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The permissive power of the ban on war

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Abstract

The ban on inter-state war in the UN Charter is widely identified as central to the modern international order–Michael Byers calls it 'one of the twentieth century's greatest achievements'. Even if it is only imperfectly observed, it is often seen as a constraint on state autonomy and an improvement on the pre-legal, unregulated world before 1945. In response to this conventional view, this article shows that the laws on war in the Charter are better seen as permissive rather than constraining. I make two points. First, by creating a legal category around 'self-defence', the laws on war authorise, and thus legitimate, wars that are motivated by the security needs of the state, while forbidding other motives for wars. Second, state practice since 1945 has expanded the scope of this authorisation, extending it in both time and space beyond the black-letter text of the Charter. The permissive effect of law on war has therefore been getting larger. These two effects suggest that international law is a resource that increases state power, at least for powerful states, and this relation between international law and power politics is missed by both realists and liberal internationalists.

Keywords

Self-defence; International Law; International Security; Laws of War; Legal Justification

> He who breaks the law has gone to war with the community; the community goes to war with him.[1]

In the standard view of international law, the power of law lies in its ability to differentiate between lawful and unlawful state behaviour and to encourage the former by making the latter more expensive. However this model fails in relation to the laws that ban inter-state war, and it fails for reasons that are important for scholarship on the relation between international law and politics. This article makes two points: that the laws on war are permissive rather than constraining and that the scope of this permission has expanded since 1945 under the influence of state practice. Contrary to the conventional view of the ban on war, *raisons d'état* are not supplanted by legalism. Legalisation has instead created a legalised path for war through the concept of self-defence. This amounts to a permissive authorisation for war that magnifies some aspects of state power, with a scope that has been expanding since 1945.

The ban of war is widely identified as central to the modern international order – Michael Byers calls it 'one of the twentieth century's greatest achievements' – and it is often used as evidence of progress

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[1] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, Cambridge: Cambridge University Press, 1899), p. 449, cited in Caleb Smith, *The Prison and the American Imagination* (New Haven: Yale University Press, 2009), p. 30.

in world politics, an improvement on the 'bad old days' when the decision to go to war was purely political[2] and unconstrained by positive-law standards or rules.[3] The contribution of these laws to the 'cooperative rules-based order' that liberal internationalists see in the world today depends on their ability to communicate to states what is permitted and what is forbidden and thus to change their incentives and costs.[4]

The distinction between lawful and unlawful war was codified in the UN Charter in 1945, but it has evolved since then such that the law today cannot be known by reference only to its formal source. Determining the legality of the use of force today requires considering the effect of informal resources such as state practices and the changing desires of powerful states, and the international political-legal system today moves away from the classical model of a set of regulative rules that limit state agency. In its place a dynamic and political model of law emerges, in which law provides legitimation to state choices. By defining what wars are lawful, and in bending to the changing interests of powerful states, the ban on war constitutes the resources that states rely on to legitimate their uses of force and delegitimate others.

This article first looks for the legal rules that ban war by asking 'what is it that states are required to do, and to refrain from doing, in their use of force against other states?' The framework for lawful war is anchored by the UN Charter on three foundations: that (i) the threat or use of force by states is illegal; except (ii) when used for self-defence or (iii) as authorised by the UN Security Council. The first part of the article uses the conventional tools of legal interpretation to consider what these laws forbid, require, and permit. I pay particular attention to the role of the legal category of 'self-defence' as self-defence invites states' security 'needs' into the determination of whether a war is lawful or not.

I then trace how the rules have been interpreted and applied in practice, focusing on the role of past practice and state interests in shaping how the law is understood. Debates over the meaning and application of the law frequently invoke past disputes, claims, and invocations as evidence, and they also contend with competing claims about the 'necessity' of war for self-defence. These changing interpretive resources have driven the contemporary content of the law. As state practice has changed what counts as lawful war, the change has a natural direction: it goes toward the desires of the agents. Over time, the rules move with the interests of the strong so that their interests become encoded inside 'compliance' with the law.[5] Following in the tradition of Helen Kinsella and Bernard Harcourt and others who study the history and dynamics of political distinctions, I consider how

[2] Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge: Cambridge University Press, 2010), p. 11.

[3] Michael Byers, *War Law* (New York: Atlantic Books, 2005), p. 148. See also, O'Connell, 'Peace and war', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

[4] See, for instance, G. John Ikenberry and Anne-Marie Slaughter, *Princeton Project on National Security* (Woodrow Wilson School, Princeton University, 2006), available at: {http://www.princeton.edu/~ppns/report/FinalReport.pdf}.

[5] The expansion of international legal institutions and forms in the late twentieth century gives strong states another means by which to exercise power over other actors in the international system. Christian Reus-Smit, *American Power and World Order* (London: Polity, 2004); Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012); David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004); Kerstin Fisk and Jennifer M. Ramos, 'Actions speak louder than words: Preventative self-defense as a cascading norm', *International Studies Perspectives*, 15:2 (May 2014), pp. 163–85.

the distinction between 'compliance' and 'non-compliance' is constituted in part by these internalised interests.[6]

The final section considers three implications of that internalisation: first, the legalisation of war decisions after 1945 gives a legal basis for the pursuit of national security interests – it changes the politics of legitimation for war but does not in itself speak to the frequency of war; second, it shows the permissive function of international law, in the sense that it authorises wars that are motivated by self-defence, while also constraining states that seek to use war for other purposes; third, it makes the ban on war infrangible: it is 'law that cannot be broken' since security interests of the state are decisive in determining whether war counts as 'self-defence' or not.

The ban on war

The universal ban on inter-state war is a central element of the UN Charter. For states that are members of the United Nations (which today means all recognised states) it is illegal to use or threaten force against other states, except as necessary in self-defence to respond to an armed attack. This right expires once the Council has taken collective measures to restore international peace and security.

The key provision is Article 2(4) of the UN Charter. It says:

> All members 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 the United Nations.

This is supplemented by Article 51, which acknowledges the legality of war in self-defence:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The texts of Articles 2(4) and 51 are the foundation of the contemporary legal regime on war, the formal rules that distinguish acceptable from unacceptable uses of force. They embody the fundamental bargain in the post-1945 international security system: war-decisions are made in the Security Council and are no longer the prerogative of individual governments.[7] The peace-and-security architecture of the United Nations system is the institutional expression of that premise. With these clauses, the Charter removes from states the right to decide as they wish how to use their militaries and installs in its place a collective system with the UN Security Council at the center.[8]

[6] Helen M. Kinsella, *The Image Before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, NY: Cornell University Press, 2011); Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2012).

[7] On this see Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012); Oscar Schachter, 'The legality of pro-democratic intervention', *American Journal of International Law*, 78:3 (1984), pp. 645–50 (p. 648).

