State Daniel Webster urged the following definition of self-defence, which the British accepted: "There must be a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. [The means of self-defence must involve] nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."

International counter-terrorism operations

Military and air forces led by the US have been engaged in 'police' operations against terrorists and their allies in Afghanistan, the al-Qaeda and the Taliban.[26]

Frank Taylor, the US Ambassador at Large and Co-ordinator for Counter-terrorism briefed the North Atlantic Council on 2 October 2001 on the results of investigations into the 11 September terrorist attacks against the United States. As a result of the information he provided to the Council, it was resolved that the individuals who carried out the attacks belonged to the world-wide terrorist network of al-Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.[27]

For the first time in NATO's history, Alliance assets were deployed in support of Article 5 operations. NATO contributed five Airborne Warning and Control System (AWACS) aircraft to the United States and also deployed elements of its Standing Naval Forces to the Eastern Mediterranean. The naval assets of Standing Naval Force Mediterranean (STANAVFORMED), which were participating in Exercise Destined Glory 2001 off the southern coast of Spain, were re-assigned in order to provide an immediate NATO military

presence in the Eastern Mediterranean.[28] The UN Security Council indirectly endorsed the military operations, with Resolutions 1373 and 1378 reaffirming the inherent right of individual or collective self-defence. It did not however become directly involved in the operations. In part this was because the operations were not aimed at a state, but rather terrorist cells operating within Afghanistan.[29]

But at the same time, disquiet was growing at the uncertain aims of the operations,[30] and the treatment of prisoners by the American authorities, particularly those sent to the Guantanamo Bay detention centre.[31] The US Government decided that it would apply the rules of the Third Geneva Convention to at least some detainees[32] and the jurisdiction of the military over enemy belligerents, prisoners of war or others charged with violating the law of war is fairly clear.[33] However, political factors have ensured that the US authorities have treated prisoners taken during its recent operations in Afghanistan in an especially strict manner.[34] However, the law of war applies if there is an armed conflict and the US has been reluctantly compelled to acknowledge this, in practice if not officially. Failure to comply with such norms would seriously weaken the claim by the US to be acting in accordance with international law in its operations in Afghanistan. Either the operation is one in which there is international armed conflict – in which case the detainees are automatically entitled to the protection of the Third Geneva Convention, or it is not. If the detainees are 'merely' terrorists, and not entitled to this protection, then it is not an international armed conflict. The particular difficulty for the US is that it has treated Taliban members as terrorists, though they represented the *de facto* Government of Afghanistan.[35]

An attack by foreign armed forces on the US would clearly constitute an attack envisaged by Article 5. But terrorists, whilst they may have enjoyed close ties with the *de facto* rulers of Afghanistan, were in no sense part of the military infrastructure or apparatus of Afghanistan. Whilst there is no doubt that Article 5 directly authorised the use of force in such circumstances, its target was more problematic. And even if Iraq is in material breach of Security Council Resolution 1441,[36] that does not authorise unilateral US action.

Conclusion

Traditionally the law of war was concerned with the regulation of warfare between states.[37] Since the 19th century there has been significant growth in the laws of humanity, or human rights.[38] It has been said that these two strands have joined.[39] The law of armed conflict is only one of a group of principles guiding nations in times of conflict.[40] It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.[41] They have now been extended to the modern phenomenon known as wars of national liberation.[42]

The NATO attacks on Yugoslavia in 1999 make it clear that the law of armed conflict applies in all international armed conflicts, including not merely wars of national liberation,[43] but also police actions conducted by the international community in the name of the laws of humanity, or human rights. But whilst the use of force by the international community in the pursuit of peace may be lawful, those operations remain subject to the rules of conduct established by international law.

Wars of secession may well replace the anti-colonial wars of the 1950s, 1960s and 1970s as the national liberation struggles of the 21st century. So far, the UN and the regional organisations (especially the OAU[44]) have been extremely reluctant to apply the right to self-determination to secessionist struggles. Current events, however, may force upon us a serious rethinking of the types of groups that are entitled to self-determination and to the active military protection of the international community.[45] It is doubtful however whether the

recent military operations in Afghanistan will have the same degree of influence on the development of international law. But they do show that where operations are conducted by the forces of liberal western democracies, mere authority to wage war is not enough.

Now the US is attempting to extend the bounds of international law to allow pre-emptive strikes. The US has claimed that that there is no need for a new Security Council resolution, as Iraq has materially breached resolution 687 – the 1991 ceasefire resolution – and that this is implicit in resolution 1441. This view is not shared by the majority of members of the UN. If the USA attacks Iraq in the absence of UN approval, it will be doing so in violation of international law. The US will risk de-stabilising a system which has always relied upon the nations acting in conformity with generally recognised principles of behaviour.

In his State of the Union address last year President Bush announced that the US would use military force against any state the administration perceived to be hostile. This is fundamentally at odds with the UN Charter. By all means be firm with Iraq, but do not act contrary to principles of international law. For to do so will seriously harm the world security order. The UN must be permitted to decide what is the appropriate action to take against Iraq, as it did in 1990-91.

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[1] 'Transforming the Military' (May-June 2002) Foreign Affairs Magazine.

