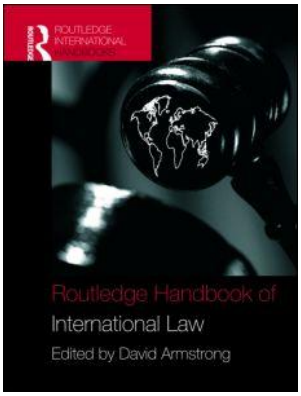

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Law and Force in the Twenty-First Century

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Section III

Law and power in international society

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Law and force in the twenty-first century

Gerry Simpson

In this chapter, the law of force (or the ius ad bellum) is represented as the performance of an argument between three competing and potent visions of international legal order. These can be characterized as an absolutist view that seeks to approach war and peace through non-negotiable, universalizable and unqualified moral truths, a sovereigntist perspective that holds the desires or fears of the sovereign to be the single source of legitimacy in assessing decisions to go to war or engage in diplomacy and (an occasionally militant) legal pacifism that wants to use law to abolish war. This may help account for the law's thematic ambiguities, its textual evasions, its judicial agonies and its interminable crises. It may explain also why its primary organs repeatedly move from institutional paralysis to hyperactivism and back. The Iraq war, for example, rather than being viewed as an extraordinary challenge to the future of international law, can be reinterpreted, in these terms, as part of the perpetual crisis of law, war and peace.

Three fantasies

On February 6, 2004 in the German city of Munich, Donald Rumsfeld, then Secretary of Defence in the Bush Administration, was asked during a press conference whether there is a code of international rules. He replied: "I honestly believe that every country ought to do what it wants to do . . . it is either proud of itself or less proud of itself."[1] Some days later, at his Sedgefield constituency, former British Prime Minister, Tony Blair, announced the end of the Westphalian era of international relations.[2] It was time, according to Blair, to usher in a new interventionist period in which force would be used to avert or end humanitarian catastrophe: "I was already reaching for a different philosophy in international relations from a traditional one that has held sway since the treaty of Westphalia in 1648; namely that a country's internal affairs are for it" (Blair 2004).

The United Nations Charter in Article 2(4) prohibits the use of force among states and the Charter's preamble speaks of eliminating the scourge of war altogether. International law, indeed, may be associated in the public mind with a form of pacifism. To be on the side of international law is to be on the side of peace, or, at the very least, the peaceful resolution of disputes.[3] This legalist–utopian insistence on the virtues of peace is pervasive but it co-exists in international relations and, more importantly, in our intuitions about security and survival, with two other fantasies. In one, war is imagined as a radical solution to

the problem of social evil. Tony Blair's Sedgefield speech and his whole humanitarian-military ethos, first articulated in Chicago in 1999, are built around this idea (Blair 1999). So, too, in a different vein is George Bush's war on terror, a self-conscious and publicly proclaimed effort to destroy all those who would do evil (or commit (certain) acts of terrorism) (U.S. National Security Strategy 2002). The second fantasy is reflected in Donald Rumsfeld's response to his European interlocutors. Here, sovereignty is anterior to, prior to and transcendent of any concepts of community or law or obligation. War is a question of pride (or, vanity) or strategic calculation or revenge, or the product of some neurotic urge. Whatever the case, sovereignty is its own justification; there is no normative universe outside the state or its elite capable of reining its (often violent) appetites. This sovereigntism sometimes is combined with a knowing realism about the true nature of international relations (Hobbesian) and the inclinations of nation states (cold hearted monsters). As Churchill put it:

> War is too foolish, too fantastic, to be thought of in the 20th Century . . . civilisation has climbed above such perils . . . the interdependence of nations . . . the sense of public law have rendered such nightmares impossible. Are you quite sure? It would be a pity to be wrong.
>
> (Woodward 2007: 44)

Often, the debate about the use of force is conducted in terms of a contest between international law's commitments to peace and constraint, and a world of violence and politics in which law struggles for footing. Most often, this image is accompanied by a sense that law is weak and ineffectual (but the product of essentially decent inclinations). Arrayed against this timid repository of our best hopes and most creative ideas are the brute conditions of international anarchy and the programmatic impulses of charismatic leaders and exceptionalist nation states. In 1970, Thomas Franck asked "Who killed Article 2(4)?" (Franck 1970). According to this view, there are myriad possible perpetrators (they include the great powers, "sovereignty", political cynicism and the lack of a community or society in international relations). In the end, even the most ardent internationalist begins to ask: Who would want to keep it alive?

