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About HPG

The Humanitarian Policy Group at the Overseas Development Institute is Europe's leading team of independent policy researchers dedicated to improving humanitarian policy and practice in response to conflict, instability and disasters.

In brief

- This HPG Briefing Paper analyses the legal basis for the use of force in the context of the 'global war on terror' and assesses the trends set by that war in the application of international humanitarian law and the protection of refugees and human rights.
- The interpretation of international law, either in justification or in opposition to the use of force, has raised passionate debate among international lawyers.
- How force is used, with or without UN Security Council authorisation, will influence how aid agencies respond, and will affect the conditions in which they work.

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The 'global war on terror': issues and trends in the use of force and international humanitarian law

Introduction

Over the past decade, military interventionism has increased. This trend has been variously justified by the need to address threats to international peace and security; to avert humanitarian catastrophe; and more recently as part of the 'global war on terror'. This Briefing Paper analyses the legal basis for the use of force in circumstances such as these; examines the application of international humanitarian law (IHL) in the global war on terrorism; and assesses the trends set by the war against terror in the protection of refugee law and human rights.

International relations and the use of force

Since the late 1920s, the use of force has been prohibited as an instrument of national policy in international relations, except in self-defence. From 1945, the UN Charter established a multilateral framework maintaining this prohibition, and has regulated the use of force in self-defence and in the collective enforcement of international peace and security through the Security Council. The *interpretation* of international law has, however, raised passionate debate among international lawyers, either in justification or in opposition to the use of force. In addition, laws on the use of force are particularly prone to unilateral legal and political interpretations.

The prohibition on the use of force

A key moment in prohibiting the use of force in international law came with the conclusion on 27 August 1928 of the General Treaty for the Renunciation of War as an Instrument of National Policy (commonly known as the Kellog–Briand Pact). This obliged state parties to 'condemn recourse to war for the resolution of international controversies, and renounce it as an instrument of national policy in their relations with one another'. Wide acceptance of the Pact ensured that its provisions rapidly crystallised into customary law, binding all states independently of specific treaties or international agreements.

Building on these obligations, the UN Charter placed a series of legal constraints on the use of force. These appear in:

- Article 2(4), which prohibits the threat or use of force against the political independence and territorial integrity of a state;
- Article 51, which stipulates that force can be used in self-defence in response to an armed attack; and
- Chapter VII, which authorises the collective use of force by the Security Council.

The strict view of Article 2(4) prohibits all use of force; with the exception of self-defence and authorisation by the Security Council, nothing justifies military intervention against a sovereign power. This view is supported by the International Court of Justice. The permissive view is that Article 2(4) prohibits only the use of force aimed at harming the territorial integrity and political independence of a state; in this view, Article 2(4) does not prohibit force used for humanitarian purposes, or to rescue nationals in danger in a foreign country.

The use of force in self-defence

The right of individual and collective self-defence exists in Article 51 of the

Box 1: International law and the 'war against terror': relevant Security Council resolutions

Since 11 September 2001, the UN Security Council has passed a number of resolutions which aim to counter terrorism. The main developments have been the elevation of terrorism to the status of a threat to international peace and security and a crime against humanity, and the crystallisation by the Security Council of binding obligations to eliminate and prevent terrorism.

Security Council Resolution 1368 of 12 September 2001 expressed the Security Council's readiness to take all necessary steps to respond to the attacks, and to combat all forms of terrorism. The resolution unequivocally condemned the 11 September attacks, and recognised the inherent right of individual or collective self-defence in accordance with the Charter. It also called on all states to work together to bring the perpetrators, organisers and sponsors of terrorist attacks to justice, and stressed that those responsible for aiding, supporting or harbouring perpetrators, organisers and sponsors would be held accountable.

Security Council Resolution 1373, of 28 September 2001, specified measures that states are to take to prevent and eliminate terrorism. However, it does not envisage the use of force as an exclusive, or regular, means of dealing with terrorism. Rather, it deploys a wide range of measures based on cooperation between states, and the establishment of a standing committee to monitor the implementation of the measures it sets out.

UN Charter and in customary international law. Important conditions for the right of self-defence in international law are: the occurrence of an armed attack; the necessity of self-defence; and proportionality of the means used in defence. Differences in interpretation revolve around whether the right to self-defence can only be invoked once an armed attack has actually taken place, or whether there is a right to *anticipatory* or *pre-emptive* self-defence. These arguments have been sharpened since 11 September. The 11 September attacks are regarded as qualifying as an armed attack, entitling the US, or any state faced with an attack on a similar scale, to resort to self-defence. However, neither state practice nor the practice of the Security Council has established a unilateral doctrine of pre-emptive self-defence.

