

THE CAMBRIDGE COMPANION TO

International Law



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7 Lawfare and warfare

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Modern law and modern war: an introduction

Warfare has always been a central preoccupation and presented a kind of ultimate test for international law. It is hard to think of international law governing the relations amongst states without having something to say about war – when war is and is not an appropriate exercise of sovereign authority, how war can and cannot be conducted, which of war's outcomes will and will not become components of a post-war status quo, and so on. It is conventional to imagine that international law restrains war by making distinctions: this is war, and this is not; this is sovereignty, and this is not; this is legal warfare, and this is not. The terms with which these legal distinctions are drawn change over time. The vernacular may be more or less sodden with ethical considerations, more or less rooted in the specific treaty arrangements entered into by states. The distinctions may be drawn more or less sharply, may be matters of kind or degree. What goes on one or the other side of these distinctions may change, but the idea that law is about distinguishing war from peace, sovereign right from sovereign whim, legal from illegal conduct, on the battlefield and off, endures.

Discussions about international law and war usually unfold as if the participants were imagining an international law which would be able to substitute itself for sovereign power in a top-down fashion, first to distinguish legal from illegal violence and then, perhaps not today but eventually, or perhaps not directly but indirectly, to bring that distinction to bear in the life of sovereigns, extinguishing sovereign authority for war at the point it crosses a legal limit. The idea is that the articulation of right will discipline, limit and restrain sovereign power when it turns to violence. International law proposes to bring this about through a series of doctrines, definitions and arguments which say where war begins and ends, and then through an apparatus of institutions and relationships which are linked in one or another way to these doctrines and which are the locus for or the effect of these sayings.

Much work has been put into codifying the doctrines through which international law will be able to say what is and is not legal and to develop a canon of thought about how these doctrines are to be interpreted when making a distinction. On the institutional side, at the national level we have the apparatus of military justice, of courts martial and penalties, the institutions of political and strategic command, of media commentary and popular engagement, of international approval and condemnation, and so forth. At the international level, international lawyers have sought to empower the UN Security Council as the arbiter of war and to build an International Criminal Court (ICC) both to adjudicate past wars and, more importantly, to signal and deter future sovereign departures from what the Court determines is legal. Recognising the limits of such institutions, international lawyers have also re-conceptualised the international political process as a more interactive process through which norms are made real in a horizontal society of states – through the enforcement authority of hegemonic states acting in the name of law, by disaggregated citizen action de-legitimising sovereign activity, or simply by the increased military and political costs imposed on those who make war when, or in ways which are understood by others to be illegal.

This conventional framework has serious limitations. It overstates the distinctiveness of war and peace as well as the extent to which international law can be said to be on the 'side' of peace. It would be more accurate to say that the international law about war operates in two directions simultaneously. On the one hand, it offers a doctrinal and institutional terrain for a kind of combat over the effectiveness and limits of war which depends upon a professional practice of distinction and a series of institutional practices and sites for rendering these distinctions real in the operations of sovereign power. On the other hand, it offers a parallel doctrinal and institutional framework for transforming sovereign power and violence into right, continuing the projects of war by other means. By following these circuits between law and war in the operations of modern war, we may come to replace our image of a law outside war (and a sovereign power normally 'at peace') with an image of sovereign power and legal determination themselves bound up with war, having their origin in war and contributing through their routine practices in 'wartime' and 'peacetime' to the ongoing, if often silent, wars which are embedded in the structure of international life.

As a starting point, we should acknowledge that the doctrinal and institutional components of the international legal regime are in operation not only when they assert themselves against the exercise of military force or when

they cabin violence within walls drawn by these doctrines. International law is equally – indeed, perhaps more routinely – the space within which war is conceived and validated and through which force is disciplined and rendered effective. It can be difficult to remember that the articulation and institutional enforcement of legal boundaries also expresses and continues projects of war. Yet sovereigns do routinely discipline and legitimate their military campaigns by pronouncing on the legality of bombing here or killing there. When this happens successfully, international law confirms the violent expression of sovereign power as right.

It is easy to understand the virtues of a powerful legal vocabulary, shared by elites around the world, which appears to distinguish legal from illegal war and wartime violence. It is exciting to see law become the mark of legitimacy as legitimacy has become the currency of power. It is more difficult to see the opportunities this opens for the military professional to harness law as a weapon, or for sovereigns to continue the exercise of power as right. Yet the humanist vocabulary of international law is routinely mobilised as a strategic asset in war, just as the vernacular of legal right is inseparable from the enforcement of sovereign power. We need to remember what it means when humanitarian international lawyers say that compliance with international law 'legitimises'. It means, of course, that killing, maiming, humiliating, wounding people is legally privileged, authorised, permitted and justified. The military has taken the hint.

The American military have coined a word for this: 'lawfare' – law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war. They observe that law can often accomplish what might once have been done with bombs and missiles: seize and secure territory, send messages about resolve and political seriousness, even break the will of a political opponent. When the military buys up commercial satellite capacity to deny it to an adversary – contract is their 'weapon'. They could presumably have denied their adversary access to those pictures in many ways. When the United States and its allies use the Security Council to certify lists of terrorists and force seizure of assets abroad, they have weaponised the law. Those assets might also have been immobilised in other ways. It is not only the use of force that can do these things. Threats can sometimes work. And law often marks the line between what counts as the routine exercise of one's prerogative and a threat to cross that line and exact a penalty.

There is, in this sense, a kind of political continuity between international legal projects which seem to concern war and peace. When special courts

are established by victors to adjudicate the criminality of opponents, it can be dressed up as the 'return' of law and peace – but it is hard to avoid thinking that law is also the continuation of war by other means. Something similar is at work when we empower the UN Security Council, itself established to institutionalise the outcome of the Second World War as a system of 'collective security', with the authority to determine the legality of wars today – when, for example, the 'legality' of the Iraq War hangs solely upon how France decides to vote. The legalisation of the last war's outcome presses itself on the legitimacy of future combat. The situation is similar when a hegemonic 'international community' sets up a court of general instance to try those who have, in their eyes, lost their 'legitimacy' as sovereigns. Whether or not anyone is prosecuted, a war has, in some sense, been lost. We might say that, through law, not all wars need to be fought to be lost decisively. These engagements of the international law about war with the ongoing relations of sovereign power enforced by war are emblematic of a more general relationship between modern war and modern law.

