Legal Information Management, 7 (2007), pp. 113–123
 Printed in the United Kingdom doi:10.1017/S147266960600150

Public International Law: Is It Fit For Purpose?

Abstract: This paper by Professor Gillian Triggs seeks to explore whether the traditional principles of public international law are 'fit for purpose' in responding to such contemporary threats to collective security by reference to three issues: the regulation of the use of force; the need to balance the sovereign rights of states with humanitarian concerns; and the relationship between human rights and the orthodox rules applicable to prisoners of war and security detainees.
Keywords: international law

Introduction

The international regime for collective security through the United Nations (UN), though never robust, is under challenge by the contemporary phenomena of terrorism, technological and communications advances and the growing power of non-state actors who are largely beyond the effective control of any one state. Recent events in Southern Lebanon and the reluctance by some states to insist on an immediate ceasefire have compounded earlier trends to the unilateral resort to force without Security Council authorization and, as a direct consequence, the continued undermining of the UN Charter regime regulating the use of force. Disregard for the Advisory Opinion given by the International Court of Justice (ICJ) in the *Israeli Wall* case[2], the refusal by Iran to comply with the Security Council's call to halt its uranium enrichment program,[3] the withdrawal by North Korea from the Non Proliferation Treaty[4] and the denial of basic rights to security detainees after the wars in Afghanistan and Iraq are further indications that some states are willing to act alone or with close allies. This appears to be so regardless of the opprobrium of the international community. Vital state interests are clearly seen as priorities, to the detriment of the rule of law.[1]

Some preliminary points might first be made before looking at some instances in which international law appears to be failing. To begin: when and why is the international legal system effective? The norms of public international law are often misunderstood tools of international regulation, partly because expectations as to what they can achieve are unrealistic. It is generally true that international law is respected and complied with by almost all states, almost all of the time. At the ordinary, even banal, level one can point to the 1982 UN Convention on the Law of the Sea which provides for the orderly transit of passage through international straits; the Warsaw Convention[5] that ensures planes can transit through the airspace of other states; the immunity of diplomatic representatives from the jurisdiction of foreign states; the 18 peacekeeping forces which are currently maintained by the UN throughout the world; the establishment of international organisations that set food, health and environmental standards; and the unprecedented WTO disputes process, with compulsory and binding procedures for all 149 Members,[6] successfully integrating developing nations into world trade. In reality, international treaties and customary norms regulate international affairs with almost unnoticed ease.

Why is international law so successful in these areas? One answer lies in the practical fact that it is in the reciprocal best interests of most states to abide by the law. Sentimentality is not an ingredient for world order; but a perception that the law provides a vital foundation for peace, stability, justice and prosperity is a necessary requirement. Mutuality of benefits is the key factor.

If this is true, why does international law appear to be an impotent and discredited force in the face of international and non-international or civil conflict? For many within civil society, if international law is not effective in managing conflict and protecting human rights, it has failed in its primary purposes and new approaches should be sought. This may be a fair judgment in light of the founding principles of Article 1 of the UN Charter[7]:

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.*

The vision of those drafting the UN Charter was to create a system of collective action to secure international peace, security and justice under the rule of law. The expectation of states, and the international body politic, was that collective action agreed by the permanent and other members of the Security Council would realize these aims, that conflict could be contained and human rights secured. These inspirational objectives are nonetheless subject to radically different perspectives in practice: the Middle East conflict being perhaps the paradigm example. To the extent that international law has failed to meet these expectations, critics of the international system are quite reasonably unlikely to be mollified by examples of an orderly implementation of the rules in day-to-day situations in which vital national interests are not perceived to be at risk. Indeed, the yardstick by which the UN and international law is judged in practice by the body politic is the effectiveness of the legal regime to regulate the use of force.[8]

Taking this yardstick, can international law be described as fit for purpose? Recent events would suggest a resoundingly negative answer:

- The bombing of Southern Lebanon by Israel, contrary to the rule that any act by a state in self-defence must be both necessary and proportionate to the unlawful armed attack which prompted it, in this case the Hezbollah missile attacks.
- Inadequacy of international humanitarian law to respond to the threats posed by guerillas, terrorists and freedom fighters.
- Failure to provide access to a legal hearing for those detained at Guantanamo after the end of hostilities.
- Intervention by the 'coalition of the willing' in Iraq, in the absence of credible evidence of a threat of armed attack.
- Refusal by Israel to dismantle the 'security wall' despite the Advisory Opinion of the ICJ that the wall was in breach of many principles of international law.[9]
- Egregious human rights violations, amounting, it is feared, to genocide, continue in Sudan and Democratic Republic of Congo, despite Security Council resolutions calling for an end to hostilities.
- Disregard by Iran of calls by the Security Council to halt its Uranium enrichment program to comply with the Non Proliferation Treaty.

One response to such examples is that they emphasise the failures and ignore the successes of international law; they look not at the doughnut but at the hole. It is much easier to prove that international law has failed in specific cases, rather than that it has succeeded in securing peace in a general sense. The international peacekeeping forces operating globally today must surely be an indicator of the effectiveness of some collective efforts. Moreover, the ideas of peace, security and justice will be judged from very different political perspectives. Is peace, for example, to be valued above the struggle for self-determination and human rights?

Another response to the manifest breaches of international law is to observe that, where issues of national security and territorial sovereignty are threatened, political and policy considerations assume the uppermost priority. The Security Council of the UN is a political body and the veto power of the permanent members will be exercised to protect and promote national interests, consistently with the international rule of law. In short, when assessing whether international law is 'fit for purpose' in managing international conflicts, assessment should be within a realistic policy and strategic context.

