Scientia Militaria, South African Journal of Military Studies, Vol 48, Nr 1, 2020. doi: 10.5787/48-1-1296

Book Review

WAR, AGGRESSION AND SELF-DEFENCE

Yoram Dinstein

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Cambridge: Cambridge University Press
2017, 405 pages
ISBN: 978-1-316-64166-8

This review is written against the background of the continuing Syrian conflict, and specifically Operation Peace Spring, the Turkish military intervention in northern Syria ostensibly aimed at creating a safe zone there for the resettlement of Syrian refugees present on Turkish territory. In terms of international law, the legality of this Turkish action has been analysed in some detail by a number of commentators and analysts in the popular media and on academic websites and blogs, illustrating that the branch of international law known as the *jus ad bellum* – the law with respect to the legality of war – remains one of the most dynamic and interesting fields of international law and international relations.

Compared to a previous era, when most armed conflicts involved armed forces of opposing states, most contemporary conflicts are so-called 'new wars', conducted by loose and fluid state-related and non-state groups, often with a cross-border character.[1] This evolution of war feeds dynamic discourses on the *jus ad bellum* and related topics, resulting in a considerable body of academic literature with a number of books[2] and even a dedicated academic journal[3] being published.

Yoram Dinstein's book, *War, aggression and self-defence*, now in its sixth edition, covers the 'older' and 'new wars' comprehensively and with aplomb. Dinstein, professor emeritus of Tel Aviv University, is a noted expert on the *jus ad bellum*, the *jus in bello* (the law related to the conduct of hostilities) and related topics, with a number of books and academic articles to his credit. This work is a focused, analytical and in-depth examination of the scope and content of the *jus ad bellum*, without venturing into related matters, such as the law of peacekeeping or disarmament and arms control.

The book is organised into three parts. Part I focuses on the legal nature of war. Chapter 1 deals with the definition of war, the territory of war (including outer space and the high seas) and the principles applicable to the law of neutrality. Chapter 2 titled 'The

course of war', explores how and when wars and hostilities are started and terminated: cease-fires, armistices and peace agreements.

Part II is titled 'The illegality of war'. The first chapter provides a historical overview of the just war theory, which aims to provide a legal basis for war when certain conditions are present. The development of this theory is traced back to its origins in Roman law, through the influence on it by Christian theology (notably by the philosopher-priest St Thomas Aquinas) and to the contributions by the Spanish monk Vitoria and the Dutch lawyer Grotius, who laid the foundations of international law in the sixteenth and seventeenth centuries, as the modern state system developed after the conclusion of the Peace of Westphalia in 1648. More recent expositions of the just war theory are Kelsen's proposition that war is legal in response to a prior illegal act, and the somewhat contested theories regarding the legality of wars of national liberation and of the doctrine of humanitarian intervention (the latter being correctly interpreted narrowly, to exclude unilateral interventions). The chapter then proceeds to report on the first attempts to limit the recourse to armed force in treaty law, the Hague Conventions of 1899 and 1907, and the Covenant of the League of Nations.

The next chapter focuses on contemporary treaty-based prohibitions on the use of inter-state force. It is contended that the 1928 General Treaty for Renunciation of War as an instrument of national policy (the so-called 'Kellogg–Briand Pact') marks the point in history where the *jus ad bellum* progressed to the *jus contra bellum*. The *jus contra bellum* was confirmed as a peremptory norm of international law by the prohibition of the use or threat of inter-state force in Article 2(4) of the United Nations (UN) Charter of 1945, which has since developed into a norm of not only treaty, but also customary international law, therefore being binding upon all states. The chapter concludes with an overview of the responsibility of states resulting from the unlawful use of force, including with respect to the obligation to provide compensation and individual criminal liability. The last part of the chapter reports on the legal limits of intervention with the consent of the government of a state, briefly referring to consent-based treaties in the Economic Community of West African States (ECOWAS) and African Union contexts, concluding that treaty-based consent will remain subordinate to UN law.

Unlike some of the other works on the subject and in line with its title, Chapter 5 of the book discusses the crime of aggression in considerable detail. It traces the historical development of this crime since the inclusion of the principle of individual criminal liability for waging aggressive war in the Treaty of Versailles (1919), through the Nuremberg International Military Tribunal (1946) to the Rome Statute of the International Criminal Court (2000). At the same time, it provides an overview of the process of defining the crime, analysing the somewhat problematic nature of the definition as well as the conditions for the exercise of jurisdiction. This is followed by the conditions applicable to individual criminal liability and immunities from jurisdiction. With respect to head of state immunity, the book has unfortunately been published before the decision by the Appeals Chamber of the International Criminal Court (ICC) in the *Jordan case*,[4] holding that heads of state do not enjoy immunities from the jurisdiction of the ICC. This section is concluded by a short chapter on the

effects the illegal use of force may have on the application of the *jus in bello,* the neutrality principle and territorial changes resulting from the illegal use of force.

