



New challenges for the *ius contra bellum* and the *ius in bello*

Syllabus

Anne Peters

Prof. Dr. iur., LL.M.

Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany), and professor at the Universities of Heidelberg and Basel (Switzerland).

Overview of the course

1. Overview of the law surrounding armed conflict.
Territorial disputes and the threat or use of force.
2. Trans-nationalisations: use of force by and against non-state actors, both inside and outside a state; involvement of third states.
3. Current problems of the law of self-defence, especially against non-state actors (terrorists, pirates).
4. Current institutional problems of the UN Security Council and of peacekeeping.
Humanitarian intervention/responsibility to protect.
5. New technology and international law surrounding armed conflict.

See for key documents and for a general bibliography the end of this syllabus.

Unit 1: Overview

Learning objectives

A. Overview of the law surrounding armed conflict:

- The prohibition of the use of military force.
- Two exceptions: self-defence and UN SC authorisation.
-
- The concept Charter; GA-Res. 3314 (XXIX) (**Reader**);
Art. 8*bis* and 15*bis*, 15*ter* ICC-Statute after Kampala (2010).
- The impact of *constitutional law requirements* on the use of force (example of UK HoC regarding Syria 2013); two-level game.

B. Territorial disputes and the threat or use of force

- The incorporation of Crimea into Russia under the threat of armed force.
- The armed conflict in Eastern Ukraine.
- The conflict over maritime delimitation in the Southern Chinese sea.

Leading cases

ICJ case law

- **ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v USA), Merits, ICJ Reports (1986), 14 (extracts in Reader).**
- ICJ, *Case Concerning Oil Platforms* (Iran v USA), ICJ Reports 2003, p. 161 et seq., esp. paras 27-78.



- ICJ, *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Reports 2005, p. 116.
- ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

Further examples

- Operation Desert Storm against Iraq (1991).
SC Res. 678 (of 29 November 1990). SC authorised all member states cooperating with Kuwait to use all necessary means against Iraq.
See Art. 42 sentence 2 UN Charter.
- The US-American military action in Iraq (March to July 2003). US reference to SC Res. 678 (1990); 687 (1991); 1441 (2002).

Documents

- Briand-Kellogg Pact (General Treaty for the Renunciation of War), signed on 27 August 1928, entered into force on 24 July 1929, 94 League of Nations Treaty Series 57, ratified by China on 24 July 1929.
- Charter of the United Nations, signed on 26 June 1945, entered into force on 24 October 1945, 1 UNTS 16, ratified by China on 28 September 1945. **See esp. Art. 2(4); 39 et seq.; Art. 51 (Reader).**
- North Atlantic Treaty, signed on 4 April 1949, entered into force on 24 August 1949, 34 UNTS 243 (not open for Chinese membership).
- Friendly-Relations-Declaration, Res. 1625 (XXV) of the UN General Assembly of 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations):
The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of
- **Definition of Aggression, Res. 3314 (XXIX) of the UN General Assembly of 14 December 1974 (Reader).**
- 1954).
Agreement (with exchange of notes) on Trade and Intercourse between Tibet Region of China and India, signed on 29 April
China, 299 UNTS 57.

Special literature

See for general literature below.

Mary-
February 2014) (Reader).

-Fatigue, *ESIL Reflections* vol. 3 issue 2 (10

Claus Kieß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force*, *Journal on the Use of Force and International Law* 1 (2014), 11-54 (Reader).



Cases

- Military action of Israel against Hezbollah in Lebanon (July-Sept. 2006).
- Military Cast L Israel against Hamas in Gaza (2008/2009).
- i of Israel against Hamas in Gaza (2014).
- The war in Georgia (2008): the Georgian government applied military force against two breakaway regions (South Ossetia and Abkhazia); Russia intervened.
- The delivery of weapons to the Syrian government (by Russia, Iran, Hezbollah) and to Syrian rebels (by Turkey and the US).

Cases of intervention

- ICJ, *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Reports 2005, p. 116, paras 49-53 (on invitation).
- Russia/Ukraine (2014).
- Mali (2013).

Documents

- Tagliavini Report: Independent International Fact-Finding Mission on the Conflict in Georgia (Report of September 2009), chapter F .
<<http://www.ceiig.ch/Report.html>>
- **Art. 16 ILC Articles on State Responsibility: Complicity (Reader).**
- **Art. 6 of the Arms Trade Treaty (A/CONF.217/2013/2) of 2 April 2013 (not yet in force) (Reader).**
- ILA, Use of Force Committee, **Final Report on the Meaning of Armed Conflict in International Law**, August 2010. <http://www.ila-hq.org>.
- Geneva Conventions, and Art. 1 of AP II (1977) (**Reader**).