The authorisation of the UN Security Council

The UN Security Council has primary responsibility for maintaining international peace and security. It has collective powers to authorise the use of force under Chapter VII of the Charter by determining that a threat to peace exists, that a breach of the peace has occurred, or that an act of aggression has taken place. Several recent military actions have been launched without Security Council authorisation, by reference to an alleged right of 'humanitarian intervention'. The major debate has been whether this 'right' had become part of the collective approach to international peace and security, or whether it existed alongside the Charter. Following NATO's intervention in Kosovo in 1999, the UK's Foreign Affairs Select Committee concluded that humanitarian intervention had a tenuous basis in international customary law, rendering NATO's action legally questionable.

International law and the war in Afghanistan

On 7 October 2001, the US reported to the Security Council that it had been the victim of 'massive and brutal attacks', and that it was exercising its right of self-defence, in accordance with Article 51 of the Charter. On the same day, the US, the UK and other allied states, with the approval of the Security Council, began military operations in Afghanistan after the Taliban refused to hand over the al-Qa'eda leadership. This refusal may have ranked as acquiescence, in keeping with Resolution 1368 (see Box 1), in activities organised by armed groups in Afghanistan, and directed against the US and its allies. The Taliban regime was removed from power and a new government was installed on 3 December 2001.

International law and the war in Iraq

When Iraq invaded Kuwait in 1990, Security Council Resolution 678 determined that its conduct amounted to a threat to international peace and security, a breach of the peace and an act of aggression. Thus, it met all three criteria for the collective use of force under Chapter VII of the UN Charter.

The situation in 2002–2003 was much more complex. Security Council Resolution 1441 warned Iraq that it would face 'serious consequences' if it continued to ignore its obligations concerning the disarmament of weapons of mass destruction. However, serious differences arose over how to proceed. The view advanced by the US and its allies was that Resolution 1441, taken with pre-existing resolutions, cumulatively provided sufficient legal authority to use force. The opposing view was that, while Resolution 1441 found Iraq to be in material breach of previous Security Council resolutions, it stopped short of authorising the use of force on that basis. Instead, it gave Iraq one final chance to comply with its disarmament obligations, and warned ambiguously of 'serious consequences' if Baghdad were to be in material breach of Resolution 1441.

During the debate on Resolution 1441, the 'automaticity' that would trigger the use of force without further recourse to the Security Council was rejected. Subsequent draft resolutions were either rejected or withdrawn in the face of objections to the use of force by France, Russia and China. On 16 March 2003, the US, the UK and Spain jointly announced their intention to launch military action. On 19 March, the US began a military attack aimed at 'decapitating' the senior leadership. The main military operation followed, conducted principally by the US and the UK, leading to the collapse of the regime.

In contrast to the unity within the Security Council that preceded the war in Afghanistan and the removal of the Taliban government, the arguments around the use of force in Iraq highlight the very different legal and political circumstances that obtained. Previous Security Council resolutions on Iraq did not include regime change; in fact, the country's territorial integrity and political independence was reaffirmed after the first Gulf war. Meanwhile, the failure to find weapons of mass destruction – the central objective and key basis for the use of force – casts doubt on the legal validity of the cumulative-effect argument, and damages the credibility of the evidence used to determine that Iraq posed a threat to international peace and security.

Regime change in Iraq raises the possibility that force was used punitively as a reprisal for not complying with disarmament obligations. Reprisals are, however, unlawful. The use of force without Security Council authorisation runs counter to the

Box 2: Key principles of IHL

The principle of *distinction* obliges parties to an armed conflict to distinguish between civilians and combatants at all times, and to direct hostilities only against military targets and combatants who take an active part in hostilities. Civilians must not be used to shield military targets (as happened in Iraq). Starvation as a method of warfare, destroying objects indispensable to the survival of the civilian population and forcibly displacing civilians for reasons related to the war are all prohibited acts. Military objectives are 'those objectives which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage'. Civilian objects are normally dedicated to civilian purposes, such as places of worship, dwellings and schools. Attacks on cultural objects, hospitals and medical facilities are also prohibited. The presence of combatants among the civilian population does not deprive that population as a whole of its civilian character, and of its protection from the effects of hostilities.

The principle of *precaution in attack* requires that care be taken not to harm civilians in the conduct of an armed attack, and a number of specific precautionary measures are specified in the first Additional Protocol of 1977 in order to minimise the potential harm to civilians or damage to civilian objects.

