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Not yet havoc: geopolitical change and the international rules on military force

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'Cry havoc and let slip the dogs of war'
William Shakespeare, *Julius Caesar*, Act III, Scene I

Introduction

This article considers the relationship between geopolitical change and the evolving international rules on military force. Its focus is the impact of the United States' rise to hegemonic status on the rules governing recourse to force (the *jus ad bellum*) and the conduct of hostilities (the *jus in bello*, otherwise known as 'international humanitarian law').[1] For reasons of space and clarity of analysis, the article does not focus on the different, more traditional IR questions of whether and why the behaviour of the United States might be constrained by these rules.

Two specific sets of rules are examined: the right of self-defence and the rules governing the treatment of detainees. The article concludes that geopolitical change frequently leads to normative change, though on some issues – such as pre-emptive self-defence – even a hegemonic state cannot change international law on its own. The challenge facing the international community is to maintain rules on military action that are reasonable, effective and widely accepted – including by the most powerful state, at least most of the time.

Self-defence

The right of self-defence in contemporary international law dates back to 1837, when the British were crushing a rebellion in Upper Canada (now Ontario). The United States, while unwilling to antagonise a superpower by supporting the rebels directly, did not prevent a private militia from being formed in up-state New York. The 'volunteers' used a steamboat, the *Caroline*, to transport arms and men to the rebel headquarters on Navy Island, on the Canadian side of the Niagara River. The British

* I am grateful for helpful comments from Katharina Coleman, Richard Price and Adriana Sinclair. Parts of this article draw on Michael Byers, *War Law* (London: Atlantic Books, 2005).

[1] In this article, the term 'hegemony' is used to describe, not only coercive power, but also the softer, less deliberate and hierarchical forms of influence exercised by a leading state. See Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law*, vol. 1 (Cambridge: Cambridge University Press, 2003), pp. 450–1 and 492–3.

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responded with a night raid, capturing the vessel as it was docked at Fort Schlosser, New York. They set the boat on fire and sent it over Niagara Falls. Two men were killed as they fled the steamer and two prisoners were taken back to Canada but later released.

The incident caused disquiet in Washington, DC. British forces, having torched the White House and Capitol Building in 1814, were again intervening on US territory. Some careful diplomacy followed, with US Secretary of State Daniel Webster conceding that the use of force in self-defence could be justified when 'the necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment of deliberation', and provided that nothing 'unreasonable or excessive' was done.[2] The British accepted Webster's criteria. Over time, as other countries expressed the same view of the law in other disputes, the *Caroline* criteria – often referred to simply as 'necessity and proportionality' – were transformed into the parameters of a new right of self-defence in customary international law.

In 1945, the drafters of the UN Charter included self-defence as an exception to their new, general prohibition on the use of military force. In addition to the existing customary criteria, three further restrictions were introduced: (1) a state could act in self-defence only if subject to an 'armed attack'; (2) acts of self-defence had to be reported immediately to the Security Council; and (3) the right to respond would terminate as soon as the Council took action.[3]

Despite this careful attempt at definition, the precise limits of self-defence still depend greatly on customary international law, in part because the UN Charter refers explicitly to the 'inherent' character of the right. And so, while the right of self-defence is codified in an almost universally ratified treaty, its parameters have evolved gradually – or at least become more easily discernible – as the result of the behaviour of states since 1945. For example, it is unclear, on a straightforward reading of the Charter, whether armed attacks against a country's citizens *outside* its territory are sufficient to trigger the right to self-defence. The story of how this particular ambiguity was resolved provides an example of how the international rules on military force traditionally evolved – at least before the emergence of a single superpower.

Self-defence and the protection of nationals abroad

In June 1976, an Air France flight from Tel Aviv to Paris was hijacked and diverted to Entebbe, Uganda. The hijackers threatened to kill the passengers and crew unless 153 pro-Palestinian terrorists were released from jails in France, Israel, Kenya, Switzerland and West Germany. On the third day of the hijacking, 47 non-Jewish passengers were released. On the fourth day another 100 were let go. The Ugandan government, led by Idi Amin, took no apparent steps to secure the release of the remaining, mostly Israeli hostages.

On 3 July 1976, shortly before the deadline set by the hijackers, Israeli commandos mounted an audacious rescue operation. Without notifying the Ugandan

[2] See R. Y. Jennings, 'The *Caroline* and McLeod Cases', *American Journal of International Law*, 32 (1938), p. 82.
[3] Article 51, UN Charter, available at: ⟨http://www.un.org/aboutun/charter/index.html⟩.

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government, they landed at Entebbe airport, killed the hijackers, saved the lives of all but three of the hostages and flew them back to Israel. Only one Israeli soldier died in the raid, but a number of Ugandan soldiers were killed and several Ugandan military aircraft destroyed. Israel claimed that the right of self-defence allowed force to be used to protect nationals abroad – when the country in which they had fallen into danger was unable or unwilling to do so. Up to this point, similar claims had never been widely accepted as legal under international law.[4]

Two draft resolutions were introduced in the UN Security Council. The first, prepared by Britain and the United States, condemned the hijackers rather than Israel and called on states to prevent and punish all such terrorist attacks. This resolution was put to a vote but failed to obtain the necessary support of nine or more Council members. The second draft resolution, submitted by Benin, Libya and Tanzania, condemned Israel for its violation of Ugandan sovereignty and territorial integrity and demanded that it pay compensation for all damage caused. This second resolution was never put to a vote. The response of countries outside the Security Council was even more muted, signalling widespread, tacit acceptance of the Israeli claim. Today, the Entebbe incident is regarded as having contributed decisively to a limited extension of the right of self-defence to include the protection of nationals abroad. When civil strife elsewhere threatens a country's citizens, whether in Haiti, Liberia or Sierra Leone, sending soldiers to rescue them has become so commonplace that the issue of legality is rarely raised.

Traditionally, when international rules on military force evolved, they did so as the result of an individual country or group of countries advancing a novel claim, often in conjunction with military action, and most other countries endorsing the claim, either by concluding a treaty to that effect or by evincing their support through acts, statements or even inaction and silence (acquiescence) formative of customary international law. This process of change was equally available to all states, though powerful states have always had certain advantages when shaping international law.[5] Moreover, as the following example begins to indicate, the end of the Cold War and the emergence of the United States as a single superpower have heightened that country's influence over international law-making.