[2] St Thomas Aquinas, '*Summa theologica*', *Secunda secundae*, *Quaestio XL* (*de bello*), quoted in John Eppstein, *The Catholic Tradition of the Law of Nations* (1935) 83.

[3] Y Dinstein, *War, Aggression and Self-Defence* (2nd ed, 1994); M S McDougal and F Feliciano, *The International Law of war* (1994); L Damrosch and D J Scheffer (eds), *Law and Force in the New International Order* (1991); A Cassese, *Violence and Law in the Modern Age* (1988); J Murphy, *The UN and the Control of International Violence* (1982); Julius Stone, *Conflict through consensus* (1977); Frederick H Rusell, *The Just War in the Middle Ages* (1975); R A Falk, *Legal Order in a Violent World* (1968); Ian Brownlie, *International Law and Use of Force by States* (1963); M S McDougal and F Feliciano, *Law and Minimum World Public Order* (1961); D W Bowett, *Self-Defence in International Law* (1958); Julius Stone, *Legal Controls of International Conflict* (2nd ed, 1959); Julius Stone, *Aggression and World Order* (1958); H Waldock, 'The Regulation of the Use of Force by Individual States in International Law' 81 *Recueil des Cours de l'Académie de droit international* 415.

[4] By states acting in accordance with Article 51.

[5] By the Security Council in accordance with Article 42.

[6] The evolution may be traced in T M Franck, *Fairness in International Law and Institutions* (1995) ch 8; Geoffrey Best, *War and Law since 1945* (1994); L C Green, *The Contemporary Law of Armed Conflict* (1993); C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 ICLQ 283; M Walzer, *Just and Unjust Wars* (2nd ed, 1977); S Bailey, *Prohibitions and Restraints in War* (1972). The concept of the just war largely disappeared after the Peace of Westphalia; L Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42 AJIL 20.

[7] (36) Alberto Coll and Anthony Arend (eds), *The Falklands War- Lessons for Strategy, Diplomacy and International Law* (1985).

[8] See Anthony Arend and Robert Beck, International Law and the Use of Force: Beyond the UN Charter Paradigm (1993); James Gow, Triumph of the Lack of Will: International Diplomacy and the Yugoslav War (1997).

[9] Gretchen Kewley, International Law in Armed Conflicts (1984).

[10] Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (1988).

[11] Geoffrey Best, *War and Law since 1945* (1994); L C Green, *The Contemporary Law of Armed Conflict* (1993); C Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles* (1984); M Bothe, K Partsch and W Solf, *New Rules for Victims of Armed Conflict* (1982); J Pictet, *Humanitarian Law and the Protection of War Victims* (1982); Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1980); A Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979); F Karlshoven, *The Law of Warfare* (1973); G Draper, 'The Geneva Convention of 1949', 114 *Recueil des Cours de l'Académie de droit international* 59; G Draper, 'Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols', 164 *Recueil des Cours de l'Académie de droit international* 1. Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations', (1988) 131 *Australian Defence Force Journal* 41-44.

[12] Lt Col Frank Thorogood (Retd), 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16.

[13] Thorogood, *ibid*; Gerry Simpson, 'Nuremberg Revisited? The UN War Crimes Tribunal for the Former Yugoslavia', *International Law News* (February 1994). There is, however, no unified system of sanctions in international law; W M Reisman, 'Sanctions and Enforcement' in C Black and R A Falk (eds), *The Future of the International Legal Order* (1971) 273; S Schwebel (ed), *The Effectiveness of International Decisions* (1971); G Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', (1956) 19 MLR 1; J Brierly, 'Sanctions' (1932) 17 *Transactions of the Grotius Society* 68.

[14] Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: a Critical History of the Law of War' (1994) 35 *Harvard International Law Review* 72. See J Ilingham and J C Holt (eds), *War and Government in the Middle Ages* (1984).

[15] Examples where treaties with native peoples were regarded as binding in international law include those with the Cherrokees, 20 September 1730; J Almon, *A Collection of all the Treaties of Peace, etc* (1772) vol 2, 13; J Dumont, *Corps universal diplomatique de droit des gens* (1726-32) vol 8 part 2, 162; C Jenkinson, *A Collection of all the Treaties of Peace* (1785) vol 2, 315.

[16] G Glahn, Law Among Nations: An Introduction to Public International Law (1992).

[17] This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

> [The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

[18] Article 1(4) of Protocol I Additional to the Geneva Conventions of 12 August 1949 (adopted on 8 June 1977) [hereinafter 'API']. See M Bothe, KJ Partsc and WA Solf, New Rules for Victims of Armed Conflicts, Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949 (1982); Y Sandoz, C Swinarski and B Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987).

[19] Instructions for the Government of Armies of the United States in the Field, General Orders No 100, reprinted in Dietrich Schindler and Jiri Toman (eds), The Laws of Armed Conflicts (1973).

[20] *Laws and Ordinances of Warre 1639*, reprinted in Charles Clode (ed), *Military Forces of the Crown* (1869) vol 1, App VI.

[21] Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

[22] Signed at Paris, 27 August 1928, instrument of ratification deposited at Washington by the United States of America, Australia, Dominion of Canada, Czechoslovkia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, and Union of South Africa, 2 March 1929: Lt Col P M Boyd, 'The Law of Armed Conflict; Definition, Sources, History' (1991) 86 *Australian Defence Force Journal* 19, 24; R H Ferrell, *Peace in Their Time* (1952).