On the one hand, modern war has engaged the bureaucratic, commercial and cultural institutions we normally associate with peace. On the other, what I term 'modern law' has proliferated the doctrinal materials and interpretive methods which can be brought to bear in discussing the distinctiveness and legality of state violence. Lines are now harder to draw, both because the world of war has become more mixed up and because ambiguities, gaps and contradictions in the materials we use to draw the lines have become more pronounced. At the same time, however, there is a lot more line-drawing going on. There has been a vast dispersion of sites and institutions and procedures through which legal distinctions about war are made. This proliferation of legally framed activity has made war and sovereign power into legal institutions even as the experience of legal pluralism and fluidity has unhinged the idea of a law which, out there, somehow distinguishes. It would be more accurate today to speak about an international law which places legal distinction in strategic play as a part of war itself, further proliferating and fragmenting the sites of its doctrinal and institutional operation.

Moreover, in the retail operations of law about war, the experience of irresolvable debate, or of debate which can only be resolved by reference outside law to the political or ethical is ever more common. As is the experience, for soldiers and citizens alike, of vertigo amidst the shifting perspectives from which killing is evaluated. It is difficult to say just how this will come out.

New doctrinal tools may arise, old tools may regain their plausibility, institutional and doctrinal activity within the field may become less dispersed and more hegemonic. It may again become plausible to imagine an international law 'outside' and 'over' sovereign power, declaring and determining the limits of violence. In the meantime, however, international law about war offers us a window onto the political and ethical consequences of the fluid and strategic relations amongst sovereign power, force and law which characterise the experience of modern law in modern war – the experience of people who work with law and declare in its name.

Dispersion: modern war as a legal institution

In warfare today, the practice of distinction – central to both law and war – has been dispersed. The sites and technologies through which legal assertions about violence are translated back and forth into the vernacular of violence have proliferated. In this sense, law has infiltrated the war machine. Law now shapes the institutional, logistical and physical landscape of war and the battlespace has become as legally saturated as the rest of modern life. Law has become – for parties on all sides of even the most asymmetric confrontations – a vocabulary for marking legitimate power and justifiable death. It is not too much to say that war has become a legal institution – the continuation of law by other means.

The point here is not at all that everyone always follows the rules or even agrees on what the rules are and how they should be interpreted. Quite the contrary – people disagree about these matters all the time. The point, rather, is that the opportunities for law to make itself felt in the experience of those participating in modern war – at one or another distance from the battlefield itself – have multiplied dramatically.

The law which structures the macro and micro-operations of warfare is far broader than the 'law of force', the 'law of armed conflict' or 'international humanitarian law'. Law is certainly most visibly part of military life when it privileges the killing and destruction of battle. If you kill *this way*, and not that, *here* and not there, *these people* and not those – what you do is privileged. If not, it is criminal. And the war must itself be lawful. But this is hardly the entire story. Operating across dozens of jurisdictions, today's military must also comply with innumerable local, national and international rules regulating the use of territory, the mobilisation of men, the

financing of arms and logistics and the deployment of force. War is waged across a terrain shaped by constitutional law, administrative law, private law and more. As warfare has evolved, law about the environment, social security, land-use, religious expression, finance and payments systems, government budgeting, privacy, as well as human rights, law of the sea, law of space, conflict of laws, law of nationality, jurisdiction are all implicated in the shape of warfare. Background doctrines of property and contract, of privacy and financial accountability, channel the legal mobilisation of violence, as do informal and customary laws of business practice, informal markets and clandestine flows of finance, information, goods and people. As a result, if we were to explore the role of law in war in a comprehensive fashion, we might not spend a great deal of time thinking about doctrines of international law which explicitly purport to deal with warfare.

At the same time, wars today are rarely fought between equivalent nations or coalitions of great industrial powers. They occur at the peripheries of the world system, amongst foes with wildly different institutional, economic and military capacities. Enemies are dispersed and decisive engagement is rare. Battle is at once intensely local and global in new ways. Soldiers train for tasks far from conventional combat: local diplomacy, intelligence gathering, humanitarian reconstruction, urban policing, or managing the routine tasks of local government. Violence follows patterns more familiar from epidemiology or cultural fashion than military strategy. Networks of fellow travellers exploit the infrastructures of the global economy to bring force to bear here and there. Satellite systems guide precision munitions from deep in Missouri to the outskirts of Kabul. And, of course, the whole thing happens in the glare of the modern media.

Moreover, if Clausewitz was right that war is the continuation of politics by other means, the politics continued by warfare today has itself been legalised. Today's sovereign stands atop a complex bureaucracy, exercising powers delegated by a constitution, and shared out with myriad agencies, bureaucracies and private actors, knit together in complex networks that spread across borders. Political leaders act in the shadow of a knowledgeable, demanding, engaged and institutionally entrenched local, national and global elite, which also has institutional forms and professional habits. Discourses of right have become the common vernacular of this dispersed elite, even as it argues about just what the law permits and forbids.

As a result, the sites at which official rules for war are given meaning and have institutional, political or personal purchase have become many. Ideas

No longer an affair of clear rules and sharp distinctions, international law rarely speaks clearly or with a single voice. That does not mean the making of distinctions is any less important. Whenever we call what we are doing war, we stress its discontinuity from the normal routines of peacetime and sharpen our collective identity against a common enemy. When the sword triumphs over the pen, our differences should be set aside – this is serious, important – a time of extraordinary powers and political deference. We are us – they are enemy. In war, different rules apply. To shoot a man – or a woman – on the battlefield is not murder. Distinction establishes the legal privilege to kill.

But just when does the privilege to kill replace the prohibition on murder? Where does war begin and end? What counts as 'perfidy', 'terror' or 'treachery'? Which civilians are innocent? And when can civilians, innocent or not, be killed, their deaths 'collateral' to a legitimate military objective? As law has become an ever-more important yardstick for legitimacy, articulated and applied across a proliferating sea of institutional settings, the legal categories used to make those distinctions have become far too spongy to permit clear resolution – or become spongy enough to undergird the experience of self-confident outrage by parties on all sides of a conflict. As a result, we might say that modern law has become the instrument both for asserting the distinctiveness of warfare and for merging it with the routines of peace – and increasingly an instrument which can and is used strategically.