Self-defence and reprisals

If the right of self-defence extends to the protection of nationals abroad, what then of situations where an armed attack has occurred but the immediate threat has passed? In other words, is self-defence limited to warding off attacks-in-progress or does the right extend to action taken in response to a recent attack? If so, what, if any, line is to be drawn between defensive and punitive armed responses?

Reprisals became illegal under international law in 1945, when Security Council authorisation and the right of self-defence were the only two exceptions provided to the UN Charter's general prohibition on the use of force. In response, some countries

[4] See Michael Akehurst, 'The Use of Force to Protect Nationals Abroad', *International Relations*, 5:3 (1977).

[5] See Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

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have sought to extend the right of self-defence to include acts designed more to punish than repel.

In 1964, eight British warplanes attacked the Harib Fortress in Yemen. The British government sought to justify the action as self-defence, following incursions by Yemenese aircraft into the Federation of South Arabia the previous day. The Security Council responded by adopting a resolution that deplored 'all attacks and incidents which have occurred in the area' and, more importantly, singled out 'reprisals as incompatible with the purposes and principles of the United Nations'.[6] Remarkably, Britain (along with the United States) abstained on the resolution – though it did so while continuing to insist, in the face of widespread criticism of its apparently punitive action, that it had engaged in nothing more than self-defence.[7] In the context of the Cold War, countries uniformly opposed changing international law to permit reprisals, or at least acts formally identified as such, while most but not all countries opposed a concomitant extension of the right of self-defence.

In April 1993, an attempt to assassinate former US President George H.W. Bush was thwarted when a sophisticated car bomb was discovered in Kuwait. Two months later, the United States fired 23 cruise missiles at the Iraqi military intelligence headquarters in Baghdad. Madeline Albright, the US permanent representative to the United Nations at the time, presented evidence of the Iraqi government's involvement in the assassination attempt to the UN Security Council. She asserted that the attempt to kill the former president was 'a direct attack on the United States, an attack that required a direct United States response'. Moreover, Albright claimed, the response was permitted under the right of self-defence in the UN Charter.[8]

The armed response took place two months after the assassination attempt had been foiled and the threat to the former president eliminated. Rather than being necessary for self-defence, it was aimed at the dual goals of punishing Iraq and deterring future plots – and was therefore a reprisal in all but name. Yet the members of the Security Council responded favourably to the US action and its claim of self-defence. Japan said that the use of force was an 'unavoidable situation'. Germany described the strike as a 'justified response'. Reaction outside the Security Council was less favourable. Iran and Libya condemned the strike as an act of aggression, while the Arab League expressed 'extreme regret' and said that force should only have been used if authorised by the Security Council. But most countries expressed no view on the legality of the US action.

The widespread acquiescence, and the change it represented from 1945 and 1964, was most likely linked to the geopolitical changes that had occurred a few years earlier. The United States was now a single superpower and its opponent, Saddam Hussein's Iraq, was no longer supported by any significant state. Still, the United States probably failed in this instance to modify the right of self-defence to allow purely punitive and deterrent action. Some rules, including those (like the right of self-defence) which protect fundamental aspects of state sovereignty, are highly resistant to change and take numerous interactions to alter; other, less deeply

[6] SC Res. 188 (1964), UN Doc. S/5650, available at: ⟨http://www.un.org/documkents/sc/res/1964/scres64.htm⟩.

[7] *Repertoire of the Practice of the Security Council*, 1964–65, ch. XI, p. 195, available at ⟨http://www.un.org/Depts/dpa/repertoire/⟩.

[8] See Dino Kritsiotis, 'The Legality of the 1993 Missile Strike on Iraq and the Right of Self-Defence in International Law', *International and Comparative Law Quarterly*, 45 (1996), p. 163.

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embedded rules, are more easily changed. Yet the US response – coupled with its newly augmented influence – will have rendered the law less clear and therefore more susceptible to modification in future. This modification has not yet happened, but if and when it does, the consequences for the UN system could be quite serious.

Often, determining whether an action falls within the parameters of self-defence will turn on the facts of the specific situation. In the case of the foiled 1993 assassination attempt, Washington explained that it had taken two months to gather conclusive evidence of Iraqi involvement in the plot and, once it was certain that Baghdad was responsible, wasted no time in acting. But once an armed attack has come and gone and there is no continuing or immediate threat, there is nothing to stop the attacked country from asking the UN Security Council to respond instead. In most domestic legal systems, the right of self-defence ends the moment an attack has ceased and there is time to call the police.

During the Cold War, one could have argued for an extension of the right of self-defence to the period following an attack on the basis that an attacked country had little reason to believe that the Security Council would respond to its pleas. The argument does not carry the same weight in the post-Cold War period. Following the 1990 Iraqi invasion of Kuwait, and on several occasions since then, the Security Council has demonstrated a new-found willingness to respond to breaches of the peace. In this changed context, attempts to extend the right of self-defence to the period following an attack could have a perverse and possibly cascading series of consequences. By allowing countries to bypass the Council, any extension of the right would render that body less effective and less authoritative, which in turn could be used to justify a further extension of the right, and so on. This problem does not present itself solely with regard to punitive actions: a similar outcome is already discernible following a successful attempt to extend the right of self-defence to include, not only responses against attacks by states, but also responses against states that willingly support or harbour terrorists – when it is the terrorists rather than the state who have mounted the attack.

Self-defence against terrorism

On 11 September 2001, nineteen Al'Qaeda operatives seized four passenger jets, crashing two of them into the World Trade Center and another into the Pentagon; the fourth plane was brought down in a Pennsylvanian field after the passengers revolted against the hijackers. Nearly 3,000 people were killed in the attacks. Almost immediately, the US government declared that it would respond militarily on the basis of self-defence. But as a legal justification for the use of force in Afghanistan – the country harbouring and indirectly supporting the Al'Qaeda leadership – the right of self-defence was not as readily available then as it is today.

Even when countries were directly implicated in terrorism, acts of self-defence directed against them did not attract much international support – prior to 2001. In April 1986, a terrorist bomb exploded in a West Berlin nightclub crowded with US servicemen. Two soldiers and a Turkish woman were killed and 230 people were wounded, including 50 US military personnel. Two weeks later, the United States

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responded by bombing a number of targets in Tripoli. Thirty-six people were killed, including an adopted daughter of Libyan leader Muammar Gadaffi.

