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0521845319 - International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey

Edited by Richard Burchill, Nigel D. White and Justin Morris

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Hilaire McCoubrey and international conflict and security law

NIGEL D. WHITE

Introduction

Hilaire was a prolific writer. Although he died at the early age of forty-six while on a lecturing visit to Pakistan in April 2000, he had written or co-written ten books in the areas of international humanitarian law,¹ collective security law,² legal theory³ and even planning law.⁴ His output in terms of journal publications was similarly impressive with, for example, seminal articles in the *International and Comparative Law Quarterly*,⁵ *La Revue de Droit Militaire et de Droit de la Guerre*,⁶ the *International Review of the Red Cross*,⁷ *International Relations*,⁸

¹ H. McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (1st edn, Dartmouth, 1990); M. A. Meyer and H. McCoubrey (eds.), *Reflections on Law and Armed Conflicts: Selected Works on the Laws of War by the Late Professor Colonel G. I. A. D. Draper, OBE* (Kluwer, 1998).

² H. McCoubrey and N. D. White, *International Organizations and Civil Wars* (Dartmouth, 1995); H. McCoubrey and N. D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth, 1996); H. McCoubrey and J. Morris, *Regional Peacekeeping in the Post Cold-War Era* (Kluwer, 2000).

³ H. McCoubrey, *The Development of Naturalist Legal Theory* (Croom Helm, 1987); H. McCoubrey and N. D. White, *Textbook on Jurisprudence* (3rd edn, Blackstone Press, 1999); *The Obligation to Obey in Legal Theory* (Dartmouth, 1997).

⁴ H. McCoubrey, *Effective Planning Appeals* (BSP Professional, 1988).

⁵ H. McCoubrey, 'From Nuremberg to Rome: Restoring the Defence of Superior Orders', (2001) 50 *International and Comparative Law Quarterly* 386.

⁶ H. McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity', (1991) 30 *La Revue de Droit Militaire et de Droit de la Guerre* 217; H. McCoubrey, 'Medical Ethics, Negligence and the Battlefield', (1995) 34 *La Revue de Droit Militaire et de Droit de la Guerre* 103.

⁷ H. McCoubrey, 'Before "Geneva" Law: A British Surgeon in the Crimean War', (1995) 304 *International Review of the Red Cross* 69.

⁸ N. D. White and H. McCoubrey, 'International Law and the Use of Force in the Gulf', (1991) 10 *International Relations* 347; H. McCoubrey, 'The Armed Conflict in Bosnia

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International Peacekeeping,⁹ the *Journal of Armed Conflict Law* and its successor the *Journal of Conflict and Security Law*.¹⁰ Quite often his calling as a minister in the Church of England was reflected in his work.¹¹ This, by no means complete, catalogue of Hilaire's writings is sufficient to show that he covered the whole spectrum of international law relating to armed conflict from the pre-conflict stage when the issues include those of arms control,¹² disarmament and conflict prevention, through the outbreak of armed conflict and discussion of the legality of resort to force (the *jus ad bellum*), to the coverage of the conduct of military operations and the protection of non-combatants by international humanitarian law (the *jus in bello*). He also covered collective security mechanisms that are applicable throughout these different stages.

The *jus ad bellum* and the *jus in bello* are terms still deployed by international lawyers, concerning the law governing the use of force in international relations and the law governing the conduct of hostilities. Hilaire's work covered both areas as well as the wider aspects of collective security and arms control, though he is probably best known for his work in the *jus in bello*, or to use its more modern term, international humanitarian law, with the publication of his leading text *International Humanitarian Law* in 1990.¹³ In her review of the book, Susan Marks noted that it should serve the essential function of being a 'companion volume to the humanitarian treaties', and thus should secure an 'appreciative readership'.¹⁴ It certainly achieved both of these aims. Hilaire's ethical, but at the same time practical, approach to the subject was reflected in the Preface to the second edition of this book:

and Proposed War Crimes Trials', (1993) 11 *International Relations* 411; H. McCoubrey, 'International Law and National Contingents in UN Forces', (1994) 12 *International Relations* 39; H. McCoubrey, 'Kosovo, NATO and International Law', (1999) 14 *International Relations* 29.

⁹ J. Morris and H. McCoubrey, 'Regional Peacekeeping in the Post Cold-War Era', (1999) 6 *International Peacekeeping* 129.

