PART I

Development of the Contemporary *jus ad bellum* in International Law

1

Introduction

There is abundant literature on the use of force under international law; much of which is of a very good quality, so why add another book to the tall stacks of publications that already exist on the topic? This book will certainly not resolve all the controversies relating to the use of force. Nevertheless, we do hope to make a worthwhile contribution to the discussion on controversial issues, including on intervention for humanitarian purposes, the use of force in self-defence against attacks by non-State actors and how the law on the use of force applies to new and emerging technologies and in response to so-called hybrid threats. We also aim to set out the scope of the law governing the use of force, while not ignoring the areas of contention both in academic literature and in the practice of States and other actors. To some extent, this book will thus cover topics which have received attention elsewhere, from restating the main points of the law to discussing points of view on various controversial issues. Of course, we aim to do so from the perspective of our respective backgrounds and insights, incorporating our previous research and the work of others in this field and providing a considered viewpoint on issues where there is a significant difference of opinion. Consequently, we think the book will offer some new insights, even on those topics which have received considerable attention elsewhere.

The title of the book also reveals one aspect of our approach that differs from that adopted in most other literature on this topic. International law has become increasingly compartmentalized over the years, sometimes to such an extent that the individual components are no longer seen as part of a whole. This 'fragmentation' of the legal system is partly due to the increasing complexity of the law and the corresponding tendency to (over-)specialization in the legal profession. We are convinced that the law on the use of force has a central place in the contemporary international legal system and should be viewed not only through a microscope but also through a telescope, to see how it is connected to the wider legal system governing international relations. To this end, we

have devoted one part of this book to exploring the relationship of the contemporary *jus ad bellum* with other areas of international law and its function within the broader legal landscape. We have done so, not to conflate the rules from one sub-system with those of another but to provide some insight into how they interrelate and to reconcile the apparent and real overlaps as well as occasional clashes of obligations which can arise between them. To put it simply, we see international law as a coherent and interlocking system, comparable to or imaginable as a metro map, with different coloured lines intersecting and serving different destinations. We also think that understanding contemporary law requires some attention to the historical evolution of the rules relating to the use of force; hence, another part of the book gives a historical overview of those rules, an aspect which is often overlooked nowadays in other works on the topic.

Who is the book addressed to? We have at least three audiences in mind. First, for our colleagues in the academic legal community as a contribution to the ongoing debate on issues relating to the use of force. Second, since we are both practitioner lawyers who have been and are engaged in providing legal advice to non-academic professionals (to the armed forces and to international tribunals respectively), we sincerely hope this book will be of use to a professional and practitioner public and assist in providing clear answers to difficult questions. This is not a 'manual' on how to apply the law in a practical setting, but if it assists those who write such manuals in providing usable answers to hard questions, it will have served one of its intended purposes. Last but not least, the book is intended as a research tool and further reading for the (post-)graduate level student and PhD candidate who is interested in the topic. We have therefore endeavoured to keep the work as accessible as possible, highlighting areas of agreement and contention to help inform the conduct of research.

The book is divided into five parts comprising a total of sixteen chapters. Part I consists of three chapters, including this one. It provides an introduction to the book and a historical background to the contemporary legal framework for the use of force. Part II, consisting of three chapters, sets out the legal framework relating to the use of force and devotes attention both to areas of agreement and to aspects of the law where there is a degree of controversy. It deals with the prohibition on the use of force and the two recognized exceptions to it. Part III, consisting of five chapters, delves further into older and newer controversies. These include the longstanding debate on the legality of the use of force for the

protection of human rights in the absence of a mandate from the UN Security Council, the impact of new technologies and new methods of warfare on the law governing the use of force and the modalities of countering so-called hybrid threats. Part IV consists of four chapters and explores the place of the *jus ad bellum* within the wider international legal system. In this part, we aim to clarify the relationship between *jus ad bellum* and other international legal regimes, such as the law of armed conflict, the law of neutrality, the law relating to State sovereignty in the context of consensual intervention, the law governing the use of the global commons (law of the sea, air law and the law of outer space), international human rights law, international criminal law and the law of international responsibility. Part V, consisting of a single chapter, provides a summary of the main findings and discusses how to harmonize and reconcile the rights and obligations arising from different legal subsystems. It also contains some reflections on the relevance of the law in a world that does not always abide by its rules and precepts.