[8] Ian Hurd, *After Anarchy: Power and Legitimacy in the UN Security Council* (Princeton: Princeton University Press, 2007).

The attempt to regulate war through law and rules was not new in 1945 – its first articulation as a legal obligation came in the Kellogg-Briand Pact of 1928, which was the first European treaty to outlaw war among its parties.[9] Before that, arguments about acceptable and unacceptable war are ancient.[10] However, the Charter is remarkable for its turn to law and to legal obligations that apply to all states in the international system. For the first time in the history of the Westphalian inter-state system war was made explicitly illegal for all states. The Charter subordinates national war decisions beneath a set of legal criteria that distinguish between legality and illegality in war-making. It is novel both in its legalisation and its universality.[11]

The ban on war as a form of international order

For many authors, the introduction of law into the decision to go to war marks a dramatic break the management of international affairs, in Europe and beyond. It is often used as evidence that the post-1945 world is fundamentally different from what existed before. For instance, according to Tom Ruys, 'up until the end of the nineteenth century, the predominant conviction was that every State had a customary right, inherent in sovereignty itself, to embark upon war whenever it pleased.'[12] This right was activated when a sovereign claimed to have experienced a harm at the hands of a foreign agent. The pre-1945 discourse of war legitimation emphasised the existence of harm and the legitimacy of the use of force in response.[13] Precipitating harms might include unpaid debts, territorial incursion, dynastic disputes, regional destabilisation, and more; and the actors perpetrating those harms might include other sovereigns, their diplomats and agents, or even firms and individuals.[14] Thus, war choices in the eighteenth- and nineteenth-century European system were legitimated in political rather than legal terms.[15]

[9] The Kellogg-Briand Pact (also known as the Pact of Paris, and more formally as the General Treaty for the Renunciation of War as an Instrument of National Policy) was for a time the most widely ratified international instrument. It bans war by its parties in their relations among each other but leaves unaffected their wars with others. The treaty has just two operative paragraphs, which require that parties 'condemn the recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another' (Article I) and 'agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means' (Article II). It remains in effect today among its signatories.

[10] See the discussion in Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (The Hague: Kluwer, 1996).

[11] The recent wave of scholarly interest at the boundary between political science and legal studies on the 'legalisation' of world politics has not addressed this case. It is not among the central cases in, for instance, Judith L. Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter (eds), *Legalization and World Politics* (Cambridge, MA: MIT Press, 2001); Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013); or Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015). Also see Oona Hathaway and Scott Shapiro, The Worst Crime of All (Simon and Shuster, 2017).

[12] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p. 11.

[13] Hathaway and Shapiro, *The Worst Crime of All*.

[14] Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Ithaca: Cornell University Press, 2004).

[15] Michael Byers, *War Law: Understanding International Law in Armed Conflict* (New York: Grove Press, 2005); Hathaway and Shapiro, *The Worst Crime of All*. See also, Jennifer Mitzen's account of European 'stability' governed by the Concert of Europe, in Jennifer Mitzen, *Power in Concert: The Nineteenth-Century Origins of Global Governance* (Chicago: University of Chicago Press, 2013).

By imposing a legal framework upon war, the UN Charter ended this era. In its place, Christine Gray writes the Charter 'provides a new terminology and the first expression of the basic rules [for war] in their modern form'.[16] Michael Byers sees this as 'a constitutional moment in international affairs: an anarchic world of self-help and temporary alliances was transformed into a nascent system of governance.'[17] Thomas Franck believes it launched the modern age, distinguished by the 'idea that the use of force by a state against another could itself be violative of the legal order's very foundations'.[18]

This argument is often derided as 'world peace through world law',[19] but its central insight has been adopted widely by liberal, realist, and many critical writers across political science, history, and legal theory. For instance, Hedley Bull identified rules on violence as a key component of the existence of society itself, whether domestic or international. Society, for Bull, begins when individuals put aside their natural right to act as they see fit and become both encumbered and liberated by rules that constrain their recourse to violence.[20] International society is therefore inconceivable without rules that regulate war. International law scholars often arrive at the same conclusion but by starting at a different point – that regulating inter-state war is the paradigmatic, essential task of public international law: it is common among international lawyers to equate international law with the regulation of violence itself. Hersch Lauterpacht said that the 'primordial duty of the [international] law' is to enact the rule that 'there shall be no violence' by states.[21] Mary Ellen O'Connell says that 'law is valued for providing an alternative to the use of force in the ordering of human affairs. In this sense, all of international law is law of peace.'[22] For Lauterpacht, as for O'Connell, the regulation of war is inseparable from the concept of public international law itself,[23] and both share with Bull the faith that controlling war with law will allow international society to emerge among nations.

G. John Ikenberry provides a defence of the view that international rules and institutions, the ban on war prominent among them, are the foundation of contemporary order. For Ikenberry, the post-1945 world is characterised by the multilateral commitment to a rules-based international system. In this 'liberal hegemonic order', the commitment to international legal institutions creates 'an order where weaker states participate willingly – rather than resist of balance against the leading

[16] Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford: Oxford University Press, 2008), p. 6.
[17] Michael Byers, 'Jumping the gun', *London Review of Books*, 24:14 (2002), pp. 3–5.
[18] Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), p. 10.
[19] The naïve version assumes that changing the law will necessarily change behaviour accordingly. This is a straw target, easier to caricature than to actually find in scholarship. The original statement of world peace through law is Grenville Clark and Louis B. Sohn, *World Peace Through World Law* (Cambridge, MA: Harvard University Press, 1958). Debunking the myth of legal naïvety in relation to the 1928 Kellogg-Briand Pact, see Harold Josephson, 'Outlawing war: Internationalism and the Pact of Paris', *Diplomatic History*, 3:4 (1999), pp. 377–90.
[20] Hedley Bull, *The Anarchical Society: A Study in World Order* (3rd edn, New York: Columbia University Press, 2002).
[21] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933), p. 64, cited in Franck, *Recourse to Force*, p. 1.
[22] O'Connell, 'Peace and war', p. 272. Rosa Brooks says 'at its most fundamental level, the rule of law is concerned with constraining and ordering power and violence'. See Rosa Brooks, 'Drones and the international rule of law', *Ethics and International Affairs*, 28:1 (2014), p. 83.
[23] Compare this to, for instance, Leo Strauss, who suggests 'the broader consideration of what law is for, namely the existence, preferably on a high level, of political society as a whole', not just the regulation of violence. Leo Strauss in 'Seminar on *The Philosophy of History*', quoted in Robert Howse, *Leo Strauss: Man of Peace* (Cambridge: Cambridge University Press, 2014), p. 130.

power … . Weaker states agree to the order's rules and institutions, and in return they are assured that the worst excesses of the leading state – manifesting as arbitrary and indiscriminate abuses of power – will be avoided, and they gain institutional opportunities to work and help influence the leading state.'[24]

