

powers. Since the ending of the Cold War the need for the General Assembly to act in a peace-keeping role has diminished.

14.6.6 Regional organisations

Under Article 53 of the Charter the Security Council can utilise regional organisations such as the OAS and OAU for 'enforcement action'. However it is clearly stated in Article 53 that no enforcement action can be taken without the authorisation of the Security Council. Some states argue that regional organisations can take measures on their own decision to maintain the peace including use of armed force. For example, the USA argued that its invasions of the Dominican Republic in 1965 and Grenada in 1983 were partly justified as actions authorised by the relevant regional organisations taken to restore peace and security in the region. This view has obtained little widespread support and it is thought that action in the name of regional organisations is only legitimate if there has been a request from a sovereign state and the regional force operates within the requesting state or under the doctrine of collective self-defence.

CHAPTER 15

THE REGULATION OF ARMED CONFLICT

15.1 Introduction

Traditionally there has always been a distinction made between the law relating to the resort to war (the *jus ad bellum*) and the law governing the conduct of the war (the *jus in bello*). The law of war in classical international law was the regime that came into operation when the relations of particular countries with each other were no longer governed by the law of peace because a state of declared war existed between them. The law of war dealt with all aspects of the hostile relationship.

The modern development of legal restrictions on the resort to war and the use of armed force has caused a shift in attitude towards the law of war. For example, the traditional view was that treaties were annulled as soon as war broke out. That is now not the case and the position depends much more on the terms of the treaty and the intention of the parties. The law of war is now less regarded as an alternative to the law of peace and more regarded as a device for alleviating the suffering caused by war. Since the end of World War Two there has been a concerted attempt, led by the International Committee of the Red Cross, to strengthen that branch of the law of war which is now often referred to as International Humanitarian Law.

Another modern phenomenon has been the reluctance of states actually to admit that they are at war and the absence of international recognition of states of war. For example, in 1982 the UK Prime Minister made it clear that the UK was not at war with Argentina and the hostilities relating to the Falkland Islands was always officially referred to as the Falklands Conflict or the Falklands Crisis. Similarly the use of force in 1991 in response to Iraq's continued occupation of Kuwait is usually officially referred to as the Gulf Conflict. This reluctance to resort to war, so-called, has led to the development of what is known as the law of armed conflict. The scope of the law of armed conflict has been extended over the years to include not only hostilities between states but also civil wars and other 'non-international' conflicts. This has been necessary because traditionally the law of war did not come into operation until there was a recognised state of war.

The definition of war offered by Starke is that it is a hostile relationship between two or more states resulting in a contest which is primarily between the armed forces of either side. There has been some dispute as to whether a formal declaration of war was required before a state of war could exist. Certainly it is felt that a declaration, even a unilateral one, is sufficient evidence that a state of war exists. But it is now accepted today that the question of whether or not a war exists is an objective one and depends on the overall picture. It is also true that with the development of the law of armed conflict much of the importance of the distinction has gone.

15.2 The sources of the law of armed conflict

Throughout history there have been restrictions placed on those using armed force in respect of methods of combat, use of weapons and treatment of civilians and prisoners of war. Up until the middle of the last century the source of the law governing armed conflict was almost entirely customary law. However, over the last 140 years a significant number of treaties have been agreed, many of which codify previously existing rules of international law. Rules of customary international law still have an enormously important role to play and much of the evidence for specific rules is found in the manuals of military law which most states have promulgated.

One of the first treaties to be concluded was the Paris Declaration Respecting Maritime Law 1856. At the outbreak of the Crimean War in 1854 all belligerents agreed certain rules relating to neutral ships and the capture of property at sea. At the peace conference that ended the war the seven participants signed the Declaration which has since been acceded to by a large number of states and, strictly speaking, remains in force to this day. In 1864 the Red Cross was established by Henri Dunant and the first of the 'Red Cross' conventions, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1864, was adopted. Since that time a large number of treaties have been signed, among the most important of which are:

- Hague Declarations 1899;
- Hague Conventions 1907, in particular the Hague Convention IV Respecting the Laws and Customs of War on Land 1907 together with the annexed Hague Regulations on the Laws and Customs of War on Land;
- the four Geneva Conventions 1949 and their two additional Protocols 1977.

Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilisation;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.¹

15.3 Application of the law: international and non-international armed conflicts

As has already been stated, the law regulating armed conflict has developed from the laws of war. War was, by definition, a dispute between states and thus clearly within the ambit of international law. As the law was extended to cover situations which could not formally be referred to as war, debate occurred as to whether the law applied to situations of civil war and internal armed conflict. Applying international law to such situations could create problems in that it might be argued that it contravened the principle of non-interference in the domestic affairs of sovereign states. Historically, internal and civil wars were matters solely for the particular state involved. However, by the 1930s there existed a number of regional agreements concerned with the regulation of internal conflicts and customary international law had developed to the situation where the laws of war would apply where a recognised situation of belligerency existed. The need for such recognition has diminished since the end of World War Two and a growing acceptance that certain provisions of the law of armed conflict will apply to internal conflict. Article 3 which is repeated in all four Geneva Conventions 1949 provides that in the case of an armed conflict not of an international character occurring in the territory of one of the parties to the Conventions, certain fundamental humanitarian provisions relating to protection of civilians will apply to those participating in the conflict. The law has been further strengthened by the Geneva Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts 1977. The provisions of Protocol II are much less extensive than those which relate to international armed conflicts. Nevertheless, the Protocol does provide certain protections for members of the civilian population and the wounded, sick and shipwrecked.

In addition to extending provisions of the law to non-international conflicts there has also been a broadening of the definition of international conflict to include 'armed conflicts in which peoples are fighting for self-determination against colonial and alien occupation and against racist regimes in the exercise of their rights of self-determination'. This broader definition was first included in General Assembly Resolution 3103 (1973) which was passed by a 82:13 vote with 19 states abstaining. Among those voting against or abstaining were the majority of Western states and the Resolution could not be considered to have the status of customary international law at the time. However, the definition was repeated in Article 1(4) Geneva Protocol I to which the majority of states

1 Convention (IV) Respecting the Laws and Customs of War on Land – signed at The Hague, 18 October 1907.

(including the Western states) are parties and it is submitted that it is now correct to include such national liberation struggles within the category of international armed conflict. Clearly, there remains a large number of actual and potential conflicts which still do not fall into the broader definition and these will be subject to the relatively more restricted provisions contained in Geneva Protocol II. The issue of the nature of the armed conflict has particular relevance in the current situation in Bosnia where the status of 'Serbian' troops is critical. At its simplest, the question can be posed thus: were the 'Serbian' forces operating in Bosnia members of the armed forces of the state of Serbia and Montenegro, or were they members of a Bosnian Serb militia? If the former is true, then the conflict must be defined as an international armed conflict since the armed forces of one state are operating without consent in the territory of another state; if the latter is true the conflict remains a non-international one. For the civilians who are suffering the question is perhaps purely an academic one, but it has important implications as to the rules of law which apply and in particular the degree of responsibility that can attach to those involved in some of the worst atrocities.

15.4 Effect of outbreaks of war and armed conflicts

The outbreak of war has far-reaching effects on the relations between the opponent belligerent states. The general rule of international law is that states are free to enact municipal legislation dealing with such matters as trading with the enemy, and provide for seizure of enemy property. This would seem to be true of war and any other armed conflict. As far as individuals are concerned state practice varies as to the exact nature of test of enemy character, but most states now effectively adopt one based on nationality.

On the outbreak of *war* diplomatic relations between the two states will cease although according to the Vienna Convention on Diplomatic Relations diplomatic agents must be enabled to leave. As has already been stated the effect on treaties is unsettled and the Vienna Convention on Treaties contains no provision dealing with effect of war.

