International Law and the Use of Armed Force by States

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1 Introduction

State violence is defined in this volume as "the illegitimate use of force by states against the rights of others." This definition gives a first idea of what state violence is about, but it does not specify when the use of force by states becomes illegitimate or what the rights of others are, independently or in relation to states. When does the use of force by states turn into state violence? Based on the given definition, there are at least three ways in which scholars can answer this question. For one, scholars can evaluate the 'normative legitimacy' of the use of force by states and philosophize on the moral rights of individuals. When should states refrain from the use of force and when do they have a moral obligation to exercise their armed powers? Secondly, scholars can analyze the 'sociological legitimacy' of the use of force by states.[1] When does a society consider the use of force appropriate and when is the recourse to armed powers believed to be illegitimate? Thirdly, it can be examined when the use of force by states is deemed 'legal' or 'illegal'. When do states violate legal obligations by resorting to force, and what are rights and responsibilities do individuals have in a legal sense?

This chapter focusses on what can be called state violence under international law. I do not seek to assess when the use of force by states is illegitimate in a normative or sociological sense, but aim to identify the legal obligations of states and

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[1] On the different dimensions of the concept of legitimacy, see Thomas (2014).

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the rights and responsibilities that individuals have under international law. More specifically, I explore how international law regulates the use of 'armed' force by states. In exclusion of other forms of force, such as economic or political coercion, the use of armed force is understood to be the military actions of states against or on the territory of other states, as well as the domestic use of armed force by state agents against civilians and other persons within the jurisdiction of a state.

In the context of this volume, which looks at state violence from different perspectives, there are at least three reasons why I think that it is important to consider how international law regulates the use of armed force by states. First of all, to the extent that international law is part of the decision-making of states, it has the potential to constrain states in the use of their armed powers. While it is difficult to determine how international law exactly influences the behavior of states, it should count for something that states generally observe their obligations under international law. Secondly, even if specific decisions on the use of armed force are not in any way motivated by rules of international law, then these rules still play an important role in how these decisions are justified. Both at the domestic and the international level, state agents try to defend their use of armed force in reference to rules of international law. Finally, and most importantly, international law matters to the study of state violence because victims can find a form of reparation on the basis of international law. States, but also individuals that act in a public capacity can be held responsible under international law for at least some cases of state violence.

The first part of the chapter discusses how different domains of international law regulate the use of armed force by states. What are the relevant obligations of states, and what rights and responsibilities do individuals have under the law on the use of force, international humanitarian law, international human rights law, and international criminal law? The second part examines how these rules are enforced by international courts. Where can victims of state violence obtain a form of reparation? Finally, the third part concludes by highlighting some of the main challenges for the international regulation of the use of armed force by states.

2 Four Domains of International Law

International law consists of various domains (also known as fields, regimes or bodies of law) that can be distinguished on the basis of their specific subject area. The use of armed force by states is mostly regulated in four of these domains: firstly, the 'law on the use of force' (*jus ad bellum*) comprises rules on when states are allowed to resort to armed force against another state or against a non-state actor on the territory of another state; secondly, 'international humanitarian law'

(*jus in bello*) regulates the conduct of states and individuals in the course of armed conflicts; thirdly, international human rights law recognizes that individuals hold fundamental rights that states are obliged to respect, protect and fulfill in their recourse to armed force; and finally, international criminal law imposes responsibilities on individuals and governs the international investigation and prosecution of international crimes, including the excessive use of armed force by states.

2.1 Law on the Use of Force

The cornerstone of the first domain lies in the UN Charter and more specifically in the prohibition of the use of armed force that is enshrined in Article 2(4) of the Charter.[2] This provision reads that "all members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations." Against the backdrop of this sweeping prohibition, the Charter foresees in two grounds on which the use of armed force by states can be justified: (1) the right to self-defense and (2) the enforcement actions of the Security Council.