Ikenberry is expressing the intuition behind liberal internationalism more generally when he says that the rules and institutions that make up the international order increase the security of both strong and weak states. He thinks they will therefore gain the consent of these states. 'The United States built postwar order within the Western world – and extending outward – on liberal ideas and principles … looking after the overall stability and openness of the system … . In ideal form, liberal international order is sustained through consent rather than balance or command. States voluntarily join the order and operate within it according to mutually agreed-upon rules and arrangements. The rule of law, rather than crude power politics, is the framework of interstate relations.'[25] In such a system, 'power is exercised through sponsorship of rules and institutions', he says.[26] The progress of 'liberal' postwar settlements since 1815 has therefore been 'based on a set of principles of restraint and accommodation', anchored by limitations on inter-state violence.[27]

It isn't only liberals such as Ikenberry who see international rules on war as giving structure to inter-state relations. Henry Nau, promoting what he calls 'conservative internationalism', takes a similar view, although he limits its scope to 'the West'. In that region (or perhaps 'community') he sees a unified international identity 'in which common law and institutions replace the balance of power and anarchy'.[28] He differentiates his view from that of liberals by explicitly endorsing the use of force as a means to expand the reach of that identity – he says 'given the continuing range of threats, the use of force to promote a freedom-forward diplomacy persists'.[29] Nau never accounts for what 'freedom' means nor does he show any connection between it and American military operations, and as a consequence his policy prescriptions carry little weight – but he shares with Ikenberry and others the view that international rules take the place of power politics and thus contribute to international order.

A version of this commitment, albeit with a different political valence, appears also in the work of Michael Hardt and Antonio Negri. In identifying global power in late modernity, Hardt and Negri find an emerging 'imperial sovereignty … an imperial notion of right' that straddles the conventional divides of domestic/international and public/private power. The 'juridification' of global power has reconstituted sovereign authority in a constellation of institutions and practices across these divides, creating 'a machine that imposes procedures of continual contractualization that lead to systemic equilibria' – in other words, a codification of states' and subjects' legal obligations and the

[24] G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton: Princeton University Press, 2011), p. 106.

[25] Ibid., p. 18. See also Stephen G. Brooks, G. John Ikenberry, and William C. Wohlforth, 'Lean forward: In defense of American engagement', *Foreign Affairs*, 92:1 (Jan/Feb 2013),

[26] Ikenberry, *Liberal Leviathan*, p. 84.

[27] Ibid., p. 21.

[28] Henry R. Nau, *Conservative Internationalism: Armed Diplomacy under Jefferson, Polk, Truman, and Reagan* (Princeton: Princeton University Press, 2014), p. 228. He identifies Iran as a 'threat' to world order because it exhibits 'less respect for international rules' than the US does (p. 231). He also says that the US 'failure' to use the collective self-defence provisions of the NATO charter (Art. V) was a mistake of historic proportions, 'one of the great mysteries and tragedies of the history of 9/11', p. 237.

[29] Nau, *Conservative Internationalism*, p. 232.

repackaging of their political relations in legal terms.[30] This is echoed in B. S. Chimni's account of the 'emerging global state', which he sees arising in the form of the interconnected web of international political, legal, and economic institutions.[31]

Hardt and Negri identify the ban on war, and the legalisation of war in the UN, as the mid-twentieth-century hallmarks of the 'juridification' of politics, both global and local: the reconstitution of war as a specifically *legal* category produces 'the right of duty of the dominant subjects of the world order to intervene in the territories of other subjects in the interest of preventing or resolving humanitarian problems, guaranteeing accords, and imposing peace'.[32] This juridical global power they call 'Empire'. 'Empire is not born of its own will but rather it is *called* into being and constituted on the basis of its capacity to resolve conflicts. Empire is formed and its intervention becomes juridically legitimate only when it is already inserted into the chain of international consensus aimed at resolving existing conflicts.'[33] For Hardt and Negri, the turn to law to adjudicate international disputes and to decide when war is permitted constitutes Empire as an emerging form of global sovereignty.

From O'Connell to Nau to Hardt and Negri, there is a widespread commitment to the view that the legalisation of war-decisions in the mid-twentieth century makes a crucial contribution to the contemporary international order. It gives a specifically legal frame to the distinction between legitimate and illegitimate wars, and it organises international political power in ways that would seem alien to the nineteenth-century model of diplomatic accommodation in European power politics.[34] By setting *legal* criteria that differentiate legitimate from illegitimate wars, the new system invites competing claims regarding the relevant laws and their application to particular circumstances. This gives rise to familiar debates about how the rules should be interpreted and applied, which I discuss next, but the point of the present section is that these debates take place within a shared commitment to the ideas that in principle states' uses of force can be divided into 'legal' and 'illegal', and that the UN Charter and other texts provide the resources for making that distinction.

The interpretation of 2(4): Text and practice

What, then, is allowed under the rules and what is forbidden? This section considers what it means to comply with the ban on war. The conventional account of the international rule of law is that the law should clearly distinguish lawful from unlawful conduct by states, and separate compliance from non-compliance. When this distinction is somewhat stable, the behavioural effect of the law comes from its ability to give rewards to those who comply and punishments to those who do not.[35] As we will see, this does not in fact happen in the case of the ban on war, but it provides a useful baseline for considering alternative views of how international law relates to international politics.

[30] Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000), p. 14. Also, Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (London: Bloomsbury Academic, 2014), esp. 3.IV.

[31] See also B. S. Chimni, 'International institutions today: an imperial global state in the making', *European Journal of International Law*, 15:1 (2004), pp. 1–37.

[32] Hardt and Negri, *Empire*, p.18.

[33] Ibid., p. 15.

[34] Mitzen, *Power in Concert*; Paul Sharp, *Diplomatic Theory of International Relations* (Cambridge: Cambridge University Press, 2009).

[35] See, for instance, Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2010).

The primary source for determining the legality of war is the UN Charter. In the hierarchy of sources of international law, a treaty is understood to provide the strongest evidence for the existence of a legal rule,[36] and therefore much has been invested in parsing its clauses on war.[37] The standard doctrine of international legal interpretation says this should be guided the 'ordinary meaning of the terms' in the treaty[38] and for the legality of war the Charter clearly permits the use force only in response to an armed attack or as authorised by the Security Council.