Washington claimed the strike on Libya was legally justified as an act of self-defence. As then-Secretary of State George P. Shultz said:

> [T]he Charter's restrictions on the use or threat of force in international relations include a specific exception for the right of self-defence. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbour terrorists or guerrillas.[9]

Yet the claim was widely rejected, with many governments also expressing doubt as to whether the strike – with its two week delay and use of heavy munitions – met the 'necessity and proportionality' criteria for self-defence. The most significant evidence of the lack of support was the refusal of France and Spain – both NATO allies of the United States – to allow their airspace to be used by the bombers that conducted the raid. As a result, the pilots, who began their mission at a US airbase in Britain, had to fly westward around the Iberian Peninsula. The widespread negative reactions from other countries meant that the legal claim and associated military action did not succeed in changing international law.

Around the same time, the additional question arose as to whether the right of self-defence extended to situations where military responses took place on the territory of countries not directly implicated in terrorist acts. In 1985, Israel claimed to be acting in self-defence when it attacked the headquarters of the Palestine Liberation Organisation in Tunisia. The UN Security Council condemned the action, with the United States, unusually, abstaining rather than voting against (and thus vetoing) the resolution.[10] A number of governments expressed concern that the territorial integrity of a sovereign state had been violated in an attempt to target, not the state itself, but alleged terrorists present there.

In 1986, the International Court of Justice ruled in a case, brought against the United States, in which Nicaragua argued that it was the victim of an illegal military intervention.[11] Washington had justified its actions as collective self-defence, on the basis that Nicaragua's support for rebel groups in surrounding countries amounted to armed attacks on those countries, to whose assistance the United States could then come. The Court held that 'assistance to rebels in the form of the provision of weapons or logistical or other support' did not amount to an armed attack triggering the right of self-defence. It also decided that collective self-defence may only be exercised if the country under attack requests assistance, and this Nicaragua's neighbours had not done. Although the decision in the *Nicaragua Case* concerned support for rebels rather than terrorists, it did confirm that countries which merely harboured or provided indirect support for terrorists were not open to attack on that basis.

[9] 'Address by Secretary of State George P. Shultz, Low-Intensity Warfare Conference, National Defense University, Washington, DC, 15 January 1986', reproduced in *International Legal Materials*, 25 (1986), p. 204.

[10] SC Res. 573 (1985), available at: ⟨http://www.un.org/Docs/scres/1985/scres85.htm⟩.

[11] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment on the merits, 27 June 1986, available at: ⟨http://www.icj-cij.org/icjwww/icases/inus/inusframe.htm⟩.

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The legal situation concerning self-defence and terrorism began to change in 1998 after two bombs exploded outside the US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Twelve Americans and almost 300 Kenyans and Tanzanians were killed; thousands more were injured. United States intelligence sources indicated that Osama bin Laden and his Al'Qaeda organisation were responsible for the attacks. Two weeks later, the United States fired 79 cruise missiles at six terrorist training camps around Khowst, Afghanistan and at a pharmaceutical plant on the outskirts of Khartoum, Sudan. At the time, the Central Intelligence Agency was convinced that the plant was producing precursors to chemical weapons; it subsequently emerged that the intelligence was flawed.

As Israel had done in 1985, the United States sought to justify its actions on the basis of self-defence. As then National Security Adviser Sandy Berger said: 'I think it is appropriate, under Article 51 of the UN Charter, for protecting the self-defence of the United States . . . for us to try and disrupt and destroy those kinds of military terrorist targets.'[12] In addition to making the claim, the US government deployed its considerable influence in support of the legal argument. President Bill Clinton telephoned Tony Blair, Jacques Chirac and German Chancellor Helmut Kohl shortly before the cruise missile strikes and asked for their support. Without having time to consult their lawyers, all three leaders agreed – and subsequently made concurring public statements immediately following the US action. As a result of the timely expressions of support, other countries were more restrained in their response than they might have been. And this muted response probably contributed, again, to obfuscating the limits of self-defence, making the rule more susceptible to change in a subsequent situation.

That situation soon arose as a result of the terrorist attacks of 11 September 2001. At the time, there were several legal justifications available to the United States for the use of force in Afghanistan. Washington could have argued that it was acting at the invitation of the Northern Alliance, it could have sought explicit authorisation for military action from the UN Security Council, or it could (perhaps) have claimed a right of humanitarian intervention – since millions of Afghan lives were at risk from famine during the winter of 2001–2002.[13] Yet it chose to focus on a single justification: a right of self-defence against terrorism.

In focusing on self-defence against terrorism, the United States found itself in something of a legal dilemma. In order to build and maintain a coalition of countries willing to use force against terrorism, the response to the 11 September 2001 attacks had to comply with the *Caroline* criteria of necessity and proportionality.[14] The military action thus had to be focused on those individuals believed responsible for the 3,000 deaths. But if the United States had singled out Bin Laden and Al'Qaeda as its targets, it would have run up against the widely held view that terrorist attacks, in and of themselves, do not justify military responses within the territory of sovereign countries. Even today, most countries are wary of a rule that could expose them to attack whenever terrorists were thought to operate from within their borders.

[12] Secretary of State Madeline Albright and National Security Adviser Samuel Berger, 'News Briefing', FDCH Political Transcripts, Thursday, 20 August 1998.
[13] See Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September', *International & Comparative Law Quarterly*, 51 (2002), p. 401; reprinted in *International Relations*, 16 (2002), p. 155.
[14] See discussion: *supra*, p. 52.

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Consider, for instance, the position of Germany after 11 September 2001: although the City of Hamburg unwittingly harboured several of the terrorists, few people would maintain that this fact alone could have justified a US attack.

The dilemma was overcome when the United States implicated the Taliban. By giving refuge to Bin Laden and Al'Qaeda and refusing to hand them over, the Taliban was alleged to have deliberately facilitated and endorsed their actions. The United States even gave the Taliban a deadline for surrendering Bin Laden, a move that served to ensure their complicity. Moreover, the Taliban's continued control over Afghanistan was portrayed as a threat, in and of itself, of even more terrorism.[15]

In this way, the United States framed its claim in a manner that encompassed action against the state of Afghanistan, without asserting the right to use force against terrorists regardless of their location. Although still contentious, this claim was much less of a stretch from pre-existing international law than a claimed right to attack terrorists who simply happened to be within another country. Subsequent statements by the Taliban that endorsed the terrorist acts further raised the level of their alleged responsibility. For these reasons, the claim to be acting in self-defence in Afghanistan – and the modification of customary international law that claim entailed – had a much better chance of securing the expressed or tacit support of other countries.