In this chapter, I want to represent the law of force (or the *ius ad bellum*) a little differently and, perhaps more representatively, as the performance of an argument between these three competing and potent visions of international and social order sketched earlier. These can be characterized as an absolutist view that seeks to approach war and peace through non-negotiable, universalizable and unqualified moral truths, a sovereigntist perspective that holds the desires or fears of the sovereign to be the single source of legitimacy in assessing decisions to go to war or engage in diplomacy and (an occasionally militant) legal pacifism that wants to use law to abolish war. These three are ideal types, of course. Most scholars, for example, tend to offer some combination of the three approaches in their work (e.g. Cassese 1999). It is important, however, to understand the *ius ad bellum* as embedding, articulating and accommodating these three sets of claims. This may help account for the law's thematic ambiguities, its textual evasions, its judicial agonies and its interminable crises. It may explain also why its primary organs repeatedly move from institutional paralysis to hyper-activism and back. The Iraq war, for example, rather than being viewed as an extraordinary challenge to the future of international law, can be reinterpreted as part of the perpetual crisis of law, war and peace.

To put this a different way, because wars are occasions for national invigoration, political reinvention or personal heroism as well as moments of collective horror, mass psychosis and individualized evil, it is not at all clear what we want to do with, and about, war.

Public international law, while it promises the resolution of this angst, is instead an expression of it. This angst is found in three doctrinal debates concerning the regulation of force and violence in the international system. These revolve around, first, the nature of the prohibition itself (what exactly is made illegal by the UN Charter and customary international law?), second, the limit and extent of the right to use force in self-defense and, third, the parameters of properly authorized collective or individual action (including the validity and desirability of wars for humanity (or humanitarian interventions)). This chapter will consider each of these in turn.

Prohibiting force, permitting violence

In 1907 the international community of states, under the influence of Latin American nations anxious about the regional ambitions of the United States, resolved to outlaw a particular form of violence in the international system. The *Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts* made it unlawful for states to use military force against each other for the purposes of securing repayment of outstanding loans (contract debts). This fin-de-siècle moment of legal regulation marks the opening move in a century-long project to outlaw certain types of violence. Of course, the significance of the 1907 Convention lies, also, in the narrowness of its range of operations; most uses of force remained perfectly lawful and indeed, the 1907 Convention can be reread as imposing a duty to attempt arbitration prior to embarking on a reparative war.

Most interstate force at this time was still constrained only by the inclinations of sovereignty or the prerogatives of conscience. This was made explicit at Versailles with the ill-starred attempt to criminalize war (or at least certain types of war). Article 227 of the Versailles Peace Treaty proposed the arraignment of the Kaiser on charges of having initiated a war of aggression or a war against the sanctity of treaties; the trial did not take place (largely because of the refusal by the Dutch government to surrender the Kaiser to the victorious Allies). The international law position is best articulated, however, by a commission on the authorship of the war (established by the Versailles delegates and made up of a group of diplomats and eminent international lawyers) (Commission on Responsibilities 1920). This Commission states, in its final report, that the criminalization of war is novel and unprecedented, and has no place under international law. War is to be left to the judgment of history and conscience; states do what they must do and the consequences are a matter for sovereigns and philosophers not lawyers (the Commission was particularly keen to preserve the immunity of these sovereigns).

The interwar period was marked by a series of haphazard initiatives largely made up of unequivocal prohibitions lacking status (a draft League of Nations *Treaty of Mutual Assistance* in 1923) or treaties with some force that, nonetheless have an ambiguity at their heart (the *Kellogg–Briand Peace Pact* outlawing recourse to war but omitting to delineate any possible exceptions based on self-defense: the inclusion of self-defense being unnecessary according to Kellogg–Briand's American sponsors because it was self-evident that sovereigns could use violence to defend themselves, see discussion, *infra*).

The year 1945, then, was a constitutional moment for law and force. At Nuremberg, the IMT declared war of aggression to be the supreme international crime, one "containing the accumulated evil of the whole". This time, in a reversal of the Commission on Responsibilities at Versailles, rather than insisting that law vacate authority to ethics, the conscience of mankind demanded that the law criminalize war. The IMT Charter Article 6 made it a crime "to plan, prepare, initiate or wage a war of aggression or wars

in contravention of international treaties". The formula is repeated in the Charter of the International Military Tribunal for the Far East, Article 6(a) and in Law No. 10 of the Control Council for Germany (20 December 1945) and restated in subsequent UN General Assembly resolutions in 1965, 1970 and 1974.

At San Francisco, meanwhile, the newly created UN Charter contains a prohibition on the use of force (and a preference for pacific forms of dispute resolution) at its center. Article 2(4) makes it unlawful for member states to use force against the territorial integrity and political independence of other states or in any manner contrary to the principles and purposes of the UN Charter. This provision has become part of customary international law and is regarded as a norm of *ius cogens*, (*Nicaragua*, para. 190) applying to non-member states also.