A final point: exacerbating the problems created by political and strategic issues are the methodological difficulties in identifying the principles of public international law regulating the use of force which can be overly general and vague. However, Christine Gray observes that, in fact, any crisis in legitimacy of the UN collective security system arises not from doctrinal disputes but from different perceptions of the facts.[10] The lack of objective fact finding has been a major impediment to enabling states to agree on appropriate action. Faulty and contrived intelligence has been at the core of the political debate about action in Iraq over the feared presence of weapons of mass destruction; Security Council concerns regarding Iran's intention to enrich uranium to develop a nuclear weapons capacity; and the inability of the major powers to agree on neither the scale of, nor the appropriate response to the humanitarian crisis in Sudan.

1. What are the contemporary challenges to international law?

With these precautions in mind, we might now consider the phenomena that challenge the effectiveness of international law, and which could not have been envisaged by those drafting the UN Charter in 1944:

- *Traditional understanding of international law* that it is created by states to govern their relations and is dependent upon their prior consent, usually manifested through treaties or state practice. The increasing role of non-state actors, transnational corporations, international organisations, NGOs and particularly the threats posed by terrorists, demonstrate that large parts of modern society are no longer under the effective control of any one state.
- *Interconnected nature of problems* such as environmental harm, international crime, particularly drug trafficking and slave trading, regulation of corporate activity, requiring a global and multilateral response.
- *Technological developments* such as catastrophic impact of nuclear, biological or chemical attack and the risk

https://doi.org/10.1017/S1472669606001150 Published online by Cambridge University Press

that weapons of mass destruction will become available to terrorists.

- *Phenomenon of failing states* such as Somalia, Sierra Leone, East Timor, collapsing under what the UN High Level Panel has described as a 'witch's brew of poverty, disease and civil war'.[11]
- *Non-international nature of conflict* stimulating efforts to protect persons from humanitarian disasters occurring within states and the evolving concept of a *Responsibility to Protect* in international law.
- *Outdated rules of international humanitarian law* failing to protect security detainees at Guantanamo, and elsewhere, who are denied POW status and the right to trial of allegations against them.

Many of the principles and institutions of international law need significant reform.

2. Collective system of security and rules regulating the use of force

For any system of legal order, it is vital that its rules are clear and readily applied. The core principles of international law, while apparently unequivocal, with few exceptions are under threat today by self-serving, subjective interpretations by states that are not accountable before any judicial body. Most notably, the Bush doctrine of 'pre-emptive force'[12] and the increasing resort by states to the unilateral use of force without Security Council, or even NATO, authorisation, threaten the legitimacy of the collective system of security created by the UN Charter.

To understand this point we might recall how the UN system was originally intended to work. The cornerstone provision of the Charter is the prohibition on the use of force in Article 2(4). The single exception to this prohibition lies in the right of self-defence against an armed attack under Article 51, so long as the response is both necessary and proportionate to the attack. Any resort to self-defence must be reported to the Security Council, which has a power to make recommendations, or to decide on measures to maintain or restore international peace and security, provided it has first made the determination that there exists a threat to 'the peace, breach of the peace, or act of aggression'. Measures may include those falling short of the use of force, such as economic sanctions, or the severance of means of communications and diplomatic relations. It may resort to action by air, sea or land forces where necessary to maintain or restore international peace and security. To enable the Security Council to exercise these powers, member states are bound to make available 'on call' armed forces (Article 43) and to hold 'immediately available' national air force contingents for combined international enforcement action.

What has been the practice of states? Until the Gulf War, the Security Council has made a determination that there was a threat to or breach of the peace only once in its history. It has rarely been clear whether the Security Council has acted in accordance with its powers under Chapter VII or VI. No state has negotiated an agreement with the Security Council and there is no standing UN force. No national air contingents are held immediately available for combined international enforcement action. State practice has been to employ unilateral force or to gather a coalition for the wars in Afghanistan and Iraq and to use regional organisations such as NATO in Kosovo. The UN, through the Secretary General, has created peacekeeping forces that were not envisaged by the Charter, and the General Assembly has developed an unforeseen role through its *Uniting for Peace* resolution in 1950.[13]

Not only has the UN evolved in a way that was not envisaged, but also the right of the permanent members of the Security Council to a veto vote has proved to be a fatal flaw. While the UN system for collective security is founded in the rule of law, it was also seen to be necessary to 'combine power with principle'[14] to ensure the consent and political will of the most powerful states in 1945. The right of each of the permanent members to veto any resolution of the Security Council, and thereby to stymie any action under Chapter VII that might be perceived to be against their national interest, continues to impede an objective, rules-based and enforceable legal regime for global security.

The 'inherent' right of self-defence

One of the principles most vulnerable to distortion and abuse has been the 'inherent' right of self-defence which has been strained to the point of incredulity by state practice. The terms 'armed attack', 'inherent right' or 'self-defence ' employed by Article 51 are not defined by the Charter, the intention being that the Security Council would interpret them in light of contemporary circumstances. Moreover, the collective system and norms have largely evolved in the context of state-to-state conflict across national borders; the German invasion of Poland in 1939 being the event uppermost in the minds of those drafting the Charter. By contrast, the relevant question today is:

Does a right of self-defence arise in response to an armed attack by a non-state actor?