Under the principle of *proportionality*, a military attack must be proportionate to the lawful military objective, and must avoid or minimise incidental loss of civilian life, injury and damage. The proportionate use of force necessitates methods and means of warfare that do not cause superfluous injury or unnecessary suffering. Terrorist acts and cluster bombing may thus be unlawful.

principle of the political independence of states, which is a legal guarantee against the removal of governments by force, and which prohibits and safeguards against the occupation and annexation of one state's territory by another.

International humanitarian law and the regulation of armed conflict

International humanitarian law (IHL) regulates conduct in armed conflicts. It is embodied in a range of treaties that regulate the methods and means of warfare, including the use of inhumane weapons, the way in which hostilities are conducted, and how civilians and those taking no active part in hostilities are to be protected. The key provisions relating to these categories of 'protected persons' are contained in the four Geneva Conventions of 1949, and the two Additional Protocols of 1977. This body of law is unique in that it is binding on state *and* non-state actors, including armed groups and individuals. All parties have a duty to observe the basic principles of IHL regardless of whether hostilities constitute an international or a national armed conflict. IHL applies to all situations of 'armed conflict' whether formally defined or not as long as hostilities have reached a certain level of intensity. Under Article 49 of Protocol 1, IHL applies equally to acts in attack and in defence, both by states and by terrorist groups. Violations of IHL that amount to war crimes or other serious violations can be addressed through the International Criminal Court, established in 1998.

IHL begins to apply when a situation of armed conflict exists, whether by a state or by armed groups. Since the 11 September attacks are regarded as constituting an 'armed attack', IHL thus applies, both to state forces and to non-state armed actors such as al-Qa'eda. Terrorist groups such as al-Qa'eda are likely to have an internal disciplinary system, a key requirement of IHL, but they are less likely to comply with the rules of armed conflict. These are grounds for prosecuting members of such groups when captured; they are not legal grounds for denying the application of IHL to them.

In the war against terror, clear lines distinguishing between civilians and combatants do not always exist. In Afghanistan, Taliban and al-Qa'eda forces did not wear uniforms, and some combatants belonging to coalition forces wore civilian clothing. Some members of Iraq's armed forces abandoned their military formations and posed as civilians. These difficulties do not by themselves render IHL inapplicable, but they do create practical problems of identification. Tactics such as feigning an intent to negotiate under a flag of truce or surrender; feigning incapacitation; and feigning protected status by using signs, emblems or uniforms of the UN or of neutral or other states not party to the conflict are punishable under the offence of 'perfidy'.

Military necessity versus humanity

The modern application of IHL balances military necessity with humanity in the conduct of war. Parties to the conflict are obliged to allow and facilitate the rapid and unimpeded passage of all relief consignments, equipment and personnel, even if this assistance is destined for civilians belonging to the adversary. In Afghanistan, calls by humanitarian agencies to be granted safe access were ignored in favour of the necessity to bomb enemy positions. By contrast, in the war in Iraq, both the port of Umm Qasr and the city of Basra were designated as strategic military objectives by allied forces for the principal purpose of securing those cities to use them as venues for the supply and delivery of humanitarian assistance. However, insecurity during and after the war has made it difficult for aid agencies to deliver such assistance effectively.

Occupation and its implications for aid agencies

The US-led coalition in Iraq is an occupying power. This means that it has responsibilities and obligations which are regulated by IHL. Occupation is a distinct, abnormal and temporary legal category. In place of a defeated government, an occupying power fills the administrative vacuum and assumes special responsibilities for administering the occupied territory and for meeting the humanitarian needs of the civilian population. Security Council Resolution 1472 (2003) affirms the occupation of Iraq under IHL and calls upon the occupying powers to comply strictly with their obligations of providing humanitarian assistance to the population of Iraq. An occupying power can affect aid agencies in occupied territory in several ways:

- *It is for the occupying power to verify the state of food and medical supplies in the territory that it occupies.* The occupying power could verify that supplies are adequate when this is not the case, in order to avoid having aid agencies in occupied territory. If it did so, it would be acting in breach of IHL.
- *An occupying power may invoke military necessity to avoid having to verify the state of food and medical supplies.* This may have the effect of excluding aid agencies from occupied territories.