Article 2(4) is a bold statement for an international system where military force had hitherto been a sovereign prerogative. But it is striking how much violence is left untouched by Article 2(4). This article (and its twin at Nuremberg) are directed at a particular and, increasingly, marginal genus of violence involving the formally invasive war making of sovereign states against one another. Article 2(4) has nothing to say about wars conducted by states against their own populations (e.g. Guatemala, 1960–96, Rwanda, 1994), or about wars within states between two or more collective groups (e.g. conflict between Bosnian Croats and Bosnian Serbs within Bosnia-Herzegovina) or wars between the state and internal armed opposition (sometimes with a self-determination cast) (e.g. Biafra 1967–70). Neither is Article 2(4) concerned with the sorts of violence perpetrated on human beings under repressive economic orders or because of the maldistribution of economic goods within the global political order.[4]

Even in the case of its putative field of application, interstate war, there is, inevitably, an elasticity at the margins (sometimes at the core) of these provisions. For example, in the case of the UN Charter, it is not clear the extent to which the qualifiers "territorial integrity and political independence" have real interpretive purchase. Did the Israeli raid on Entebbe Airport in Kampala (to free hostages taken by a Palestinian group) in 1976 have an adverse effect on Ugandan integrity and independence? Many legal experts took the view that this action fell foul of Article 2(4) but the US, for example, in debates at the Security Council, emphasized the limited nature of the intervention as a way of excusing it (Gray 2004: 30). Similarly, was the 2003 war in Iraq an effort to restore Iraq's political independence (by removing a tyrant) (Soefer 2003)? Or was it an egregious breach of that independence (the imposition of foreign-emplaced government to replace an indigenous one?) (Sands 2006). Then there is the question of scale and intensity. How is the provision to be interpreted in such a way as to avoid its application to trivial cases of force while at the same time maintaining its integrity (this is an issue taken up in the discussion of self-defense)? Thomas Franck has considered these questions in his illuminating discussion of legitimacy (Franck 1990). The problem for international lawyers lies in coming up with prohibitions that offer clarity and flexibility at the same time. The twin dangers of the idiot rule (the rule that allows for no margin of appreciation, the norm that looks foolish if applied rigidly to a complex moral problem) and the vague rule (the rule that allows for myriad exceptions, provides for every possible nuance and ends up emptied of content) are with us at all times in this area.

Self-defense, armed attack

The law of self-defense, too, is constructed around the dilemmas of sovereignty, law and virtue. The legalist–utopian fantasy of abolishing war confronts, at the same time, the necessity of defending the state and statism in

its abstract formal sense (Koskenniemi 1991) and the intuition that some state-based ideological projects are worth defending and others are not (Rawls 1999; Tesón 1992).

Prior to 1945, self-defense was an unstated exception to any principle making war unlawful. Curiously, self-defense pre-dates the prohibition itself, receiving what is regarded as its first thorough diplomatic airing in an exchange of letters between Lord Ashburton (the British Foreign Secretary) and Daniel Webster (the American Secretary of State) in 1837. This came to be known as the *Caroline Incident*, an early instance of a purported exercise of preemptive self-defense against the activities of terrorist non-state actors. The US and the UK, while disagreeing on the specific case (involving the destruction, by the British, of a Canadian rebel ship operating from US waters and alleged to be engaged in an attack on British interests in British North America (Canada)), arrived at a joint declaration as to the content of self-defense. Such action was permitted in cases involving "a necessity for self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation". This case continues to exercise power over the legal (Jennings 1938) and political (US National Security Strategy 2002) imagination.

If Caroline elaborates a principle of constraint, then almost a century later, Kellogg–Briand's silence around self-defense was just as eloquent. The renunciation of war as a means of settling disputes and as a national policy choice was unaccompanied by any qualification in regard to self-defense. For the Americans, at least, such a reference was otiose. The right to self-defense, an inherent sovereign prerogative, was simply a fact of international political life. This rendering of self-defense as simply "there" – a fact of sovereignty – was restated 70 years later in the *Nuclear Weapons case*. The ICJ, contemplating the legality of nuclear devices, found it difficult to conceive of an instance in which such weapons could be used without offending principles of proportionality, necessity and humanity. Yet, always self-defense and the requirements of sovereignty were in the background threatening to unpick the near complete prohibition. Famously, then, the Court stated it could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the state would be at stake" (*Nuclear Weapons* 1996: para 105, disposatif E). The Court was engaged in a tragic struggle to reconcile an overwhelming human instinct (for survival, for humanity, for law) with the potent formulations of sovereignty.

This assumption that self-defense is somehow present (and therefore not requiring articulation) in a way that the prohibition itself is not, is found in Article 51 of the UN Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."

The word "inherent" has generated a fair bit of commentary. In *Nicaragua*, it was used to establish that the law on the use of force was part of customary international law independent of the Charter itself (this was important for the purpose of escaping the US reservation to its declaration accepting the jurisdiction of the International Court). In the work of many expansionists (those who wish to extend the right to self-defense), it is used to justify readings of self-defense that take it some way beyond the text of Article 51 itself (Bowett, 1958) and, more radically, it preserves the idea that sovereignty is prior to law, that the natural right to use force in self-defense pre-exists the law of self-defense.