As regards our methodology in this book, we take a modernized legal-positivist approach to the law in relation to both sources and interpretation. Hence, we consider the law to be found primarily in the sources enumerated in Article 38 of the Statute of the International Court of Justice (ICJ), with the addition of decisions of international organizations which have legally binding effect. For the interpretation of treaties we use the well-known methods set out in the Vienna Convention on the Law of Treaties. We consider customary law to be identified through the application of the criteria developed in ICJ case law for determining the existence and content of a rule of customary international law. We also apply historical legal analysis and cite past and more recent examples from State practice as a means of illustrating the law. We use open sources on weapons technology and military operational questions (such as targeting doctrine) where relevant. We follow a legal-doctrinal approach in applying the law to concrete examples and cases. Hence, while we use numerous examples and cite State practice and case law where relevant, this is neither an empirical study of any particular case or situation nor a critique of any State's record on the use of force.

Where there are parallel legal obligations or potential conflicts of obligations arising from different legal regimes, we try to resolve them by using tools such as complementarity of obligations and systemic harmonization, with the aim of maintaining the coherence of the legal system. We do this on the basis of several premises: first, that States are bound by the totality of their legal obligations; second, that such

obligations should be given due consideration when determining how to give them effect and harmonize them as far as possible; third, in the case of conflict between obligations arising from different legal regimes, it must be determined which obligation takes precedence over another. The complementarity of obligations would mean, for instance, that while the law of armed conflict is separate from the law on the use of force and provides rules relating to the conduct of hostilities irrespective of the right to use force, it does not preclude the relevance of the law governing the use of force once hostilities commence. Likewise, the law governing the use of particular geographical areas, such as the law of the sea or the law relating to the peaceful use of outer space, must be given due regard when applying the law on the use of force.

Finally, while we fully acknowledge that the law does not develop in a vacuum and that it is not alone in shaping the policy and behaviour of States and other actors, we see the law as distinct from pure policy, morality, ethics or other extra-legal considerations. We see a clear divide between the law as it is and the law that we or anyone else would like to have or which may be in the process of crystallizing. So we consistently distinguish 'black letter law' from opinions or possible directions in which the law may be moving.

2

From Just War to the Great War

2.1 Introduction

This chapter follows through the history of the Western just war tradition, as the one forming the basis of the contemporary international law on the use of force. In the following paragraphs the main tenets of the different eras and approaches of the Western just war tradition will be briefly discussed. This brief review is useful in order to understand many aspects of today's *jus ad bellum*, such as how the prohibition on the use of force came to be; what, to this day, continue to be its core ideas and concerns; how self-defence, as one of the two exceptions to the prohibition on the use force, evolved in customary law over the centuries; how its current customary law content should be interpreted; and what precedents there are for collective action by States against unlawful uses of force.

2.2 The Just War Tradition

Justifying war has for long been at the centre of morality and law. Most of the world's philosophical, ethical or religious traditions have viewed war as a public and collective undertaking of a community against a foreign enemy. They have therefore formulated principles and/or rules on the causes and conduct of war (see Fact Box 2.1).

2.3 Ancient Greece and Rome

Both the ancient Greeks and Romans recognized several causes for legitimate war, and no war was commenced before allegations of legitimacy (*justum bellum*, for Romans) were made.[1]

[1] C. Phillipson, *The International Law and Custom of Ancient Greece and Rome* (Macmillan, 1911), vol. 2, pp. 167, 182; K. Tibori-Szabó, *Anticipatory Action in Self-Defence* (Springer, 2011), p. 32.

FACT BOX 2.1 JUST WAR PERSPECTIVES AROUND THE WORLD

Justifications for war were embedded in the different philosophical, ethical or religious traditions governing a particular society and reflected these traditions' variations, schisms or changes over time. It is near impossible to speak about just war 'theory' or 'tradition' in the sense of a settled system of ideas; it is easier to speak of views and perspectives on war. With this in mind, the brief descriptions below identify some of the basic and relatively enduring ideas characterizing various just war perspectives around the world.

Ancient Egyptian perspectives: Seen as quasi-divine beings, pharaohs possessed incontestable legitimacy to wage wars on behalf of the kingdom, which was regarded as the terrestrial embodiment of the principle of order and justice (*Ma'at*). Defending the *Ma'at* against forces of chaos, embodied by foreign peoples (barbarians) or rebellious factions within the kingdom was regarded as just. Pharaohs frequently expanded this concept to include aggressive wars waged beyond their borders, as the conception of Egypt as the sole residence of order and justice meant that all Egyptian wars were defensive, fought against enemies who constantly threatened peace and security.

Ancient Chinese thought: A righteous war (*yi zhan*) could be both defensive and offensive as long as the use of arms and soldiers was for a righteous cause (*yi bing*), the war was ordered by a legitimate ruler and it was publicly announced. The main righteous causes were self-defence, punishment of wrongs and the preservation of peace. The latter also allowed for war against those viewed as barbarians, thereby spreading civility and harmony among them. Necessity and proportionality had to be observed in the conduct of war.