The law of armed conflict has become a confusing mix of principles and counter-principles, of firm rules and loose exceptions. In legal terms, 'war' itself has become a smorgasbord of finely differentiated activities: 'self-defence', 'hostilities', 'the use of force', 'resort to arms', 'police action', 'peace enforcement', 'peace-making', 'peace-keeping'. It becomes ever harder to keep it all straight. Meanwhile, warfare has itself come to comprise an ever-wider range of divergent activities. Troops in the same city are fighting and policing and building schools. Restoring water is part of winning the war. Private actors are everywhere – from insurgents who melt into the mosque to armed soldiers who turn out to work for private contractors, not to mention all the civilians providing moral and physical support to those who bomb and shoot, or who run the complex technology and logistical chains 'behind' modern warfare. In the confusion, military and humanitarian voices will often have a motive to insist on a bright line. For the military, defining the battlefield defines the privilege to kill. But aid agencies also want the guys digging the wells to be seen as humanitarians,

about what war is and is not, what uses of force are and are not legal, which wars are and are not legally legitimate, run through the political, institutional and social fabric of societies. The articulation of warfare has become everywhere bound up with questions of right, as much when we identify violations, isolate bad apples or denounce war criminals as when we interpret killing as compliance. In the first instance, this reflects the fact that war is a professional practice. Militaries today are linked to their nation's commercial life, integrated with civilian and peacetime governmental institutions, and covered by the same national and international media. Mobilising 'the military' means setting thousands of units forth in a coordinated way. Officers discipline their force and organise their operations with rules. Public and private actors must be enlisted in projects of death and destruction, which they must in turn explain to their families, their pastors, their comrades. Coalition partners must be brought on board. Delicate political arrangements and sensibilities must be translated into practical limits – and authorisations – for using force. Nor is the legal professionalisation of warfare an exclusively First-World practice. Indeed, it turns out the Taliban issues training materials outlining the rules of engagement designed to maximise the effect and legitimacy of their force in their own cultural time and place.

In each of the spaces in which war is made, the determination of what is and is not legal plays a role in constituting the entities who will act. Negotiations over participation in warfare are conducted as debates about the 'rules of engagement' – who could do what, when, to whom? For politicians who will take the heat, it is important to know just how trigger happy – or 'forward leaning' – the soldiers at the tip of the spear will be. Soldiers – and citizens – must be made in the image of these rules. At each of these sites, there are opportunities for adjusting, refining and making the distinction between legal and illegal – and it will often be these distinctions through which the political debates are resolved, the families are able to feel proud, the allies to establish a common front.

Modern law: rhetorical strategy

As the sites over which the regime of distinction has dispersed itself have proliferated, the doctrinal and conceptual materials used to distinguish war and peace or legal and illegal state violence have become surprisingly fluid.

not post-conflict combatants – privileged not to be killed. Defining the not-battlefield opens a 'space' for humanitarian action. Others will be moved to soften the distinctions, perhaps to permit military funds to be used for a police action, or to insist that human rights norms be applicable in combat. In a dispersed regime for articulating the legality of sovereign force, we can expect a constant push and pull, making and unmaking formal distinctions, in ways which reflect the calculations of actors pursuing very local strategies.

As it became a more plastic medium, international law offered an ever-wider range of instruments for making and unmaking the distinction between war and peace, allowing the boundaries of war to be managed strategically. Take the difficult question – when does war end? The answer is not to be found in law or fact – but in strategy. *Declaring* the end of hostilities might be a matter of election theatre or military assessment, just like announcing that there remains 'a long way to go', or that the 'insurgency is in its final throes'. We should understand these statements as *arguments*. As messages – but also as weapons. Law – legal categorisation – is a communication tool. And communicating the war is fighting the war. This is a war, this is an occupation, this is a police action, this is a security zone. These are insurgents, those are criminals, these are illegal combatants, and so on. All these are claims with audiences, made for a reason. Increasingly, defining the battlefield is not only a matter of deployed force – it is also a rhetorical and legal claim.

When people use the law strategically, moreover, they change it. The Red Cross changes it. Al Jazeera changes it. CNN changes it; the US Administration changes it. Humanitarians who seize on vivid images of civilian casualties to raise expectations about the accuracy of targeting are changing the legal fabric. When an Italian prosecutor decides to charge CIA operatives for their alleged participation in a black operation of kidnapping and rendition, the law of the battlefield has shifted. As US military forces in the Middle East have changed their military objectives and strategy over recent years, they have also adjusted their rules of engagement with respect to civilian death. In broad terms, what had seemed legally acceptable collateral damage in an invasion came to seem a threat to the success of an occupation – and what seemed acceptable to enforce an occupation came to seem counter-productive in 'counter-insurgency operations'. The rules were tightened and civilian death was meted out more parsimoniously. At the same time, however, observers (and civilian populations) altered their expectations about the civilian death which would occur and which had to be tolerated. They pushed back,

tightening the reins on the US forces yet further until any dead civilian seemed to rebuke the legitimacy and prove the failure of the mission.

As a result, strange as it may seem, there is now more than one law of armed conflict. Different nations – even in the same coalition – will have signed different treaties. The same standards look different if you anticipate battle against a technologically superior foe – or live in a Palestinian refugee camp in Gaza. Although we might disagree with one or the other interpretation, we must recognise that the legal materials are elastic enough to permit diverse interpretations. Amnesty International called Israeli attacks on Hezbollah 'war crimes that give rise to individual criminal responsibility'. Israel rejected the charge that it 'acted outside international norms or international legality' and insisted that 'you are legally entitled to target infrastructure that your enemy is exploiting for its military campaign'.

There is no court of world public opinion on the international stage to adjudicate such claims. Speaking in such terms overstates the unity of the process by which these claims become real in the bodies of soldiers and citizens and in the institutions of civilian and military life. In the dispersed and multiple contexts through which law influences the conduct of warfare today, the process by which these diverse claims take institutional, political and professional form will vary. As a result, a lawyer advising about what the law of war means will need to make a rather precise assessment of the institutional, political, social and human context, before making a prediction about how people with the power to influence the client's interest will interpret and enact claims about the distinctiveness of what the client contemplates doing.