This is the textual foundation for law against war. It appears regularly in the justifications states use to argue for their wars. It was invoked, for instance, by the UK in relation to its military action against Argentina's occupation of the Falkland Islands in 1982: when diplomatic negotiation and then Security Council Resolution 502 did not lead to Argentina's withdrawal, the government of Margaret Thatcher used its military to achieve that result by force.[39] In 1990, self-defence was used to justify international military intervention to repel the Iraqi army from Kuwait. In that case, the UN Security Council affirmed 'the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait' and situated its authorisation for war against Iraq within those terms.[40] Conversely, the US/UK invasion of Iraq in 2003 was widely condemned as illegal because it contradicted Article 2(4) and did not appear to qualify as a response to an 'armed attack' by Iraq.[41]

The Charter provides the first word on the subject but it is rarely allowed the last word[42] and the Iraq 2003 example hints at why. The key phrases in the law ('armed attack', 'use of force', 'the Purposes of the United Nations', among others) require interpretation and there is ample space within them for competing interpretations of both the law and the facts of the situation to which they are applied. These interpretive controversies are well-known.[43] They include questions such as whether the 'threat or use of force' includes non-military forms of coercion such as embargoes,

[36] This is based in part on the hierarchy of legal sources set out in Article 38(1) of the Statute of the International Court of Justice, and in part on customary law and state practice. See Christopher Greenwood, 'The Sources of International Law: An Introduction', available at: {http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf} accessed 5 May 2016.

[37] Several book-length treatments exist including Gray, *International Law and the Use of Force*; Franck, *Recourse to Force*; O'Connell, 'Peace and war'. On self-defence in particular, see Alexandrov, *Self-Defense Against the Use of Force in International Law*.

[38] This is set out in the Vienna Convention on the Law of Treaties (1969) at Article 31(1).

[39] See *The United Nations Yearbook* (New York: United Nations, 1982), pp. 1319–47.

[40] UN Res 661, available at: {http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/11/IMG/NR057511.pdf?OpenElement}.

[41] For contestation over this among American legal scholars, see the essays in 'Agora: Future implications of the Iraq Conflict', in the *American Journal of International Law*, 97:3 (2003).

[42] Michael Byers provides a rare exception in Byers, 'Jumping the gun', p. 5 where he says 'the UN Charter provides a clear answer to these questions: in the absence of an armed attack, the Security Council alone can act.' This is at odd with Byers's analysis in *War Law*, and reflects perhaps the fact that for Byers the US invasion of Iraq was not the sort of war which should be legitimated by finding it to be legal under the Charter.

[43] See Ruys, '*Armed Attack' and Article 51 of the UN Charter*, p. 1; Olivier Corten, 'The controversies over the customary prohibition on the use of force: a methodological debate', *European Journal of International Law*, 16:5 (2006), pp. 803–22; Duncan B. Hollis, 'The existential function of interpretation in international law', *Temple University Legal Studies Research Paper Series*, 2013:43 (2013); Ingo Venzke, 'Is interpretation in international law a game?', in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford: Oxford University Press, 2014); Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press 2008); and essays in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012).

market pressure, or diplomatic sanctions; whether it prohibits attacks on private as opposed to governmental targets in other countries; whether it permits attacks on a government if the provoking act originated with a non-state actor and not the state; whether the phrase 'the territorial or political independence' narrows or merely illustrates the scope of what is forbidden; and what is meant by 'or any other manner that is inconsistent with the purposes of the UN'.

In interpreting the meaning of the ban on war, two sets of resources do most of the work: (i) those historical instances in which governments have invoked and argued over the meaning of the law in the past; and (ii) the plausibility of the state's claim to self-defence. I examine next how these two constitute the contemporary ban on war and are integral to assessing the legality and illegality of uses of force. Together they also allow the self-identified security interests of states to determine the legality of their actions and so make 'legality' derivative of those interests rather than a source of external judgment of state action.

State practice in the interpretation of the ban on war

How the rules have been used, interpreted, and argued over in past practice is significant for resolving ambiguity and filling lacunae in international law. According to Thomas Franck, state practice gives '"live" meaning … to inert words by existential experience and transactional processes'.[44] It is taken as evidence of how governments understand the content of their obligations and therefore of what they consider to be lawful and unlawful.[45] This is implied by the logic of consent and obligation that is at the heart of international law itself: since states are the agents that consent to the obligations in the treaty, their own understanding of the content of those obligations is relevant when resolving controversies around them.

Past practice toward a piece of international law can change the meaning of the obligations that it contains – indeed it must, since unless it can do so then there is no point in consulting practice as a means to understand the text. As illustrations, Thomas Franck notes several areas in which the obligations of state toward the ban on war have changed since 1945 despite no change in the Charter language. Article 51, for instance, establishes that states must cease their 'self-defence' operations when the Security Council takes action on the matter. This has not been followed in practice,[46] and international judicial and political institutions have endorsed this failure as legally adequate.[47]

More consequential for international politics is the expansion in concept of 'anticipatory' self-defence. The Charter clearly outlaws such action: it requires that 'an armed attack has occurred'

[44] Franck, *Recourse to Force*, p. 51.

[45] On legal interpretation see Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, and the analyses in Ingo Venzke, *How Interpretation Makes International Law* (Oxford: Oxford University Press, 2012), and Duncan B. Hollis, 'The existential function of international law', in Bianchi, Peat, and Windsor (eds), *Interpretation in International Law*. See also, Katharina Berner, 'Authentic interpretation in public international law', manuscript presented to the Rule of Law Center, Berlin Social Science Center (WZB) (2014). Hollis says 'International law does not exist without interpretation.' (p. 1). Also Chimène I. Keitner, '"Cheap talk" about customary law', in David L. Sloss, Michael D. Ramsay, and William S. Dodge (eds), *International Law and the U.S. Supreme Court* (Cambridge: Cambridge University Press, 2011).

[46] See the references in Oscar Schachter, 'Self-defense and the rule of law', *The American Journal of International Law*, 83:2 (1989), pp. 259–77 (p. 263, fn. 22). See also, Franck, *Recourse to Force*, p. 50.

[47] In both the Iraq-Kuwait war in 1990 and the Afghanistan war in 2001, for instance, the states invoking self-defence did not defer to the Council and the Council followed up by affirming their right not to do so.

before self-defence is permitted. But the rule has been read almost from the start as if it permitted anticipatory wars and the legality of the practice is in principle widely accepted.[48] The controversy over anticipation comes from disagreements over how to identify the *circumstances* in which it is legal, and on this the most common formulation invokes the *Caroline* case from 1837 to find that anticipatory attacks are lawful when the threat of attack is 'imminent'.[49]

Scholars and states have reconciled this practical reading of the law with its more restrictive Charter text in two ways – first, by suggesting that anticipatory self-defence is part of the 'inherent' right to self-defence which the Charter 'shall not impair', and second, by showing that the practical implications of banning anticipatory war are unworkable and thus the Charter cannot possibly mean what it says. The first is a technical legal argument and the second a consequentialist one, but they lead to the same outcome: the use of force prior to an armed attack is presented as lawful despite the plain text of the Charter as well as its *traveaux preparatoires*.[50]