Classic South Asian perspectives: These include Hindu, Sikh and Buddhist thoughts about war. Under Hinduism, just war was fought to uphold the *dharma* – that is, to maintain peace and security through law and order within the larger cosmic order. The *dharma* could be endangered by aliens or nationals alike; force had to be used as a last resort and the conduct of war had to be as humane as possible. According to Sikh thought, the use of force was sanctioned in the defence of the *dharma*, which included resistance to the oppressor and fighting for liberty. War had to be waged as a last resort and a Sikh could never be the first to draw a sword. Buddhism condemned war unreservedly and attested to its futility in gaining a meaningful resolution to any conflict. A righteous war was one fought with ideas, not arms. Recognizing, however, the reality of war, Buddhism cautioned against indiscriminate and excessive use of force during hostilities.

Islamic perspectives: Just war in classical Muslim sources revolves around the concept of *jihad* (struggle, striving). Originally, this term was synonymous with self-defence. Under this early interpretation, wars were fought in defence of the caliphate or of the Muslim religion. Later on, *jihad* was expanded to accommodate wars for the conquest of new lands and the expansion of Islam. Such wars had to be ordered by a sovereign possessing uncontested political and religious legitimacy. Classical

FACT BOX 2.1 (*cont.*)

Muslim texts also contained detailed rules on the initiation, conduct and conclusion of wars.

Western thought (discussed in this chapter): Its roots can be traced back to the customs and laws of ancient Greece and Rome. Early Christian philosophy took over these prescriptions and gave them Christian foundations. During the Middle Ages, just war principles were codified and different sub-traditions emerged. Thinking about war was intrinsically connected to natural law concepts, according to which certain natural rights and intuitions accrued simply from the fact of being human or sovereign. Starting in 1600, secularism and positive law gradually replaced the Christian and natural law tenets of the just war tradition, although elements of it remain in the discourse on the ethics of war to the present day.

Sources: R. Cox, 'Expanding the History of the Just War: The Ethics of War in Ancient Egypt' (2017) 61 *International Studies Quarterly* 371–84; A. J. Bellamy, *Just Wars: From Cicero to Iraq* (Polity Press, 2006), 7–10, 120–1; P. Robinson (ed.), *Just War in Comparative Perspective* (Ashgate, 2003); L. Jayasuriya, 'Just War Tradition and Buddhism' (October 2009) 46 *International Studies* 371–480; H. M. Hensel (ed.), *The Prism of Just War: Asian and Western Perspectives on the Legitimate Use of Military Force* (Ashgate, 2010); M. C. Bassiouni and A. Guellali, *Jihad and Its Challenges to International and Domestic Law* (Hague Academic Press, 2010); R. J. Hoffmann, *The Just War and Jihad: Violence in Judaism, Christianity and Islam* (Prometheus Books, 2006); V. Morkevičius, *Realist Ethics: Just War Traditions as Power Politics* (Cambridge University Press 2018).

The most frequent grounds for resorting to war were violation of a treaty, withdrawal from an alliance, offence committed against an ally, breach of neutrality, offence against envoys, infringement of territorial rights, desecration of sacred places and unjust refusal of extradition.[2] Before the Peloponnesian War, Greek city-states followed customary practices for limiting war; later, however, written treaties were preferred.[3] Matters of war in Rome were regulated by the *ius fetiale*, a set of religious laws related to the conclusion of treaties and declarations of war.[4] Commencement of hostilities was 'just' only when it was carried out in conformity with these laws.[5] Adherence was ensured and overseen by the *fetiales*, a college of priests who had special responsibility for maintaining peaceful relations. The fetials, although required to discuss

[2] Phillipson, *International Law* (n. 1), p. 182.
[3] A. J. Bellamy, *Just Wars: From Cicero to Iraq* (Polity Press, 2006), pp. 15–16.
[4] G. M. Reichberg et al., *The Ethics of War: Classic and Contemporary Readings* (Blackwell, 2006), p. 47.
[5] Ibid., p. 47.

only the mere formalities of war, often analysed the legitimacy of the reasons invoked.[6]

The Roman jurist and philosopher Marcus Tullius Cicero (106–43 BC), developed a more comprehensive account of the legitimacy of war. According to him, '[w]ars ... ought to be undertaken for this purpose, that we may live in peace, without injustice'.[7] Cicero believed that no wars were just unless waged after a formal demand for restoration or unless formally declared by the appropriate authority.[8] He also advised restraint in the punishment of enemies once victory was secured.[9]

The concepts of just cause and appropriate authority developed by Roman law and ethics found their way into early and medieval Christian philosophy and greatly influenced the just war tradition for centuries to come.