Some historical background to the modern rhetoric of distinction

The fluidity of the modern law about warfare is no accident. It is the result of two hundred years of professional struggle. At least twice over the last two hundred years, international law concerning war has dramatically transformed itself in an effort to provide a satisfying vernacular of distinction. Across the nineteenth century, the broad considerations of ethics and policy which had preoccupied the international law about war for centuries – when is war just, when is war wise, how ought the sovereign to treat his enemy, his ally, his subjects, and so forth – were gradually leached out.

They were replaced by a series of sharp distinctions and clear rules which were either agreed between sovereigns (these weapons and not those) or deduced from the nature of war and sovereignty themselves (war and peace, civilians and combatants, belligerents and neutrals, law about going to war and law about conducting war). By the early twentieth century, the doctrinal materials had narrowed to focus on clear formal distinctions defined and agreed by sovereigns. War and peace were legally distinct, separated by a formal 'declaration of war'. A sharp distinction between public and private law made it seem reasonable to insist that private rights survived the violence of warfare which public powers did not. It was at this moment that the 'law of war' and the 'law in war' came to seem sharply distinct – separate ways of judging the legality of making war and then, irrespective of the legality of the war, of judging the legality of weaponry and tactics.

At the same time, the idea of law's own disciplinary function in relationship to war changed. At the start of the nineteenth century, international law offered a kind of handbook of advice and good sense to guide the action of statesmen. It focused on considerations affecting the right to make war and the sensible limits of warfare. It did not imagine the jurist and the statesmen or military commander as part of sharply distinct disciplines, but as part of a shared community of leaders struggling to make sense of natural law and national interest. By the end of the century, a more formal doctrinal law tracing its rules to state practice and consent – or simply to the nature of sovereign authority itself – offered itself as an external, autonomous and in some sense scientific judge of the legality of sovereign action in warfare. It treated the distinctions between legal and illegal war, weaponry or tactics as best able to be drawn by independent jurists ruminating on the nature of sovereignty and the meaning of agreed texts.

Over the course of the twentieth century, international law shifted again. From the First World War forward, many international lawyers thought the effort to restrain war by rules unrealistic. Some turned instead to diplomatic promises and institutional arrangements to provide for the 'collective security' and manage a process of 'peaceful change', primarily through the League of Nations. For those who continued to pursue the doctrinal route, considerations of justice and policy which had been exogenised found their way back in. Distinctions came to be drawn less sharply, often as matters of degree rather than kind.

Rumination on the nature of the international community, the obligations inherent in sovereignty and the potential for abuse of sovereign right

joined meditation on the inherent powers and rights of sovereignty as foundations for international doctrines assessing the limits and legality of warfare. Agreed rules about weaponry were joined by broad principles – such as proportionality or military necessity – which expressed the limits of warfare in terms which seemed more pragmatic and could more readily be associated with reflections on justice. By the end of the Second World War, these doctrinal approaches were harnessed to the institutional framework of the United Nations, whose Charter shifted the focus from the rhetoric of legal declarations of war and distinctions between neutrals and belligerents to the institutional management of threats to the peace and the use of force. Over the years, as distinctions softened, it seemed reasonable to consider applying elements of what had been the law of peace – particularly the law of human rights – on the battlefield, and of blurring the boundaries between the legality of a war and the legality of weapons used and tactics chosen.

Across the twentieth century, this transformation was supported by both military specialists and humanitarians. Both came to doubt the viability and usefulness of sharp distinctions. For the military professional, bright lines can be helpful in the blur of combat, communicating a firewall between levels of combat to their own force, to allies and enemies alike. But they can also constrain in unpredictable ways. It will often be more useful to work with loose standards expressing broad principles, to weigh and balance the consequences of military action in light of its objectives. At the same time, ethical absolutes, let loose on matters of war and peace, can be dangerous, heightening enthusiasm for military campaigns beyond a sovereign's actual political capacity to follow through. They can focus attention in the wrong place and it may not be clear, in advance, which tactic or weapon will, in fact, cause the least harm. The rule against use of chemical weapons on the battlefield seems to preclude the use of tear gases routinely used in domestic policing – a line which led to the widespread use of flamethrowers to clear caves during combat in Afghanistan. Moreover, narrowly drawn rules permit a great deal – and legitimate what is permitted. From a humanitarian point of view, it seems wiser to assess things comparatively, contextually, in more pragmatic terms.

By the end of the twentieth century, international law's attitudes toward its own rules also changed. The authority of rules came less from their pedigree than from their effectiveness. International lawyers became less interested in whether a rule was valid – in the sense that it could be said to be rooted in consent, in sovereignty or in the nature of an inter-sovereign

community – than in whether it worked. International law was what international law did. The observations of sociologists or political scientists about what functioned as a restraint or a reason became more important than the ruminations of jurists in determining what international law was and was not. As one might imagine, it became ever less possible to say in advance or with precision what rules would, in fact, be effective as law. To do so was to make a prediction about what would, in the end, be enforced. Acting under cover of law became a wager that the action's legality would be upheld in the unfolding of state practice. Moreover, it became clear that the effectiveness of rules depended less on something intrinsic to the rule than on aspects of society – how powerful was its proponent, how insistent its enforcement, how persuasive its reasons to the broad public who would determine its legitimacy. As a result, the discipline's image of itself was ever less one of autonomous juridical reason and ever more one of engaged social science and partner in statecraft or policy.

These shifts did not happen everywhere at the same time or to the same extent, nor did they happen in a vacuum. They were part of a widespread enthusiasm and then loss of faith in the formal distinctions of nineteenth-century legal thought – in the wisdom, as well as the plausibility, of separating law sharply from politics, or private right sharply from public power. Within that framework, much depended on the details of national legal cultures and upon the political strategies of leading jurists and others in particular locations. More importantly, these shifts were not decisive. Remnants of each discarded sensibility remain. As a result, people now speak about the legal distinctions of warfare in three different dialects, each reminiscent of a historical phase in the discipline's development.

At the start of the twenty-first century, international law, taken as a whole, speaks about warfare as a matter of justice and wise policy, recollecting the early nineteenth century; as an object for juristic assessment through rumination on first principles and elaboration of valid rules, in a way which recalls late nineteenth-century thinking; and as a very twentieth-century question of legitimacy determined by the persuasiveness of justification to international elites, whose granting or withholding of legitimization in turn validates or invalidates the distinctions and judgments which are made. Moreover, these dialects have been changed by their encounters with one another. They have become methodological options, rather than simply what law is all about. Focusing on questions of justice and policy, for example, may be picked up in a spirit of eclectic pragmatism, alongside the languages

of juridical forms and sociological legitimacy, or as a matter of methodological – even ethical and political – commitment, responsive to what seem the limitations of both nineteenth- and twentieth-century ideas. Those who today give voice to legal distinctions – legal professionals, statesmen, media experts and law people – sometimes do so with passion about the mode of argument being made and sometimes with a kind of eclectic indifference to issues of method.