In the 21st century, the global nature of conflict, transnational and technical capacities and potentially catastrophic consequences of attacks by terrorist groups

https://doi.org/10.1017/S1472669606001150 Published online by Cambridge University Press

strain accepted legal principles. The current humanitarian crisis in Southern Lebanon and the attacks against the United States on 9/11 raise this question. If the attacks by al-Qaeda against the United States, or by Hezbollah against Israel are essentially acts of non-state actors, does the classic right of self-defence arise under Article 51?

Article 51 does not explicitly restrict the right of self-defence to attacks by other states. Indeed, armed attacks by non-state actors have been a concern for many centuries. It might be remembered that the *Caroline Incident,* upon which the principles of self-defence were constructed was itself a case in which the attacks were by an armed group that was not under any state direction.[15] If a right of self-defence does apply to non-state actors the next question is:

What is an 'armed attack' and against which targets might a right of self-defence be exercised?

Here again the law is far from clear. The ICJ, in its decision in the *Nicaragua* case, placed certain constraints on the right of self-defence. It stated that an armed attack included:

> *"The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein… the Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State or armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."*[16]

In short, for the right of self-defence to arise, the attack must be intentional, grave in its consequences and on a large scale. The terrorist flights against the Twin Towers and Pentagon in the United States on 9/11 were accepted by the Security Council as an armed attack by al-Qaeda justifying the response against the territory of Afghanistan in October 2001, despite the uncertain role played by the Taliban.[17] While the attacks on 9/11 amply meet the criteria set out by the ICJ, it may be argued that the capturing of Israeli soldiers by Hezbollah in July 2006 is no more than one of hundreds of similar frontier incidents that are not properly characterized as an armed attack.[18]

While some commentators argue that an armed attack should not be confined in this way, but rather should include any use of armed force, the orthodox view is that set out in the consistent jurisprudence of the ICJ in the *Oil Platforms* case,[19] *Nicaragua* case,[20] *NATO (Provisional Measures)* case[21] and the *Israeli Wall* Advisory Opinion.[22] The views of the ICJ in the *Israeli Wall* Advisory Opinion appear to be unduly restrictive in suggesting that an attack from an occupied territory under the control of the victim state is not an armed attack for the purposes of self-defence.[23] Thus the mining of a single warship might constitute an armed attack. Contemporary 'hard' cases might include anthrax in the mail, viruses sent to attack computer systems or attacks on merchant shipping, civil airliners or private citizens while overseas. Aircraft straying into the airspace of another state would, however, appear to be non-intentional and thus does not amount to an attack.

Anticipatory self-defence and preventive action

In addition to the uncertainties regarding the content of the right of self-defence, there has long been serious doubt as to the right to use force in anticipation that unlawful force will be employed. The right of states to use force in the face of an imminent threat of an armed attack is generally accepted by states and legal commentators, so long as it is necessary, in the sense that no other means would have been effective to deflect it, and it is proportionate. No rational legal regime could ignore the practical reality that states will not, and should not have to, wait until an attack has actually commenced before taking defensive action, especially where the risk is of nuclear or other catastrophic attack. In his report *In Larger Freedom*, the Secretary General asserted that 'imminent threats are fully covered by Article 51'.[24]

Many states, however, take a considerably more expansive view of the right of self-defence. The United States and Israel have been particularly vocal in supporting a right of 'preemptive force', stimulated by the attacks on 9/11; the aim being apparently to expand the idea of anticipating an imminent threat to pure preventive action.

There is no legal authority for any right that goes beyond the constraints imposed by imminence, necessity and proportionality. The UN High-Level Panel considered the law where a 'rogue' state is about to acquire a nuclear weapons capacity. The Panel rejected any right of a potential target of nuclear attack by such a state to act preventively against a threat that is not proximate, arguing that the feared target state should report the matter to the Security Council who would then authorise appropriate action:

> *'For those impatient with such a response, the answer must be that in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based, is simply too great for the legality of unilateral preventive action. Allowing one to so act is to allow all'.*[25]

No other state argues for a right of self-defence against non-imminent threats; the United Kingdom

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requiring 'some degree of imminence' depending upon the circumstances such as a threatened terrorist or nuclear attack.[26] Developing states, articulating their views through the Non-Aligned Movement, tend to take a restrictive view of Article 51, limiting it to an armed attack only, favouring the regime for collective security.

International law has long accommodated the so called 'persistent objector' to evolving new rules. However, the threat to established principles that is now posed by probably the most powerful nation in the world, creates a particular threat to world order to the extent that the United States does not believe it is accountable for its interpretation of the law.

Can a right of self-defence be exercised against a state that is not legally responsible for a terrorist attack emanating from its territory?

While international law accepts that a state has a right of self-defence against a non-state actor, it is less clear whether the victim state can act against a terrorist organisation while it is in the territory of another state. If we assume for the moment that UK intelligence confirms that the alleged plan to bomb planes flying between London and New York was masterminded by a terrorist group in Pakistan, does the UK government have the right to attack terrorist strongholds in Islamabad? The traditional law of state responsibility provides some guidance. The facts indicate that Afghanistan might have borne some responsibility for the 9/11 attacks, to the extent that it supported or failed to prevent the acts of al-Qaeda emanating from within its territory. Evidence of the support given by the Afghan government for al-Qaeda strengthens the analysis that self-defence could be employed in Afghan territory because Afghanistan was itself in breach of international law.