¹⁰ H. McCoubrey, 'The Concept and Treatment of War Crimes', (1996) 1 *Journal of Armed Conflict Law* 121; H. McCoubrey and J. Morris, 'International Law, International Relations and the Development of European Collective Security', (1999) 4 *Journal of Armed Conflict Law* 195; H. McCoubrey, 'The Protection of Creed and Opinion in the Laws of Armed Conflict', (2000) 5 *Journal of Conflict and Security Law* 135.

¹¹ *Ibid.*

¹² For example, F. Hampson and H. McCoubrey, 'Giving Legal Evidence in Proliferation Cases', in J. Dahlitz (ed.), *Future Legal Restraints on Arms Proliferation: Arms Control and Disarmament Law* (United Nations, 1996), p. 25.

¹³ McCoubrey, *International Humanitarian Law*, (1st edn).

¹⁴ S. Marks, (1990) 49 *Cambridge Law Journal* 525 at p. 526.

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This book seeks to emphasise that international humanitarian law is no Utopian aspiration – there is nothing ‘Utopian’ about any aspect of war – but a severely practical prescription which is entirely workable in the harsh exigencies of warfare. Obedience to it does not impede legitimate military efficacy, nor does violation gain any real advantage, but merely gains the perpetrator a deserved reputation for barbarism, to the detriment of its relations with other states.¹⁵

Considering the continued prevalence of warfare since the inception of the United Nations in 1945, it is remarkable that international humanitarian law was, until the advent of the international criminal tribunals in Yugoslavia and Rwanda in the mid-1990s, treated by mainstream international lawyers as a bit of a backwater. This is reflected in Susan Marks’ review of the first edition of *International Humanitarian Law* when she wrote that ‘if it was ever thought to be an esoteric subject of little contemporary relevance, recent events show that this is unfortunately not so’.¹⁶ Hilaire’s approach to the subject was to focus on the rules and principles of international humanitarian law and on the education of those involved in warfare, whether soldiers or politicians, in the law and its importance. He did not believe for an instant that there was a contradiction in espousing the necessity of rules embodying basic principles of humanity in a context where the normal peacetime rules against killing and destruction are basically suspended. The point Hilaire never tired of making is that war did not signify that any amount of death and destruction was permitted; it should and could be regulated. This was the issue he grappled with in his inaugural lecture to mark his appointment to a Chair at the University of Hull in 1996.¹⁷

Furthermore, Hilaire always saw the *jus ad bellum* and the *jus in bello* as two halves of a whole subject underpinned by a coherent philosophical framework. In 1992, while colleagues together at Nottingham University, we published a co-authored work *International Law and Armed Conflict*¹⁸ which was intended as a textbook to cover the whole area. Although the work was divided evenly, Hilaire was almost exclusively the inspiration behind, and the writer of, the introductory chapter that still provides a most insightful explanation of the coherence of the

¹⁵ H. McCoubrey, *International Humanitarian Law* (2nd edn, Dartmouth, 1998), p. vii.

¹⁶ S. Marks, (1990) 49 *Cambridge Law Journal* 525.

¹⁷ H. McCoubrey, *International Laws of Armed Conflict: Practical Prescription or Dangerous Utopia?* (Hull University Press, 1997).

¹⁸ H. McCoubrey and N.D. White, *International Law and Armed Conflict* (Dartmouth, 1992).

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whole subject area, while maintaining a firm distinction between the *in bello* and *ad bellum* limbs. The chapter is largely reproduced in the following section as part of an introductory chapter to this work, in which the contributors take a number of the difficult and controversial topics raised in that introductory work a great deal further. It seems fitting that Hilaire's approach to the subject matter should form the framework of enquiry for the current collection of essays in his memory.

Law and war: the theory of constraint¹⁹

War or armed conflict, the technically preferable general term, represents a major breakdown of the 'normal' conduct of international relations. It is also, tragically, a recurrent feature of the modern world and provision is accordingly made for its potential occurrence in public international law. This provision comprises principally the *jus ad bellum*, relating to resort to armed force in the conduct of international relations, and the *jus in bello*, relating to constraints upon the actual conduct of hostilities, and forms the subject matter of this book. It is appropriate before considering the substance of the law to examine as a preliminary issue its theoretical bases. In the particular case of the laws of armed conflict this is especially important since its very existence involves an apparent paradox.