The first explicit exception to the prohibition of the use of armed force is the right to self-defense. Pursuant to Article 51 of the Charter, all states have "the inherent right of individual or collective self-defense if an armed attack occurs … until the Security Council has taken the measures necessary to maintain international peace and security." A right to self-defense may exist in response to an armed attack of another state, but also in reaction to an armed attack that is initiated by a non-state actor that operates from the territory of another state. Furthermore, a right to self-defense may be exercised by a state itself, but it may also ask other states to assist or act on its behalf. In fact, states may be obliged to assist, as is the case for NATO member states, who have agreed under Article 5 of the North-Atlantic Treaty that an armed attack against a member in Europe or North-America shall be considered an attack against them all.

The right to self-defense under the UN Charter is limited in at least two ways.[3] Firstly, the defensive use of armed force must always observe the 'proportionality principle'. Simply put, one cross-border incident cannot justify the start of a

[2] Note that it has been claimed that Article 2(4) also includes other forms of force such as political and especially economic coercion. The prevailing view is, however, that the prohibition of the use of force is limited to armed force (Randelzhofer and Dörr 2012, pp. 208–209).

[3] It remains contested whether and to what extent there exists a general right of self-defense under customary international law apart from Article 51 of the UN Charter (Randelzhofer and Nolte 2012, pp. 1403–1406).

full-blown war. Secondly, when a state invokes its right to self-defense it has the obligation to report this immediately to the Security Council and to discontinue its use of armed force as soon as the Council has taken necessary measures. What this shows is that the right to self-defense allows for a temporary rather than a structural response to the threat or use of armed force by another state or a non-state actor.

A second exception to the prohibition of the use of armed force is the use of enforcement actions on behalf of the Security Council. Under the Charter, the Council has the primary responsibility for the maintenance of international peace and security. When the Council determines that there exists a threat to the peace, a breach of the peace or an act of aggression in the sense of Article 39 of the Charter, it has the legal power to take decisions that are binding for its member states. In this regard, the Council may also authorize states to use armed force. The Council has done this several times, such as in 1990 when it approved a US-led coalition of states to use 'all necessary means' to realize the liberation of Kuwait from Iraqi occupation. Through a resolution of the Charter, a state or a group of states may thus be entitled to resort to armed force against another state or against a non-state actor that operates from the territory of another state.

The precise 'scope' of the enforcement actions of the Council and of the right to self-defense has been subject to considerable debate. It is, for example, contested whether a state can invoke its right to self-defense when using force to anticipate future attacks and states do often not agree on how a specific authorization of the Council should be interpreted. Still, the 'existence' of the two exceptions that are explicitly contained in the Charter has not been challenged.

The same cannot be said of two other possible justifications for the use of armed force that states and commentators have suggested: (1) the protection of nationals abroad and (2) humanitarian intervention. First of all, some have argued that there is an unwritten exception to the prohibition of Article 2(4) allows states to resort to armed force in order to protect or rescue their nationals from the territory of another state. Various commentators have claimed that under customary international law this exception exists "in limited cases and under well-defined preconditions" (Randelzhofer and Dörr 2012, p. 228). Most importantly, the foreign state must either be unwilling or unable to ensure the safety of the concerned persons and the intervening state should not have any other motives besides rescuing their nationals. Other commentators have pointed out, however, that only a few states have used force to rescue nationals, and that this argument has never been invoked as the sole justification of a state for resorting to force (Gray 2008, pp. 156–157). Thus, the existence of the protection of nationals abroad as an exception to the prohibition of the use of armed force is far from certain.

