Introduction: international conflict and security law

Christian Henderson and Nigel D. White

It has perhaps become something of a truism to say that the attacks of 11 September 2001 (hereinafter ‘9/11’) and subsequent events led to a reconsideration of the fundamental rules that govern international security and armed conflicts. Yet, as this Research Handbook on International Conflict and Security Law aims to demonstrate, the results of this reconsideration are still not altogether clear. What is clear, however, is that the relevant debates as to what the current state of the law is – or ought to be – stretch right across the boundaries of international conflict and security law.

The direct response to the attacks of 9/11 asked fundamental questions of the legal rules and principles governing the use of force, otherwise known as the jus ad bellum. In particular, questions were asked as to when actions in self-defence can lawfully take place, and, perhaps most importantly, against whom they may be taken and the weapons and tactics that may be employed in doing so. However, subsequent uses of force by the United States and its allies, particularly in Iraq in 2003 and Libya in 2011, raised important questions as to the role and relevance of the United Nations Security Council, including where the authority in deciding upon the necessity for enforcement action employing the use of force and in interpreting its resolutions is positioned. Similarly, the normative debates concerning the relevance of the prohibition of the use of force were, as ever, lively and often polarised. However, as an undercurrent to these debates – and largely missed but no less important – was the question as to the continuing role of the norm prohibiting threats of force of both an express and implied nature, a question which is, of course, of current importance given the raft of threats made against Iran and North Korea in relation to their nuclear capabilities.

Yet even these continuing debates are only the first port of call when considering the relevant legal issues that have been fervently debated more than ever over the past decade. Indeed, the uses of force and armed conflicts that have been engaged in during this period raise particular questions as to the typology of armed conflict. The outcome to this debate has an impact upon the relevant legal rules and principles that are applicable in an armed conflict, otherwise known as the jus in bello. This branch of international law seeks to regulate the way in which armed conflicts are fought so as to enable states to achieve their military objectives while protecting civilians. In this respect, but also more broadly, legal issues regarding the use of weapons, targeting practices, the use of private contractors to engage in armed combat on behalf of states, and concern regarding protected persons during these conflicts have never been far away from both the pages of the international law literature and newspapers across the globe. The violation of the law governing these areas not only gives rise to issues of state responsibility but also war crimes, the latter being particularly topical given the prominence of the now functioning International Criminal Court and the establishment of various ad hoc courts, tribunals and fact-finding commissions.

1

Christian Henderson and Nigel D. White - 9781849808576
Downloaded from Elgar Online at 05/29/2019 12:59:55PM
via free access
While the protection of civilians during armed conflict is key to realising the aims of the *jus in bello*, questions as to the role of international human rights law in such conflicts have also arisen. The regime interaction between these two branches of international law, but also their interaction with the *jus ad bellum*, is a topic that is particularly relevant given the realities and complexities of what have become known as ‘targeted killings’. Though the traditional separation of the *jus ad bellum* from the *jus in bello* still holds sway, there are increasing signs of it coming under greater strain. Violations of the *jus in bello* may be a justification for using force; and in Libya in 2011 the law governing military operations was not simply the rules and principles of the *jus in bello*, but also the Security Council Resolution authorising the use of force.

Despite the unavoidable prominence of global terrorism in recent years and its potential impact upon traditional understandings of international law, there are other equally pressing issues that come under the umbrella of international conflict and security law. Indeed, since the intervention in Kosovo in 1999 – which many perceived as being ‘legitimate yet unlawful’ – there has been much discussion and debate regarding the legal concept of humanitarian intervention, and in particular where the authority lies in determining the necessity for such interventions. As a consequence of this debate – and in many respects still fuelled by it – the concept of a ‘responsibility to protect’ emerged, the boundaries of which are currently being tested in the context of the Arab Spring.

Yet issues of international security are broader than just when and how the use of armed force is permitted. Indeed, pre-conflict issues in respect to conflict prevention, arms control and disarmament, as well as the concerns regarding nuclear weapons development and proliferation, are, as they were for much of the 20th century, on the agendas of states and international lawyers. However, the conceptual separation of ‘preventive’ security from other areas of conflict and security law is not always convincing as it remains that arms control measures may be applied during all stages, and of course diplomacy should never be ruled out as a means of heading off or stopping conflict, or of peace-building. Also, issues of a post-conflict nature (featured in the contemporary discussion over the emergence of a possible *jus post bellum*, which incorporates those legal issues that arise in the transition from war to peace) cannot be forgotten in any treatment of international conflict and security law. Indeed, the consensual imposition of peacekeeping forces – and their ‘muscularisation’ – into areas which are witnessing the transition from war to peace are a large part of the function of the UN and other organisations. Furthermore, it is also often in this context that territories are administered externally, raising issues of the law applicable to the components of peace – the peace agreements themselves and the international actors whose presence guarantees the peace. Issues as to compensation and reparations for the wrongs that have been committed remain areas that are underdeveloped despite the existence of a number of historical precedents.

Ultimately, though we can say that the various components of international conflict and security law are identifiable, and indeed within those components detailed substantive laws exist, their interpretation and application are often disputed. As the above, albeit brief, introduction, has thus far attempted to demonstrate, the relationships between the various components are still changing and unclear.
This *Research Handbook* brings together 21 leading international law scholars from around the world. The authors are experts in the field of international conflict and security law which, as highlighted above, is the term used in this volume as an umbrella for many issues of international law that affect in one way or another international peace and security, as well as the regulation of the conduct of hostilities. In this context, the authors introduce, analyse and discuss the contemporary debates regarding various topics drawn from across the conceptual and legal divides of the *jus ad bellum*, *jus in bello* and *jus post bellum*. Although it was originally intended that the various chapters would be neatly divided along the lines of these three branches of international conflict and security law, the resulting chapters made such a divide almost impossible to achieve. However, this was a positive result as it simply highlighted the need for such topics to be addressed together as well as the overall success of the resulting project (we hope that readers agree with our assessment!). This is also down to the skill and deftness of approach of the individual authors who kindly agreed to write on a topic on which they have notable expertise. Consequently, while the chapters are organised in the book in a logical sequence, they can equally be read and referred to in any order. Although the book aims to cover many of the controversial issues highlighted above regarding conflict prevention and the legality of resorting to the use of armed force through to those arising during armed conflict and in the phase between conflict and peace, the breadth and scope of the subject preclude coverage, or at least dedicated coverage, of all topics. However, being the first to examine many of the most relevant topics under these areas in one volume, the book will be of interest to scholars from various disciplinary backgrounds looking for a contemporary grounding in issues under the broad theme of international conflict and security law.

CH
NDW
August 2012