[23] Lt Col P M Boyd, 'The Law of Armed Conflict; Definition, Sources, History' (1991) 86 *Australian Defence Force Journal* 19, 24; R H Ferrell, *Peace in Their Time* (1952). See also the 'Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' *Yearbook of the International Law Commission* (1950) vol II.

[24] For just two examples, see Foreign Policy In Focus Statement, 'Lawyers Statement on UN Resolution' (5 December 2002), http://fpif.org/commentary/2002/0212lawyers.html; 'No legal justification' (17-23 October 2002) 608 *Al-Ahram* (Cairo) http://weekly.ahram.org.eg/2002/608/op12.htm.

[25] Ove Bring, 'Should NATO take the lead in formulating a doctrine on humanitarian intervention' (1999) 3 *NATO Review* 24, 25.

[26] The Taliban movement was formed in Kandahar in 1994 by Islamic students who take a radical approach to interpreting Islam. The Taliban captured Kabul in September 1996 from Mujaheedin regime. The government of Burhan-ul Din Rabani was ousted. The Taliban government in Kabul was recognised only by Pakistan, Saudi Arabia and United Arab Republic – all of whom withdrew recognition following 11 September 2001 http://www.afghan-info.com/TALIBAN.HTM.

[27] NATO Update (3 October 2001) http://www.nato.int/docu/update/2001/1001/e1002a.htm#FN1.

[28] 'Operation Active Endeavour', Allied Forces Southern Europe (15 January 2002), http://www.afsouth.nato.int/operations/Endeavour/default.htm.

[29] The difficulties this has caused are not confined to the treatment of prisoners of war, though the discussion will be confined to this one issue.

[30] Ewen MacAskill, 'Legal warning on war aims', *The Guardian* (London), 4 October 2001.

[31] Alexandra Poolos, 'Afghanistan: Treatment Of Prisoners At Guantanamo May Injure U.S.-British Alliance' 21 January 2001 (Radio Free Europe/Radio Liberty); 'White House Debates Status Of Detainees' 29 January 2002 (Reuters).

[32] 'US will apply Geneva rules to Taliban fighters', *Los Angeles Times*, 8 February 2002.

[33] *Johnson v* Eisentrager, 339 US 763, 70 S Ct 936 (1950) at 286.

[34] For a failed attempt to apply for a writ of *habeas corpus* on behalf of the prisoners, see *Coalition of Clergy, Lawyers and Professors v Bush* (Unreported, US District Court for the Central District of California, A Howard Matz J, February 2002). The application failed on procedural grounds for lack of standing and jurisdiction.

[35] 'The president has ... determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status': Secretary of Defence Donald Rumsfeld and General Richard Myers, US Department of Defence, News Briefing. News Transcript (8 February 2002) http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html at 29 May 2002.

[36] Which required compliance with resolutions 661, 678, 686, 687, 688, 707, 715, 986, 1284; Resolution 1441 (2002) United Nations Security Council S/RES/1441 (2002).

[37] Gretchen Kewley, *International Law in Armed Conflicts* (1984).
[38] Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations', (1988) 131 *Australian Defence Force Journal* 41- 44; F de Mulinen, 'The Law of War and the Armed Forces' (1978) 202 *International Review of the Red Cross* 20-45.
[39] Lt Col Frank Thorogood (Retd), 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16.
[40] George Schwarzenberger, *International Law* (1968) vol 2, 'The Law of Armed Conflict'.
[41] This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

> [The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

[42] Article 1(4) of API; G Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165(4) *Recueil des Cours de l'Académie de droit international* 353-445; D Schindler, 'The Different Types of Armed Conflicts' (1979) 163(2) *Recueil des cours de l'Académie de droit international* 117-163.
[43] Article 1(4) of API.
[44] Now the African Union.
[45] For but two examples of writers who have seen Yugoslavia as critical to the development of modern humanitarian law and the law of war, see Major John Hutcheson, 'The Genocidal Events in Bosnia-Herzegovina and the International Community's Ability to Deter Future "Ethnic Cleansing"' (1999) 138 *Australian Defence Force Journal* 11-18; P Akhavan, 'Punishing war crimes in the former Yugoslavia: A critical juncture for the New World Order' (1993) 15 *Human Rights Quarterly* 262-89.

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Public Issues Committee

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PRECIS

International law, the United Nations and Iraq

A United States-led war against Iraq would be a breach of international law if it is conducted without specific UN authorisation

The new strategic doctrine of the Bush administration is at the centre of an intense international debate. The US doctrine goes beyond the Cold War strategy of deterrence to Communist aggression to one which promotes pre-emptive attacks against terrorists and states with weapons of mass destruction. Yet international law has not changed. The world community prescribes only limited circumstances in which offensive military action may occur. This presents a critical problem for the US, the UN, and the world. What will President Bush do if an attack upon Iraq is not inherently permitted by international law, or authorised by the UN? Will the Americans act unilaterally, as the US Government has already asserted that it has the right to do?