What of the case where the state from which the attack emanates was not able, with the best will in the world, to control the acts of a terrorist group? It may be misleading to confine the right of the victim state to use self-defence against the territory of a state to cases where that state is demonstrably responsible for the attack and thus in breach of international law. Rather, an alternative view is that a state always has an 'inherent' right to defend itself against an armed attack, regardless of whether the state from whose territory the attack has emanated is in breach of any rule of international law. If that 'host' state is unable to prevent such attacks, the victim state has the right to defend itself against the territory of that host state, quite independently of whether it has breached international law.

Necessity and proportionality

The requirement set out by the ICJ that the armed attack be both grave and large is criticised by some commentators who argue that any armed attack raises the right of self-defence.[27] For such critics of the Court's jurisprudence, the relevant question is whether the act of self-defence meets the tests of necessity and proportionality in all the circumstances. These criteria, they argue, provide a more satisfactory means of assessing the validity of the action employed in self-defence. The difference between the two tests is significant. If any armed attack raises a right to self-defence it has the effect of moving the focus away from assessment of the initial attack towards the appropriateness of the responding action; it is the validity of the response that becomes the relevant legal question. The necessity and proportionality of the current Israeli bombing, invasion and occupation of Southern Lebanon would thus be measured by reference to the unlawful attacks by Hezbollah, the capture of two Israeli soldiers and their use as hostages, and the continuing threat posed by rocket attacks from within Lebanese territory. By contrast, if the analysis is more narrowly confined to whether the capture of the two Israeli soldiers alone justified the subsequent bombing, invasion and occupation by Israel, the legal position is likely to be that the response was grossly disproportionate and unnecessary.

In my view, the ICJ has demonstrated a clear intent to narrow the right of self-defence to grave and large attacks. This is as clear a statement of the law as is available and represents the best evidence of what the law is, despite the variation of views by commentators. This brief survey of a vital norm regulating the use of force is under challenge by at least two powerful states. Varying, self-serving and subjective interpretations of the right of self-defence pose a danger to the collective regime, prompting proposals for reform of the Security Council's decision-making powers.

Guidelines for Security Council decision making

The UN High-Level Panel has made many proposals to reform the system for collective security. In order to promote objectivity in, and hence legitimacy of, Security Council decision-making, the Panel recommended guidelines for the use of force that were accepted by the Secretary General in his report *In Larger Freedom*.[28] Meeting with mixed responses from member states, Kofi Annan[29] argued that the Security Council should come to a common view as to how to weigh the seriousness of the threat, the proper purpose of the proposed military action, whether other means might plausibly succeed, whether the military option is proportional to the threat, and whether there is a reasonable chance of success. The

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final resolution of the World Summit in September 2005 did not adopt the suggestion, noting only that the UN Charter was sufficient to address the full range of threats to international peace and security. In short, states were not willing to add any further words to those used in Article 51 itself.

International Court of Justice in the *Legality of Nuclear Weapons Case*

While the efforts of the Secretary General to lead reform of the collective security system at the UN have been only marginally successful, the ICJ has also had the opportunity to provide jurisprudential leadership when the General Assembly asked for an Advisory Opinion on the legality of the threat or use of nuclear weapons in 1996 - a question of crucial importance to the effective regulation of the use of force throughout the 20th century and today.[30] The Court reached its opinion, only with the casting vote of President Bedjaoui, that it was not able:

> *…to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstances.*
>
> *Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.*
>
> *The Court cannot 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.*[31]

As one of the primary tasks of any judicial body is to decide upon the law, a *non liquet* being unknown to the ICJ, it was disappointing that the Court was unable to determine the law on so fundamental a point. Koskenniemi argues that, as it was impossible to decide either way without an appearance of 'bias', the Court chose to recognize the 'insufficiency' of the logic favouring the protection of human life and the environment, on the one hand, over the 'right' of states to survival, on the other.[32] While the Court will have been well aware of the political importance of its views, it ought nonetheless to have exercised its judicial function by finding language that properly balances these differing values, perhaps through the principles of necessity and proportionality. For civil society and many states, the Opinion was yet another example of the impotence of international law in the face of the imperatives of the most powerful nation states.

3. Responsibility to protect

Mounting evidence of genocide in the 20th and now the 21st centuries in Rwanda, Cambodia, Bosnia, Sudan and Kosovo, has exposed the inadequacies of the traditional principle prohibiting intervention in the domestic affairs of another state. The international community, prompted by civil society and the media, is now more willing to accept the need to intervene where a state cannot or will not save its citizens from a humanitarian disaster. In this sense, it is the individual right to be protected that 'trumps' the protection of the state against intervention. The NATO bombing in Kosovo in 1999, while probably not valid at international law, was in its first stages a politically acceptable act to prevent ethnic cleansing/mass murder and deportation of thousands of Albanians.[33] The subsequent Security Council resolutions, while not explicitly approving the act, do appear to support the intervention. There is an evolving political sense that where an intervention is both necessary and proportionate to the likely humanitarian tragedy, it should be valid at international law.

Some steps are now being taken in this direction. The UN Summit in 2005 agreed that there is a responsibility to protect in cases of genocide, ethnic cleansing and serious breaches of international humanitarian law.[34] States members of the UN now recognise that they have a collective responsibility to act under the UN Charter, particularly under Chapter VII where, if a state fails to protect its own citizens, military action is a last resort. The right to take action, where the Security Council has determined that there is a breach of international peace and security, is not of course new and the UN Summit agreement does not change the existing law. However, the adoption of the responsibility to protect articulates a power that might be employed more readily during the political negotiations within the Security Council. The Summit, for example, invites the permanent members of the Security Council to 'refrain from using the veto in cases of genocide, war crimes, crimes against humanity and ethnic cleansing'. In this way, international law is responding dynamically to the contemporary concern for the humanitarian needs of the individual above the artificial construct of the state.