The United States also deployed its considerable influence to secure widespread support in advance of military action. The collective self-defence provisions of the 1949 North Atlantic Treaty and the 1947 Inter-American Treaty of Reciprocal Assistance were engaged, and both NATO and the Organization of American States formally deemed the events of 11 September 2001 an 'armed attack' – legally relevant language under the self-defence provision of the UN Charter. Similarly, UN Security Council resolutions adopted on 12 and 28 September 2001 were carefully worded to affirm the right of self-defence in customary international law, within the context of the terrorist attacks on New York and Washington, DC.[16]

As a result of the strategic approach adopted by the United States, its newfound influence as the single superpower and the resulting widespread support for its legal argument and action against Afghanistan, the right of self-defence now includes military responses against countries that willingly harbour or support terrorist groups, provided that the terrorists have already struck the responding state. The long-term consequences of this development may be significant. Few countries would have objected if the United States had relied on arguments of invitation, Security Council authorisation or even humanitarian intervention, but acting alone might have been made more difficult for Washington in future. Having seized the opportunity to establish self-defence as a basis for military action against terrorists and governments that willingly support them, the United States, and other countries, will be able to invoke it again in circumstances which are less grave, or where the responsibility of the targeted state is less clear. And, as with the possible extension of self-defence to include punitive actions, the newly elongated right will diminish the

[15] See John Negroponte, 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', UN Doc. S/2001/946, 7 October 2001, available at ⟨http://www.un.int/usa/s-2001/6946.htm⟩.

[16] SC Res. 1368, UN Doc SC/7143; SC Res. 1373, UN Doc SC/7158; both available at ⟨http://www.un.org/Docs/scres/2001/sc2001.htm⟩.

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relevance and authority of the United Nations on matters concerning the use of military force.

The extension of the right of self-defence to include military action against states that willingly harbour or support terrorists was the result of a deliberate effort to change the rules on military action. The single superpower is able to exercise considerable influence on international law-making, at least when it consciously and strategically seeks to do so. Yet it still needs to persuade other countries. The following example, of an equally deliberate effort to secure an extended right of pre-emptive self-defence, demonstrates the limits that exist upon the United States' ability to influence law-making.

Pre-emptive self-defence

On 7 June 1981, nine Israeli air force pilots conducted a bold and dangerous raid deep into hostile territory. Hugging the ground to avoid detection, they flew more than 600 miles before dropping their bombs on a nuclear reactor under construction at Osirak, near Baghdad. The reactor was badly damaged, Iraq's nuclear programme was seriously impaired, and none of the attacking planes were lost. Israel claimed that it had engaged in pre-emptive self-defence on the basis that a nuclear-armed Iraq would constitute an unacceptable threat, especially given Saddam Hussein's overt hostility towards the Jewish state. The UN Security Council immediately and unanimously condemned the action as illegal.[17] The condemnation was all the stronger because the United States joined in the vote rather than abstaining. In the British House of Commons, then-Prime Minister Margaret Thatcher said that an 'armed attack in such circumstances cannot be justified; it represents a grave breach of international law'.[18] Other governments were equally critical.

More than customary international law was at issue, since the UN Charter sets out its general prohibition on the use of force before recognising the right of self-defence 'if an armed attack occurs'. Interpreting the self-defence provision of the Charter requires that we look to the customary international law rules of treaty interpretation, which are codified in the 1969 Vienna Convention on the Law of Treaties and stipulate that treaties must be interpreted in accordance with the 'ordinary meaning of the terms'.[19] When this approach is applied, any pre-existing right of pre-emptive self-defence is apparently superseded by the 'if an armed attack occurs' language – particularly since self-defence is codified as an exception to the prohibition on the use of force and, as an exception, should be construed narrowly.

However, the UN Charter also refers to the 'inherent' character of the right of self-defence. This reference complicates the analysis by implicitly incorporating the pre-existing customary international law of self-defence into the treaty. Consequently, it is sometimes argued that pre-emptive action is justified if there is a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no

[17] SC Res. 487 (1981), available at ⟨http://www.un.org/Docs/scres/1981/scres81.htm⟩.

[18] 'Israel blasts Iraq's reactor and creates a global shock wave', *Time Magazine* (US edition), 22 June 1981, p. 24.

[19] Article 31, *Vienna Convention on the Law of Treaties*, available at ⟨http://www.un.org/law/ilc/texts/treatfra.htm⟩.

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moment of deliberation' – the *Caroline* criteria in their original, full expression. Until the adoption of the UN Charter in 1945, these criteria were widely accepted as delimiting a narrow right of pre-emptive self-defence in customary international law. Today, even a narrow right of pre-emption can only exist if the language of the Charter is ignored, re-read, or viewed as having been modified by subsequent state practice. Yet during the latter half of the twentieth century, most of the state practice cut the other way.

Since 1945, most governments have refrained from claiming pre-emptive self-defence.[20] The United States, concerned about establishing a precedent that other countries might employ, implausibly justified its 1962 blockade of Cuba as 'regional peacekeeping'. Israel, concerned not to be seen as an aggressor state, justified the strikes that initiated the 1967 Six-Day War on the basis that Egypt's blocking of the Straits of Tiran constituted a prior act of aggression. And in 1988, the United States argued that the shooting down of an Iranian civilian Airbus by the USS *Vincennes*, although mistaken, had been in response to an ongoing attack by Iranian military helicopters and patrol boats. Even the most hawkish leaders baulked at a right of pre-emptive action during the Cold War, at a time when both the world's principal disputants possessed armadas of nuclear missile submarines designed to survive first strikes and ensure 'mutually assured destruction'. The unanimous vote in the Security Council to condemn the 1981 Osirak bombing was but the clearest indication of this thinking. That said, during the Cold War there was widespread acceptance, in one very particular context, of what could be considered a narrow right of pre-emption: namely, the right to launch missiles as soon as it became clear that enemy missiles were incoming, without having to wait for them to strike.

Today, as seen from the White House, the situation looks quite different. Relations with Russia have improved, no other potential enemy has submarine-based nuclear missiles (though China may eventually acquire some), and the first phase of a missile defence system has been initiated. When President George W. Bush announced an expansive new policy of pre-emptive military action on 1 June 2002, he clearly did not feel deterred by the prospect of Armageddon.