The instigation and conduct of war has since the very earliest times been subject to some degree of regulation or control. In our own time the UN Charter enshrined the prohibition of all wars not waged in self-defence – though it does allow collective self-defence (that is a coalition acting together against an aggressor), and action to restore international peace. In 1945 and the years that followed almost all nations signed the UN Charter, thereby promising to '*refrain in their international relations 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 UN*'. Aggressive war, as such, has been eliminated from among the *lawful* means of conducting international relations. Any act of war that is not permitted is therefore unlawful. No country is above these legal restrictions, which are the product of centuries of jurisprudential evolution. Aggressive war is no longer a legitimate instrument of national policy.

The legality of any given action by the international community, or by an individual state or group of states, depends upon whether the action is justified by international law. A US-led attack on Iraq might be designed to force compliance with UN resolutions, but if it were not expressly authorised by the UN Security Council it would place the international security system in grave peril. No state may unilaterally commence a war in order to force compliance with its own interpretation of UN resolutions. The critical question is whether a US-led attack upon Iraq which had not obtained specific UN Security Council approval can be said to be an unjustified offensive

war? Force may be used, in the last resort, as a means of enforcing international law. This can include intervention, reprisals, or war. But these types of police action may only occur where international law clearly allows it. Many commentators have argued that current legal views of the UN Charter do not permit an immediate attack on Iraq. This was because the action would be neither based on a Security Council decision under Chapter VII of the Charter, nor pursued in self-defence under Article 51, the only two justifications for the use of force that are currently available under international law.

Military and air forces led by the US have been engaged in 'police' operations against terrorists and their allies in Afghanistan, the al-Qaeda and the Taliban. Though the links between these groups, those responsible for the World Trade Centre bombing, and Iraq, are at best unproven, Iraq undoubtedly has itself acted in violation of international law. If the UN Security Council condemns Iraq, and authorises the US or other nations to take military action against that country, so be it. But the US should refrain from unilateral or even multi-lateral action without such authorisation. The US has claimed that that there is no need for a new Security Council resolution, as Iraq has materially breached resolution 687 – the 1991 ceasefire resolution – and that this is implicit in resolution 1441. This view is not shared by the majority of members of the UN. If the USA attacks Iraq in the absence of UN approval, it will be doing so in violation of international law. The US will risk de-stabilising a system which has always relied upon the nations acting in conformity with generally recognised principles of behaviour.

In his State of the Union address last year President Bush announced that the US would use military force against any state the administration perceived to be hostile. This is fundamentally at odds with the UN Charter. By all means be firm with Iraq, but do not act contrary to principles of international law. For to do so will seriously harm the world security order. The UN must be permitted to decide what is the appropriate action to take against Iraq, as it did in 1990-91.

14 March 2003

International law, the United Nations and Iraq

Introduction

The new strategic doctrine of the Bush administration is at the centre of an intense international debate. The doctrine laid out in the document, "the National Security Strategy of the United States of America", marks a significant shift from beliefs that had dominated Cold War strategic thought. The new doctrine goes beyond the Cold War strategy of deterrence, to one which backs pre-emptive attacks against terrorists and states with weapons of mass destruction. The new doctrine makes the argument, "given the goals of rogue states and terrorists, the U.S. can no longer solely rely on a reactive posture as we have in the past... we cannot let our enemies strike first. As a matter of common sense and self-defence, America will act against such emerging threats before they are fully formed."

The question of the legality of the apparently imminent US-led attack upon Iraq is one which is central to the development of the world order in the first half of the twenty-first century. For, despite its justification as a police action to prevent the spread of weapons of mass destruction – or any of the other reasons given for attacking Iraq, the US has acted largely outside the international legal order. This is illustrated by the US Defence Secretary Donald Rumsfeld, in the journal *Foreign Affairs*, wrote that defending the US required both prevention and, sometimes, pre-emptive action.[1] Yet international law prescribes limited circumstances in which offensive military action may occur.

The scope of the law of war

The instigation and conduct of war has since the very earliest times been subject to some degree of regulation or control. In the 13th century Thomas Aquinas wrote that, 'in order that a war may be just three things are necessary. In the first place, the authority of the prince, by whose order the war is undertaken ...'[2] His second and third requirements for a just war, like those of his predecessor St Augustine, Bishop of Hippo, were a just cause, and right intent. However, the law of war has advanced much since St Thomas lived, and ironically, the UN Charter, designed to promote peace, enshrines a growing tendency to prohibit all wars not waged in self-defence[3] – though it does allow collective self-defence,[4] and the restoration of international peace.[5] This has left little room for the 'just war', a concept which has nevertheless increasingly reared its head in the law of war.[6]

The legality of any given action by the international community, or by an individual state or group of states depends upon whether the action is justified by international law. A US-led attack on Iraq might be designed to force compliance with UN resolutions, but it would not be expressly authorised by the UN. Nor would this resemble traditional peacekeeping missions, or defensive military actions, such as the British action for the recovery of the Falkland Islands in 1982.[7] That is not to say, however, that the US would act unlawfully in attacking Iraq. But what would be the legal basis for its action?[8] Are there any lessons for other military campaigns, such as those conducted recently by the US and its allies in Afghanistan, as part of a global 'war' on terrorism?