Important Security Council Resolutions

- On Terror A -Res. 1368 (of 12 September 2001):
like any act of international terrorism, as a threat to international peace and security .
(See also SC-Res. 1735 (2006) on Al Qaida and Taliban; SC-Res. 1757 (2007) on Lebanon).
- SC Res. 1816 (2 June 2008) on Piracy and Armed Robbery at Sea.
- SC Res. 2178 of 24 September 2014 (on IS).
- SC Res. 1904 (2009) and 1989) on the Ombudsperson on Targeted Sanctions and the (reformed) Delisting Procedure.

Special literature

A. *Ius contra bellum*

Christian J. Tams, The Use of Force against Terrorists, The European Journal of International Law 20 (2009), 359-397 (extracts in Reader).

-L Issues Surrounding Third-State Intervention in the Syrian Civil War, Chinese Journal of International Law 13 (2014), 13-53.



Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (New York/London: Routledge 2013).

Michael N. Schmitt, *Legitimacy versus Legality Redux: Arming the Syrian Rebels*, *Journal of National Security Law and Policy* 7 (2014), 139-159.

Christian Non- assistance to Governmental and Opposition Forces, *University of New South Wales Law Journal* 36 (2014), 665-672.

Joseph Klingler, *Counterintervention on behalf of the Syrian Opposition?*, *Harvard International Law Journal* 55 (2014), 483-523.

Daniel Brunstetter/Megan Braun, *From Jus ad bellum to Jus ad Vim: Recalibrating our Understanding of the Moral Use of Force*, *Ethics and International Affairs* 27 (2013), 87-106.

Unit 3: Self-defence



Cases

- *U.S. v. Al Qaeda* against Afghanistan after 9/11 (2001 et seq.). See UN SC Res. 1368 (2001).
- ICJ, *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Reports 2005, p. 116, para. 51.
- IGH, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 et seq., paras 138–139 and paras 5–6 of separate opinion Buergenthal.
- The targeted killing of Osama Bin Laden (2012). (*See in detail: unit 5*)
- Military action against the Islamic State of Iraq and the Levant (ISIL) (2014).

Documents

- **Definition of Aggression, Res. 3314 (XXIX) of the UN General Assembly of 14 December 1974 (Reader).**
- **Art. 4, 8 and 9 ILC Articles on State Responsibility 2001 (Reader).**
- UN SC Res. 1368 (12 September 2001), preamble 3d indent and para. 1 (self-defence against Al Qaida?).
- **The National Security Strategy of the United States of America (Bush-Doctrine) of 17 September 2002, chapter V (Reader).**
- UK: Motion of the House of Commons, *Hansard*, 26 September 2014, column 1365-1366 (on air strikes against ISIL).

Scholarly standard setting proposals

- The Chatham House Principles of International Law on the Use of Force in Self-Defence (2006). Repr. in ICLQ 55 (2006), 963-972.
- Leiden Policy Recommendations on Counter-Terrorism (2010). Repr. in: Larissa van den Herik/Nico Schrijver (eds): Counter-Terrorism and the Law of International Human Rights (2010), 101-102.



Bin Cheng, Pre-emptive or Similar Type of Self-Defence in the Territory of Foreign States, *Chinese Journal of International Law* 12 (2013), 1-8.

Unit 4: Humanitarian Intervention and R2P

Learning objectives

- Current institutional problems of the UN Security Council and of peacekeeping.
- operations.
- **Humanitarian intervention:** is there a customary law-based right or principle of humanitarian intervention? Is an (delivery of weapons for use against regime committing horrible crimes)?
- **Responsibility to protect (R2P):** The three pillars. Legal status. How does R2P relate to humanitarian intervention?
- s (Brazil).
- The admissibility and potential legal basis of a right to **rescue own nationals**.

Cases

- The Kosovo intervention of the NATO (1999).
- in Libya (19 March – 31 October 2011). SC Res. 1970 and 1973. Invocation of R2P of the territorial state by the SC; but reproach of transgression of the SC authorisation, *inter alia* by delivery of weapons to opposition.
- The civil war in Syria (since 2011). Use of chemical weapons on 21 August 2013. Arms delivery to the Syrian government by Russia, Iran, Hezbollah. Arms delivery to



- Brazil, Concept paper: Responsibility while Protecting: Elements for the Development and Promotion of a C UN Doc. A/66/551-S/2011/701 of 11 November 2011.
- UK Government legal position on Humanitarian Intervention (statement of 29 August 2013 on chemical weapon use by Syrian regime).