It was vital to the majority of states present at the Summit, however, that the right of action by the Security Council should be distinguished from any purported broader right of 'humanitarian intervention' by states on a unilateral basis. Most states reject any such right, regarding it as a pretext for intervention by more powerful states.[35] Indeed, history demonstrates that almost all cases of so called humanitarian intervention are in reality but camouflage for wider strategic and resource objectives of more powerful states. The apparently intractable problem thus remains; the failure of the Security Council to act because of the veto power. Should some states with a good faith, political will and

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power take no action to assist the people of Sudan because the Security Council fails to attract the necessary consensus to do so? Should any one state have the right to intervene in Southern Lebanon to prevent further civilian deaths in the absence of Security Council authorisation? There may be no necessary or categorical answer to these questions, other than to observe that in this context, international law is not yet 'fit for purpose'. The failure of international law to respond satisfactorily to such humanitarian needs is one of the most crucial challenges for reform of the law.

4. International Humanitarian Law

Rights of Prisoners of War and Security Detainees

International humanitarian law (IHL) is arguably one of the most well-developed branches of international law and has been largely codified in the 1949 Geneva Conventions – the so-called Red Cross Conventions – and two subsequent Protocols. IHL is also one of the most complex areas of law, as not all states are parties to the same treaties. Some states, while parties to the 1949 Conventions, have not ratified the Protocols, the United States being a noteworthy example. Others are party to neither, requiring an assessment of the status of the rules at customary law. Some rules of IHL are clear and readily recognised. Others are not, and require amendment or clarification. Perhaps the greatest problem in application of the rules to today's events is their vulnerability to self-serving interpretation and application by states. It has been shocking, for example, for the proverbial 'reasonable man and woman on the Clapham omnibus' to observe media reports of the treatment of those detained in Guantanamo Bay after their capture in the wars in Afghanistan and Iraq. Rules that were thought to be well established, clear and easily applied are demonstrably inadequate for today's conflicts, most notably where they involve non-state actors such as terrorists, prisoners of war and security detainees.

Terrorism and non-state actors

A vital contemporary question is whether IHL and human rights law are capable of responding to terrorism. Analysis of the validity of the Guantanamo detentions, for example, exposes the central point of distinction between the United States and the UN Working Group appointed to report on the detentions. Does the 'war on terror' import the body of IHL, thereby justifying security detentions and the denial of Convention rights? Once the international armed conflict or 'hostilities' are over, do the usual human rights norms, such as the right to fair trial, reassert their function in regulating the rights of security detainees? When are hostilities over in a 'war against terrorism'? The question is how international law and its recent emphasis on human rights should adjust to security threats posed by terrorism.

Is the war on terror an international armed conflict?

The United States has made the unilateral determination that an armed conflict exists, a view challenged by the UN Working Group on Arbitrary Detention which argues that international terrorism is not an armed conflict for the purposes of the application of IHL.[36] Terrorist acts, when carried out by non-state actors against states, do not amount to an international armed conflict on any traditional analysis and would not justify the withdrawal of international norms – especially *jus cogens* norms, such as the prohibition on torture – from those held as potential risks to national security.

In rejecting the legal validity of the detentions in Guantanamo, the UN Working Group argues that they cannot be justified where the motivation lies in interrogations and intelligence gathering and where there is, in fact, no international armed conflict. In these circumstances the Working Group concludes that the *lex specialis* (i.e. IHL) no longer applies and that the human rights guaranteed by Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[37] become available to the detainees. In short, while detention of suspected terrorists may well be justified in particular circumstances, such detainees are entitled to the protection of fundamental human rights laws, including the right to challenge the legality of their detention before an independent and impartial tribunal, the right to due process of the law and the assistance of counsel.

Prisoners of war

Most obviously ill-suited to modern conflicts, such as guerilla warfare, are the provisions relating to prisoners of war. The Third Geneva Convention[38] provides that a prisoner of war (POW) is a person who has fallen into the power of the enemy and includes members of the armed forces, including militias and volunteers. Also entitled to inclusion as a POW are organised resistance movements if, among other things, they carry their arms openly, have a fixed distinctive sign, and abide by the laws and customs of war. Guerillas, terrorists or freedom fighters do not typically meet these requirements and will be treated as civilians or unlawful combatants. If a person who is otherwise entitled to combatant status fails to distinguish himself from the civilian population, the question arises whether he remains entitled to treatment as a POW. The answer to this question prompts different responses from, on the one hand, the International

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Committee of the Red Cross (ICRC), which asserts in its rules that there is no right to POW status, and on the other hand, legal commentators who argue that only spies and mercenaries lose this status. The concern is that states will interpret these provisions as they see fit and deny POW status, as has been the case in Guantanamo.