Traditionally the law of war was concerned with the regulation of warfare;[9] usually, though not exclusively, interstate warfare.[10] Additionally, since the 19th century there has been significant growth in the laws of humanity, or human rights.[11] It has been said that these two strands have joined.[12] There has been much concentration on humanitarian law, and especially the punishment of war criminals.[13] But the basic question of when it is lawful to start an offensive war has been largely ignored.[14]

The basic sources of the law of armed conflict are written and unwritten rules, treaties, agreements, and customary law. A treaty is an agreement between entities, both or all of which are subjects of international law possessed of international personality and treaty-making capacity. All sovereign states enjoy the right to make treaties. Some self-governing colonies, protectorates, and international organisations have the capacity to enter into agreements, though their right to do so is usually limited.[15]

Custom is general state practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent state authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations. The existence of custom, unlike treaty-law, depends upon general agreement, not unanimous agreement.[16]

It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.[17] They have now been extended to the modern phenomenon known as wars of national liberation. These revolutions are defined as armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the UN and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN.[18]

There have long been efforts to codify the rules of war, generally those relating to the conduct of hostilities (*jus in bello*), but also those dealing with the legality of the use of force (*jus ad bellum*). One early modern attempt was by Francis Lieber, whose *Instructions for the Government of Armies of the United States in the Field*, was promulgated by President Abraham Lincoln in 1863.[19] But articles of war, governing the army in the field, had been issued since early times, and reached their culmination in England in the 17th century.[20]

The first major international attempt at codification was the Hague Peace Conference in 1899, where a number of conventions on the law of war were adopted. Then in 1907, another conference at The Hague revised the rules and made them more detailed. It also gave greater emphasis to the legality of the use of force. The resulting Law of The Hague recognised that the total avoidance of war should be the ultimate goal. But it recognised that war is sometimes unavoidable, and was to this extent a legitimate means of settling disputes between nations.[21]

The Kellogg-Briand Pact 1928 (Pact of Paris) codified the customary law of war with respect to *jus ad bellum*. It was signed by 65 countries, including the US, who all thereby renounced aggressive war as an instrument of national policy.[22] In Article 1, 'the high contracting parties 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'. The Treaty had the effect of outlawing war as an instrument of national policy (with respect to the signatories), and advanced the concept of aggressive war as being contrary to international law – though it did not give rise to it – as this could be traced to Thomas Aquinas if not earlier.

In 1945 and the years that followed, almost all nations signed the UN Charter, thereby promising to 'refrain in their international relations 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 UN'. Hence, aggressive war, as such, has been eliminated from among the lawful means of conducting international relations. Yet, the use of armed force has not ceased. International law has recognised this. In particular, the law of armed conflict applies not only to situations of declared war, but to any situation of international armed conflict and, to a more limited degree, armed conflicts which are not of an international character. Furthermore, armed force may be used pursuant to a decision or recommendation of the UN, in accordance with Article 42 of its Charter, and yet is not 'war' in the strict technical sense.

Offensive war?

Could a US-led attack upon Iraq be classified as an unjustified offensive war? This is an important question, for if so, it would be contrary to the law of war. The London Charter of 1945, establishing the International Military Tribunal at Nuremberg, contained the first definitions of crimes against peace and of crimes against humanity.

Article 6(a) defined crimes against peace:

> namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

Article 6(b) defined war crimes:

> namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to,... wanton destruction of cities, towns and villages, or devastation not justified by military necessity;

Principle VI of the International Law Commission in 1950 confirmed the criminality of the acts defined in Article 6 of the London Charter. But the Pact of Paris had already made waging an aggressive war potentially subject to international sanctions, though it did not become a crime for which individual criminal liability could arise until after World War II.[23]

The UN and the waging of offensive war

Article 1 of the UN Charter states that:

> The Purposes of the UN are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2 states in part:

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

> 4. All members shall refrain in their international relations 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 UN.
> 5. All Members shall give the UN every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the UN is taking preventive or enforcement action.
> 7. Nothing contained in the present Charter shall authorize the UN to interfere in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The General Assembly has power to discuss, consider, and recommend. The Security Council alone has the power of making binding decisions. According to Article 39:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 provides for a range of non-military measures and, if they prove ineffective, Article 42 allows more direct action:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the UN.

However, while the UN itself can take or authorise military action, the Charter does not necessarily exclude the possibility of unilateral action by individual states. This is recognised in Article 51:

> 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 UN, 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.

Thus the threat or use of force may be used, in the last resort, as a means of enforcing international law. This can include intervention, reprisals, or war. But these types of police action may only occur where international law clearly allows it. Aggressive war is no longer a legitimate instrument of national policy, but nor is the use of force limited or reserved to the UN.

Many international lawyers have argued that current legal views of the UN Charter do not accommodate an attack on Iraq.[24] This was because the action was neither based on a Security Council decision under Chapter VII, nor pursued in collective self-defence under Article 51; the only two justifications for the use of force that are currently available under international law.[25] Whether this view of international law is correct depends on whether the

law of war has now accommodated, or is in the process of accommodating, wars conducted for humanitarian purposes or to reduce the risk of widespread war.