Of course, there are sovereigntists who take the view that some aspects of self-defense are beyond law (there is a hint of this in *Nuclear Weapons*). Dean Acheson said of the Cuban Missile Crisis:

> The power, position and prestige of the United States had been challenged by another state; *and the law does not deal with*

> *such questions of ultimate power* – power that comes close to the sources of sovereignty.
> (Acheson 1963b)

Mostly, however, contours of the relationship of law, sovereignty and virtue are conducted through legal texts and discourse. The central doctrinal debates in relation to self-defense turn respectively on the definition of an "armed attack", the constraints on any response to an armed attack (implicating questions of "necessity" and "proportionality"), the extent of any right to use force preemptively and the existence of a right to exercise force against non-state actors (particularly those located in foreign state territory).

In order to activate a right to use force in self-defense, there must be an armed attack (*Oil Platforms*: paras 51, 61–64 and 72; *Nicaragua*: para. 195) or, at least the imminent threat of one. What, though, *is* an "armed attack"? The consensus appears to be in favor of requiring the use of military force of a certain degree of intensity (*Nicaragua*: 191 and 195; *Oil Platforms*: 63–64; Brownlie 1963: 278) against a state's territory, armed forces or embassies (and in the absence of that state's consent) and the existence of some sort of intention on the part of the attacking state to bend the target state to its will (Chatham House Report 2005: 5). The aim, then, is to exclude minor or trivial uses of cross-border force (a rifle fired across a frontier) as well as more substantial but accidental infringements of territory (inadvertent overflights by military aircraft or missiles). In *Nicaragua*, the ICJ made further, and more contentious, distinctions between "uses of force" (arming and sending irregulars or rebels into foreign territories) and "armed attacks" (invasions or the arming and sending of irregulars when such action acquired the gravity of an armed attack). The Court held that only the latter gave rise to a right to self-defense. These, apparently, semantic distinctions accord with the different language used in Article 2(4) and Article 51 of the UN Charter and they are attempts to restrict the latitude for responsive violence (particularly the sorts of collective self-defense that might have the effect of widening a conflict). The Court, however, has been criticized (sometimes ridiculed) for making these distinctions (Higgins 1994).

On the one hand, this could be characterized as a contest between a restrictionist tendency (present among judges at the ICJ) to reduce the scope for legitimate interstate violence as much as possible, and an expansionist effort to limit the constraints on defensive force or maximize the range of permissible responses to threats and infringements. But, on the other hand, this debate is also about the relationship between and among sovereigns (Koskenniemi 2002).

These struggles re-emerge in three further doctrinal debates. In *Oil Platforms*, the Court found that any use of force in self-defense must be "necessary and proportionate" (*Oil Platforms*: para. 51). This was held to be a "rule of customary international law" (*Legality of Nuclear Weapons*: para. 41). The *Nicaragua* court, rather unhelpfully, emphasized that action in self-defense ought to be "proportional to the armed attack and necessary to respond to it" (*Nicaragua:* para. 176). Necessity, then, refers both to the lack of a reasonable alternative means of ending or averting the attack and the reasonableness of the military measures taken.

This rule was given some elaboration in the discussion of the US attack on the Iranian oil installations in 1986 and 1988. Here, the Court found that this use of force was disproportionate because *Operation Praying Mantis* (encompassing widespread attacks on Iranian interests) was an incommensurate response to a single assault on one US ship, which damaged but did not sink the ship, killed no US personnel and was of unknown origin (*Oil Platforms*: para. 77). The Court found, too, that there was a lack of necessity for the attacks (they were not required to prevent Iranian mining of the Straits, there were no demands made to the Iranians requiring them to cease employing force from the platforms and some of the US attacks had been merely

"opportunistic"). The Court rejected also the US argument in this case that there is a "measure of discretion" when undertaking good faith evaluations of essential interests (*Oil Platforms*: para. 73). For the Court, such evaluations were not a matter of subjective tests (para. 43) but law.

Questions of proportionality and necessity, however, are most often auto-interpretive thereby affording precisely this sort of discretion. There always will be a clash of sovereigns or a conflict between restrictionist and expansive reading of the law. In the case of the Afghanistan intervention, some scholars (viewing the matter from the perspective of Afghan sovereignty) argued that the invasion and occupation of a whole country could not possibly be proportionate to the destruction of two buildings in New York City (e.g. Myjer and White: 2002). Another group of scholars argued that proportionality and necessity had to be considered from the perspective of the attacked state (e.g. Lowe, Chatham House 2005: 44). For the United States, it appeared perfectly reasonable to occupy the country in order to eliminate the Taliban, a government that had given succour to the group responsible for the attack on the Twin Towers. It is difficult to know how such arguments about proportionality and necessity ought to be resolved except by courts making the sorts of sometimes arbitrary and assertive judgments found in some ICJ jurisprudence on the matter.

