

## FOREWORD

JAMES CRAWFORD AC SC\*

A foreword to a thematic issue on the law of the use of force must acknowledge that, of all the areas of international relations that states have sought to bring within the purview of international law, this may present the most practical challenges. It is often referred to in support of the view that ‘with the weight of power, law in its critical aspects remains largely hortatory’.<sup>1</sup> In light of recent shifts in how and against whom wars are fought, some might be even more inclined to dismiss the law on the use of force as being of little relevance.

The evidence for that view has been exaggerated. To start with, far from remaining hortatory, the prohibition of the use of force in the *Charter of the United Nations* (‘*UN Charter*’) has coincided with a sharp and sustained decline in both the incidence and deadliness of war. Genuinely interstate wars (as distinct from civil wars with intermittent foreign intervention) have been rare since 1945, and with a few notable exceptions, such as the 1991 and 2003 wars against Iraq and the 1998–2000 war between Ethiopia and Eritrea, have almost vanished since the Cold War. Battle deaths in state-based armed conflicts (both interstate and civil) dwindled by more than 90 per cent from the late 1940s to the early 2000s.<sup>2</sup> Several factors have been cited to explain this decline, and it is true that serious breaches of the rules on the use of force continue to occur, but it is plausible to suggest that the decline is at least partly due to a progressively embedded norm of state behaviour, reflected in international law.<sup>3</sup>

On a deeper level, many critiques of the relevance of the law on the use of force simply miss the point. The test of the relevance of international law rules should not be limited to whether powerful states sometimes flout them: it should

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\* Whewell Professor of International Law, University of Cambridge and Research Professor of Law, LaTrobe University.

1 Oscar Schachter, ‘Metaphors and Realism in International Law’ (2002) 96 *Proceedings of the Annual Meeting (American Society of International Law)* 268, 269.

2 From about 500 000 to about 30 000 per year: Steven Pinker, *The Better Angels of Our Nature: The Decline of Violence in History and Its Causes* (Penguin, 2011) 363. Pinker’s figures are based on the armed conflict dataset from the Uppsala Conflict Data Project and Peace Research Institute of Oslo: Human Security Report Project, *Human Security Brief 2007* (Human Security Report Project, 2007), citing data from Bethany Lacinia and Nils Petter Gleditsch, ‘Monitoring Trends in Global Combat: A New Dataset in Battle Deaths’ (2005) 21 *European Journal of Population* 145, updated in 2010 by Tara Cooper.

3 See James Crawford and R Nicholson, ‘The Continued Relevance of Established Rules and Institutions Relating to the Use of Force’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force* (Oxford University Press, forthcoming 2014).

also extend to how they influence the process of making decisions and resolving disputes. As Christine Gray has remarked, the rules on the use of force ‘clearly also serve a declaratory function: they set out a goal to be aimed at, the ideal that states adhere to.’<sup>4</sup> One role of the legal scholar in the realm of the use of force is to tease out the consequences of those rules, both by applying them to specific situations and by considering how they can and should influence political and legal processes.

The contributions to this thematic issue of the *University of New South Wales Law Journal* all fulfil this role. They belong to a tradition of scholarship on the use of force that has long wrestled with challenges peculiar to the topic: the juxtaposition of the strongly worded prohibition of the use of force in the *UN Charter* with two exceptions, for self-defence and the collective security system, whose interpretation and application continue to arouse debate; the difficulty of identifying state practice and *opinio juris* against a background of ‘high politics’; and the relevance of concepts, such as humanitarian intervention and the ‘responsibility to protect’, that purport to reshape the application of the law but whose own status under international law is at best uncertain. The inherent controversy of questions relating to the use of force simply adds to the importance of sober scholarly analysis. It can elucidate and strengthen attempts to impose a legal framework on an area of state behaviour that has historically been characterised not by the rule of law but by the *realpolitik* of military power.

Andrew Garwood-Gowers considers some of these questions directly in the context of the recent international intervention in Libya and (qualified) non-intervention in Syria. He argues that the mandate granted by the Security Council in Libya was broadly consistent with resolutions on the use of force predating the notion of a ‘responsibility to protect’ and was enabled primarily not by humanitarian concerns but by a confluence of political and factual circumstances. Similarly, he infers from the division on the Security Council on Syria that disagreement and deadlock will continue to hinder attempts to respond to intrastate humanitarian crises. His conclusions are relevant not only to the interpretation of the rules on the use of force, including the influence of the ‘responsibility to protect’, but also to the extent to which they shape the process of making decisions in political forums such as the Security Council.