The legal status of the alleged right to humanitarian intervention—which may be defined as the use of armed force by states with the aim to protect people from massive human rights violations by states or non-state actors—is even more uncertain. Several commentators have argued that the Charter, customary international law and/or the newly developed concept of a 'responsibility to protect' foresee in this exception to the prohibition of the use of armed force (Randelzhofer and Dörr 2012, p. 222). However, each of these three possible legal bases for a right (or even obligation) to humanitarian intervention raise serious difficulties. Firstly, a humanitarian intervention as an implicit exception in the Charter seems impossible to reconcile with Article 2(4) unless one takes a rather "artificial definition" of the encompassed criterion of territorial integrity (Shaw 2008, p. 1156). Secondly, the available evidence of state practice and *opinio juris*—which are the two conditions for the establishment of a rule of customary international law—is sparse and can hardly be called sufficient at this point in time. And finally, the concept of a responsibility to protect is mainly political and to the extent that it does have legal implications, it "stops short of including the autonomous right of individual states to use armed force against another state" (Randelzhofer and Dörr 2012, p. 225). All this comes to show that the existence of humanitarian intervention as a legal exception to the prohibition of the use of armed force—rather than a moral justification—continues to be very uncertain.

In short, the different rules on when states are allowed to resort to armed force provide various rights and obligations for states. The difficulty with applying these rules is that their exact scope or even their existence remains heavily contested. More than any of the other three domains that are considered here, jus ad bellum suffers from manifest uncertainties (Kammerhofer 2012). There are several reasons debit to this, but the most important one is that the relevant provisions of the Charter were written for inter-state conflicts and with the idea that the Council would always be able to take a leading role in resolving these conflicts. The realities that the law on the use of force now must seek to accommodate is that most armed conflicts are internal rather than between states, and that in many conflicts the Council will not be able to maintain or restore international peace and security.

2.2 International Humanitarian Law

Apart from jus ad bellum, international law also seeks to regulate the conduct of states and individuals in the course of armed conflicts. Think, for instance, of rules on the protection of civilians in occupied territories, but also of rules on prohibited methods of warfare and the treatment of prisoners of wars. The shared aim of these

rules is to humanize international as well as internal armed conflicts. Originally called the 'laws of war', they have more recently been termed international humanitarian law (IHL). While many of these rules are part of customary international law, the principal sources of IHL are a number of international conventions and in particular the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 (AP I and II).

Who are protected by these conventions and protocols? The rules of IHL extend protection to a wide range of persons. However, the scope and form of this protection depends on whether a person is or is not directly participating in an armed conflict—combatants versus civilians—and also on the way(s) in which a person is participating. As a first rule of thumb, there are three groups of combatants that each have a different form of protection under IHL: (1) those who are members of the armed forces of a party to an armed conflict, (2) other persons that take a direct part in the hostilities and (3) combatants who have become *hors de combat* (out of the fight).

The first group can be called 'privileged' combatants. Upon capture they are entitled to the protections of prisoners of war (POW), which means, among other things, that they should be kept alive, in good health and be treated humanely. Furthermore, as long as these 'official' combatants behave in accordance with IHL, they also have the 'combatant privilege' to participate directly in hostilities: they have the right to attack and kill.

The legal position of the second group of combatants is more complex and uncertain. Under a number of conditions this group also enjoys a combatant privilege. For instance, states may be obliged under IHL to grant POW status to captured members of rebel groups or liberation armies. On the other hand, one of the most contested questions of IHL is when and to what extent states have obligations with respect to members of organized armed groups such as Al Qaeda, the Taliban, or Islamic State (Solis 2010, pp. 205–219).

A third group of combatants are those that have become *hors de combat*, which can either be by choice or by force. When privileged combatants surrender or get wounded, sick or shipwrecked, they are normally entitled POW status when they fall into the hands of an opposite party. In addition, the first two Geneva Conventions encompass specific provisions that are directed at giving further protection to wounded, sick and shipwrecked combatants.

In comparison to the three different groups of combatants, civilians enjoy a more extensive form of protection, at least if they are not directly participating in hostilities. One of the most basic rules of IHL, known as the principle of distinction, is that the parties to an armed conflict should at all times distinguish between civilians and combatants, and between civilian and military objectives. Article 51(2) of AP I stresses that civilians shall "not be the object of attack." This does

not mean, however, that their protection is absolute. What armed forces must do under IHL is take the principle of proportionality into account. This second core principle of IHL is defined in article 51(5)(b) of AP I, which reads that an attack is disproportionate when the expected loss of civilian life, injury to civilians or damage to civilian objects is "excessive in relation to the concrete and direct military advantage anticipated."