A second doctrinal debate has been preoccupied with the relationship between Afghanistan's responsibility for the attacks on the United States and the US right to use force in self-defense against terrorists operating from Afghan territory. In relation to terrorism and state responsibility generally, there are two relatively straightforward cases and one much more complicated matter. The two simple cases involve terrorists operating from non-sovereign territory (e.g. outer space or, more likely, the high seas) or from bases in a state where that state has actively supported, or failed to take reasonable measures to prevent, such activities. In each of these cases, the exercise of self-defense is uncontroversial.

The difficult case occurs when there is an armed attack emanating from a state territory where that state does not incur state responsibility for the attack (i.e. the actions of the non-state group cannot be attributed to the state in question). Again, two views emerge. One group of commentators and judges point to the problems inherent in permitting a use of military force in self-defense against a state that has committed no wrong under international law (*Armed Activities* 2005: 146–7). Another group wonders how it can be that the necessity of self-defense can turn on the responsibility of the host state rather than the sovereign rights of the attacked state (Chatham House 2005: 8; *Armed Activities, Separate Opinion of Judge Simma*: 7–12). This latter view suggests that if it is necessary for the US to invade Afghanistan in order to prevent further attacks on US territory, then such force constitutes lawful self-defense. Once again, though, it is unclear how such a dilemma ought to be resolved from within a legal tradition in which there is an allergy to choosing one set of sovereign rights over another.

The final doctrinal debate concerns preemptive self-defense. The Bush administration placed this debate center-stage with its National Security Strategy initiative in 2002 but lawyers have wrestled with this problem since, at least, the *Caroline* case. Strict constructionists have argued that since Article 51 permits self-defense only when there is an "armed attack", there can be no right to use force in *anticipation* of an armed attack. This position has been seriously eroded from at least three directions. Another group of textualists have argued that the word "inherent" in Article 51 incorporates either a pre-existing right to anticipatory self-defense (*Caroline*) or an equivalent post-1945 customary right. Others have argued that an "armed attack" begins from the moment a decision to use force has been made or from the moment such

a use of force has become imminent (this collapses altogether the distinction between self-defense and anticipatory self-defense) (Dinstein 2001: 172).

Finally, there are those who have taken a pragmatic or "policy-oriented" approach to argue that the advent of nuclear weaponry or the speed of modern armies or some radical change of circumstances have made it impossible to reject a right to anticipatory self-defense. In each case, however, the formula for anticipatory self-defense has been yoked to a finding of imminence and this, in turn, has been linked to some notion of immediacy or temporal proximity.

The Bush Doctrine departed from all of these traditions to develop an expanded idea of self-defense based on preventative war. As President Bush put it in his West Point speech in 2002: "We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge" (Bush 2002b). Imminence remains relevant; indeed there is considerable effort made to ground the new doctrine in old precedents (notably *Caroline*): "We must adapt the concept of imminent threat to the capabilities and objectives of . . . rogue states and terrorists."[5] However, this form of preemptive self-defense relies on a modified version of "imminence". It is no longer the imminence of the attack that is controlling but instead the likely emergence of an irreversible threat. This conception of self-defense is heavily weighted in favor of the responding state. This may explain why it suits the dominant hegemon. The 2003 intervention in Iraq is often cited as an example of the Bush Doctrine in practice, although the emphasis throughout the period immediately prior to the war was on issues of collective security. Still, it is no doubt true that figures in the Bush administrations and prominent voices in the political and media establishments in the US believed this was a test of preemption's credibility (Soafer 2003). In this sense, the existence or non-existence of WMDs was somewhat beside the point from the perspective of preemption. What counted was the possibility or probability of Iraq emerging at some point in the future as a threat to US security. The preemptive war was about Saddam's psychology not Iraq's current capability.

Needless to say, this invocation of a rather distant prospect of emerging danger failed to attract many adherents to the idea of preemption in Iraq. No doubt, the current weight of legal opinion favors heavily the existence of a right to anticipatory self-defense in cases of imminent attack (this has been confirmed in the Secretary-General's *In Larger Freedom* Report 2005: para. 124) or "irreversible emergency" (Chatham House 2005: 5) but there is precious little support for any expanded right to engage in preventative wars (a short-lived and roundly condemned "Howard Doctrine" says something about the status of this form of self-defense; more tellingly still, the UK Attorney-General, Peter Goldsmith, condemned the doctrine in a statement to the House of Lords in April 2004 (UK Attorney General 2004).