The post-1945 world legal order enshrined in the Charter of the United Nations proscribes, by Article 2(4) of the Charter, the threat or use of force against the territorial integrity of a state, building upon and strengthening earlier principles and provisions which failed at the onset of the Second World War. The Charter does however, by Article 51, admit resort to armed force in the exercise of an 'inherent right of individual or collective self-defence' in the event of an 'armed attack', pending 'measures' being taken by the UN Security Council. Under Chapter VII of the Charter, the Security Council itself may authorize forceful measures to restore peace and security. These principles involve in application a complex canon of interpretation, but the broad conceptual base is clear enough. Discounting bizarre and unlikely circumstances of error, armed conflict will generally result from *prima facie* unlawful acts by one or more of the states involved and may to that

¹⁹ This is drawn from McCoubrey and White, *International Law and Armed Conflict*, ch. 1, with kind permission of Ashgate Publishers. Some footnotes and text have been omitted.

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extent be considered an unlawful condition of international relations. In this context the making of regulatory provision, beyond a simple ban, in anticipation of such a situation has a strongly paradoxical appearance and requires explanation. Beyond this, there must too be considered the practical viability of such regulation, a matter which is perhaps most problematic in the context of the *jus in bello*.

The logic of formal limitations upon armed force

The great Prussian military theorist Karl von Clausewitz stated in his classic work *Vom Kriege* that '[w]ar . . . is an act of violence intended to compel our opponent to fulfil our will',²⁰ adding the elaboration that:

War is . . . a real political instrument, a continuation of political commerce, a carrying out of the same by other means. All beyond this which is strictly peculiar to War relates merely to the peculiar nature of the means which it uses.²¹

These statements may of course be greatly elaborated, but the essential depiction of armed conflict as a pursuit of policy objectives, including national self-defence, by means of military force leading to actual hostilities may surely be accepted as accurate. Once armed conflict has actually commenced its limitation presents difficulties. Clausewitz makes the point succinctly in the following comment:

[H]e who uses force unsparingly, without reference to the bloodshed involved, must obtain a superiority if his adversary uses less vigour in its application . . . [F]rom the social condition both of States in themselves and in their relations to each other . . . War arises, and by it War is . . . controlled and modified. But these things do not belong to War itself, they are only given conditions; and to introduce into the philosophy of War itself a principle of moderation would be an absurdity.²²

This seemingly brutal passage must be read carefully and upon examination can be seen not only to state a problem but to resolve it. Whether or not armed conflict could upon an absolute level be made subject to 'a principle of moderation', such conflicts do in practice take place in the political society of the community of nations. That 'society' embodies certain

²⁰ Karl von Clausewitz, *Vom Kriege* (Berlin, 1832); F. N. Maude (ed.) (J.J. Graham (trans.), Routledge, 1982), p. 101.

²¹ *Ibid.*, p. 119. ²² *Ibid.*, p. 102.

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expectations which are in part enshrined in public international law and these expectations determine the 'given conditions' even under the ultimate stress of armed conflict. Expectations are not, of course, necessarily fulfilled and it would be foolish to pretend that legal moderation of hostilities is invariably successful. Nonetheless, the pressures for compliance with communal expectation are by no means negligible for any person, or in this case state, which aspires to be a fully participant member of the society concerned. An analogy is sometimes sought to be drawn between the community of nations and 'primitive', meaning non-technological, human societies. Such an analogy must be treated with great caution, but in the sense of the relative weakness of central institutions vis-à-vis the periphery and the importance of customary norms and the role of 'self-help' in the performance of 'legal' tasks it is not without value. In the context of legal anthropology Simon Roberts has written:

Some degree of order and regularity must be assured if social life in any community is to be sustained. This state need not be one of quiet harmony, and indeed societies differ widely as to the amount of friction and disorder which their members seem able to tolerate; but conditions must be such that ... an element of order [can] ... endure over time within the group.²³

The analogy with violent resort in the international community may here be considered of some value in so far as the point is made that communal expectations do not terminate at the point of resort to violence but reach even into it.

If law may be accepted as having a role even in the collapse of international relations, the question then becomes one of the nature of the limiting 'given conditions' implicit in the expectations of the international community. Although Clausewitz directed his observations largely to what is now termed the *jus in bello*, the same general issue arises in the context of the *jus ad bellum*. The 'given conditions' derive ultimately from perceptions of armed conflict and here a broad spectrum of thought exists.

Philosophies and wars

There are those who in various ages have considered armed conflict a positive benefit. Before the First World War, Fieldmarshal von Mackenson

²³ S. Roberts, *Order and Dispute* (Penguin, 1979), p. 30.