During a commencement speech at West Point, President Bush addressed the threat of weapons of mass destruction (WMD) in association with international terrorism. He advocated a degree of pre-emption that extended towards the preventive or even precautionary use of force: 'We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge'. Even if the threats are not imminent, 'if we wait for threats to fully materialise, we will have waited too long'.[21] The new policy – now widely referred to as the 'Bush Doctrine' – made no attempt to satisfy the *Caroline* criteria. There was no suggestion of waiting for a 'necessity of self-defence' that was 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'. As a policy statement, the Bush Doctrine was a radical departure from the US position during the Cold War.

The staff lawyers and diplomats in the US State Department were undoubtedly aware that the President's words at West Point had little chance of achieving the

[20] See Michael Byers, 'Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change', *Journal of Political Philosophy*, 11 (2003), p. 171.

[21] Remarks by President George W. Bush at 2002 Graduation Exercise of the United States Military Academy West Point, New York, available at ⟨http://www.whitehouse.gov/news/releases/2002/06/20020601-3.htm⟩.

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widespread international support required to change customary international law. Relatively few countries possess enough of a military deterrence to be able to contemplate a world without the combined protections of the UN Charter and the *Caroline* criteria. Accordingly, the Bush Doctrine was reformulated to make it more acceptable to other countries, and thereby more effective in promoting legal change. The National Security Strategy of the United States, released on 20 September 2002, explicitly adopted – and then sought to extend – the criteria for self-defence articulated by Daniel Webster following the *Caroline* incident:

> For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilisation of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.[22]

In other words, the National Security Strategy took George W. Bush's newly articulated policy of prevention or precaution and recast it within the widely accepted, pre-existing framework of pre-emptive self-defence. It did so, first, by omitting any mention of the UN Charter, thus implicitly asserting that the pre-1945 customary right of self-defence remained the applicable law. By glossing over the problematic relationship between the *Caroline* criteria and the Charter, the document strategically sought to establish a new baseline for the legal discussion. Only then did it go further, asserting that the criterion of imminence now extends beyond threats which are 'instant, overwhelming, leaving no choice of means, and no moment of deliberation', to include more distant and uncertain challenges.

The claim was made within a context that at least suggested the need for legal change. Few would contest that terrorism and WMD are serious problems. But more significantly, other governments were not actually asked to agree to a change in the rule. Instead, all the National Security Strategy proposed was an adaptation of how the (supposed) existing rule is applied in practice. The claim was designed to appear patently reasonable and, as such, deserving of widespread support and acquiescence. Such support and acquiescence, once combined with military action justified on the basis of the claim, would then generate new customary international law.

Yet the reformulated doctrine of pre-emptive self-defence is not as innocuous as it first appears. By adopting the pre-1945 criterion of imminence and stretching it to encompass new facts, the approach advocated in the National Security Strategy could introduce considerably more ambiguity into the law. This ambiguity could, in turn, allow power and influence to play a greater role in the law's application. In future, whether the criterion of imminence is fulfilled would depend in large part on the factual circumstances – as assessed by individual states and groups of states. And the ability of the powerful to influence these assessments could be considerable, given the various forms of political, economic and military pressure that can be brought to bear in international affairs. In addition, powerful countries sometimes have special knowledge based on secret intelligence, or at least claim such knowledge in an

[22] National Security Strategy of the United States, 20 September 2002, p. 19, available at ⟨http://www.whitehouse/gov/nsc/nss.html⟩.

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attempt to augment their influence, as occurred before the 2003 Iraq War. As a result, the criterion of imminence would more likely be regarded as fulfilled when the United States wished to act militarily, than when other countries wished to do the same. The law on self-defence would remain generally applicable – available as a diplomatic tool to be deployed against weak states – while the most powerful of countries would gain greater freedom to act as it chose.

Fortunately, the US government does not have a monopoly on good international lawyers. A few regional powers, such as India, Israel, and Russia, responded favourably to the claim set out in the National Security Strategy, as did Australian Prime Minister John Howard, who suggested that the UN Charter be amended to allow for a right of unilateral pre-emptive action. But Howard's comments sparked angry protests from other Southeast Asian states – protests that contribute to reinforcing the pre-existing customary international law. Other countries, including France, Germany and Mexico, expressed concern in more moderate terms while Japan voiced support for a right of pre-emptive self-defence but was careful to confine its claim to the *Caroline* criteria. More recently, it has been revealed that the British Attorney General, Lord Goldsmith, deemed the Bush Doctrine illegal in a highly confidential legal opinion that was provided to Prime Minister Tony Blair on 7 March 2003.[23]

This at-best mixed reaction would, in itself, have prevented any change in the customary international law of self-defence. And as the Iraq crisis escalated, it also contributed to bringing the United States to the UN Security Council where, on 8 November 2002, Resolution 1441 was adopted unanimously.[24] Although the resolution did not expressly authorise the use of force against Iraq, it did provide some support for an argument that a previous authorisation, accorded in 1990, had been revived as a result of Iraq's 'material breaches' of the 1991 cease-fire resolution and, later, Resolution 1441. The Bush administration relied on both this argument and the pre-emptive self-defence claim to justify the 2003 Iraq War, while its two principal allies, Britain and Australia, relied solely on the Security Council resolutions. The advancement of two distinct arguments, with the latter receiving broader support, reduced any effect that the claim to an extended right of pre-emption might have had on customary international law.

Opposition to the Bush Doctrine has continued to grow, and not just among governments. In December 2004, the UN Secretary General's High Level Panel on Threats, Challenges and Change, a group of 16 former prime ministers, foreign ministers and ambassadors (including Brent Scowcroft, who served as National Security Adviser to President George H.W. Bush), presented its highly authoritative response to the US President's claim:

> The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorise such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option.
>
> 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

[23] Available at ⟨http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28_04_05_attorney_general.pdf⟩.
[24] SC Res. 1441 (2002), available at: ⟨http://www.un.org/Docs/scres/2002/sc2002.htm⟩.

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preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.[25]

The Bush Doctrine of pre-emptive self-defence represents a failure of US policy with regard to international law-making, resulting from a refusal to pay greater heed to the law-making interests of other countries and frame the claim accordingly. Nevertheless, the claim has resulted in a degree of legal change, or at least legal clarification. Today, much more than just five years ago, it is difficult to find an international lawyer who argues that there is *no* right of pre-emptive self-defence whatsoever. The academic debates over the meaning of 'if an armed attack occurs' that raged during the latter half of the twentieth century, have been replaced by a general acceptance that a narrow right of pre-emptive self-defence exists, as it did before 1945, in 'cases in which the necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment of deliberation'. The power and influence of the United States is such that, even when it fails in a law-making effort, it still leaves a mark on international rules.