It may be, of course, that what is being argued for, most often implicitly, by the United States in its National Security Strategy and by some (largely western) expansionists are exceptional rights to employ force in self-defense (Simpson and Wheeler 2007). One way to understand the doctrine of self-defense is to see it as constructed around an asymmetrical distribution of rights (Simpson 2004). No longer a universal right to use force when attacked, it becomes a right subject to expansion when the great powers (say, the United States or Russia) act in the name of security, or international community or democracy, and contraction when less virtuous or powerful states (say, Iran, or Vietnam in 1979) claim to employ it as part of their repertoire of sovereign rights. The elasticity of the language used makes this tendency less visible than it might otherwise be. It becomes possible both to justify and condemn virtually every act. Thus, even relatively sophisticated articulations of the self-defense

norm, such as those found in the Chatham House statement, rely on open-ended phrases such as "each case will necessarily turn on its facts" or "depending on the circumstances" and on subjective references to "good faith" (Chatham House 2005: 7–8).

To conclude, the law of self-defense is a painfully constructed abstraction. It embodies an effort to constrain war through law while at the same time permitting wars in the name of (self-judged) sovereign rights. It purports to yield generalizable norms of behavior and yet has been regularly interpreted to support expansive readings where elite powers use defensive force and restricted readings where outlier states respond to perceived aggressions. The law of self-defense is a conversation between legal pacifism (or abolitionism), sovereign vanity and self-preservation, and the sense that justifications for defensive force turn, to an extent, on the virtuousness of those employing this form of force.

Collective security, humanity

Along with self-defense, Security Council-authorized uses of force represent the other uncontroversial exception to the prohibition on non-consensual uses of armed force between states.[6] Indeed, the UN founders in San Francisco envisaged the eventual eclipse of self-defense altogether as the Council took full responsibility for international security. In fact, the reverse occurred, at least initially. By the turn of the century, scholars such as Michael Reisman were calling for expanded forms of unilateralism to compensate for the moribund nature of the collective security order (Reisman 2000b).

This security order, articulated in Chapter VII of the Charter, was based on the assumption that the Council, on finding that a threat to the peace, breach of the peace or act of aggression had occurred (Article 39), would take measures (first provisional (Article 40) then coercive (Article 41) and finally military (Article 42)) to restore or maintain international peace and security. These "measures" might be effected by a state or group of states acting with the authorization of the Council or, in the case of military force, under Article 42, the UN's own would-be standing army (to be established under a UN Staff Command in Article 43–47) might deploy to confront an aggressor state. FDR believed that this system would work best where the great powers acted in concert to regulate or discipline a largely disarmed world (this was the "Four Policemen" model).

A law of unintended consequences began to operate almost immediately. Prior to the Gulf War in 1991, US–Soviet strategic rivalry paralyzed the Council and meant that a UN standing army could not be created. The Council authorized various activities but these were either exceptional Chapter VII interventions (in Korea in 1950) or consent-based peacekeeping activities not even envisaged by the drafters of the Charter (Congo 1960; Kosovo 1999).

The Iraq crisis may be regarded in retrospect as a crisis for collective security but it was an opportunity, too. In 1991 the Security Council authorized, in Resolution 678, collective action to expel the Iraqi army from Kuwait. A coalition of largely western forces, acting in combination with the Kuwaitis, launched a successful and brief war against Iraq. This was the Charter's paradigm case of collective action: perhaps its only one. Saddam Hussein's Iraq was the Charter enemy from central casting. The Charter had, after all, been designed around the idea that there would be no repeat of the inaction of the League in the face of the insidious inter-war aggressions of middle powers (Italy in Abyssinia, Japan in Manchuria). It was this inaction that was thought to have emboldened Hitler (this explains the talk of appeasement in relation to Iraq). Saddam's Iraq precisely was a middle power: weak enough to be overborne in brief war but powerful enough to pose as a plausible threat to international peace and security.

The Gulf War in 1991 initiated a change in the UN's self-image and in the potential uses of collective security. Paradoxically, this one paradigm instance of intervention heralded a shift in Council policy towards all sorts of action unanticipated at San Francisco and of debatable constitutionality. In the case of Somalia, the Council authorized a humanitarian intervention, and the war in the former Yugoslavia resulted in resolutions embroiling the UN in a civil war and the establishment by the Council, acting under Chapter VII, of a war crimes tribunal (Security Council Resolution 827). The Council has in recent years initiated its own war on terrorism establishing oversight committees (e.g. Resolution 1373) and placing individuals on lists of known terrorists. Most of this has been politically contentious (is it prudent for the UN to become engaged in humanitarian interventions (see Blackhawk in Somalia) or in civil wars (the Srebrenica debacle)?). And, despite the Council's apparently unconstrained powers in Articles 25 and Chapter VII of the Charter, there are concerns that it may have overreached its constitutional authority (Álvarez 1995; *Lockerbie* 1998; *Tadic* 1995).