The transformation of historical modes of thought into styles of argument has arranged them in relation to one another as methodological positions on an imaginary continuum between political realism and ethical judgment. You are not speaking international law today if you seem to be expressing sovereign will or declaring what is just. Each analytic style offers a somewhat different way to declare what is and is not legal without sounding as if you are simply saying what you believe or desire. In each style, legal pronouncements are 'rooted' in sovereign consent, just as they are compatible with widely shared principles of justice. They have also pulled away from these roots, through a series of rituals and transformations which blend the two ambitions together. Those who speak about 'just war' in legal terms, for example, may feel confident that they are expressing more than an ethical preference because they have derived their definition of 'just war' by reference to the practice of sovereigns or the nature of an inter-sovereign society. Those who speak about the power of legitimacy feel they are doing more than restating political outcomes in legal terms because they have traced the attribution of legitimacy to rule-following, perhaps because, in social terms, rules exert a kind of pull toward compliance or because the psychology of statesmen can plausibly be reconstructed to suggest rules were followed even when states did not think doing so was in their best interest. As a result, in each of these three modes of distinction, law can be intertwined with sovereignty and with the violence of sovereign power while also being professionally practiced and articulated as if it were something altogether different.

Speaking in these ways, international law can echo with virtue and stand firmly on the side of peace while pursuing a proliferating institutional and professional engagement with the practice of war. Defending this doubled professional sensibility has itself become an important disciplinary project. The various rhetorical styles offer languages for tarring alternative modes of argument with the professional sins of either ethical or political subjectivism. In this sense, defence of an autonomous legal doctrinal and institutional determiner has been replaced by a professional practice of

disciplining the boundaries of legal argument itself to exclude political whim and ethical preference. In such a profession, it is easy to mistake our ability to articulate law's autonomy – for which we have numerous discursive tools ready at hand – for an actual capability to restrain the power and violence of war.

At the same time, however, the proliferation of styles has allowed for the emergence of powerful antidotes to arguments that this or that death was legally compelled or justified. These antidotes – embedded in counter-styles of professional argument – often unravel the confidence with which people have asserted that this or that act of violence was legal or illegal. Indeed, it turns out that none of these vernaculars of distinction holds up very well to thoughtful criticism, which may help explain why there are three to begin with. An international law rooted in natural justice or wise policy seems unlikely to provide much of a solid foundation in a plural world. People will disagree about what justice means, which policy is wise – indeed, they may go to war over their disagreements – and it is hard to see how lawyers have any comparative advantage over sovereigns as auguries of justice or practical wisdom or, on the basis of their vision of wisdom and justice, any independent platform, expertise or mandate for distinguishing the legitimate from the illegitimate. That is partly why late nineteenth- and early twentieth-century international lawyers thought a narrower catalogue of rules rooted in sovereign power might offer a stronger perspective from which to judge state behaviour. It turned out, however, that an autonomous regime of valid rules was insufficiently robust to distinguish legal from illegal warfare with certainty. Agreed rules were too narrow, principles were ambiguous and ran in too many contradictory directions, and it seemed difficult for rumination on sovereignty to crowd out the actual exercise of sovereignty. That was partly why international jurists turned to more social and interactive conceptions of the relationship between international law and warfare. But here were also difficulties. The notion that law is what it does makes it terribly difficult to distinguish law from whatever happens in a convincing fashion. States did things for lots of reasons – just when had law been the dominant cause? The idea that statesmen are persuaded by law or that states act in the shadow of an international society which metes out legitimacy ultimately rests on a hypothesis about the existence of the community international law is intended to express and to construct.

In the end, there are good reasons to be sceptical of claims made in any of these modes that this act of war is legal and this is not, that this is war and

this is peace, or that this is legitimate and this is not. That does not mean such claims are unimportant or that they never persuade. Speaking this way can be quite satisfying, and not only because it can be pleasurable to speak confidently about violence which is and is not legal. These performances also routinely take institutional form, disciplining and excusing soldiers, making or ruining careers, identifying targets, emboldening or disheartening allies, comforting or demoralising those who have killed or whose loved ones have died. This is knowledge which routinely becomes power, conjuring and shaping violence. But we will need to understand what it means for the vernacular of justification to have become both widely available for strategic use and subject to the experience of legal pluralism and a loss of certainty.

People pursuing projects: arguments about the legality of violence as strategy

We should think of international law as a set of arguments and counter-arguments, rhetorical performances and counter-performances, deployed by people pursuing projects of various kinds. To focus our attention on the practice of making and unmaking legal distinctions about war, it is useful to suspend the effort to determine who is right. To understand what happens to our ethics, to our politics, and to ourselves when we keep our noses to the grindstone of legal argument in the face of all the killing that people do in war, we will need to leave to one side the question of whether this or that war is legal, whether this or that doctrine is valid or persuasive or made legitimate through enforcement – or which mode of assertion offers the most robust, effective, or appropriate style for legal work. Worrying about these things, arguing about them, giving opinions about them, are all routine professional practices for international lawyers which one will surely want to master if one wants to work in the field.

We are also more likely to understand the strange alchemy of articulation and professional action if we suspend the effort to wring new legal norms from what we find, to look back at claims and counter-claims, panning for those which have been cashed out in the currency of behavioural change as a general proposition of law which will next time 'bind' sovereigns. At the moment, we lack the conceptual and social scientific tools to assess 'what happened' in a way which could disentangle the legal from everything else.

Moreover, the relationship between articulation and action is not one of back and forth - claim affecting practice, tempering claim, constraining action, strengthening norm, and so on. Things are more confusing, simultaneous, and un-decidable.