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was reported to hold the view that each generation should have a war to toughen it. The more general opinion, across a range of times and cultures, has been that hostilities may on occasion be ‘necessary’ to avert a yet worse evil but are not in themselves desirable. Warfare was far from being condemned in either ancient Greece or Rome, but in the *Nichomachean Ethics* Aristotle wrote, in a discussion of the relation of happiness and leisure:

[W]e make war in order that we may live at peace . . . [N]obody chooses to make war or provokes it for the sake of making war; a man would be regarded as a bloodthirsty monster if he made [friendly states] . . . into enemies in order to bring about battles and slaughter.²⁴

This is certainly reflected by political rhetoric in cases of armed conflict and those who, like Adolf Hitler, transparently did manoeuvre in order to engender war have indeed emerged with the reputation of ‘bloodthirsty monsters’. On the other side of the planet, classical Chinese thought was more overtly ‘pacific’, including both the ‘official’ Confucianism adopted as the Imperial ideology by the Han and later dynasties and Taoism which on many other issues diverged sharply from Confucian orthodoxy. The second great Confucian thinker, Mencius (Meng K’e), wrote:

Confucius rejected those who enriched [evil] rulers . . . How much more would he reject those who do their best to wage war on their behalf. In wars to gain land, the dead fill the plains; in wars to gain cities, the dead fill the cities . . . Death is too light a punishment for such men.²⁵

The Taoist classic *Tao-Te Ching*, attributed to Lao Tzu, states more concretely that:

One who assists the ruler of men by means of the way does not intimidate the empire by a show of arms . . . [A good commander] aims only at bringing his campaign to a conclusion . . . but only when there is no choice; bring it to a conclusion but do not intimidate.²⁶

These views involve, variously, both *jus ad bellum* and *jus in bello* concerns, but clearly treat warfare as, at most, an evil necessity. Against this background, military endeavour in classical China was, at least until

²⁴ Aristotle, *Nichomachean Ethics*, 1177b; H. Tredennick (ed.) (J. A. K. Thomson (trans.), revised edn, Penguin, 1976), p. 329.

²⁵ *The Mencius*, IVa: 13, (D. C. Lau (trans.), Penguin, 1970).

²⁶ Lau Tzu, *Tao-Te Ching*, xxx, 69, 69b (D. C. Lau (trans.), Penguin, 1970).

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the Ch'ing (Manchu) conquest in 1644, in theory accorded lower status than civil activity. In practice, however, this by no means necessarily inhibited military initiatives.

Judaeo-Christian thought has contributed a rather different strand of theory which, notwithstanding the vision of Christ as 'Prince of Peace', includes a somewhat misunderstood concept of 'Holy War'. Islamic thought includes the parallel concept of *jihad* or war of duty. From the same general sources comes an idea of 'just warfare' which requires comment in the immediate context. Ideas of *bellum justum* or just war have acquired an evil reputation summarized by Jean Pictet in his description of:

the well known and malignant doctrine of the 'just war' ... [which] did nothing less than provide believers with a justification for war and all its infamy ... [E]very effort has been made on every occasion to justify aggression ... [and] to justify the cruelties which abounded in [a] ... sanguinary age.²⁷

This was undoubtedly the effect of abuse of the doctrine in its various forms, but in its origin it was an attempt to limit resort to armed force to justified causes. This became necessary when Christianity was adopted by Constantine the Great as the official religion of the Roman Empire and the Church was obliged to develop a conceptual framework for its relations with the secular life of the Empire. The true intent can be seen in the, much later, thirteenth century criteria for a just war set out by St Thomas Aquinas, who, in summary, wrote that war is in principle a sin because punishment is ordained only for sin and Scripture tells us that all who draw the sword shall die by it.²⁸ War may, however, be just where it is used to remedy wrongdoing by those intending to advance virtue and avert evil.

The currency of this particular form of just war theory may be considered to have ended with the 1648 Treaty of Westphalia which concluded the Thirty Years War. In the succeeding era, less emphasis was placed upon the justification of causes, in law if not in practice. The incident of the Ems telegram used by Bismark to elevate a heated dispute over the Hohenzollern candidature for the throne of Spain into the 1870 Franco-Prussian War may serve as an illustration of the continuing

²⁷ J. Pictet, *Development and Principles of International Humanitarian Law* (Nijhoff, 1985), pp. 13–14.