The Iraq and Kosovo interventions presented quite different and rather unexpected problems for collective security. Up until this point, disagreement turned on the desirability of collective security and, in a less visible debate, on the extent of the Security Council's powers under the Charter. Few questioned whether the Council *had* authorized war in 1950 or in 1994 or in 1991. It seemed clear that a combination of the appropriate voting pattern and language (the Council invariably referred to using "all necessary measures" in resolutions authorizing war) would activate a right to intervene. The Kosovo war, however, raised two further, unexplored, possibilities. First, could a sequence of resolutions characterizing a situation as a threat to the peace but not giving explicit authorization to use force be interpreted as an implicit authorization? Second, might it be the case that an intervention illegal under the rules of the UN Charter could still be deemed legitimate because of some combination of necessity (i.e. the necessity to end a humanitarian catastrophe) and Security Council condemnation or censure of the offending state?

For the time being, it is premature to say that a doctrine of implicit authorization has emerged from only a handful of cases (*House of Commons Foreign Affairs Committee* 2000), particularly given the opposition of China and Russia to this interpretation of the resolutions passed shortly before the Kosovo war in 1999. Legitimacy, too, is underdeveloped (Tom Franck's *The Power of Legitimacy* is a notable exception (Franck 1990)) as a norm capable of explaining or justifying interventions.[7]

The war initiated by the "Coalition of the Willing" in Iraq in 2003 received very little backing from international lawyers around the world (a small group of US academics and government lawyers defended the war). In this case, the problem was one of interpretation rather than doctrine. The collective security argument for the war, superbly articulated on March 7 by the UK Attorney-General, Lord Goldsmith, in a memorandum that was kept from the British people and Cabinet until several years later, turns on the existence of a resolution (678) expressly authorizing war (but passed in 1991) and allegedly revived by a later resolution (1441) passed in October 2002. What lawyers, and it is fair to say also many politicians, argued over was the form of words contained in Resolution 1441. The Americans and British argued that since this resolution had afforded Iraq "a final opportunity" to comply with earlier resolutions and avoid a serious breach of its obligations, and since Iraq had failed to take the opportunity and had continued to be in serious breach, the US and the UK had been authorized by the Council, prospectively, to take action on March 20, 2003. Put in different terms, the

original authority contained in Resolution 678 had been revived by the failure to comply with Resolution 1441. The French position (shared to an extent by the Russians, the Chinese and many international lawyers) was that Resolution 1441 contained no "automaticity" and, indeed, required the Council to reconvene to consider Iraq's behavior. This, and the UN's repeated reference to its prerogatives on the question of Iraq, made any unilateral action by a small group of Council members acting without a specific, explicit and contemporaneous resolution, unlawful.

The intensely contested nature of the Iraq war and collective security in general can be explained partly by the existence of the three models of law and war discussed at the beginning of this chapter. Legalists concerned with the integrity of the Charter and the need to preserve the constraining power of law have worried that Council activism has strayed into areas where the Council has no writ or where the Council has become a tool to promote hegemonic ends through war. Sovereigntists, meanwhile, have encouraged the Council to act in cases where state security is threatened but have been less enthusiastic about more muscular or programmatic forms of intervention to promote human rights or counterterrorism. Finally, there is a humanitarian–aspirational camp that views the Council as a vanguard organ capable of pursuing all sorts of designs for enlarged security or humanity or peace.

These threads have come together over the difficult question of humanitarian intervention. To what extent should the international community protect vulnerable populations located in oppressive states? This is an ancient question; Grotius and Suarez were each engaged with it and it has re-emerged at different points in the history of international law. In the 1970s international law academics debated the desirability of unilateral humanitarian interventions and developed "criteria" for interventions (scale of suffering, likelihood of success, duration and scope of intervention and so on). Cases of possible humanitarian interventions were discussed (Bangladesh 1971, Cambodia 1979) and the development of a customary right of intervention was mooted. Scholars disagreed and then they lost interest.

Twenty years later the Security Council intervened to protect civilians in Mogadishu. This, however, ended badly and there was no significant intervention in the Rwandan genocide. Humanitarian intervention had become a troubling idea. The Security Council had the power to authorize interventions along these lines but, commonly, lacked the will. States acting unilaterally sometimes possessed the inclination but lacked legal authority to intervene. Meanwhile, argument raged between those eager to engage in wars for humanity (Blair 1999), those who were worried that this would be cover for new variants of hegemony, those who continued to hold on to the idea that sovereignty remained a barrier to such interventions and those who believed that concerns about humanity were fraudulent (as Carl Schmitt put it: "He who invokes humanity cheats" (Schmitt 1996)).