The 'adaptability' of the Charter to new situations is widely accepted by governments and scholars. It presumes that the line separating acceptable from unacceptable behaviour is not clear or fixed, and that past state practice can illuminate where the line lies today. It isn't particularly controversial.[51] Neither is the fact that the practice and desires of the strongest states dominate in legal interpretation with the effect that the law is likely to evolve in ways that the Great Powers find acceptable. Many scholars see this as a desirable feature of international law, including Franck who says that a 'strictly literal interpretation of the Charter's collective security system' became 'unworkable' after 1945 and so its interpretive expansion since then has been a good thing.[52] W. Michael Reisman argues against having international rules that are 'mechanically applied' – after all, he says, the 'political [and] technological environment have been changing inexorably since the end of the 19th century' and our reading of the law must change with it.[53] To do otherwise he says (in a startling choice of phrase) 'rapes common sense'.[54] The interpretation of a treaty must keep up with 'evolutions in the

[48] See, among others, Ikenberry, *Liberal Leviathan*, p. 259: 'The notion that states have a right of self-defense in the face of an "imminent threat" was widely recognized in international law and diplomacy.' The consensus around this even includes scholars who are otherwise committed to a literal reading of the Charter. Oscar Schachter, as an example, is generally opposed to 'expanded conceptions of self-defense' but he finds it unproblematic to say that there is 'strong resistance to widening self-defense to permit force except where there has been an armed attack or *threat of armed attack*' (emphasis added). By accepting the legality of anticipatory self-defence, he is accepting the 'expanded' conception and arguing in effect that it should not be expanded any further. Schachter, 'Self-defense and the rule of law', pp. 271, 273.

[49] Variations, of course, exist. The idea of 'imminence' is often derived from Daniel Webster, who said that anticipatory acts are acceptable when 'the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation'. See Daniel Webster, 'Letter to Henry Stephen Fox', in K. E. Shewmaker (ed.), *The Papers of Daniel Webster: Diplomatic Papers, 1841–1843, Volume 1* (Hanover, NH: Dartmouth College Press, 1983).

[50] The issue of 'anticipation' came up in 1945 and was struck down by the Five Powers who dominated the Charter-drafting process. The US considered the issue internally in its delegation and Harold Stassen expressed the definitive official position against it: 'this was intentional … we did not want exercised the right of self-defense before an armed attack had occurred'. Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p. 65. citing *Foreign Relations of the United States* (1945), p. 818.

[51] It is in fact integral to treaty interpretation in international law. See the essays in Georg Nolte (ed.), *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013).

[52] Franck, *Recourse to Force*, p. 21.

[53] W. Michael Reisman, 'Coercion and self-determination: Construing Article 2(4)', *American Journal of International Law*, 78:3 (1984), pp. 642–5 (p. 644).

[54] Reisman, 'Coercion and self-determination', p. 645.

international security environment'[55] and remain 'in accord with changing circumstances and social values'.[56] Michael Byers says it is 'a pragmatic response' of law to the present needs of states.[57] Tom Ruys believes 'legal rules are not static, but are capable of evolving over time'.[58]

The implication of this flexibility is that the legal status of an act may change even if the text of the law has not. What was legal may become illegal, and vice versa, in response to certain changes in the external environment such as in military technology, the nature of threats, and consequent changes in the needs of states for defence against them. Legal interpretations that are 'not evident from the text' (in Franck's words) sometimes come to be accepted as authoritative,[59] at which point legality no longer means being 'faithful to the language of the treaty'. According to Reisman, 'one should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription'.[60] Jan Klabbers says, 'many possibly illegal acts have been warmly welcomed by the membership of the organization concerned, ranging from usurpation of powers to debatable use of credentials procedures. In turn, this creates the following situation: if a healthy majority agrees with the activity, then it can hardly be deemed illegal, for, if it were illegal, how could a healthy majority possibly accept it?'[61] To the extent that the law is specified by reference to how it has been used in the past, then possibly illegal acts can be reconstituted as legal through depending on how they are received by the society. These 'uses of history' ensure that the law is not seriously at odds with the interests of powerful actors.[62] The dynamics of legal development work toward the natural and perpetual coincidence of law and Great Power interests.

The 'self' in self-defence

The Charter creates a legal regime in which self-defence is the sole lawful motivation for a state using force outside its borders. This is what Oscar Schachter called 'defensism' with respect to the laws on war – where the needs of self-defence define the outer bounds of legality.[63] As mentioned earlier, this has come to be understood to include the use of force before an armed attack has occurred as long as it responds to an imminent threat of attack. Defensism as a legal justification suggests that states act legally (and rightly) when they respond militarily to the 'compulsion from fear' that is produced by an external threat.[64]

It is not surprising therefore that self-defence has become the most popular justification for war, often with all sides in the conflict claiming it as their motivation. In debates about the appropriate

[55] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p. 511.
[56] Franck, *Recourse to Force*, p. 21.
[57] Byers, *War Law*, p. 60.
[58] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p. 6. It is through this process that many states and scholars have argued that humanitarian intervention has become a legal form of international military action. As states have come to see humanitarian intervention as desirable, they have consequently argued that it is legal under the Charter. Belgium made this argument at the International Court of Justice in the *Legality of the Use of Force* case, as did the United Kingdom in relation to the Kosovo bombing: 'The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe … . In these circumstances, military intervention is legally justifiable.' See Gray, *International Law and the Use of Force*, p. 42.
[59] Franck, *Recourse to Force*, p. 49.
[60] Reisman, 'Coercion and self-determination', p. 644.
[61] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge: Cambridge University Press, 2009), p. 218, cited by Ramses Wessel in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016 [forthcoming]).
[62] On the 'uses of history', see Sam Moyn, *Human Rights and the Uses of History* (London: Verso, 2014).
[63] Schachter, 'Self-defense and the rule of law', p. 268.
[64] The phrase comes from Strauss's discussion of Thucydides presented in Howse, *Leo Strauss*, p. 135.

application of the law and its core concept, most attention has focused on what might be called the 'genuineness' of the connection between the use of force and the security needs of the state – for instance, the *Nicaragua* decision at the International Court of Justice was founded on the Court's rejection of 'justification of collective self-defense maintained by the United States in connection with the military and paramilitary activities in and against Nicaragua'.[65] To make a judgment about whether the use of force is 'necessary' for a state's self-defence requires assessing the security needs of the state, as well as the nature, imminence, and other qualities of the external threat, and also the utility and proportionality of military force in remedying the threat.[66] These questions open the space for disagreement and controversy, which characterises the history of claims to 'self-defence' under international law. For methodological positivist approaches to international law, resolving these questions is crucial since only by that path can one determine when states are complying with or violating the law. Post-positivist approaches are not committed to finding answers to such questions, and instead see them as reflecting political disagreements about what the rules should be and what conduct should be sanctioned and in what way.