- *An occupying power is permitted to requisition foodstuffs, articles or medical supplies.* This is allowed on the exclusive condition that the requirements of the civilian population have been taken into account. In that event, there is a further obligation on the occupying power to make arrangements to ensure that a fair price is paid for any requisitioned goods. However, this may not be ethically acceptable to humanitarian agencies.
- *The occupying power may not be able to restore order and stability in the aftermath of war.* Continued instability may deter aid agencies from working in occupied territory. This was clearly the case in the aftermath of the war in Iraq.

The war on terror and refugee protection

Since 11 September, there has been a closer alignment of refugee policy and legislation with national security. Security Council Resolution 1373 obliged states not to grant safe haven to suspected terrorists. Concerns that terrorists may use the refugee system to gain entry for the purpose of perpetrating terrorist acts have prompted many countries to establish powers to detain or remove asylum-seekers or refugees from their territories in ways contrary to the Refugee Convention of 1951. Restrictions on granting asylum have increased, as have attempts to limit entry by using detention as a deterrent, imposing visa requirements on asylum-seekers, imposing punitive sanctions on carriers transporting asylum-seekers, and proposals to erect asylum processing zones outside prospective host states. The use of exclusion clauses has increased against individuals believed to have committed international crimes, serious non-political crimes and any other acts deemed to be contrary to the principles and purposes of the UN, for example gross violations of human rights.

The war on terror and human rights

The war has also raised questions concerning the protection of human rights. Although terrorist acts violate the human rights of individuals, those committing terrorist acts themselves must be treated in accordance with human rights law, particularly where detention, fair trial, non-discrimination and deportation are concerned. Many states have abrogated some of their human rights obligations as permitted by human rights treaties, citing the threat of terrorism. But there are rights that cannot be abrogated and which must be respected, particularly the right to life; the prohibition on torture and on inhuman and degrading treatment; non-discrimination; and compliance with general obligations of international law. Major human rights concerns in the war against terror include:

- Profiling individuals as potential threats on the grounds of race, origin or religious belief.
- Administrative detention of terrorist suspects without trial, sometimes within the jurisdiction of a state, and sometimes outside it, as in the US base at Guantanamo Bay in Cuba.
- Sending or returning individuals, including asylum–seekers, to states where they are likely to face torture or inhuman and degrading treatment.
- Surrendering suspected terrorists to states that perpetrate torture or inhuman and degrading treatment.

Conclusions

Three main perspectives on the interpretation of international law can be identified:

- *The contextual approach.* This represents the mainstream position followed by the majority of international lawyers. It takes a strict view of Articles 2(4) and 51 and Chapter VII, including Security Council resolutions. International law, whatever its defects, is applicable to all use of force by states and armed bands. Humanitarian intervention is regarded as unlawful, and there is insufficient evidence in state practice for the existence of such a right. The use of force in Afghanistan would be justified as collective self-defence; the right of self-defence is broadly confined to responding to an armed attack, and does not extend to the protection of nationals abroad against terrorism. The unilateral use of force against Iraq is illegal.
- *The realist approach.* This approach acknowledges the role and purposes of Articles 2(4) and 51 and Chapter VII, together with the relevant resolutions of the Security Council, but argues that they should be interpreted 'realistically'; they were designed to deal with the use of force between states in the circumstances of 1945, and can no longer serve important goals of the international community, such as responding to horrific terrorist attacks against nationals abroad or the need to disarm dangerous regimes.
- *The legal constructionist approach.* This approach is based on the combined or cumulative effect of provisions concerning the use of force, together with Security Council resolutions, NATO declarations in the case of Kosovo, and human rights. In this view, there is a right of humanitarian intervention to prevent an overwhelming humanitarian catastrophe; the war against terror is justified, and self-defence is applicable to deal with threats or acts of terrorism against nationals abroad. The use of force against Iraq is lawful by virtue of the combined or cumulative effect of Security Council resolutions on disarmament; no explicit authorisation by the Security Council was required for regime change in Iraq.

Whatever view one takes, it is clear that the use of force has significant implications for international humanitarian law. The important point is that IHL applies equally to all parties in an armed conflict; all parties are obliged to respect the principles of distinction between civilians and combatants, between combatants and prisoners of war, and between military and civilian objects. These principles have been strained in the war against terror, but this is true of any war. The resilience of the laws of armed conflict lies in the fact that they are intended to protect those involved, as well as those affected, and in the fact that the laws themselves have evolved out of the experience of war.

This Briefing Paper is drawn from Chaloka Beyani, 'International Law and the "War on Terror"', in Joanna Macrae and Adele Harmer (eds), *Humanitarian Action and the 'Global War on Terror': A Review of Trends and Issues*, HPG Report 14 (London: ODI, 2003).

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