A similar pattern, of an unsuccessful effort at major legal change resulting in smaller but still significant normative alterations, can be seen in US efforts to justify violations of international humanitarian law with regard to the treatment of detainees.

Treatment of detainees

The treatment of detainees during and after armed conflict is governed by rules of customary international law that have been codified in the four Geneva Conventions of 1949 and a number of other treaties. According to this body of law – the *jus in bello* or international humanitarian law – soldiers are legitimate targets during armed conflict. Killing members of the enemy's armed forces is one of the goals of military action.

Civilians, in contrast, must not intentionally be killed. However, civilians can be protected in time of armed conflict only if a distinction is maintained between combatants and non-combatants. This differentiation is achieved by offering combatants the protection of prisoner of war status if captured, as long as they are in a chain of command, wearing a fixed distinctive emblem (usually a shoulder patch), carrying their arms openly and acting in accordance with international humanitarian law. Prisoners of war must be treated humanely. They cannot be killed, tortured, used as human shields, held hostage, or used to clear landmines.

The incentive of prisoner of war status is not always effective, especially in conflicts involving irregular forces in poorer countries, and some experts argue that the distinctive emblem requirement is inconsistent with modern forms of war. Apart from their turbans, the armed forces of the Taliban government did not wear anything approaching uniforms during the 2001 Afghanistan War, though they were in a chain of command, carried their arms openly and, for the most part, abided by international humanitarian law.

[25] 'A More Secure World: Our Shared Responsibility – Report of the Secretary General's High Level Panel on Threats, Challenges and Change', p. 63, available at ⟨http://www.un.org/secureworld⟩.

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The distinction between combatants and non-combatants is also threatened by the practice of US special forces, which constitute an increasingly important part of the US military yet have – with the apparent support of Secretary of Defense Donald Rumsfeld – taken to wearing civilian clothing. The practice has been challenged. When the New Zealand government sent a contingent of commandos to fight in Afghanistan, it refused to allow the soldiers to wear civilian clothes, a decision that created some friction with the United States. The decision was correct: if special forces – indeed, any soldiers – are captured operating out of uniform, they are not entitled to the protections owed prisoners of war regardless of the country for which they fight.

Rumsfeld's disdain for international humanitarian law became public in January 2002 when suspected Taliban and Al'Qaeda members were transported to the US naval base at Guantanamo Bay, Cuba. Ignoring public criticism from a number of European leaders, the UN High Commissioner for Human Rights and even the normally neutral and very discrete International Committee of the Red Cross, the Defense Secretary insisted the detainees could not be prisoners of war and refused to convene the tribunals required under Article 5 of the Third Geneva Convention to determine their status. Rumsfeld also ignored advice from the Pentagon's own lawyers, the 'judge advocates', and based his decision on an analysis of international humanitarian law by then White House Counsel (now Attorney General) Alberto Gonzales, a former corporate lawyer. Four years after the war in Afghanistan, some 550 suspects remain at Guantanamo Bay despite having never been charged or granted access to counsel.

In November 2002, the English Court of Appeal described the position of the Guantanamo Bay detainees as 'legally objectionable'; it was as if they were in a 'legal black hole'.[26] The situation has improved marginally since then. In June 2004, the US Supreme Court finally addressed the matter. On behalf of a 6-3 majority of judges, Justice John Paul Stevens wrote:

> Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.[27]

Justice Stevens went on to hold that anyone detained by the US government outside the United States has the right to have the legal basis for his detention reviewed by a US federal court. Just one week later, the Pentagon announced that it would in fact convene the status determination tribunals required by Article 5 of the Third Geneva Convention.

Other violations of international humanitarian law have been committed against detainees in Afghanistan, Iraq, and elsewhere. In November 2001, a prisoner revolt at Mazar-i-Sharif in Afghanistan was put down with air-to-surface missiles and B-52 launched bombs. More than 175 detainees were killed; 50 died with their hands tied

[26] *Abbasi & Anor., R (on the application of)* v. *Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department*, Court of Appeal of England and Wales (Civil Division), 6 November 2002, available at ⟨http://www.bailii.org.cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/1598.html⟩.

[27] *Rasul* v. *Bush*, 321 F.3d 1134, reversed and remanded, 8 June 2004, available at ⟨http://supct.law.cornell.edu/supct/html/03-334.ZO.html⟩.

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behind their backs. In December 2002, the *Washington Post* reported on the use of 'stress and duress' techniques during interrogations at Bagram Air Base, also in Afghanistan.[28] In March 2003, the *New York Times* reported that, while in custody over a three month period, a suspected member of Al'Qaeda was 'fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees to 10 degrees.'[29] Also in March 2003, the *New York Times* reported that a death certificate, signed by a US military pathologist, stated the cause of death of a 22 year-old Afghan detainee at Bagram Air Base in December 2002 as 'blunt force injuries to lower extremities complicating coronary artery disease.'[30] The form gave the pathologist four choices for 'mode of death': 'natural, accident, suicide, homicide'. She marked the box for homicide.

In July 2003, UN Secretary General Kofi Annan reported to the Security Council that his Special Representative for Iraq, the late Sergio Vieira de Mello, had expressed concern to the United States and Britain about their treatment of thousands of detained Iraqis. One week later, Amnesty International claimed that US forces in Iraq were resorting to 'prolonged sleep deprivation, prolonged restraint in painful positions – sometimes combined with exposure to loud music, prolonged hooding and exposure to bright lights'.[31]

Regrettably, the reports failed to attract widespread media attention until March 2004, when it became known that the *New Yorker* was about to publish photographs of prisoner abuse at Abu Ghraib Prison near Baghdad, together with a damning report by investigative journalist Seymour Hersh. At this point, CBS television decided to air photographs it had been suppressing for several weeks, reportedly at the behest of the Bush administration. The photographs showed detainees stripped naked, ridiculed, piled on top of each other, being raped, forced to masturbate, bitten by dogs, and terrorised with the threat of electrocution. The actions were blatant violations of international humanitarian law.

Given the proximity to the 2003 Iraq War, it is likely that some of the detainees at Abu Ghraib were prisoners of war. If so, the captors who abused them violated the Third Geneva Convention, Article 13 of which provides that POWs 'must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.'[32] To reinforce the point, Article 14 stipulates that prisoners of war 'are entitled in all circumstances to respect for their persons and their honour'.