The concept of self-defence also presumes an understanding of what constitutes the 'self' which states have a right to defend. On this issue, the direction of state practice since 1945 has been remarkably consistent: the 'self' is expanding. The 'self' in self-defence has grown beyond the territorial borders of the state and now encompasses a range of state interests abroad. This is despite no change in the underlying formal texts. For instance, citizens abroad are now often invoked as the subjects of 'self-defence' – Entebbe being the classic example, but many states have made similar operations and justifications.[67] Similarly, the current American legal justification for its drone policy asserts that self-defence authorises the US to kill people anywhere in the world who are affiliated with 'al Qaeda and associated forces' and who cannot be captured.[68] In the Cold War, both the US and the Soviet Union invoked self-defence to justify military operations designed to install or maintain governments that were consistent with their spheres of influence, on the theory that any adverse change of government was likely the result of 'external aggression'.[69] More recently, NATO has taken on an active military role outside the territory of its members, in Bosnia, Kosovo, Afghanistan, and Libya, with the justification that its defensive philosophy has 'move[d] from a geographical to a functional understanding of security'.[70] In other words, the 'self' that it defends is conceptual rather than territorial – it is the sum of national interests of its members. Threats to the self might therefore

[65] International Court of Justice (ICJ), *Nicaragua,* Summary of Judgment, para. 2, available at: {http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5} accessed 5 May 2016.

[66] This mirrors a shift in realist thinking about international relations from a 'balance against power' model to a 'balance against threat' model, following Stephen M. Walt, 'Alliance formation and the balance of power', *International Security*, 9:4 (1985), pp. 3–43.

[67] On Entebbe, see the debate between Jeffrey A. Sheenan, 'The Entebbe Raid: the principle of self-help as justification for state use of Armed Force', *The Fletcher Forum*, 1:1 (1977), pp. 135–53; and Jordan J. Paust, 'Entebbe and self-help: the Israeli response to terrorism', *The Fletcher Forum*, 2:1 (1978), pp. 86–92. On military action on behalf of citizens abroad see Ruys, *'Armed Attack' and Article 51 of the UN Charter*.

[68] United States Department of Justice, 'Attorney General Eric Holder Speaks at Northwestern University Law School' (5 March 2012), available at: {http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html} accessed 5 May 2016.

[69] Alexandrov, *Self-Defense Against the Use of Force in International Law*, ch. 17. See also Schachter's justification of American military action against 'sharp local deviations' from US preferences in South American governments, in Louis Henkin, 'Reports of the death of Article 2(4) are greatly exaggerated', *American Journal of International Law*, 65:3 (1979), pp. 544–8 (p. 546).

[70] NATO, 'NATO Ten Years After: Learning the Lessons' (11 September 2011), available at: {http://www.nato.int/docu/review/2011/11-september/10-years-sept-11/EN/index.htm}.

emanate from other states (for instance, Kuwait's response to the Iraq invasion in 1989) and from entities other than states (the US and others in Afghanistan from 2001 onwards).

Many of these uses of the law are highly contentious among legal scholars but they reflect the political power of international legal justification. These are the terms in which states argue for the legitimacy of their wars, and they presume a confidence on the part of the state that the language of self-defence provides political support for war in a way that its absence does not. Just as the concepts of the 'civilian' and its opposite are key to defining what is an acceptable target in armed conflict, the concept of self-defence is accepted as the key to differentiating between acceptable and unacceptable uses of force.[71] Kinsella shows for the civilian/combatant dichotomy how the distinction is politically powerful even when there is controversy or uncertainty about who resides on which side of the line. For self-defence, the power of the concept to legitimise war is not dependent on there being a consensus over what precisely it means. Claims about self-defence are appeals for political legitimation for war, making use of interpretive resources and understandings already existing in inter-state relations.

The contemporary expansive understanding of self-defence in effect substitutes 'threat' as the trigger for military response where the Charter text says 'armed attack'. Self-defence has come to refer to the defence of the interests of the state not of its physical borders and territory. Operationalised this way, the rule gives states a right to use force to change circumstances abroad that it deems unfavourable to its national security and thus permits a much wider range of uses of force than the literal reading of the Charter would suggest.[72] It makes a 'threat to the self' a sufficient provocation to authorise a military response. It also draws a circle back to the nineteenth-century model of war as a response to harm: self-defence in response to a threat to national interests is indistinguishable from a model that legitimates war in response to the harms suffered by the sovereign. The justification is now in legal as opposed to political terms, but its relation to the sovereign and the sovereign's interests is unchanged.

When grouped with the expansion of self-defence to include acts taken before 'an armed attack occurs', the result is that state practice under the UN Charter has loosened the restrictions of war in both time and space. Lawful self-defence can now take place before or long after an 'armed attack'. This eliminates the limit implied by *ratione tempori*.[73] It can also take place against non-state actors or in defence of citizens abroad. This eliminates the state-centric limit on *ratione personae*. Self-defence has lost both its physical and temporal limits. This widens the possibility for

[71] Kinsella, *The Image Before the Weapon*.

[72] Consider a passage from Louis Henkin, as he argued in 1971 that Article 2(4) had been influential in shaping American foreign policy. He said 'few believe that the OAS [Organization of American States] or even the United States alone would use force against the political independence or territorial integrity of any country in the [Western] Hemisphere, even in the event of sharp local deviation, if it was not in fact abetted from the outside.' Henkin meant this to show how profoundly the ban on war had been internalised in American foreign policy. He believed American decision-makers would find it hard to justify violating it. But at the same time he saw 'outside' influence over 'local deviations' to be sufficient justification for lawful American intervention. He appeared to think that the ban on war protected states from American intervention as long as they remained on line with American preferences regarding their policies. For Henkin, then, the use of force by the US in Latin America was not prohibited by Article 2(4) if it was a response to Soviet or other 'outside' actions there. Henkin, 'Reports of the death of Article 2(4) are greatly exaggerated', pp. 544–8 (p. 546).

[73] On 'after', consider that the US attacks on Libya in 1986 were characterised as 'self-defence' after Libyan attacks on various US interests around the world including the Berlin disco bombing but took place some ten days after the disco bombing on 5 April of that year.

international military conflict that is seen as lawful under the Charter and makes the ban on war look more like an authorisation of force than a constraint on it.[74]

To sum up: the ban on war has evolved under the influence of state practice, especially the practice of strong states, and self-defence has come to dominate the process of assessing the legality of the use of force by states. Both developments make it more difficult (especially for strong states) to take actions that constitute violations of the law against war, as their own interests are already incorporated into the meaning of compliance. Compliance is increasingly guaranteed by the mutual implication of law and interests.