Special literature

Karine Bannelier and Theodore Christakis, Under the UN Security

Law 26 (2013), 855-874.

Phil C.W. Chan, A Keen Observer of the International Rule of Law? International Law in and Argumentation in the Security Council, *Leiden Journal of International Law* 26 (2013), 875-907.

Christian Tams in: Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford: OUP 2012), 360-374.

Andrew Garwood-Gowers, China and the Libyan Intervention, *Asian Journal of International Law* 2 (2012), 375-393.

Olivier Corten and Vaios Koutroulis, The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus contra Bellum and Jus in Bello, *Journal of Conflict and Security Law* (2013), 1-35.

Unit 5: New technology

Learning objectives

- **Cyber war** cyber-attacks
The problem of attribution. The Tallinn Manual (2013).
- **global war on terror** -Qaeda and Taliban and
adviser Harold Koh, 2010) an armed conflict in
the sense of IHL?
- If yes, which type? How is a NIAC (non-international armed conflict) defined? Criteria of intensity (trigger), geographical scope. In the whole state, e.g. in Pakistan? *See Articles 2 and 3 common to the Geneva Conventions and Art. 1 AP I (Reader)*.
- What are the legal consequences of the (non)-applicability of IHL for the lawfulness of targeted killing?
- Legal questions arising from the use of **drones**.
- **Targeted killing:**
- Admissibility under ius contra bellum: prohibited use of force (threshold question)?
- Admissibility under IHL: w Who
are legitimate targets? (See Art. 51(3) AP I): -
What is the status of the drone operators sitting e.g. in Germany? How can the proportionality principle be respected (what is a legitimate objective? Collateral damage? Psychological effects for the population?). Obligation to take precautions.
- Admissibility under human rights law: When do human rights apply in armed conflict (relationship to regime of IHL)? Do international human rights apply extraterritorially (i.e.



does the CCPR bind the drone operator sitting in Germany even when the effects occur in Syria? applied? Right to life. Public emergency.

Procedural requirements, notably transparency.

- Legal questions arising from the use of lethally armed robots (**LAR**).

Leading cases

On targeted killing

- Israeli Supreme Court, Judgment of 13 December 2006, HJC 769/02.
- Peshawar High Court (Pakistan), Writ Petition No. 1551-P/2012, Dost Mohammad Khan CJ, Judgment of 11 April 2013.

On the relationship IHL – human rights law

ECHR (GC), *Hassan v UK*, appl no. 29750/09 of 16 September 2014, paras 99-111 (see Art. 31(3) lit. c VCLT). Detention in Iraq during armed conflict: Art. 5 ECHR applicable but not violated.

UN Special Rapporteurs

Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: **Study on Targeted Killings**, Human Rights Council 14th Session (UN Doc A/HRC/14/14/Add.6, 28 May 2010).

Ben Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: **Framework Principles** for Securing the Human Rights of Victims of Terrorism, Human Rights Council 12th Session (UN Doc. A/HRC/20/14, 4 June 2012).

Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, **Report on LAR** (UN Doc. A/HRC/23/47, 9 April 2013).

Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, **Report on Drones** (UN Doc. A/68/382, 13 September 2013).

Ben Emmerson, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counter-Terrorism Operations (UN Doc. A/68/389, 18 September 2013).

Ben Emmerson, Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counter-Terrorism Operations (UN Doc. A/HRC/25/59, 11 March 2014).

Other Documents

International Committee of the Red Cross, Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009).



US-President Barack Obama, *The Future of our Fight against Terrorism* speech at the National Defense University of 23 May 2013; full text published by guardian.co.uk. (includes statements on targeted killing and use of drones).

Multi-stakeholder standard setting exercise

The **Tallinn Manual** on the International Law Applicable to Cyber Warfare, prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence (Michael Schmitt general editor, Cambridge: CUP 2013).

Relevant legal norms for the assessment of LAR (lethally armed robots)

Attribution: Art. 4 ILC Articles on state responsibility.

Legality of the weapon: Art. 35 Geneva AP I (1977).

Uncontrollable effects: Art. 51 (4 c) Geneva AP I (1977).