15.5 Rules on belligerence

Much of the law relating to belligerency has the aim of minimising damage to civilians. Many prohibitions apply to non-military objectives. *Military objectives* usually means targets which by their nature, location, purpose or use make an effective contribution to military action and whose destruction, capture or neutralisation offer a definite military advantage.

15.5.1 Restrictions on weapons

Attempts to prohibit the use of particular types of weapons have been made in various civilisations over a long period of time. In the ancient Hindu codes there was a prohibition on the use of poisoned arrows. In 1132 the Lateran Council declared that the crossbow was an 'un-Christian weapon'. When the law of war began to be codified in the 19th century, the prohibition of certain weapons was an early objective. The St Petersburg Declaration 1868 is regarded as the first major international agreement prohibiting the use of particular weapons, in this

case the prohibition of bullets under 400 grammes which exploded on impact – no states objected to exploding shells. Further development of the rules occurred at the Hague Conference in 1899 which resulted in the three Hague Declarations 1899. Declaration 2 prohibits the use of certain asphyxiating gases and Declaration 3 further prohibits the use of exploding bullets. The Declaration outlawed the use of so-called dum-dum bullets which were designed to expand in the body after impact. They were named dum-dum after the place in India where the UK first manufactured them.

A subsequent conference was held in the Hague in 1907 which resulted in a number of treaties relating to war. Hague Convention VIII Relative to the Laying of Automatic Submarine Mines 1907 remains applicable today: it regulates the use of naval mines (still relevant); and Hague Convention XIV attempted to regulate the use of bombing from balloons.

More progress was made after World War One and in 1925 the Geneva Gas Protocol was agreed.

PROTOCOL FOR THE PROHIBITION OF THE USE IN WAR OF ASPHYXIATING, POISONOUS OR OTHER GASES, AND OF BACTERIOLOGICAL METHODS OF WARFARE

ENTRY INTO FORCE: 8 February 1928

The undersigned Plenipotentiaries, in the name of their respective governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The High Contracting Parties will exert every effort to induce other states to accede to the present Protocol. Such accession will be notified to the government of the French Republic, and by the latter to all signatories and acceding Powers, and will take effect on the date of the notification by the government of the French Republic.

The present Protocol, of which the English and French texts are both authentic, shall be ratified as soon as possible. It shall bear today's date.

The ratifications of the present Protocol shall be addressed to the government of the French Republic, which will at once notify the deposit of such ratification to each of the signatory and acceding Powers.

The instruments of ratification of and accession to the present Protocol will remain deposited in the archives of the Government of the French Republic.

The present Protocol will come into force for each signatory power as from the date of deposit of its ratification, and, from that moment, each power will be bound as regards other powers which have already deposited their ratifications.

In witness whereof the Plenipotentiaries have signed the present Protocol.

Done at Geneva in a single copy, the seventeenth day of June, One Thousand Nine Hundred and Twenty-Five.

Since the Second World War there have been a number of attempts to modify further and strengthen the law relating to weapons. However, it sadly has to be admitted that the development of the law is usually one step behind the ingenuity of weapons manufacturers. As particular restrictions are introduced so states look for ways of evading the new law. An illustration of the problem is provided by examining the law relating to four particular categories of weapons:

- conventional weapons
- weapons of mass destruction
- biological and chemical weapons
- environmental weapons

15.5.1.1 Conventional weapons

'Conventional weapons' includes all weapons not included in the other four categories. The principal relevant treaty is the UN Convention on Prohibitions or Restrictions of Certain Conventional Weapons that Cause Unnecessary Suffering or Have Indiscriminate Effects 1981 (the Weaponry Convention) together with its three annexed protocols which entered into force in December 1983.

CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS AND PROTOCOLS (1980)

ENTRY INTO FORCE: 2 December 1983

The High Contracting Parties,

Recalling that every state has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations,

Further recalling the general principle of the protection of the civilian population against the effects of hostilities,

Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts

of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,

Also recalling that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,

Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience,

Desiring to contribute to international detente, the ending of the arms race and the building of confidence among states, and hence to the realisation of the aspiration of all peoples to live in peace,

Recognising the importance of pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control,

Reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict,

Wishing to prohibit or restrict further the use of certain conventional weapons and believing that the positive results achieved in this area may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons,

Emphasising the desirability that all states become parties to this Convention and its annexed Protocols, especially the militarily significant states,

Bearing in mind that the General Assembly of the United Nations and the United Nations Disarmament Commission may decide to examine the question of a possible broadening of the scope of the prohibitions and restrictions contained in this Convention and its annexed Protocols,

Further bearing in mind that the Committee on Disarmament may decide to consider the question of adopting further measures to prohibit or restrict the use of certain conventional weapons,

Have agreed as follows:

Article 1 Scope of application

This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in para 4 of Article 1 of Additional Protocol I to these Conventions.

Article 2 Relations with other international agreements

Nothing in this Convention or its annexed Protocols shall be interpreted as detracting from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict.

Article 3 Signature

This Convention shall be open for signature by all states at United Nations Headquarters in New York for a period of 12 months from 10 April 1981.

Article 4 Ratification, acceptance, approval or accession

1 This Convention is subject to ratification, acceptance or approval by the Signatories. Any state which has not signed this Convention may accede to it.

2 The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

3 Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each state, provided that at the time of the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, that state shall notify the Depositary of its consent to be bound by any two or more of these Protocols.

4 At any time after the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, a state may notify the Depositary of its consent to be bound by any annexed Protocol by which it is not already bound.

5 Any Protocol by which a High Contracting Party is bound shall for that Party form an integral part of this Convention.

Article 5 Entry into force

1 This Convention shall enter into force six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2 For any state which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force six months after the date on which that state has deposited its instrument of ratification, acceptance, approval or accession.

3 Each of the Protocols annexed to this Convention shall enter into force six months after the date by which twenty states have notified their consent to be bound by it in accordance with para 3 or 4 of Article 4 of this Convention.

4 For any state which notifies its consent to be bound by a Protocol, annexed to this Convention after the date by which twenty states have notified their consent to be bound by it, the Protocol shall enter into force six months after the date on which that state has notified its consent so to be bound.

Article 6 Dissemination

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces.

Article 7 Treaty relations upon entry into force of this Convention

1 When one of the parties to a conflict is not bound by an annexed Protocol, the parties bound by this Convention and that annexed Protocol shall remain bound by them in their mutual relations.

2 Any High Contracting Party shall be bound by this Convention and any Protocol annexed thereto which is in force for it, in any situation contemplated by Article 1, in relation to any state which is not a party to this Convention or bound by the relevant annexed Protocol, if the latter accepts and applies this Convention or the relevant Protocol, and so notifies the Depositary.

3 The Depositary shall immediately inform the High Contracting Parties concerned of any notification received under para 2 of this article.

4 This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, para 4, of Additional

Protocol I to the Geneva Conventions of 12 August 1949 for the Protection of War Victims:

- (a) where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, para 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I in accordance with Article 96, para 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or
- (b) where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in sub-para (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects:
 - (i) the Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect;
 - (ii) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and
 - (iii) the Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict.

The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.

Article 8 Review and amendments

1

- (a) At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound. Any proposal for an amendment shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties and shall see their views on whether a conference should be convened to consider the proposal. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited. states not parties to this Convention shall be invited to the conference as observers.
- (b) Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties which are bound by that Protocol.

2

- (a) At any time after the entry into force of this Convention any High Contracting Party may propose additional Protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. Any such proposal for an additional Protocol shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties in accordance with sub-para 1(a) of this article. If a majority, that shall not be less than eighteen of the High Contracting Parties