Any of the captives at Abu Ghraib who were not prisoners of war were probably still protected by Common Article 3 of the Geneva Conventions. This provision requires that, even in armed conflicts not of an international character (as, arguably, the situation in Iraq had become), persons taking no part in the hostilities are protected absolutely from 'violence to life and person, in particular murder of all

[28] Dana Priest and Barton Gellman, 'US Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities', *Washington Post*, 26 Dec. 2002, A1.

[29] Don Van Natta Jr.,' Questioning Terror Suspects In a Dark and Surreal World', *New York Times*, 9 March 2003, p. 1.

[30] Carlotta Gall, 'US Military Investigating Death of Afghan in Custody', *New York Times*, 4 March 2003, A14.

[31] Amnesty International, 'The Threat of a Bad Example – Undermining International Standards as ''War on Terror'' Detentions Continue', AI Index: AMR 51/114/2003, 19 August 2003, available at ⟨http://web.amnesty.org/library/Index/ENGAMR511142003⟩.

[32] *Third Geneva Convention relative to the Treatment of Prisoners of War*, available at ⟨http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions⟩.

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kinds, mutilation, cruel treatment and torture' as well as 'outrages upon personal dignity, in particular, humiliating and degrading treatment'.

Regardless of the status of the detainees, some of the outrages committed against them were violations of their right not be tortured. This fundamental rule of customary international law was codified prominently in the 1984 Convention against Torture, a treaty ratified by the United States. Article 1 of the Convention defines torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[33]

A confidential memorandum, prepared for Secretary of Defense Rumsfeld by a group of Bush administration lawyers in March 2003 and obtained by the *Washington Post* in June 2004, argued that the President was not bound by the provisions of the Third Geneva Convention or the Convention against Torture, at least insofar as these international rules have been implemented in US domestic law.[34] The analysis was based on an earlier Department of Justice memorandum that made a series of dubious assumptions – including that none of the detainees were prisoners of war and that customary international law and US federal law are hermetically sealed from each other – that together transformed legal analysis into an exercise in politically motivated justification. The memorandum was written by John Yoo, a political appointee who has since returned to his regular position as a law professor at the University of California, Berkeley. The *New York Times* reported that the then State Department Legal Adviser, William Taft IV, dissented from the group's analysis and its conclusions, 'warning that such a position would weaken the protections of the Geneva Conventions for American Troops'.[35]

The abuse of detainees engages the responsibility not only of individual soldiers. Under a principle of international criminal law known as 'command responsibility', individuals higher in the chain of command – including defense secretaries and presidents who serve as commanders-in-chief – may also commit war crimes if they know, or have reason to know, that their subordinates are committing or about to commit crimes and fail to take all feasible steps to prevent or stop them. The existence of memoranda seeking to justify war crimes, originating from the central legal offices of the White House, Pentagon and Department of Justice, certainly suggests that in this instance there was knowledge well up the chain of command.

Additional violations of international humanitarian law were committed when the International Committee of the Red Cross was denied access to some parts of Abu Ghraib Prison, and to some detainees, as reportedly occurred early in 2004. Under the 1949 Geneva Conventions and the 1977 Additional Protocols, the ICRC is

[33] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, available at ⟨http://www.ohchr.org/english/law/cat.htm⟩.

[34] Dana Priest and R. Jeffrey Smith, 'Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002', *Washington Post*, 8 June 2004, A1.

[35] Neil A. Lewis and Eric Schmitt, 'Lawyers Decided Bans on Torture Didn't Bind Bush', *New York Times*, 8 June 2004, A1.

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mandated to visit and register prisoners of war. This right of access is essential because it promotes the good treatment of prisoners of war and ensures they do not disappear. Although the ICRC traditionally does not publicly denounce governments that fail to uphold international humanitarian law – in order to preserve its neutrality, thereby ensuring future access to prisoners and civilians in need – it has, on several occasions since 2001, openly expressed concern about the actions of the United States.

Many of the ICRC's concerns persist today with regard to persons detained by the United States or its allies in a variety of known and unknown locations, including at a US airbase on the British-owned Indian Ocean island of Diego Garcia. The ICRC has not been provided access to these individuals – itself a violation – and there is no way of knowing whether they are being tortured, otherwise mistreated, or killed.

In the same context, a second confidential memorandum obtained by the *Washington Post* in October 2004 was reportedly used to justify a related war crime: the transfer of detainees out of occupied Iraq for interrogation elsewhere.[36] Article 49 of the Fourth Geneva Convention protects civilians during an occupation by unambiguously prohibiting 'individual or mass forcible transfers, as well as deportation of protected persons from occupied territory . . . regardless of their motive.' Indeed, one of the principal purposes of the Fourth Geneva Convention is to prevent persons from being moved out of an occupied territory and thus out of the oversight of the ICRC. The memorandum, which strains legal credulity, was written by Jack Goldsmith, who served as a political appointee in the Pentagon and Department of Justice and is now a professor of law at Harvard University.

Finally, even alleged terrorists are protected by a ban on extra-judicial killing found in customary international law and numerous human rights treaties. When it comes to extra-judicial killings, George W. Bush's State of the Union address in January 2003 included a seemingly indicative admission: 'All told, more than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate. Let's put it this way – they are no longer a problem to the United States and our friends and allies.'[37] Previous administrations at least paid lip service to the existence of normative constraints by concealing and denying their covert operations.

The existence of all this law-breaking is all the more troubling because of its possible effects on international humanitarian law. The problem is not so much that other countries will take up the dubious justifications advanced by US government lawyers and use them to support their own mistreatment of detainees, though there are certain arguments – such as an argument that a new category of 'unlawful combatants' should be read into the Third Geneva Convention alongside prisoners of war and civilians – that have resonated with some decision-makers and commentators. The problem, rather, is that the United States has abdicated its position as the leading champion of strong protections for combatants and civilians during and after armed conflict. Instead of serving as a positive role model for other countries, the United States undermines the rules by demonstrating contempt for them. The long-term effects of this negative signalling should not be underestimated. Even in better times, protections for individual human beings rarely counted among the

[36] Dana Priest, 'Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions', *Washington Post*, 24 October 2004, A1.

[37] President George W. Bush, State of the Union, 28 January 2003, available at: ⟨http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html⟩.

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principal interests of states. In a world in turmoil after 11 September 2001 and America's subsequent over-reaction, secondary interests are more easily sacrificed, particularly when no country has, as yet, assumed the positive leadership role left vacant by the United States.