To orient ourselves as we follow the making of statements into the institutional arrangements and actual people whose relationships and practices are constituted through the making of claims, we should begin by imagining the terrain or stage upon which rhetorical claims about law and war might be made, the types of actors who may be involved, the kinds of interests they may bring to the effort to speak about the violence which is and is not legal. In the last few years, all sorts of people have performed legal arguments about war: military officers, human rights lawyers, Red Cross lawyers, demonstrators, ambassadors, presidents and prime ministers, media commentators and, of course, law professors. People from many countries and cultures have done so - Americans and Iranians, Europeans and Australians, members of Hamas, Israeli public officials and judges and citizens, UN officials and East Timorese citizens. We might begin by saying that the sum of their statements is what we mean by international law.

Doubtless, people spoke it more or less 'well' in a professional sense, more or less sincerely, with more or less passion and commitment. We may eventually want to throw out some statements which fail to meet some minimum standard of plausibility. Indeed, it is tempting to toss out arguments which no trained legal professional would treat as plausible international legal articulations, perhaps precisely because they seem to be exclusively ethical or political. There is a risk, however, that doing so will lead us to miss a whole range of institutions and practices set in motion by statements about the international legality of warfare which arise from the mobilisation of lay voices or those of adjacent professions, including politicians, soldiers, reporters, novelists, therapists or priests. To understand what law does in war we will not want to limit ourselves to what professionals in the discipline say that it does. After all, we know that the professional discourse is filled with statements that *other people's* claims about what is and is not legal are wrong because they are misusing the language or speaking about something else. To avoid adjudicating these claims, itself a routine professional practice, we ought to begin with a rather large tent.

This leaves us a large body of statements distinguishing violence into the legal and the illegal, the legitimate and the illegitimate, the just and the unjust. This is the material which might be arranged in a series of styles or

dialects, loosely associated with historical periods, all of which remain in use. In each dialect there is a large vernacular of arguments and counter-arguments, at both the level of simple assertion about what is and is not legal, and at the level of method where claims and counter-claims are made about the appropriate way to identify and interpret international legal materials. Learning this body of material - and understanding the procedures and institutions through which it might be put to use - is, in the largest sense, what it means to become an international lawyer.

We ought then to consider the ways in which this material comes to be used, building a typology of projects and sites of articulation. Since we are speaking about warfare, we might think about it being used to pursue two types of projects. We might say that there are those who speak the language of law and war for the purpose of strengthening their military hand - by disciplining and directing their forces, legitimating their actions and justifying their means - and those who do so for the purpose of restraining or weakening a military force by un-disciplining and reorienting its forces or by de-legitimating its violence. Let us leave to one side, for a moment, those who speak it for another purpose - say to strengthen the language of law itself by embroidering it into an effort to justify or restrain a military action, whatever the consequences. In this basic picture, we have simply those who claim to strengthen and those who claim to weaken the hand of force. We might think of these rhetorical positions as those of friend and enemy or perhaps more conventionally, of the national military and the international humanitarian. In every engagement, the one performs power as truth, the other speaks truth to power.

We can now begin to think about our model more dynamically. Where and how will modern law be brought to bear in modern war to further one or the other of these projects? Given the fluidity of modern law and the plasticity and dispersion of modern war, it will often be unclear precisely how a given statement might operate to strengthen or weaken the hand of force. Narrowing the rules of engagement, for example, may concentrate and discipline, or it may derail the effort, harnessing force to other objectives or demoralising and de-legitimating those who fight. A great deal will depend upon the larger regime through which statements are made, which offers an unending range of institutional manoeuvres from denouncing to commanding, from sensationalising to routinising. Even here, much is in doubt. Prosecuting a soldier may be a way of locating responsibility or avoiding it, focusing or distracting attention, strengthening or weakening a campaign.

We might, following Clausewitz, postulate that if all this claiming has any effect at all in war, whatever strengthens one side weakens the other. As a starting point, we might say that it will be in the interests of one party to advance whenever it is in the interests of the other to rest or withdraw. Following his lead, we might begin with the hypothesis that whenever a claim for the legality of this war or this tactic would strengthen offence by allowing power to be exercised as right, we ought to expect the defence to think hard, not only about how to fight back so as to assert its own power as right, but also about how a claim of right might itself slow down the offence. The defence begins, then, by determining, if it can, that the attack is illegal, and speaking that truth to sovereign power. Of course, to be effective, this statement will need to pass through the institutions and regimes of law and politics and become a power which can, in fact, arrest the offence. In an opposite fashion, the offence must also make good its claim of right, through conquest, certainly, or more routinely through the capillaries of the world political regime through which such assertions succeed in strengthening one's hand in battle. Over time, where those who use the language have different - opposing - interests, it would be reasonable to expect that quite different performances will emerge which interpret rules or practices differently, stress different principles or precedents, shift amongst different dialects or frames of analysis, and which resonate with different audiences.

As on the terrain of battle itself, of course, this may not happen. Someone may win and the struggle may end. Either may acquiesce in the legal determination of their adversary. Perhaps they were not able to think of a legal way to claim what would be in their interest. Perhaps they carry on insincerely, if emphatically. Perhaps they become convinced that what seemed to be in their interest should be sacrificed to the argument of the other side - they may, in effect, switch sides. For Clausewitz, the tendency to pause in war - for neither side to attack or withdraw - could only be explained by bringing other factors and other players onto the stage - the friction of physical, technical and communication failures or the political calculations which emerge from mutual bargaining with third parties. Something parallel seems to be happening on the terrain of rhetorical engagement. Either or both party(ies) may play for the attention of third parties, in ways which temper their claims, although this will often simply intensify their opposing assertions. There may be friction of one or another sort, the technologies and sites for making their assertions may not be found, and so forth. They may simply

lack the intellectual or communicative resources to develop the argumentative antidote and make it stick.

As we observe the struggle unfolding, we can explore the effect of participation on those involved at quite a micro-level of professional practice as well as the macro-level of national strategy and the deployment of political capital. We can be on the lookout for professional deformations and structural biases which enter the struggle through the making and unmaking of assertions. As a general matter, we could say that in this rhetorical war of manoeuvre amongst argumentative styles, the terrain is not symmetrical between those who assert their power as truth and those who claim to speak truth to power. When you believe you exercise power as right, it will be tempting to treat those who speak to you in the voice of a truth as enemies or traitors - or to dismiss them as dreamers who have not understood how effectively you have already restrained, disciplined and legitimated what you now perform. Of course, often those who aim to speak truth to your power will actually be your enemy or, if successful, will aid your enemy. As a result, it is easy to understand how important it will be for peace-makers to persuade those making war that knuckling under to the higher power of law will ultimately make them stronger, that those who speak truth to their power also share their realism, their pragmatism, their political savvy as well their commitment to the larger cause. They may be right in this - the party of war may have mistaken its interests, threatened to win the battle but lose the war, and so forth. But the effort to frame things in this way pulls those who seek to restrain the use of force by speaking truth into a strategic alliance with those whose power becomes truth.