2.4 Early and Medieval Christian Views

After three centuries of pacifist Christian philosophy prohibiting participation in military action, from the fourth century onwards Christian philosophy required justifying grounds to make the resort to war acceptable to both divine and earthly authority.[10]

Contemporaneous religious writings mirrored these changes.[11] One of the most important thinkers of early Christianity was Augustine of Hippo, who gave expression to an early Christian understanding of just war, based on precepts of 'natural law', which he regarded as knowledge that the divinely created natural order placed in every human being.[12] Relying on Roman concepts and early Christian thinking, Augustine identified several 'just causes', such as: obeying a divine command; defending the safety or the honour of the State; avenging injuries; punishing a nation for failure to take corrective action for wrongs committed

[6] I. Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1963), p. 4; Tibori-Szabó, *Anticipatory Action* (n. 1), pp. 33–4.
[7] Reichberg et al., *Ethics of War* (n. 4), p. 52, citing from Cicero, 'On Duties', bk I, s. 34, in M. T. Griffin and E. M. Atkins, *Cicero: On Duties* (Cambridge University Press, 1991).
[8] Ibid., citing from Cicero, 'On Duties' (n. 7), bk I, s. 36.
[9] Ibid., citing from Cicero, 'On Duties' (n. 7), bk I, s. 34; Bellamy, *Just Wars* (n. 3), pp. 19–20.
[10] Tibori-Szabó, *Anticipatory Action* (n. 1), pp. 35–6.
[11] Ibid., p. 36.
[12] Bellamy, *Just Wars* (n. 3), p. 25; R. Dougherty, 'St Augustine on Natural Law', in J. Crowe and C. Y. Lee (eds.), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019), pp. 67–8.

by its citizens; and coming to the defence of one's allies.[13] According to Augustine, natural law did not allow wars to be fought for territorial expansion or without the approval of the appropriate public authority.[14]

After the fall of the Roman empire, several smaller kingdoms and principalities were established and the Catholic Church acquired ever greater responsibility in European affairs. After the establishment of the Holy Roman Empire, the Church shared power with the emperor and medieval popes often acted as political rulers to maintain a frail public order.[15] Between the fourth and eighth centuries, the barbarian invasions took place, forcing the Church to take a more realistic view on issues of military action.[16] From the tenth century onwards, the secular functions of the Catholic Church came to occupy a prominent place alongside its divine functions, and towards the end of the first millennium the Church started engaging in military affairs.[17] In 1095, Pope Urban II called the first crusade, against the Muslims and the Jews in ancient Palestine.[18] In the twelfth and thirteenth centuries, eight other crusades took place, most of them for the conquest of ancient Palestine.[19]

The justification for war as understood in the time of the crusades was aptly described by the *Decretum*, attributed to Gratian, a twelfth-century canon lawyer from Bologna.[20] The *Decretum* had three main parts, the second of which was a compilation of cases (*causae*), in which Gratian raised a number of legal questions. According to Case 23, war was just if waged in order to regain what had been stolen or to repel the attack of enemies.[21] Gratian further indicated that defending the

[13] J. M. Mattox, *Saint Augustine and the Theory of Just War* (Continuum, 2006), p. 74.
[14] Augustine, 'City of God', bk XIX, chap. 7, repr. in E. L. Fortin et al., *Augustine: Political Writings* (Hackett, 1994), p. 149.
[15] A. Nussbaum, *A Concise History of the Law of Nations* (Macmillan, 1947), pp. 23–7; Bellamy, *Just Wars* (n. 3), pp. 30–1.
[16] Nussbaum, *Concise History* (n. 15), pp. 23–7; Tibori-Szabó, *Anticipatory Action* (n. 1), p. 37.
[17] S. C. Neff, *War and the Law of Nations: General History* (Cambridge University Press, 2005), p. 48.
[18] 'Pope Urban II's Speech at Clermont, November 27, 1095', as reported by Robert the Monk, in R. G. D. Laffan, *Select Documents of European History: 800–1492* (Henry Holt, 1929), pp. 54–6.
[19] Tibori-Szabó, *Anticipatory Action* (n. 1), p. 38.
[20] The *Decretum* was a collection of canon law compiled and written in the form of a legal textbook. The collection was continuously annotated by canonists (Decretists, later coined Decretalists) in the second half of the twelfth century. Reichberg et al., *Ethics of War* (n. 4), p. 104; Bellamy, *Just War* (n. 3), pp. 34–6.
[21] Gratian, *Decretum*, pt II: 'Decreti Pars Secunda', Case 23, question II, canon 1, repr. in Reichberg et al., *Ethics of War* (n. 4), p. 113.