The use of force without the approval of the UN

The exercise of independent action by the US and its allies is not necessarily contrary to the UN Charter. Article 1 of the UN Charter allows, or even requires that member nations:

> take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

However, such police actions are only allowed to suppress a breach of international law. What had Iraq done? It had not invaded or threatened a neighbour.

Pre-emptive action by the US

This was in reliance on Article 51 of the UN Charter. According to James Baker, former Secretary of State to Bush senior, self-defence. The international law standard for whether a particular use of force is self-defence comes from an 1837 incident where British subjects destroyed an American ship, the Caroline, in a US port, because the Caroline had been used in American raids into Canadian territory. The British claimed the attack was self-defence. Through an exchange of diplomatic notes, the dispute was resolved in favour of the Americans. US Secretary of State Daniel Webster urged the following definition of self-defence, which the British accepted: "There must be a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. [The means of self-defence must involve] nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."

International counter-terrorism operations

Military and air forces led by the US have been engaged in 'police' operations against terrorists and their allies in Afghanistan, the al-Qaeda and the Taliban.[26]

Frank Taylor, the US Ambassador at Large and Co-ordinator for Counter-terrorism briefed the North Atlantic Council on 2 October 2001 on the results of investigations into the 11 September terrorist attacks against the United States. As a result of the information he provided to the Council, it was resolved that the individuals who carried out the attacks belonged to the world-wide terrorist network of al-Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.[27]

For the first time in NATO's history, Alliance assets were deployed in support of Article 5 operations. NATO contributed five Airborne Warning and Control System (AWACS) aircraft to the United States and also deployed elements of its Standing Naval Forces to the Eastern Mediterranean. The naval assets of Standing Naval Force Mediterranean (STANAVFORMED), which were participating in Exercise Destined Glory 2001 off the southern coast of Spain, were re-assigned in order to provide an immediate NATO military

presence in the Eastern Mediterranean.[28] The UN Security Council indirectly endorsed the military operations, with Resolutions 1373 and 1378 reaffirming the inherent right of individual or collective self-defence. It did not however become directly involved in the operations. In part this was because the operations were not aimed at a state, but rather terrorist cells operating within Afghanistan.[29]

But at the same time, disquiet was growing at the uncertain aims of the operations,[30] and the treatment of prisoners by the American authorities, particularly those sent to the Guantanamo Bay detention centre.[31] The US Government decided that it would apply the rules of the Third Geneva Convention to at least some detainees[32] and the jurisdiction of the military over enemy belligerents, prisoners of war or others charged with violating the law of war is fairly clear.[33] However, political factors have ensured that the US authorities have treated prisoners taken during its recent operations in Afghanistan in an especially strict manner.[34] However, the law of war applies if there is an armed conflict and the US has been reluctantly compelled to acknowledge this, in practice if not officially. Failure to comply with such norms would seriously weaken the claim by the US to be acting in accordance with international law in its operations in Afghanistan. Either the operation is one in which there is international armed conflict – in which case the detainees are automatically entitled to the protection of the Third Geneva Convention, or it is not. If the detainees are 'merely' terrorists, and not entitled to this protection, then it is not an international armed conflict. The particular difficulty for the US is that it has treated Taliban members as terrorists, though they represented the *de facto* Government of Afghanistan.[35]

An attack by foreign armed forces on the US would clearly constitute an attack envisaged by Article 5. But terrorists, whilst they may have enjoyed close ties with the *de facto* rulers of Afghanistan, were in no sense part of the military infrastructure or apparatus of Afghanistan. Whilst there is no doubt that Article 5 directly authorised the use of force in such circumstances, its target was more problematic. And even if Iraq is in material breach of Security Council Resolution 1441,[36] that does not authorise unilateral US action.

Conclusion

Traditionally the law of war was concerned with the regulation of warfare between states.[37] Since the 19th century there has been significant growth in the laws of humanity, or human rights.[38] It has been said that these two strands have joined.[39] The law of armed conflict is only one of a group of principles guiding nations in times of conflict.[40] It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.[41] They have now been extended to the modern phenomenon known as wars of national liberation.[42]

The NATO attacks on Yugoslavia in 1999 make it clear that the law of armed conflict applies in all international armed conflicts, including not merely wars of national liberation,[43] but also police actions conducted by the international community in the name of the laws of humanity, or human rights. But whilst the use of force by the international community in the pursuit of peace may be lawful, those operations remain subject to the rules of conduct established by international law.

Wars of secession may well replace the anti-colonial wars of the 1950s, 1960s and 1970s as the national liberation struggles of the 21st century. So far, the UN and the regional organisations (especially the OAU[44]) have been extremely reluctant to apply the right to self-determination to secessionist struggles. Current events, however, may force upon us a serious rethinking of the types of groups that are entitled to self-determination and to the active military protection of the international community.[45] It is doubtful however whether the

recent military operations in Afghanistan will have the same degree of influence on the development of international law. But they do show that where operations are conducted by the forces of liberal western democracies, mere authority to wage war is not enough.