²⁸ St Thomas Aquinas, *Summa Theologica*, 2a2ae. 40, 1.

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practical importance of 'causes'. The *jus ad bellum* as it has developed since the First and Second World Wars has to some extent returned to a concern with causes. Not to 'just war' concepts *stricto sensu* but at least to formalized concepts of 'justifiable' exceptions to a *prima facie* general proscription of resort to armed force in the conduct of international relations. Modern concepts of 'self-defence' and 'national liberation', the latter owing some of its modern shape to post-1917 developments in 'socialist' thought, fit this mould. Such ideas, like the earlier *bellum justum* theories, are of course open to abuse. In the earlier part of the modern era, the use by Hitler of the *auslanddeutsch* population in post-1918 Czechoslovakia as a cover for aggression provides a clear illustration, even granted that self-determination was at the time more a 'political' than a juridical concept.

In both its essential aims and its attendant problems the basic doctrines of the modern *jus ad bellum* may perhaps be considered to represent a revised and strict form of a well established view of armed conflict as an evil occasionally 'necessary' for the aversion of some yet greater peril. Such a view conflicts, of course, with any idea of a human right to peace, advanced by a number of writers in the field of the laws of armed conflict.²⁹ An unqualified right to peace raises serious and extra-legal questions as to whether warfare is the worst conceivable evil in international society or whether some consequences of non-resistance might exceed it, the spectre of the Third Reich and other atrocious regimes being obviously an important element in such vexed debates. Whatever view of that issue may for the time being be taken, the focus of continuing contention in the modern *jus ad bellum* rests, and it is here suggested rests properly, upon the particular nature of the 'necessities' for military action which are to be recognized and their vulnerability to abuse.

The viability of constraints upon the conduct of hostilities

Whatever view is taken of resort to armed force in the conduct of international relations, it is an inescapable fact of the modern world that armed conflicts continue to occur. The legal constraints imposed upon their conduct by the *jus in bello* are clearly subject to the serious

²⁹ See G. Herzeg, *Development of International Humanitarian Law*, trans. (Sandas Simon and Lajos Czante (trans.), Akademiai Kiado, 1984).

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practical difficulties outlined more than a century and a half ago by von Clausewitz. Geoffrey Best has written:

The passionate and chancy business of war has never been and can never be helpful to the practice of that coolness and self-control which respect for any sort of law ideally requires.³⁰

One may agree that moderation in the use of armed force can never be prescribed with perfect effect and much may depend upon the extent of a particular conflict, for example whether or not continued national existence depends upon the outcome. A much more extreme viewpoint was expressed by the novelist Leo Tolstoy in his account of Napoleon's 1812 campaign against Russia. In a brief discussion of the relevance of 'rules' of warfare, published interestingly at about the time of the negotiation of the highly significant 1868 Declaration of St Petersburg, Tolstoy wrote in relation to the resistance 'guerilla' warfare that followed the occupation of Moscow:

From the time [Napoleon] . . . took up the correct fencing attitude in Moscow and instead of his opponent's rapier saw a cudgel raised above his head, he did not cease to complain to Kutuzov and to the Emperor Alexander that the war was being carried on contrary to all the rules, as if there were any rules for killing people.³¹

This rather crude statement of the primacy of force, which goes very far beyond anything which Clausewitz argued, was made by a proponent of broad pacifism. As to the rules of warfare in the early nineteenth century, the ideas of 'guerilla' warfare – the phrase derives from the Napoleonic occupation of Spain – and the *levée en masse* received little or no recognition but were in practice not unknown. The evidence suggests that the Russian army as such in the 1812 campaign was not markedly different in formal 'rectitude' from that of France, a point implicitly conceded by Tolstoy in criticism of the restraint counselled by members of the Imperial General Staff. Tolstoy's analysis suggests a

³⁰ G. Best, 'Preface' to M. A. Meyer (ed.), *Armed Conflict and the New Law*, vol. I, *Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (British Institute of International and Comparative Law, 1989), p. v.

³¹ L. Tolstoy, *War and Peace* (Moscow, 1868–9; L. and A. Maude (trans.), Macmillan, 1943), Book XIV, ch. 1, p. 1139. The Kutuzov referred to was Fieldmarshal Prince Gollenitshev-Kutuzov, appointed to command by Tsar Alexander I and generally praised for his cautious and successful conduct of the campaign, which relied heavily upon the harshness of the Russian winter.