As a matter of law, where there is any doubt as to whether a person meets the conditions for POW status under Article 4, Article 5 of the Third Geneva Convention is clear in providing that he is to be treated as *prima facie* entitled to that status until such time as the question has been determined by a competent tribunal. In fact, no such tribunal has been established, or is contemplated under the Geneva Conventions in respect of the detainees of Guantanamo. The United States Supreme Court's decision in the *Hamdan case* has, however, prompted further proposals by the United States government to establish some sort of review hearing.[39]

Security detainees

The outdated criteria for POW status have had an unexpected consequence where a state interns a person who is not categorised by it as a POW (validly or otherwise). The rights of such persons are set out in the Fourth Geneva Convention for the Protection of Civilian Persons. Civilians may be detained without the usual Convention rights where they constitute a threat to the security of a state in an international armed conflict.[40] Little assistance with respect to interpretation of a 'security' risk is provided either by IHL or general international law, opening up a yawning gap in the protection of detainees who can be denied basic rights, otherwise available under international criminal law, on the pretext that their internment is justified for reasons of security.

Adding to legal uncertainty, IHL makes a distinction between hostile acts in the territory of a state and those occurring in occupied territory where a security detainee may be denied the right to communication only. The effect of Article 5 of the Fourth Geneva Convention is that enemy aliens who take part in hostile acts in the territory of a state risk losing most of their Convention rights, including the right to correspond, to receive relief, to spiritual assistance and to receive visits from representatives of the Protecting Power and the ICRC.[41] By contrast, where such acts arise in occupied territory, only the right of communication will be forfeited, and all other Fourth Convention rights remain available to a security detainee. The Fourth Geneva Convention reflects the view that resistance by a civilian population to an occupying power should not deprive citizens of most of their Convention rights. A meaningful distinction between national territory and occupied territory may be doubtful and is difficult to apply. Indeed, the ICRC has commented that the idea of occupation is 'fluid in guerilla operations as no fixed legal border delineates the areas held by either party', leading to difficulties in application of the Fourth Convention. [42]

In summary, the protections afforded to unlawful combatants by IHL depend upon satisfaction of a number of criteria, including nationality and the place of capture and detention. If a person is in enemy hands in occupied territory, the rights provided by the Fourth Convention are relatively comprehensive. If they are in enemy hands in the territory of the detaining power, the protections are limited. Where a person is captured in battle, and effective control cannot be demonstrated, the protections are 'the least developed'.[43] For those held in Guantanamo and captured on the battlefield, international humanitarian law is thus at its weakest. It remains true nonetheless that all unlawful combatants are protected by the fundamental guarantees set out in Article 75 of the First Protocol. [44]

Thus, in order to determine the rights of those detained in Guantanamo, it is necessary to consider whether, under Article 5 of the Fourth Geneva Convention, they have been captured in the territory of a party to the conflict or in occupied territory. Detainees in respect of occupied territory are entitled to protection against deportation and physical and moral coercion and to have the same rights to be released as POWs. Those detained in the territory of the United States, Afghanistan or Iraq will not be entitled to Fourth Geneva Convention rights if the exercise of any of these rights is a threat to security. These detainees remain entitled to be treated humanely.

Right to be treated humanely

While the effect of Article 5 is significantly to diminish the rights of security detainees in respect of hostile acts in the territory of the detaining state, there is an obligation for all persons to be treated with humanity:

> *In each case, such persons shall nevertheless be treated with humanity. Where there is a trial, the person is entitled to the rights of fair and regular trial. All the usual Convention rights and privileges as a protected person are also to be afforded to security detainees 'at the earliest date consistent with the security of the State or Occupying Power'*

Curiously, there is no right to a trial, only a right to a fair trial in the event that the detaining power chooses to conduct one. This appears to be a significant disincentive to providing a security detainee with a trial in the first instance and is rather at odds with the objectives of the protections afforded by the Fourth Convention.

In addition to the right to be treated humanely, there is also an overarching right to be treated in accordance with Article 3[45] relating to non-international armed conflicts under which violence to life and person and outrages upon personal dignity, including humiliating and

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degrading treatment, are prohibited. Article 75 of Protocol I also sets out minimum and fundamental guarantees to all those within the power of a party.

An examination of the rights of detainees captured in the wars in Afghanistan and Iraq amply illustrate the central point that the Red Cross rules have become overly technical and vulnerable to subjective interpretations, thus undermining their legitimacy.

Detainees captured in Afghanistan

Those captured during the conflict in Afghanistan, mainly Taliban and al-Qaeda members, are entitled to POW status under the Fourth Geneva Convention and Protocol 1. While the United States is a party to the Geneva Conventions, it has adopted a distinction, applying the civilian Convention to the Taliban but not to al-Qaeda members.[46] If, for the purpose of analysis, al-Qaeda members are not POWs, what status might they have? Afghanistan does not appear to be an occupied territory in the sense of the Hague Convention,[47] (though this may be questioned, as the Northern Alliance forces controlled much of the state when many of the detainees were captured). Nationals of a co-belligerent or neutral state are excluded from protection by Article 4 where they are captured in the territory of a belligerent state.[48] Indeed, many of those captured are nationals of Saudi Arabia, Pakistan, Kuwait, Algeria and Yemen, all apparently neutral states, or Australia, United Kingdom and other coalition states, being co-belligerents. These nationals will thus be denied Fourth Geneva Convention protection for as long as their states of nationality have normal diplomatic relations with the United States.[49] By contrast, detainees from Afghanistan will be protected, as will nationals of Iran, which does not currently have diplomatic relations with the United States.

In short, there is no single answer to the question of the rights of those captured in Afghanistan, as each detainee must be assessed by reference to his nationality and the place and time of the conflict. The fundamental guarantees, however, continue to apply as minimum rights available at customary law and under common Article 3 and Article 75 of The First Protocol.