Gareth D Williams is concerned with another aspect of the rules on the use of force: the supposed ‘unwilling and unable test’ of whether a state can use force on the territory of another state that is hosting a non-state actor such as a terrorist organisation. The relevance of the putative test is illustrated by recent operations by Russia against Chechen rebels in Georgia and by the United States (‘US’) against al-Qaeda in Pakistan. Williams discusses the practical considerations influencing the test, the potential grounds for it in both the *UN Charter* and related principles of customary international law, and the interest of a state seeking to engage in extraterritorial ‘self-defence’ in securing the host state’s

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4 Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 27.

consent. His discussion highlights the tension between the rules on the use of force in the *UN Charter*, designed to apply to interstate conflicts, and the difficulty of applying them to more complex conflicts with non-state actors, sometimes with the active or passive support of other states.

The same is true of Christian Henderson's article on the provision of arms and 'non-lethal' assistance to government and opposition forces. His analysis is again conducted against the background of the Arab Spring, but he connects it with the broader jurisprudence on non-intervention, including *Military and Paramilitary Activities in and against Nicaragua*.<sup>5</sup> He distinguishes the supply of arms and 'non-lethal' assistance to Libya and Syria from earlier Cold War instances on the basis of the greater reliance on moral arguments and argues that, though the 'responsibility to protect' may not have changed the law, it is changing perceptions of unilateral forcible intervention. His argument illustrates the extent to which the application and interpretation of the law on the use of force are shaped by political events.

It is not only the application of the rules on the use of force that is challenged by shifts in how war is conducted. James D Fry considers the legality of a new weapon, the XM25 Individual Semi-automatic Airburst Weapon System, that some believe could end guerrilla warfare by preventing combatants from hiding behind walls or in ditches. He argues that despite its effectiveness, the weapon appears to violate both customary international law and the *First Additional Protocol to the Geneva Conventions*.<sup>6</sup> His analysis raises both legal and policy questions about the extent to which the law of armed conflict, like the law on the use of force, can and ought to be adaptive to methods of warfare that bear little resemblance to those prevailing at the time the relevant rules came into existence. It also illustrates the difficulty of identifying state practice and *opinio juris* in the context of armed conflict.

Finally, Andrew Byrnes and Gabrielle Simm delve deeper into the extralegal influences on the law on the use of force by analysing institutions that play no *direct* role in international law at all: informal peoples' tribunals, such as those established to determine the legality of the US invasion of Iraq, that seek to complement formal international courts and tribunals whose jurisdiction may not extend to many questions of international law. They argue that such tribunals do more than simply fill gaps; they also provide an impetus for the establishment of formal tribunals and offer a means to follow up their proceedings and decisions.

Some of the challenges to the law discussed in the articles are perennial: the influence of political factors on compliance with and interpretation of the rules, omnipresent in any discussion of the use of force; and the limited availability of formal means of enforcement or dispute resolution, which informs Byrnes' and Simm's piece. Others are new, either in their nature or in the greater extent to which states now encounter them: conflicts involving both states and non-state

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5 (*Nicaragua v United States of America*) (*Merits*) [1986] ICJ Rep 14.

6 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*First Additional Protocol*').

actors across international frontiers, raised in different ways in both Henderson's and Williams' articles; the international response to crises such as Libya and Syria, considered by Henderson and Garwood-Gowers; new weapons, such as that discussed by Fry; and the relevance of the 'responsibility to protect'.

The contributions are consistent with the idea of international law as process: it is both a form of praxis, a product of claim and counterclaim, assertion and reaction, by states and other actors, and at the same time a system of legal principles and rules. This notion implies that international law will embody diffuse judgments that may, when they concern topics as controversial as the use of force, take some time to arrive at. It should not be a cause for alarm that the law on the use of force remains, in some respects, indeterminate. On the contrary, it is a sign of the continuity and even durability of the law on the use of force, that despite the origin of the prohibition on the use of force in the different political and historical circumstances of 1945, and despite drastic changes in the nature of state-based armed conflict since then, it retains its relevance as 'a goal to be aimed at',<sup>7</sup> as a practical guide to permissible state behaviour and as a continuing influence helping to reduce and contain the frequency and intensity of armed conflict.

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7 Gray, above n 4.