Compliance with the rule of doubt (if in doubt, target is a civilian): Art. 50(1) AP I (1977).

Principle of distinction; principles of military necessity and proportionality; precautions (Art. 57 AP I).

O

Art. 28 and 30 ICC-Statute.

Art. 85(3) Geneva AP I (1977).

Command responsibility: Art. 86(2) and 87 Geneva AP I (1977).

Art. 4 and 6 CCPR (right to life; public emergency).

Special literature

Mary Ellen International Law of Drones, 14 ASIL Insights 36, 12 November 2010.

Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law 25 March 2010.

Harold Hongju Koh, *International Law in Cyberspace*, Remarks at the USCYBERCOM Inter-Agency Legal Conference, 18 September 2012.

Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, Harvard International Law Journal 54 (2012), 13-37.

From a symposium on drone wars:

Jens David Ohlin, *Is Jus in bello in Crisis?*, Journal of International Criminal Justice 11 (2013), 27-45.

Noam Lubell and Nathan Derejko, *A Global Battlefield?*, Journal of International Criminal Justice 11 (2013), 65-88.



Key documents on *Ius in bello*

Hague Regulations Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, entered into force on 26 January 1910, 205 Consolidated Treaty Series 263. Ratified by China in 1916.

The four Geneva Conventions

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in Field, entered into force on 21 October 1950, 75 UNTS 31. Ratified by China in 1956.

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, entered into force on 21 October 1950, 75 UNTS 85. Ratified by China in 1956.

Geneva Convention (III) relative to the Treatment of Prisoners of War, entered into force on 21 October 1950, 75 UNTS 135. Ratified by China in 1956.

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, entered into force on 21 October 1950, 75 UNTS 287. Ratified by China in 1956.

The Additional Protocols

Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, entered into force on 7 December 1978, 1125 UNTS 3. Ratified by China in 1983.

Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, entered into force on 7 December 1978, 1125 UNTS 609. Ratified by China in 1983.

Protocol III Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem, entered into force on 14 January 2007, 2404 UNTS 261. *Not ratified by China.*

General literature on *Ius contra bellum*

Allhoff, Fritz/Evans, Nicholas G./ Henschke, Adam (eds), *Routledge Handbook of Ethics and Just War* (New York/London: Routledge 2013).

Arend, Anthony Clark and Beck, Robert J., *International Law and the Use of Force* (2d ed. New York/London: Routledge forthcoming 2015).

Corten, Olivier, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing 2010).

Dinstein, Yoram, *War, Aggression and Self-Defense* (5th ed. Cambridge: CUP 2012).

Gray, Christine D., *International Law and the Use of Force* (3d ed. Oxford: OUP 2008).



Kolb, Robert, *Ius contra Bellum: Le Droit International Relatif au Maintien de la Paix: Précis* (Basel: Helbing Lichtenhahn ed ed. 2008).

General literature on ius in bello

Benvenisti, Eyal, *The International Law of Occupation* (2d ed. Oxford: OUP 2012).

Bothe, Michael /Partsch, Karl /Solf, Waldemar, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2d ed. Leiden: Martinus Nijhoff 2013).

Detter, Ingrid, *The Law of War* (3d ed. Farnham: Ashgate 2013).

Dinstein, Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict* (2d ed. Cambridge: CUP 2010).

Emanuelli, Claude, *International Humanitarian Law* (Brussels: Editions Yvons Blais 2009).

Fleck, Dieter, *The Handbook of International Humanitarian Law* (3d ed. Oxford: OUP 2013).

Henckaerts, Jean-Marie/Doswald-Beck, Louise/Alvermann, Caroline (eds), *Customary International Humanitarian Law* (Cambridge: CUP 2005; 3 volumes).

ICRC (ed), *Commentary on the Geneva Conventions of 12 August 1949* (Geneva: 1952 et seq.; multiple volumes).

Kolb, Robert, *Ius in bello: Le Droit International des Conflits Armés: Précis* (2d ed. Basel: Helbig & Liechtenhahn 2009).

McMahan, Jeff, *Killing in War* (Oxford: OUP 2009).

Sassòli, Marco/Bouvier, Antoine A./Quintin, Anne, *How Does Law Protect in War?* (3d ed. Geneva: ICRC 2011; 2 volumes).

Thürer, Daniel, *International Humanitarian Law: Theory, Practice, Context*, The Hague Academy: *Collected Courses* 338 (2008), The Hague 2011 (Pocket Book Series).