At the same time, we must imagine that claims to make war in the name of right will rarely sound sincere or seem persuasive to those who believe the truth lies elsewhere - who oppose the war, are disgusted by the tactic, or simply expect themselves to be maimed or killed. They will be motivated to interpret those who would make legal assertions which discipline and strengthen the sword as perverse misuses of the rhetoric of peace to foul ends, conflatting law with their own sovereign interest and ethics, uprooting it from a more general ethics, unravelling the careful process by which a more general and historical sovereignty had been codified as law. It will therefore be important for those who do seek to strengthen the military hand through law to make their assertions of right in a way which repositions them in alliance with the larger principles of law and peace. Their assertions may be correct - the party of peace may have mistaken its

interests, sheathing precisely the sword which could have arrested a broader destruction.

Taking these two tendencies together, we should not be surprised, however, that those who exercise power as truth will be pulled toward ever more hyperbolic invocations of justice and law. The imbalance, then, lies in this: those who speak truth to power find themselves drawn into the collaborative exercise of violence, while those who exercise power as truth will tend to heighten the distance between what they do and what they say. Over time, justice will come to be articulated most robustly by those who make war, while war may well be made most effectively by those who began as masters of truth. This rather simple model suggests a hypothesis for exploration – that the back and forth of legal discourse about war tends towards a sharp differentiation of positions in which each is constantly motivated to align itself with or pose as the other. It is not surprising, in this light, that in law, enemies will sound like friends, and friends, enemies. Or that those who make war will speak as peace-makers, those who would restrain violence as strategic realists. We can expect a kind of endless dialogue, proliferating itself alongside warfare – very different from the image of law as the voice and hand of the universal, come to civilise swords into ploughshares. The action is less vertical – law to power, power to law – than horizontal, between claimants, amongst selves and positions. Rather than truth muddling with power, we find a far more human interaction of tit for tat, in which death and destruction unfold alongside a dialogue which seems to be terribly pertinent, but is nevertheless somehow about something else.

Pursuing the operations of law in war – and war in law – along these lines, we might see the practice of warfare and legal distinction, taken together, as part of a history of struggle, by humanitarians and military professionals, by friends and enemies, in times of 'peace' and 'war', over the relationship between international power and right. These struggles are normally not won and lost on the terrain of either rights or powers. They are not adjudicated by argument or force of arms – but through the variety of relatively small-scale technologies where assertion and action are blended together and their outcomes routinised into practices of governance and modes of global political or economic life. Over time, this practice may simultaneously become both power and right. In this sense, the law about war is not only an effective machinery for managing the military, for disciplining and legitimating recourse to arms, but also as part of the larger technology through which international power and right are made and known.

Modern law and modern war in action

Returning to the world in which modern law and war take place, we will not be surprised by the extent to which political leaders now routinely justify warfare in the language of human rights and international law, or by military commanders who frame strategic calculations in the language of law. They understand that violence one can articulate, disclose and proudly stand behind will be more effective, sustainable and legitimate. From a strategic point of view, we might imagine deploying a legal standard like 'military necessity' or 'proportionality' by calculating a kind of CNN effect, in which the additional opprobrium resulting from civilian deaths, discounted by the probability of it becoming known to relevant audiences, multiplied by the ability of that audience to hinder the continued prosecution of the war, will need to be added to the probable costs of the strike in calculating its proportionality and necessity – as well as its tactical value and strategic consequences. Claims about the legal distinctiveness of what one undertakes have become the currency in which cheques can be written against one's legitimacy balance, their persuasive power determining the price to be paid.

But calculations in that currency are terribly difficult to make and sustain, while the conflation of right and power at both the micro- and macro-level can lead people to lose critical distance on the violence of war. It is easy, for example, to substitute argument about the UN Charter for judgment about the ethical or political consequences of war. Yet it is difficult to think of a use of force that could not be legitimated in the language of the Charter. It is a rare statesman who launches a war simply to be aggressive. There is almost always something else to be said – the province is actually ours, our rights have been violated, our enemy is not, in fact, a state, we were invited to help, they were about to attack us, we are promoting the purposes and principles of the United Nations. Something.

We must recognise that neither humanitarian idealism nor military necessity provides a standpoint outside the ebbs and flows of political and strategic debate about how to achieve objectives on the battlefield. Conversing before the court of world public opinion, statesmen not only assert their prerogatives – they also test and establish those prerogatives through action. Political assertions come armed with little packets of legal legitimacy – just as legal assertions carry a small backpack of political corroboration. As lawyers must harness enforcement to their norms, states must defend their

prerogatives to keep them – must back up their assertions with action to maintain their credibility. A great many military campaigns have been undertaken for just this kind of credibility – missiles become missives. In this environment, the experience can be one of self-confident assertion and pride in the strategic shrewdness of one's assertions – but also of uncertainty and unease when one remembers the experience of being defeated from certainty by the assertions and powers of others in a plural legal environment.

In war, moreover, the assertions of opposing forces on questions of legitimacy and legality will echo across a chasm of difference in perspective. The legal and pragmatic assessment of wartime violence can heighten each side's confidence while stigmatising their foe. For all sides, limiting civilian death has become a pragmatic commitment – no unnecessary damage, not one more civilian than necessary. The difficulty is determining what is necessary, necessary for what and for whom, and then making a claim to kill in a way that resonates. In today's asymmetric conflicts, it is all too easy to view tactics unavailable to one's own forces as perfidious, whether that means the shock and awe of bombing from a great height or hiding amongst civilians and placing one's weapons amongst the religious.