Part III deals with exceptions to the prohibition of the use of force. The first chapter in Part III reflects an analysis of the right to self-defence in response to the occurrence of an armed attack, as provided for in Article 51 of the UN Charter, confirming that such a right existed in customary international law before the adoption of the Charter. The relationship between the concept of 'armed attack' and the prohibition of the 'use of force' in international relations provided for in Article 2(4) of the Charter, is then explored, after which the chapter proceeds to provide an excellent overview of the various discourses relating to the occurrence of and response to an armed attack, notably –

- the controversial doctrine of pre-emptive self-defence;
- the conditions for the existence of an armed attack (invoking the right to self-defence);
- the right to self-defence in response to an armed attack by non-state actors post 9/11; and
- the conditions required for action taken in self-defence: necessity, proportionality and immediacy.

How and under which conditions a state may react in self-defence, are discussed in the next chapter of Part III. The first part concentrates on measures available in case of an armed attack by a state, while the second explores measures available if such an attack is launched from the territory of another state by a non-state actor. As regards attacks from a state, the author distinguishes between measures short of war (armed reprisals where force is used, but which fall short of war) and war as a measure of self-defence, analysing the conditions of necessity, proportionality and immediacy as applicable in both cases. The chapter concludes with a discussion on the legal principles and state practice applicable to self-defence by a state against armed groups attacking it from the territory of another state.

The author then proceeds to collective self-defence and collective security. As the International Court of Justice found in the *Nicaragua case,*[5] the right to collective self-defence emanates not only from Article 51 of the UN Charter, but also from customary international law. However, the contours of this right are not very clear, and in Chapter 9 the author organises this right into four categories of collective self-defence available to states (namely the right to individual self-defence being exercised individually or collectively, the right to collective self-defence being exercised by states on an individual basis, or by states acting collectively), and the legal authority provided for in Article 52(1) of the UN Charter for collective self-defence based on treaties or the mandates of regional organisations. The chapter concludes with an analysis of the exercise of collective self-defence by the international community on the basis of the UN Charter in the case of the first Gulf war of 1991–1992.

The concluding chapter deals with collective security arrangements, which could serve as a legal basis for the use of force when exercised in pursuance of the mandate of an international organisation. The right to decide to use force is therefore not granted to every single state, but only to an organ of the international community. The concept has its roots in the League of Nations, and forms the cornerstone of the United Nations, with the Security Council being mandated in the Charter to authorise the use of force in case of a threat to or breach of the peace or an act of aggression.

A discussion of the scope of the Security Council's powers and its decision-making process is followed by an overview of cases in which these powers have been exercised, as well as the relationship of the Council to NATO, specifically focusing on the legality of the NATO military intervention in Kosovo in 1999 without Security Council authorisation. The competence of the UN General Assembly in matters pertaining to international peace and security where the collective use of force may be exercised, is interpreted – in this reviewer's view correctly – as being limited to non-binding recommendations. The chapter concludes with an analysis of the relationship between the Security Council and the International Court of Justice, both UN organs, in cases where their separate but complementary functions may be exercised with respect to the same event.

While this book has considerable academic merit, it does not have theoretical pretensions. Its strong point is its clarity and accessibility and its focus on the needs of practitioners, both military and non-military. The diplomat serving her or his country at the United Nations, the planners of a military operation or the instructor at a military academy will all derive equal benefit from it. Dinstein's interpretation of the law on the use of armed force is narrow and non-speculative; it is left to other commentators in the field to push the boundaries outwards by means of theories aimed at extending the legal limits of the use of force. The sources referred to in the work are embedded in the *lex lata*, the law as it is: treaties, the practice of states, case law of both domestic courts and international courts and tribunals, and resolutions of the UN Security Council, while not neglecting the considerable academic contribution being made to this field. This book remains a work of solid and authoritative scholarship.

ENDNOTES

[1] See C Chinkin & M Kaldor. *International law and new wars.* Cambridge: Cambridge University Press, 2017.

[2] Notably C Gray. *International law and the use of force.* Oxford: Oxford University Press, 2018; C Henderson. *The use of force and international law.* Cambridge: Cambridge University Press, 2018; R Cryer & C Henderson (eds). *Law on the use of force and armed conflict.* Cheltenham: Edward Elgar, 2017; M Weller (ed). *The Oxford handbook on the use of force in international law.* Oxford: Oxford University Press, 2015.

[3] *Journal on the Use of Force and International Law.*

[4] *Situation in Darfur, Sudan. In the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir,* No. ICC-02/05-01/09 OA2.

[5] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* 1986 ICJ Reports 14.