Analysis

Hegemonic powers have always shaped the international legal system to their advantage. In the sixteenth century, Spain redefined basic concepts of justice and universality to justify the conquest of indigenous Americans. In the eighteenth century, France developed the modern concepts of borders and the 'balance of power' to suit its continental strengths. In the nineteenth century, Britain introduced new rules on piracy, neutrality and colonialism, again to suit its interests as the leading country of the age.[38]

In the early twenty-first century, when there is little prospect of a conventional war being fought on US territory, there are those who argue that the interests of the United States would be advanced by eliminating the legal restrictions on the use of force.[39] At the same time, however, the United States regularly depends on allies who value and abide by international law. On other occasions, the United States finds it useful to deploy legal arguments when seeking to persuade others not to use force themselves. This combined desire for flexibility, constraint and general compliance would seem to be one of the factors behind the law-making and law-changing efforts of the United States, as seen in several of the examples above. Even when the US government wishes to act inconsistently with international law, it usually seeks to justify its behaviour in legal terms. Moreover, its lawyers regularly and actively seek to change the law, by renouncing existing treaties or negotiating new ones, or by provoking and steering changing patterns of behaviour with a view to modifying customary rules and widely accepted treaty interpretations. They do not generally seek an absence of legal constraints.

The administration of George W. Bush has been particularly well placed to modify international law, having inherited a country with almost unprecedented military, economic and political power. The events of 11 September 2001 strengthened its position yet further, generating global concern about terrorism, widespread sympathy for the United States, and concern about what might happen to those that stood in its way. The President's advisers have taken full advantage of the situation, applying pressure in pursuit of goals that, under normal circumstances, would have been more difficult to achieve. Among these goals has been greater flexibility to use force outside the UN Charter, and more leeway in the treatment of detainees.

To the degree the Bush administration succeeds in its law-changing efforts – and it has not yet succeeded with regard to pre-emptive self-defence and the treatment of detainees – its successes will have deleterious effects. Whenever it creates greater

[38] See generally, Wilhelm G. Grewe, *The Epochs of International Law* translated and revised by Michael Byers, (Berlin: Walter De Gruyter, 2000).

[39] See John R. Bolton, 'Is There Really "Law" in International Affairs?' *Transnational Law & Contemporary Problems*, 10 (2000), p. 1; Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (New York: Palgrave Macmillan, 2001).

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flexibility to use force, it contributes to marginalising the United Nations in the field of international peace and security, thus rendering it more difficult for governments to draw upon this important source of legitimacy for the use of military force. Whenever it seeks more leeway in the treatment of detainees, it squanders moral authority and the capability to influence and persuade. All this in turn diminishes the potential for cooperative, multilateral responses to threats and breaches of the peace – responses that would share the military and financial burdens of intervention among larger numbers of countries, and reduce the resentments that armed interventions so easily feed.

Yet the international rules on military force have proven quite resilient in the face of US efforts. This is probably due to several factors, including a widespread realisation that the changes sought would result in less rather than more international peace and security. Governments everywhere are now aware that, while terrorism can cause great destruction and upheaval, efforts to stamp it out can serve as a smokescreen for the pursuit of less worthy goals, or at least have serious unanticipated consequences. Even some of the United States' closest allies, while providing strong support for the American people, have begun providing cooperation on specific issues only after careful consideration of their best interests, which prominently include the maintenance of a just, strong, equal and effective system of international law.

A second factor explaining the resilience is that rules, by their very nature, are more resistant to change than many of the other components of the international system. Indeed, a norm or standard can hardly be considered a rule if it is subject to alteration at the whim of those whom it supposedly constrains. And some rules of international law are more resistant to change, more deeply embedded in the international system, than others.[40] In the case of customary international law, this resistance to change develops through the gradual accretion of state practice and *opinio juris* (a subjective belief in the existence of obligation). In the case of treaties, resistance develops through the widespread ratification of the treaty in question, which renders renegotiation difficult, or through the inclusion of a super-majority requirement or veto in the treaty's amendment provisions. Not surprisingly, some of the international legal system's most resistant rules protect foundational aspects of state sovereignty, such as the right of non-intervention, or core aspects of human dignity such as the prohibition on torture. It could take decades before the full impact of the United States' post-Cold War rise to hegemonic status, together with the paradigm-shifting events of 11 September 2001, is manifested in the rules governing recourse to military force, the conduct of hostilities, and the treatment of detainees.

A third factor in the resilience of the rules on military force could be the growing complexity of the international legal system and the multiplicity and diversity of actors involved in it. During the 1990s, academic commentators ascribed considerable significance to the decline of the sovereign state and the rise of intergovernmental organisations, transnational corporations and NGOs. It is indisputable that non-state actors such as the International Committee of the Red Cross and Amnesty International play an important role in the maintenance, development and change of international rules. The contemporary international legal

[40] See generally, Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999).

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system involves a matrix of diverse law-making interests and influences that make it qualitatively different from previous configurations of that system, and more difficult for hegemonic influence to be exercised.[41]

At the same time, the impact of a larger and more varied group of actors may be less significant with regard to rules, such as those on military force, that operate in areas where the monopoly of state power remains relatively unchallenged. The need for analytical caution is particularly evident when one considers the scale of US military predominance: troops deployed in over 140 countries and a defence budget that comprises 47 per cent of global military expenditures.[42] One of the more startling consequences of 11 September 2001 has been the return of the state as the dominant force in international affairs, with security as its central obsession.

Finally, it is not clear that one should wish to deny the United States significant influence on the making and changing of the international rules governing military force. Although the United States has an interest in maintaining a system of widely agreed rules, both to facilitate cooperation and to constrain others, it is also powerful enough to walk away from these rules, or at least to frequently violate them – if it felt its particular circumstances and interests were not adequately taken into account. The international community thus finds itself in a peculiar position: unable to impose new rules on the single superpower, able to impede its law-changing efforts, and fully aware that too much intransigence could carry a heavy price. It is therefore important that we pay attention to US perspectives and interests concerning the use of military force, while standing firm in defence of existing rules if and when the United States unreasonably violates or otherwise seeks to undermine them. The prevention of havoc involves an ongoing effort to keep the rules in place *and* to keep the powerful within the rules. That effort may have been a struggle of late, but the dogs of war remain closely leashed.

[41] See Grewe, *Epochs of International Law*, Epilogue.

[42] See *SIPR Yearbook 2005* (Stockholm: Stockholm Institute for Peace Research, 2005), summary at: ⟨http://yearbook2005.sipri.org/pressrl/SIPRIYB2005PRfinal.pdf⟩.

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