American Major General James Mattis, poised to invade Falluja in Iraq, concluded his demand that the insurgents stand down with these words: 'We will always be humanitarian in all our efforts. We will fight the enemy on our terms. May God help them when we're done with them' (CNN World, 10 April, 2004). His juxtaposition of humanitarian claims and blunt threats was as chilling as his self-confidence. In war, it is terribly hard to remember how this will sound to other ears, particularly when the law of armed conflict has so often been a vocabulary used by the rich to judge the poor. No one, after all, experiences the death of their husband or sister as humanitarian and proportional. And everyone who believes in the legitimacy of their struggle will applaud its pursuit – the more so if it seems to be pursued by the least violent means available against a perfidious foe. It was equally chilling to hear the Iraqi insurgents in Falluja respond to Mattis by threatening to decapitate civilian hostages if coalition forces did not withdraw. What could be more perfidious? Like Mattis, the insurgents were threatening innocent civilian death – less of it actually. We must remember that many will hear such a threat as a legitimate humanitarian effort to achieve a military objective with the least damage to civilian life and that is how they will record it in their calculus of legitimate power.

When things go well, modern international law can provide a framework for talking across cultures about the justice and efficacy of wartime violence. More often, the modern partnership of war and law leaves all parties feeling their cause is just and no one feeling responsible for the deaths and suffering of war. Good legal arguments can make people lose their moral compass and sense of responsibility for the violence of war while politics and ethics have successfully been held at bay. It is in this atmosphere that discipline has broken down in every asymmetric struggle, when neither clear rules nor broad standards of judgment seem adequate to moor one's ethical sense of responsibility and empowerment. All sides assess their adversaries by the strictest standards and prefer permissive rules of engagement. Everyone has a CNN camera on their shoulder – but who is watching – the enemy, the civilians, your family at home, your commanding officer, your buddies? In this context, soldiers, civilians, media commentators and politicians all begin to lose their ethical moorings.

There is no way to avoid decisions about whom to kill in warfare. The difficulty arises when humanitarian law transforms *decisions* about whom to kill into *judgments*. When it encourages us to think death results not from an exercise of human freedom, for which a moral being is responsible, but rather from the abstract operation of professional principles. What does it mean to pretend the decision to kill is a principled judgment? It can mean a loss of the experience of responsibility – command responsibility, ethical responsibility, political responsibility. Indeed, the greatest threat posed by the merger of law and war is loss of the human experience of moral jeopardy in the face of death, mutilation and all the other horrors of warfare.

Modern war and modern law are conjoined in this new situation. Indeed, it is a distinctively modern triumph to have transformed war into a legal institution while rendering law a flexible strategic instrument for military and humanitarian professionals alike. We modernised the law of war to hold those who use violence politically responsible. That is why we applaud law as a global vernacular of 'legitimacy'. Unfortunately, however, the experience of political responsibility for war has proved elusive. Law may do more to constitute and legitimate than restrain violence, impressing itself upon its subjects in myriad dispersed sites of discipline and aspiration. It may accelerate the vertigo of combat and contribute to the loss of ethical moorings for people on all sides of a conflict. Pressing beyond modern law and modern war would require that we feel the weight of the decision to kill or let live. Most professionals – and citizens – flee from this experience.

We all yearn for the reassurance of an external judgment – by political leaders, clergy, lawyers and others – that what we have gotten up to is, in fact, an ethically responsible politics. In the end, however, Clausewitz was right. War is the continuation of political intercourse in another language. For modern war, modern law has become that language.

War and law have teamed up to divorce our politics from ethical choice and responsibility while structuring and defending a global political or economic order of ongoing and unequal struggle. Power has become a mixed matter of identity, strategy, assertion and discipline, authority and violence. Law and war have become oddly reciprocal, communicating and killing along the boundaries of the world system, at once drenched in the certainty of ethics and detached from the responsibility of politics. Working in partnership, modern law and modern war have enforced and pacified the boundaries of today's global architecture, while erasing their complicity and partnership with power and evading both ethical and political responsibility.

Understanding the entanglement of law and force in international affairs suggests a reorientation in our thinking about international law more broadly. The international legal ambition to develop a distinctively legal mode of articulation and action, rooted in sovereign power and resonating with a common ethics, is simply too large a rock to be lifted. Nor is it as important – or altogether salutary – a project as we imagine. The spaces of law's engagement are not modelled easily as the application or enforcement of a norm, but constitute a more interactive practice suspended between authorisation and exercise.

We should come to see law implicated throughout the international political and economic system, not as the articulation of rights or restraints, but as a more subtle and dispersed practice through which people struggle with one another through articulation and action. Our question ought not to be whether law restrains or power enforces, but rather the modes and machinery of strategy and tactic, of the constitution of subjects and the fate of ethics and politics. In such an inquiry, we would attend carefully to the articulations made in law's name, focusing on their structure, and their translation into social practice and discussion, rather than their hegemony or veracity. The ambition would be to see law written into the ongoing struggles – let us call them wars – which structure the political economy and ethical vernacular of peacetime routines.

Although globalisation has fragmented economic and political power, it has neither de-legalised them nor legalised them in a coherent and

comprehensible pattern of functions and policy directions. If we follow the articulation of international law about war into the capillaries of international social, political and economic life, rather than a battle between power and right, we find an ongoing struggle amongst assertions of each, carried forward by people defining their identities and jockeying for position. And we find a strange double consciousness, oscillating between sincerity and savvy, strategy and confession of faith. It is in spaces like this that those who support and oppose military violence in the language of law have been brought into such a strange and elegant partnership or duet. By tracing their strategy and struggle we may illuminate international law as a terrain for political and ethical engagement rather than as a substitute for political choice and ethical decision.

with multiple aspects of the topic: as 'law' directing and shaping its subjects; as a technique for governing the world of states and beyond statehood; and as a framework within which several critical and reformist projects are articulated. The chapters situate international law in its historical and ideological context and examine core concepts such as sovereignty, jurisdiction and the state. Attention is also given to its operation within international institutions and in dispute settlement, and a separate section is devoted to international law's 'projects': protecting human rights, eradicating poverty, the conservation of resources, the regulation of international trade and investment and the establishment of international order. The diverse group of contributors draws from disciplinary orientations ranging from positivism to post-modernism to ensure that this book is informed theoretically and politically, as well as grounded in practice.

Introduction *James Crawford and Martti Koskeniemi*

Part I The Contexts of International Law

International law in diplomatic history *Gerry Simpson*

International law in the world of ideas *Martti Koskeniemi*

International law as law *Frédéric Mégret*

Part II International Law and the State

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