Now the US is attempting to extend the bounds of international law to allow pre-emptive strikes. The US has claimed that that there is no need for a new Security Council resolution, as Iraq has materially breached resolution 687 – the 1991 ceasefire resolution – and that this is implicit in resolution 1441. This view is not shared by the majority of members of the UN. If the USA attacks Iraq in the absence of UN approval, it will be doing so in violation of international law. The US will risk de-stabilising a system which has always relied upon the nations acting in conformity with generally recognised principles of behaviour.

In his State of the Union address last year President Bush announced that the US would use military force against any state the administration perceived to be hostile. This is fundamentally at odds with the UN Charter. By all means be firm with Iraq, but do not act contrary to principles of international law. For to do so will seriously harm the world security order. The UN must be permitted to decide what is the appropriate action to take against Iraq, as it did in 1990-91.

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[1] 'Transforming the Military' (May-June 2002) Foreign Affairs Magazine.

[2] St Thomas Aquinas, '*Summa theologica*', *Secunda secundae*, *Quaestio XL* (*de bello*), quoted in John Eppstein, *The Catholic Tradition of the Law of Nations* (1935) 83.

[3] Y Dinstein, *War, Aggression and Self-Defence* (2nd ed, 1994); M S McDougal and F Feliciano, *The International Law of war* (1994); L Damrosch and D J Scheffer (eds), *Law and Force in the New International Order* (1991); A Cassese, *Violence and Law in the Modern Age* (1988); J Murphy, *The UN and the Control of International Violence* (1982); Julius Stone, *Conflict through consensus* (1977); Frederick H Rusell, *The Just War in the Middle Ages* (1975); R A Falk, *Legal Order in a Violent World* (1968); Ian Brownlie, *International Law and Use of Force by States* (1963); M S McDougal and F Feliciano, *Law and Minimum World Public Order* (1961); D W Bowett, *Self-Defence in International Law* (1958); Julius Stone, *Legal Controls of International Conflict* (2nd ed, 1959); Julius Stone, *Aggression and World Order* (1958); H Waldock, 'The Regulation of the Use of Force by Individual States in International Law' 81 *Recueil des Cours de l'Académie de droit international* 415.

[4] By states acting in accordance with Article 51.

[5] By the Security Council in accordance with Article 42.

[6] The evolution may be traced in T M Franck, *Fairness in International Law and Institutions* (1995) ch 8; Geoffrey Best, *War and Law since 1945* (1994); L C Green, *The Contemporary Law of Armed Conflict* (1993); C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 ICLQ 283; M Walzer, *Just and Unjust Wars* (2nd ed, 1977); S Bailey, *Prohibitions and Restraints in War* (1972). The concept of the just war largely disappeared after the Peace of Westphalia; L Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42 AJIL 20.

[7] (36) Alberto Coll and Anthony Arend (eds), *The Falklands War- Lessons for Strategy, Diplomacy and International Law* (1985).

[8] See Anthony Arend and Robert Beck, International Law and the Use of Force: Beyond the UN Charter Paradigm (1993); James Gow, Triumph of the Lack of Will: International Diplomacy and the Yugoslav War (1997).

[9] Gretchen Kewley, International Law in Armed Conflicts (1984).

[10] Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (1988).

[11] Geoffrey Best, *War and Law since 1945* (1994); L C Green, *The Contemporary Law of Armed Conflict* (1993); C Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles* (1984); M Bothe, K Partsch and W Solf, *New Rules for Victims of Armed Conflict* (1982); J Pictet, *Humanitarian Law and the Protection of War Victims* (1982); Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1980); A Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979); F Karlshoven, *The Law of Warfare* (1973); G Draper, 'The Geneva Convention of 1949', 114 *Recueil des Cours de l'Académie de droit international* 59; G Draper, 'Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols', 164 *Recueil des Cours de l'Académie de droit international* 1. Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations', (1988) 131 *Australian Defence Force Journal* 41-44.

[12] Lt Col Frank Thorogood (Retd), 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16.

[13] Thorogood, *ibid*; Gerry Simpson, 'Nuremberg Revisited? The UN War Crimes Tribunal for the Former Yugoslavia', *International Law News* (February 1994). There is, however, no unified system of sanctions in international law; W M Reisman, 'Sanctions and Enforcement' in C Black and R A Falk (eds), *The Future of the International Legal Order* (1971) 273; S Schwebel (ed), *The Effectiveness of International Decisions* (1971); G Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', (1956) 19 MLR 1; J Brierly, 'Sanctions' (1932) 17 *Transactions of the Grotius Society* 68.

[14] Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: a Critical History of the Law of War' (1994) 35 *Harvard International Law Review* 72. See J Ilingham and J C Holt (eds), *War and Government in the Middle Ages* (1984).

[15] Examples where treaties with native peoples were regarded as binding in international law include those with the Cherrokees, 20 September 1730; J Almon, *A Collection of all the Treaties of Peace, etc* (1772) vol 2, 13; J Dumont, *Corps universal diplomatique de droit des gens* (1726-32) vol 8 part 2, 162; C Jenkinson, *A Collection of all the Treaties of Peace* (1785) vol 2, 315.

[16] G Glahn, Law Among Nations: An Introduction to Public International Law (1992).

[17] This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

> [The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

[18] Article 1(4) of Protocol I Additional to the Geneva Conventions of 12 August 1949 (adopted on 8 June 1977) [hereinafter 'API']. See M Bothe, KJ Partsc and WA Solf, New Rules for Victims of Armed Conflicts, Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949 (1982); Y Sandoz, C Swinarski and B Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987).