In addition to the principles of distinction and proportionality, militarily necessity and unnecessary suffering are considered the other two core principles of IHL. Military necessity essentially means that "no more force or greater violence should be used to carry out a military operation than is necessary in the circumstances" (Solis 2010, p. 258). This principle is inextricably linked to and dependent on the principles of proportionality and unnecessary suffering. The latter principle lies behind the different rules and specific conventions on prohibited methods of warfare. As stated in Article 35(2) of AP I, "it is prohibited to employ weapons … and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

In considering the scope of these and other more specific humanitarian rules that can apply to states as well as to individuals, it is important to realize that IHL differentiates between two types of armed conflicts. Traditionally, the laws of war were mainly concerned with 'international armed conflicts'. The Geneva Conventions of 1949 (as well as AP I) were designed for cases of declared war between states and any other armed conflicts that would arise between states. In the case of a 'non-international armed conflict' only so-called 'common' Article 3 of the four Geneva Conventions would apply. This provision contains a list of basic humanitarian norms, such as that the wounded and sick shall be collected and cared for. With the adoption of AP II, which was specifically drafted to extend other essential humanitarian rules to internal conflicts, IHL has started to adjust to the new realities of armed conflicts. In this respect, IHL has been more 'progressive' than the law on the use of force. Still, many rules on international armed conflicts are more far-reaching than the rules on internal conflicts.

2.3 International Human Rights Law

The third domain of international law that should be distinguished in the context of the use of armed force by states is international human rights law. Its principal sources are the human rights treaties that have been adopted in the course of the last 70 years. The international legalization of human rights started with the adoption of the UN Charter (1945) and the non-binding Universal Declaration of Human Rights (1948), which were complemented in 1966 by the International

Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. Taken together, these four instruments recognize a broad list of fundamental rights and freedoms that every human being should be able to enjoy.

Since the adoption of these first international instruments, which have been ratified by most states, the international human rights system has expanded through the adoption of a long list of specialized human rights treaties that focus on the rights of particularly vulnerable groups. Furthermore, several regional institutions have developed their own human rights systems. The most prominent examples are the European Convention on Human Rights (ECHR), the American Convention on Human Rights, and the African Charter on Human and Peoples Rights.

Apart from their differences in substance and geographic range, there are remarkable similarities between all these human rights treaties. These similarities define international human rights law as a distinctive domain of international law. A first feature that the different international and regional human rights treaties share is the nature of the obligations that they create for states. These obligations are quite different from other types of obligations that states have under international law (Megret 2010, p. 124). By ratifying human rights treaties, states do not primarily commit to respect human rights vis-à-vis other states. It is the rights of individuals within their jurisdiction that states promise to secure and advance.

A second similarity can be found in how states are supposed to discharge their obligations under human rights treaties. In a general sense, it can be said that states must seek to (1) respect, (2) protect, and (3) fulfil human rights. States have first and foremost a duty to respect human rights, which means that they have a 'negative obligation' not to take actions that would violate particular rights. State agents should, for instance, not torture their prisoners—which would be an (illegal) act of state violence. In addition, states have a duty to protect persons from certain human rights violations: they have to ensure that rights of individuals are not violated by third parties and can be held liable for not offering an adequate level of protection. This is known as the 'indirect horizontal effect' of human rights. Finally, under international human rights law, states have a 'positive obligation' to fulfil particular human rights. States must, for instance, incorporate the relevant rights into domestic law and ensure the provision of effective remedies to victims of human rights violations.

A third feature of international human rights law is that in implementing their obligations domestically, states have a significant amount of flexibility. While states are bound by the same (minimum) standards, the implementation of these standards does not have to be uniform. More than any of the other three domains of international law that are highlighted here, human rights law seeks to accommo-

date different cultural, geographic, legal and political contexts. This idea of plural implementation is also known as the 'margin of appreciation', a doctrine that has been pioneered by the European Court of Human Rights.