This does not suggest that anything states want do can be made lawful just by making a claim to that effect. Claims about legality are deployed by governments and others in the pursuit of legitimation. These claims are often highly contested both by legal specialists who might object to how the law is being characterised and by political actors who object to the actions being legitimated by the claims. For example, the question of whether US bombing against ISIL in Syria in 2016 *really is* self-defence or not under the UN Charter is not likely to be resolved – the issue rests on controversies over what the law allows and forbids, as well as over how these US actions fit into the law, and on these points it is probably unrealistic to expect convergence on any settled consensus. Regardless of the controversy, however, it is clear that in this instance the US desires to be seen as acting lawfully, and this desire reflects political power that comes from international legal resources. Governments are motivated to fit themselves into the confines of international legality because it brings them political legitimation. This is the heart of the 'international rule of law'.[75]

The permissive power of international law also implies constraints. I have focused on the former here as I think this is frequently overlooked, but constraints from law are important as well. Both a general and a specific form of constraint is worth considering: first, the need for legal justification is a kind of general constraint on governments in that the desire for legal legitimation makes it more difficult to take actions for which legal justifications are hard to find; second, for the ban on war, the Charter clearly outlaws wars that are not motivated by self-defence and so makes it more difficult for states to engage in wars of aggression, profit, humanitarianism, and other motives.

My goal in this article is to highlight the political power of these legal claims. The contestation over the meaning and application of legal resources is itself evidence of the importance of international law and legality in global politics. This leads therefore to the *opposite* conclusion than that drawn by some 'IR realists' who suggest that international law is relatively unimportant in power politics. I show instead that the permissive power of international law is of central importance to governments: legality, when it lines up with state interests, enhances state power and governments strive energetically to use it to their own ends. This perspective connects political power and the international rule of law in a manner that is more 'realistic' than that of the self-styled 'realists' in IR theory.

Implications

The UN Charter does not outlaw war. Instead, it changes the categories under which war may be legitimately pursed by states. The distinction is significant, both conceptually and substantively for

[74] D'Amato says self-defence is 'a loophole that gets wider the more one looks at it'. Anthony D'Amato, 'The invasion of Panama was a lawful response to tyranny', *American Journal of International Law*, 84:2 (1990), pp. 516–24.

[75] Ian Hurd, 'The international rule of law and the domestic analogy', *Global Constitutionalism*, 4:3 (2015), pp. 365–95.

the study of international law and politics. First, it means that the difference between pre- and post-1945 lies in the social framework of political legitimation, rather than in the legal status of war as such. Self-defence has been institutionalised as a legitimate justification for war. Second, it gives states a new justification for war (self-defence) and this is a permissive rather than constraining force. It makes the choice to use force *easier* for states rather than harder. It reinforces the fact that there is no reason to expect the incidence of war to decline after 1945; what we should expect to see is a change in the justifications that states use for war, and this we do indeed see. Finally, the merger of law and state interests means that the conceptual distinction between 'following the law' and 'following interests' has been eliminated. This undermines both the rationalist method of studying the importance of international law and the positivist attempt to measure 'compliance'.[76]

What changed as a result of the Charter?

This difference between the pre-1945 world and the world of the UN Charter is frequently specified incorrectly. Those who see the ban on war in 1945 as a 'transformative moment in international affairs'[77] and 'a radical departure in the systemic response to violence among states',[78] see the laws against war as a constraint on state agency. In this view, the Charter is a new external obstacle to states' pursuit of what they see as their interests with respect to war; it suggests that the power of the rules is manifest when states choose to follow the rules (and refrain from the use of force) rather than follow their independent interests which might be driving them to war. What is new after 1945 in that model is that the illegality of war makes war harder to choose.

The evidence in this article suggests a different interpretation of the change brought about by the Charter. Rather than outlaw war, it is more accurate to say that the Charter changed the terms of political legitimation for states engaging in war. It differentiates among the purposes for war, and makes some purposes more legitimate and others less. Specifically, it gives privileged status to self-defence and forbids all other purposes. This is not a comprehensive ban on war, and its success cannot be measured by a decline in the incidence of war overall. The change is in what Joseph Raz calls the lawful 'reason for action'.[79] Its significance therefore should be evident in whether and how this new resource is or is not taken up and used by actors. By this test, the Charter rules on war are enormously successful, as self-defence and Article 51 have become ubiquitous in states' justifications for military action and the pre-1945 justifications have almost disappeared. It is another question altogether whether this is a step forward or backward for the substantive goals of national, international, or human security. In this light, the main challenge to the laws comes from novel claims that there may exist legal justifications for war outside of the framework of Articles 51 and 2(4) – there are several candidates in this category, including humanitarian intervention, Responsibility to Protect, the defence of democracy, and more, though it is telling that the strongest arguments for each of these stop short of suggesting they are lawful in a formal sense in international law.[80]

[76] On the first, see Guzman, *How International Law Works*. On the second, see Oona Hathaway, 'Do human rights treaties make a difference?', *The Yale Law Journal*, 111:8 (2001–2), pp. 1935–2042.

[77] Byers, *War Law*, p. 2.

[78] Franck, *Recourse to Force*, p. 9.

[79] Joseph Raz, 'Reasons: Practical and adaptive', in David Sobel and Steven Wall (eds), *Reasons for Action* (Cambridge: Cambridge University Press, 2011).

[80] See D'Amato, 'The invasion of Panama was a lawful response to tyranny' on pro-democracy intervention; Franck, *Recourse to Force* on humanitarian intervention; and Gareth Evans and Mohamed Sahnoun, 'The Responsibilty to Protect', *Foreign Affairs,* 81:6 (2002), pp. 99–110 on Responsibility to Protect.

Permissive role of law: as opposed to regulative/restrictive

Action is only possible when the actor has access to reasons and meaning that situate his or her action in its social context. As Charles Taylor and others have examined, a shared understanding of the meaning of certain kinds of acts is a precondition for meaningful action.[81] To sign a contract, vote in an election, or walk a picket line, depends on an existing framework of social understandings that makes it possible for the actor to engage in the action, and without such a framework the acts are impossible. One cannot do what one cannot conceive, at least not intentionally. The invention of new social categories therefore makes new kinds of action possible, as with civil unions, 'stand your ground', or wars of 'self-defence'. The addition expands the set of options available for agents to choose.

Martha Finnemore has explored this phenomenon with respect to the invention of 'humanitarian intervention' as a kind of military action.[82] Beginning in the 1980s, as humanitarian intervention came to be widely understood as a distinct and potentially legitimate use of force by states, governments could do something that they literally could not do before. Finnemore argues that in the process states gained a policy option that they previously did not have and they become empowered in a way that would not have made sense at the start of the twentieth century. State power increased as a result (at least for some states).