[19] Instructions for the Government of Armies of the United States in the Field, General Orders No 100, reprinted in Dietrich Schindler and Jiri Toman (eds), The Laws of Armed Conflicts (1973).

[20] *Laws and Ordinances of Warre 1639*, reprinted in Charles Clode (ed), *Military Forces of the Crown* (1869) vol 1, App VI.

[21] Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

[22] Signed at Paris, 27 August 1928, instrument of ratification deposited at Washington by the United States of America, Australia, Dominion of Canada, Czechoslovkia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, and Union of South Africa, 2 March 1929: Lt Col P M Boyd, 'The Law of Armed Conflict; Definition, Sources, History' (1991) 86 *Australian Defence Force Journal* 19, 24; R H Ferrell, *Peace in Their Time* (1952).

[23] Lt Col P M Boyd, 'The Law of Armed Conflict; Definition, Sources, History' (1991) 86 *Australian Defence Force Journal* 19, 24; R H Ferrell, *Peace in Their Time* (1952). See also the 'Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' *Yearbook of the International Law Commission* (1950) vol II.

[24] For just two examples, see Foreign Policy In Focus Statement, 'Lawyers Statement on UN Resolution' (5 December 2002), http://fpif.org/commentary/2002/0212lawyers.html; 'No legal justification' (17-23 October 2002) 608 *Al-Ahram* (Cairo) http://weekly.ahram.org.eg/2002/608/op12.htm.

[25] Ove Bring, 'Should NATO take the lead in formulating a doctrine on humanitarian intervention' (1999) 3 *NATO Review* 24, 25.

[26] The Taliban movement was formed in Kandahar in 1994 by Islamic students who take a radical approach to interpreting Islam. The Taliban captured Kabul in September 1996 from Mujaheedin regime. The government of Burhan-ul Din Rabani was ousted. The Taliban government in Kabul was recognised only by Pakistan, Saudi Arabia and United Arab Republic – all of whom withdrew recognition following 11 September 2001 http://www.afghan-info.com/TALIBAN.HTM.

[27] NATO Update (3 October 2001) http://www.nato.int/docu/update/2001/1001/e1002a.htm#FN1.

[28] 'Operation Active Endeavour', Allied Forces Southern Europe (15 January 2002), http://www.afsouth.nato.int/operations/Endeavour/default.htm.

[29] The difficulties this has caused are not confined to the treatment of prisoners of war, though the discussion will be confined to this one issue.

[30] Ewen MacAskill, 'Legal warning on war aims', *The Guardian* (London), 4 October 2001.

[31] Alexandra Poolos, 'Afghanistan: Treatment Of Prisoners At Guantanamo May Injure U.S.-British Alliance' 21 January 2001 (Radio Free Europe/Radio Liberty); 'White House Debates Status Of Detainees' 29 January 2002 (Reuters).

[32] 'US will apply Geneva rules to Taliban fighters', *Los Angeles Times*, 8 February 2002.

[33] *Johnson v* Eisentrager, 339 US 763, 70 S Ct 936 (1950) at 286.

[34] For a failed attempt to apply for a writ of *habeas corpus* on behalf of the prisoners, see *Coalition of Clergy, Lawyers and Professors v Bush* (Unreported, US District Court for the Central District of California, A Howard Matz J, February 2002). The application failed on procedural grounds for lack of standing and jurisdiction.

[35] 'The president has ... determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status': Secretary of Defence Donald Rumsfeld and General Richard Myers, US Department of Defence, News Briefing. News Transcript (8 February 2002) http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html at 29 May 2002.

[36] Which required compliance with resolutions 661, 678, 686, 687, 688, 707, 715, 986, 1284; Resolution 1441 (2002) United Nations Security Council S/RES/1441 (2002).

[37] Gretchen Kewley, *International Law in Armed Conflicts* (1984).
[38] Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations', (1988) 131 *Australian Defence Force Journal* 41- 44; F de Mulinen, 'The Law of War and the Armed Forces' (1978) 202 *International Review of the Red Cross* 20-45.
[39] Lt Col Frank Thorogood (Retd), 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16.
[40] George Schwarzenberger, *International Law* (1968) vol 2, 'The Law of Armed Conflict'.
[41] This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

> [The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

[42] Article 1(4) of API; G Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165(4) *Recueil des Cours de l'Académie de droit international* 353-445; D Schindler, 'The Different Types of Armed Conflicts' (1979) 163(2) *Recueil des cours de l'Académie de droit international* 117-163.
[43] Article 1(4) of API.
[44] Now the African Union.
[45] For but two examples of writers who have seen Yugoslavia as critical to the development of modern humanitarian law and the law of war, see Major John Hutcheson, 'The Genocidal Events in Bosnia-Herzegovina and the International Community's Ability to Deter Future "Ethnic Cleansing"' (1999) 138 *Australian Defence Force Journal* 11-18; P Akhavan, 'Punishing war crimes in the former Yugoslavia: A critical juncture for the New World Order' (1993) 15 *Human Rights Quarterly* 262-89.

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