In 2000 the International Commission on State Sovereignty, a Canadian-sponsored group of elite policymakers and lawyers, published a document outlining a "Responsibility to protect" (ICISS 2000). This idea received further elaboration and status in the Secretary-General's High-Level Panel on Threats, Challenges and Change in 2004 and was endorsed by Kofi Annan himself in his major reform statement, *In Larger Freedom* (2005). The doctrine is grounded in two uncontentious propositions and two more novel formulations. Advocates of a responsibility to protect argue that sovereign states have a duty to protect the human rights of their own citizens (this seems self-evident given the slew of human rights conventions to which states have signed up) and that the Security Council has a right to authorize humanitarian interventions to protect acutely

vulnerable people (this, too, is unremarkable given the language of Chapter VII and, in particular, Article 39). These two norms, of course, give no protection at all to the victims of Rwandan- or Guatemalan-style genocides. They are the victims of pathological sovereign states (their own sovereign state) and passive international organizations. The High-Level Panel, then, suggests two supplementary norms. The first provides a duty or responsibility on the part of the international community to take action against states. In particular, the Security Council is required to engage in a policy analysis, guided by a normative framework, not unlike that developed by the 1970s' scholars, discussed earlier. The second norm, barely adverted to, might permit states to act unilaterally where there has been no response from either the host state or the responsible international organization.

This "responsibility to protect" norm is preoccupying international lawyers at present precisely because it draws together the three thematics that form the core thesis of this chapter. It negotiates with a legalist pacifism that wants to constrain force through law and forbid uses of force whose justification is derived from supervening and highly contested notions of humanity. It offends a sovereign centrism that insists on the inviolability of borders and is suspicious of the motives and intentions of the great powers. And, finally, it advances a programmatic, cosmopolitan conception of community, and furnishes that community with reasons and justifications for using military violence to advance or protect its key values. This is the very stuff of the *ius ad bellum* and represents the past, present and future of collective security discourse.

Arguing about war

Law and force in the twenty-first century will be shaped to some extent by technological developments (computer-attacks, new weaponry, soldier-robots), environmental transformations (the much discussed resource wars over oil, water and minerals) and political pathologies (the decline of reflective democracy in western industrialized nations, the rise of a post-democratic Russia, the increasing military assertiveness of an economically emboldened China). However, there is an equally significant terrain of language and law that will determine how wars are understood and when they might be fought. At the beginning of the twenty-first century, it might be said that war has been abolished or that the abolitionist tendency has prevailed in Martin Wight's domain of eternal recurrence and repetition. But this is not the legalist utopian–pacifism with which one branch of international law will always be associated. Instead, this termination is a linguistic, rhetorical and juridical turn embedded in the practice of war and the repositioning of international legal and political institutions (most notably the United Nations). At one level, war as a method of control has been displaced by political, economic and cultural hegemonies. To reverse von Clausewitz, politics is the continuation of war by other means. More significantly, in some of our linguistic and institutional practices, war has become peace. Previously (in some respects) oppositional, the language of peace has displaced entirely the language of war. The international community now deploys its military forces in peacekeeping, peace building, peace enforcement and so on. The great powers, meanwhile, no longer fight wars but are instead engaged in what Carl Schmitt called "pest control" (usually termed anti-insurgency operations or counterterrorism).

It has always been the case that such wars have been justified as exceptions to the prohibition on the use of force. Increasingly, however, the policing wars of the contemporary era are regarded as having transcended the prohibition altogether. Pacifism, sovereignty and humanity are conjoined in a legal order dedicated to abolishing wars by fighting them.

Notes

1 Donald Rumsfeld at Munich Press Conference, February 6, 2004 at http://www.guardian.co.uk/comment/story/0,3604,1145413,00.html and http://italy.usembassy.gov/viewer/article.asp?article=/file2004_02/alia/a4020905.htm.
2 Prime Minister Blair, Speech to Sedgefield Constituency Party, March 5, 2004 at http://politics.guardian.co.uk/iraq/story/0,12956,1162991,00.html.
3 Article 33 of the UN Charter obliges states to resolve conflicts peacefully. This is a background to the more specific prohibitions and exceptions found elsewhere.
4 Of course, international law has developed to cover these activities (antiterrorism conventions, human rights standards, the application of war crimes law to internal armed conflict).
5 *National Security Strategy of the United States* (September 2002), part I.
6 The use of force by invitation of the host government is deemed to be lawful. See *Armed Activities* (*Congo vs. Uganda*) at paras 42–54 for an interesting discussion of consent or invitation in this context.
7 For example, a Whitehall spokesman was quoted as saying, in relation to the proposed invasion of Iraq: "What will be important is that what we are being told to do has legitimacy. Legitimacy can derive not just from a UN mandate. Lawful and legitimate are not necessarily the same thing" (Richard Norton Taylor, "Threat of war: Blair to order invasion this month: tanks will form the core of British contingent", *The Guardian*, October 8, 2002: 12.