Detainees captured in Iraq

With respect to Iraq, the rights of those captured and detained in Iraq might be considered as follows:

- Detainees captured in Iraq during the conflict between March and late April 2003 prior to the occupation, including the Saddam Fedayeen and other militia groups, appear to satisfy the criteria as POWs. If not so classified, validly or otherwise, they will be 'protected persons' under Article 4 and entitled to the usual Fourth Convention rights and fundamental guarantees.
- Those captured during the occupation, beginning in late April or early May 2003, when combat operations were declared to have ended, are also protected persons; an 'occupation' being in effect once the invading army gains authority over the area.[50] Those persons captured during the occupation have many different nationalities, possibly reflecting the fact that some foreign nationals entered Iraq with the purpose of taking action against the coalition forces. Such nationals include those of Saudi Arabia, Jordan, Syria, Pakistan, the United States, Australia and the United Kingdom. Clearly, those from co-belligerents, the United Kingdom and Australia and other coalition states with which the United States has diplomatic relations, will not be protected persons. While those from neutral states, such as Syria and Pakistan, will not be entitled to the rights set out in the Fourth Geneva Convention, it has also been argued that protection will not extend to those aliens who have entered (or 'infiltrated') the occupied territory unlawfully.[51] There is no authority for such a restriction upon Article 4 and all those captured in occupied territory have Fourth Geneva Convention rights.
- Where the detained person is suspected of acts hostile to the state, the detaining state may derogate from the rights protected by the Fourth Geneva Convention, as is established by Article 5. However, as the detainees were captured in Iraq as an occupied territory, as distinct from the territory of the detaining state, all Convention rights are preserved except the right of communication. (The First Protocol, as such, will not apply to the United States and thus is not relevant unless it states a rule of customary law).

Conclusions

The effectiveness of the international legal regime to manage conflict is under severe strain. Some states appear able to violate the most basic principles with impunity and, where they attempt to defend their acts at international law,[52] they distort the rules in ways that are self-serving and subjective – the antithesis of the idea of the rule of law.

Calls for reform by states, and by the UN High-Level Panel and Secretary General have produced little apart from the articulation of the *Responsibility to Protect* through collective action. The old divisions between developed and developing states remain, the latter fearing any justification for intervention in their domestic sovereign affairs. Most states will not agree to expand the right of self-defence beyond the narrow interpretation of Article 51, the right to respond proportionately to an imminent and overwhelming threat being the only qualification.

Compounding the difficulty of gaining a consensus among states on the facts and the law is the political dimension of the role of the Security Council. In my view, we will never achieve a satisfactory rule-based regime for the management of international conflicts until we have:

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- A collective system based on some form of majority voting (perhaps 2/3rds), in which no state has a veto power.
- Compulsory and binding resolution of disputes by the ICJ or similar tribunal.
- Enforcement mechanisms for all judicial rulings.
- Reform of the structure and voting powers in the Security Council.
- Integration of non-state actors and civil society into the international legal system.

Each of these suggestions is improbable in the current political environment and thus to the pragmatic realist, somewhat naïve. That may be so, but the debate has nonetheless started. The lead taken by the Secretary General's High-Level Panel has already facilitated the replacement of the Human Rights Commission with the new Human Rights Council. If the political will can be developed by a significant proportion of influential states, backed by NGOs, transnational corporations and international organisations, it may prove possible to build a more legitimate system in the future that is better fitted for its purposes.

References

[1]Britain's Home Secretary, Mr John Reid

[2]*Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9th July, 2004.

[3]Security Council Resolution S/Res 1696 (2006), 31 July 2006, setting deadline of 31 August 2006.

[4]North Korea ratified the treaty in 1985 but gave notice of withdrawal from the treaty on January 10, 2003 following U.S. accusations that it had started an enriched uranium weapons program.

[5]*Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Signed at Warsaw on 12 October 1929.

[6]*Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2, Agreement Establishing the World Trade Organisation (1994).

[7]The *Charter of the United Nations* was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization.

[8]*Report of the Panel on UN Peacekeeping Operations*, Brahimi Report; UN Doc. A/55.305 (2000).

[9]Above n 1.

[10]'A Crisis of Legitimacy for the UN Collective Security System', 56 *International and Comparative Law Quarterly* (to be published in late 2006); Legality of Use of Force (Serbia and Montenegro v Belgium) (Serbia and Montenegro v Canada) (Serbia and Montenegro v France) (Serbia and Montenegro v Germany) (Serbia and Montenegro v Italy) (Serbia and Montenegro v Netherlands) (Serbia and Montenegro v Portugal) (Serbia and Montenegro v United Kingdom): Preliminary Objections. Judgment of 15 December 2004' (2005) *54 International Comparative Law Quarterly*, 787–794.

[11]*A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2004).

[12]George W Bush outlined foreign policy direction with greater emphasis on military superiority and pre-emption ("strength beyond challenge"), unilateral action, and a commitment to "extending democracy, liberty, and security to all regions": Speech, June 1, 2002, Westpoint. The policy was formalized in a document titled *The National Security Strategy of the United States of America* (2002).

[13]UN Res 377(A) (1950): Provides that if there is there is a 'threat to the peace, breach of the peace or act of aggression', and a lack of unanimity of the permanent members of the Security Council (France, China, Russia, Britain, United States) that international peace can be maintained, the General Assembly'shall consider the matter immediately'.

[14]Above n11, UN Doc. A/59/565 (2004), 14.