A fourth similarity among the different human rights treaties is that most rights are not 'absolute' in the sense that states cannot limit them. Under specifically listed circumstances or through a general limitation clause (such as article 12(3) of the ICCPR), most treaties allow states to limit the enjoyment of particular rights. For instance, the right to be free from detention is limited by the possibility of imprisonment for criminal offenses. Furthermore, most human right treaties include a 'derogation regime', which authorizes states to suspend some of their obligations in case of a public emergency, such as a natural disaster or an armed conflict. On the other hand, however, some rights are absolute in the sense that they are non-derogable. There is no emergency that allows a state, for instance, to torture or enslave people.

The final feature that characterizes international human rights law is its scope of application. States generally owe human rights obligations to persons that are within their jurisdiction. This includes both the nationals of a state, but also non-nationals that reside on its territory (although they may not have the same rights as nationals). In addition, states may have human rights obligations outside of their territory, especially when a state has effective control over the territory of another state or over the enjoyment of a particular right by an individual. In a general sense, it may thus be said that international human rights law applies regardless of who the victim of state violence is.[4]

Core Rights vis-à-vis the Use of Armed Force by States

Which rights intend to protect person from the excessive use of armed force by states? By resorting to armed force, states can violate any of the rights that are part of international human rights law. Yet, the rights that are most directly associated with the use of armed force by states are those that seek to protect the integrity of the person. This comprises the right to be free from torture and the right to life. These so-called "core-rights" put important, and to a certain extent absolute constraints on the use of armed force by the security forces or the other law enforcement officials of a state (Rodley 2010, p. 209).

The right to be free from torture (and ill-treatment) is guaranteed in all the major human rights treaties as well as in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Article 1 of this

[4] Note, however, that the extraterritorial application of international human rights law and its relation to IHL (in the context of an armed conflict) remain uncertain and relatively unexplored areas in international law.

Convention provides the most widely accepted definition of torture as "any act by which severe pain or suffering, whether physical or mental" is intentionally inflicted on a person by or with the consent of a public official or other person acting in an official capacity "for such purposes as obtaining from him or a third person information or a confession." As defined by UNCAT, torture is thus by necessity an act of state violence, since it can only be committed by or with the consent of state agents.[5] Moreover, in contrast to most other human rights, the right to be free from torture does not allow for any exception, such as national security or the infamous ticking bomb scenario. This means, in other words, that torture is a form of state violence which is always prohibited under international human rights law.

The right to life is the second core right that seeks to protect the integrity of the person. With regard to the use of armed force by states, this right prohibits the arbitrary deprivation of life by the security forces or other law enforcement officials of a state. Clearly, this prohibition does not mean that state agents are never authorized to take the life of a person within the jurisdiction of a state. All the major human rights treaties recognize that in a number of situations a state may have to use lethal force, for example, to defend a person from unlawful violence or to prevent the escape of a lawfully detained person. The use of lethal force by states agents is, however, only acceptable under international human rights law when this is absolutely necessary to achieve a predefined objective and when force is used in a proportionate manner. In this sense, the right to life poses an important constraint on the use of armed force by states, even though the right is not as absolute as the right to be free from torture.

2.4 International Criminal Law

The last domain of international law that should be highlighted here is international criminal law (ICL). There are several historical precedents to the international investigation and prosecution of mass atrocities, the most important being the Nuremberg and Tokyo Tribunals that were created by the Allied Powers to prosecute German and Japanese officials in the aftermath of the Second World War. These Tribunals played a major role in developing the legal notions of individual and command responsibility for international crimes. As a distinctive domain of international law, however, ICL mainly evolved in the middle of the 1990s with the

[5] Note, however, that the Rome Statute of the International Criminal Court does not require the element of official responsibility. Torture as a crime against humanity or war crime can thus also be committed by non-state actors.

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