The Charter forbids wars that are not essential for national security, and this outlaws wars of aggression, retaliation, colonialism, honor, and profit. No state today claims these are the motive for their wars. This is persuasive evidence of the success of the law. But the Charter legitimates defensive wars and therefore after the Charter states have in 'self-defence' a justification for military action that is endorsed by the political power of international legalisation. It is no surprise that states have been enthusiastic about identifying their wars as defensive. This points to the permissive power of the law on war: to go ahead with a war, states are encouraged to explain how it qualifies as self-defence, which means showing how it serves the essential security interests of the state. Failing to this incentive raises the costs of war for governments, in much the same way that Kenneth Waltz suggested that states are induced to follow other structural incentives in the international system such as self-help.[83]

Infrangible law: Compliance and law that cannot be broken

Scholars may well strive to identify a conceptual core to the idea of self-defence, but few real-world instances where the concept is invoked are so clear-cut – it is likely that all such claims are contested. These dynamics account for the characteristic controversies that accompany claims to self-defence, as when one's opponent challenges the authenticity of the claim. The typical result is that the parties advance competing interpretations of the facts of the case, the security needs of the actors, and the law itself, in support of their preferred policy positions. Many scholars interpret such disputes as a sign of a problem for the law, perhaps even evidence of desuetude – the collapse of legal obligation in the face of persistent violation: Thomas Franck declared Article 2(4) 'dead' in 1970 and Michael

[81] Charles Taylor, 'To follow a rule…', in Craig Calhoun, Edward LiPuma, and Moische Postone (eds), *Bourdieu: Critical Perspectives* (Chicago: University of Chicago Press, 1993); Friedrich V. Kratochwil, Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs (Cambridge: Cambridge University Press, 1989).

[82] Finnemore, *The Purpose of Intervention*.

[83] Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979).

Glennon updated that claim in the 2000s.[84] But this conclusion confuses manipulation and disinterest; it treats the law as a regulative rule rather than a resource of legitimation. States work hard to remain within the limits provided by international law, and part of this effort is evident in their provision of explanations about their behaviour and about the congruence between their behaviour and for the law. The utility that actors find in invoking the rules to explain their actions is evidence of both law's malleability and its continuing, compelling political appeal. These suggest that the law is highly salient to actors, which is the *opposite* of desuetude.

States' ability to use the 'self' to redefine the law in line with their national security interests leads not to desuetude but rather to infrangibility. An infrangible law is one that cannot be broken, and the ban on war's internalisation of state interests produces this effect. As long as states are using war only to secure their own selves, then their actions cannot be violations of Articles 51 and 2(4). The Charter is automatically complied with in the course of pursuing the state's self-understood, national-security self-interest. The appropriateness of claims to self-defence is established when the state is genuinely defending its essential needs in response to an external threat. Thus, to delegitimate a claim to self-defence requires providing an account of the state's interests that denies that the war was in fact necessary for the country's security.

The legalisation of self-defence provides a novel institutional home for the old concept of *raisons d'état* as justification for war. Where in earlier periods these *raisons* might take the form of the needs the sovereign in relation to harms caused by outsiders, in our current legalised period they are defined in relation to threats to the national security of the state. International legalisation has rewritten 'just war theory' as 'legal war theory'. Niccolò Machiavelli said: 'that war is just which is necessary'.[85] In light of the Charter, today he could say 'that war is legal which is necessary'.

Conclusion

The ban on war has been remade since 1945 by the influence of state practice. It is reconstituted as it is invoked in new circumstances so that its content reflects what Marx called 'the struggles and wishes of the age'.[86] The literal reading of the Charter has never been taken seriously as the operative rule on war but law has not been abandoned. States and others remain committed to the premise that the use of force should follow international law, that is, to the international rule of law understood as 'compliance'. What has changed in this formula is what 'compliance' entails in state behaviour.

Many have tried to understand what Michael Reisman called the 'curious legal grey area [that] extended between the black letter of the Charter and the bloody reality of world politics'.[87] Most often, the proposed solution involves searching for more precision in the law itself, on the faith that by logical and historical inquiry one can identify what is and is not permitted under the law. Tom Ruys says 'the confusion on the shared normative framework renders it increasingly difficult to come to a reasoned consensus on the legality of a particular intervention through the

[84] Thomas Franck, 'Who killed Article 2(4)? or: Changing norms governing the use of force by states', *American Journal of International Law*, 64:5 (1970), pp. 809–37; Michael Glennon, 'The fog of law: Self-defense, inherence, and incoherence in Article 51 of the United Nations Charter', *Harvard Journal of Law and Public Policy*, 25:2 (2002), pp. 539–58 (p. 540).

[85] Niccolò Machiavelli, *The Prince* (1532), ch. 26 cited in O'Connell, 'Peace and war', p. 275.

[86] Karl Marx, 'For a ruthless criticism of everything existing' [also known as 'Letter from Marx to Arnold Ruge'] in Robert C. Tucker (ed.), *The Marx-Engels Reader* (2nd edn, New York: Norton, 1978), p. 15.

[87] Reisman, 'Coercion and self-determination', p. 643.

exchange of claims and counter-claims at the international level. The implication is an erosion of the "compliance pull" of the *Jus ad bellum*, which can only be remedied by a much-needed clarification of the law.'[88]

Instead, I suggest that the legal regime on the use of force by states cannot be understood as a fixed distinction between legal and illegal acts; legality of a war is not a function of its relation to a pre-given set of rules, and the ban on war does not function as an objective standard by which state conduct can be judged to be either lawful or unlawful. The law may perhaps contribute to international order but it does not do so by holding firm the line against inter-state 'aggression'. Instead, it legitimates state behaviour by legalising it, making certain categories of war more rather than less possible.

This is consequential because it makes 'compliance' with the law on war derivative of state interests rather than independent of them. It undermines the classical notion of the international rule of law expressed by Michael Byers when he says that 'to improve the world – for everyone … obeying the requirements of war law is a necessary first step'.[89] This article has shown that 'obeying' the law set out in Articles 2(4) and 51 does not necessarily mean refraining from the use of force. If the Charter does indeed introduce a new era of global order and constitutionalism, it is not one in which war is outlawed and state power necessarily reduced. Following the law is not distinct from states' following their security self-interests and the change in the legal justification for war says nothing about the frequency with which states might use military force. The ban on war creates a legal circularity that enables states to use force within the political structure of international law. It constitutes a legalised system of *raisons d'etat* at the heart of the modern legal-political system and what it means to comply with the law is not independent of what governments want to do.

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[88] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p. 4.

[89] Byers, *War Law*, p. 155. See also the ICJ *Nicaragua* expectation that 'the conduct of States should, in general, be consistent with such rules' rather than that 'the application of the rules in question should have been perfect'. *Nicaragua* case, para. 186, cited in Gray, *International Law and the Use of Force*, p. 25