[15]Correspondence of 24 April 1841, between Webster for the United States and Fox for the United Kingdom, setting out their understanding of the legal position where rebels against British rule in Canada assisted by United States nationals attacked British ships in 1837 sending the *Caroline* over the Niagara Falls. They agreed that 'to show the necessity of self-defence, instant, overwhelming and leaving no choice of means and no moment for deliberation', any necessary act must not be unreasonable or excessive.

[16]*Nicaragua v US* [1986] ICJ Rep 14 at [195].

[17]S/Res/1368 (2001) condemning the terrorist attacks of 11 September 2001 in New York, Washington, DC and Pennsylvania, USA; and S/Res/1373 (2001) on international cooperation to combat threats to international peace and security caused by terrorist acts; NATO, OAS.

[18]A border incident is thought to be distinguishable because there is no intention to impose the will of the attacker on the territory or policy of the other state.

[19]*Oil Platforms (Islamic Republic of Iran) v United States of America*, ICJ, 6 November 2003.

[20]Above n16.

[21]Legality of Use of Force: eight cases (*Serbia and Montenegro v Belgium*) (*v Canada*) (*v France*)(*v Germany*) (*v Italy*) (*v Netherlands*) (*v Portugal*) (*v Spain*) (*v United Kingdom*) (*v United States of America*), ICJ June 2, 1999.

[22]Above n1.

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[23]This limited view of the ICJ seems at odds with the views of the Security Council in its Resolution 1368 '*Threats to International Peace and Security*' (2001).
[24]*In Larger Freedom: Towards Security, Development, and Human Rights for All*, Report of the Secretary General on the United Nations, Sept (2005), [124]. This report was published in preparation for the UN's World Summit held in September 2005 to review progress with achieving the objectives of the Millennium Declaration adopted by all UN members in 2000; the *High Level Panel on Threats, Challenges and Change* was created by the Secretary General in December 2003, reporting in 2005 UN Doc A/59/565, *A More Secure World: Our Shared Responsibility*.
[25]Above n11 at [191].
[26]British Attorney General's written advice to Prime Minister regarding the legality of the Iraq war and UN Res 1441, March 7, 2003.
[27]Daniel Bethlehem QC, see for example, *International Law and the Use of Force: The Law As It Is and As It Should B*e, Written evidence submitted to Foreign Affairs Committee, 8 June 2004, www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm
[28]Above n23.
[29]Secretary General, United Nations, 1997–
[30]*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996.
[31]Ibid at [95–97].
[32]M Koskenniemi, 'What is International Law For?', M Shaw (ed), *International Law*, 2nd Edn (2006) at 72.
[33]Gillian Triggs, *International Law: Contemporary Principles and Practices* (2006) at 602–3.
[34]World Summit Outcome, 15 Sept 2005, UN General Assembly Doc. A/60L.1 at [138] and [139].
[35]Gray above n. 10.
[36]Economic and Social Council, Commission on Human Rights E/CN 4/2006/120, 15 February, 2006.
[37]UN Doc. A/6316 (1966), entered into force March 23, 1976.
[38]*III Geneva Convention relative to the Treatment of Prisoners of War*, adopted by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 12 August, 1949.
[39]*Hamdan v Rumsfeld, Secretary of Defense, et al*, United States Court of Appeals for the District of Columbia Circuit No. 05-184, decided June 29, 2006. In a case bought by Guantanamo detainee, Salim Ahmed Hamdan, a 5-3 decision of the Supreme Court rejected the premise that George Bush, as wartime President, could order military trials for Guantanamo detainees without the protections of the Geneva Convention and American law. The administration must adopt a military system for trying suspected terrorists consistent with international standards or release the suspects from military custody.
[40]*IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva (1958) Articles 42, 68, 78 and 79.
[41]*Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, (1958) at 56.
[42]Ibid, Article 45.
[43]K. Dormann , The Legal Situation of Unlawful/Unprivileged Combatants' *International Review of the Red Cross* March 2003, Vol. 85, at p.73.
[44]*The Protection of Victims of International Armed Conflicts*, Protocol Additional to the Geneva Conventions of 12 August 1949, adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, entry into force 7 December 1979.
[45]Article 3 is common to both the Third Geneva Convention and the Fourth Geneva Convention.
[46]White House Fact Sheet, *Status of Detainees at Guantanamo*, 7 February 2002; detainees are to be treated humanely consistent with military necessity 'in a manner consistent with the principles of the Third Geneva Convention of 1949'.
[47]*Convention (IV) Respecting the Laws and Customs of War on Land* and its Annex: *Regulations Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907.
[48]Jason Callen, 'Unlawful Combatants and the Geneva Conventions', (2004) 44 *Virginia Journal of International Law*, 1025 at 1069; ?? Callen argues that those captured in Afghanistan were in a zone of military operations in disputed territory that was not under the control of any civilian government.
[49]*Callen* at 1070; in *Prosecutor v Delalic*, the Appeals Court accepted that nationality could included those assimilated into the enemy state, depending on the relations between the individual and the state.
[50]Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957) at 28.
[51]*Callen* at 1067.
[52]The United States sought UN authority for the war in Iraq and argued that it in fact had earlier authorisation. It also sought legitimacy from the UN regarding action in Afghanistan and Iraq, *ex poste facto*. Thus the United States claims the right to act unilaterally, but will attempt to secure UN legitimisation if possible.

Biography

Professor Gillian Triggs is Director of the British Institute of International and Comparative Law.

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