

DEVELOPMENTS

Book Review - Michael Byers, War Law: Understanding International Law and Armed Conflict (2005)

*By Prae Kriengwatana**

[Michael Byers, *War Law: Understanding International Law and Armed Conflict (2005)*, Grove Press : New York (2005) ISBN 0-8021-1809-7 224 pp., 24.00 USD]

The debate around the legality of the military intervention in Kosovo eventually evolved as a landmark moment in international lawyers' assessment of the scope and reach of the international law on the use of force, as laid down in Article 2(4) and in Chapter VII of the UN Charter.¹ As aptly analyzed at the time, the 'extreme case' of an extra-ordinary, exceptional use of force, not explicitly authorized under the rules of the Charter, made the discursive spectrum about the possible justifications of military intervention seemingly limitless.² The wide-spread international concern over human rights violations in a region one flight-hour south of Munich, Germany, eventually opened the flood-gates for an all-out politico-ethical attack on the fragile utopia of an international legal order.³ What for some is welcomed as an "international constitutional moment"⁴, is for others a "marketing trick" to further besiege international law in the name of an allegedly new '*Grundnorm*' of international law and politics.⁵ With view to the crucial role of the United States in the creation and preservation of a liberal international legal and

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¹ Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L. L. 1 (1999); Antonio Cassese, *Ex inuiriā ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L. L. 23 (1999)

² Martti Koskenniemi, *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002)

³ Peer Zumbansen, *Die Vergangene Zukunft des Völkerrechts*, 34 KRITISCHE JUSTIZ 46 (2001)

⁴ Anne-Marie Slaughter/William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L. L.J. 1 (2003)

⁵ Andreas Fischer-Lescano/Philip Liste, *Völkerrechtspolitik: Zur Trennung und Verknüpfung von Recht und Politik in der Weltgesellschaft*, 12 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN [ZIB] 209 (2005), at 221

political order, the justifications offered for another bypassing of the UN Charter in the case of the second Iraq War has been described by Jürgen Habermas in this Journal as a dramatic “fall of a monument”.⁶ Ed Morgan has poignantly found that “[I]nternational law has become unstuck in time. It has gone to sleep stressing a normative future based on state ‘obligations owed towards all the other members of the international community’, and it has awakened in a bygone world in which the state is ‘susceptible of no limitation not imposed by itself.’⁷ In an ever-increasingly globalized world of interdependence such debates have long ceased to be specialized expert discourses as the average person displays a direct interest and concern with the welfare and actions of other countries. The said rules that govern the use of force in international affairs and which have been seeing experts tear out their hairs for many years are clearly no longer confined to the studies of legal experts but have become the subject of interest to the general public. With the profuse quantities of scholarly work being released, it may be overwhelming for a non-international law expert as much as for the general lay person to find a book that provides an overview simple enough to understand yet stimulating to read and avoiding the didactic style of a textbook. Michael Byers’s *War Law: Understanding International Law and Armed Conflict* successfully achieves this subtle balance.

A relatively short book of 224 pages, *War Laws*, authored by the Canada Research Chair in Global Politics and International Law and Director of the Liu Institute for Global Issues at the University of British Columbia, explains the complexities of international law and politics without requiring the reader to have any previous in-depth knowledge. Leaving out legal jargons and philosophical abstractions, Byers cuts to the core of how and when international rules on the use of force matter. The book is divided into four parts, beginning with definition of key terms and a brief historical overview and ending with a powerful epilogue attacking the foreign policies of the United States. Part One gives an preview of the role of the UN Security Council and how its resolutions can be subjected to different interpretations. Part Two discusses the right of self-defence and the legality of preemptive self-defence in the context of terrorism. “Humanitarian interventions” as exceptions to the prohibition on the use of force are the focus of Part Three, and Part Four is a discussion of international humanitarian laws concerning the protection of soldiers and civilians once armed conflict arises, as well as the emergence of war crime courts and tribunals.

⁶ Jürgen Habermas, *Interpreting the Fall of a Monument*, 5 GERMAN L.J. 701 (2003); reprinted in JÜRGEN HABERMAS, *THE DIVIDED WEST* (2006)

⁷ Ed Morgan, *Slaughterhouse-Six: Updating the Laws of War*, 5 GERMAN L.J. 525 (2004)

In the book's opening lines, Byers gives an example of a recent incident, which illustrates the tension between global politics and the laws of war, when he observes that "it is clear that the international rules on the use of force matter." Byers then raises the question: "But what exactly is international law, where does one find it, and how does one determine its rules?"⁸ The question is answered through a concise explanation of customary international laws and treaties, the UN Charter as a starting point for laws of armed conflict, and the written and unwritten rules governing the recourse to force. Before the reader comes to the conclusion that these rules are set in stone, Byers uses the invasions of Iraq in 1991 and 2003 as vivid examples of the interplay between law and politics.⁹ By portraying the rules as malleable and susceptible to different or expanded interpretations, Byers sets the stage for showing how the United States has relied on this inherent characteristic of the law to the push for a right of preemptive self-defence and self-defence against terrorism.

Beginning with a case study of the destruction of the *Caroline* in 1837 and Webster's criteria of 'necessity and proportionality' as the parameters for self-defence¹⁰, Byers canvasses the evolution of the legal distinction between war and self-defence, stating that "while the right is codified in an almost universally ratified treaty, its contours have become more easily discernable as a result of state practice".¹¹ He uses the 1976 Entebbe¹² incident as an example to show where the right of self-defence has been extended to include the protection of nationals abroad, but argues that the right should not be extended to a situation where there is no longer an immediate threat.¹³ In making this argument for a line to be drawn between defensive and punitive goals, Byers shows his outright disapproval of the United States' reaction following the attempted assassination of the former US President

⁸ MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* (2005), 3.

⁹ *Id.*, 40-41, 45-49.

¹⁰ *Id.*, 53-54.

¹¹ *Id.*, 56.

¹² Hijackers on an Air France jet forced the plane to land in Entebbe, Uganda and demanded release of pro-Palestinian terrorists in return for the mostly Israeli passengers and crew. Israeli sent a rescue operation without notifying the Ugandan government, killing all the hijackers and several Ugandan soldiers. See further *id.*, 57.

¹³ *Id.*, 58.

Bush in 1993¹⁴ and rejects a right of self-defence against terrorism as a justification for use of force without Security Council authorization.¹⁵

Despite the fact, that Byers' book does not explicitly want to engage with the debate identified at the beginning of this review, it is impossible not to. Even in a book directed at a general audience, with no overburdening footnote apparatus and mind-numbing name-dropping throughout, Byers speaks his mind when he finds the reason behind US foreign policy to be simple: "It would serve the United States' interest to have the right of self-defence extended to the use of force against terrorists abroad, there being no prospects that another country would use exercise the same defence against terrorist on US territory".¹⁶ He echoes findings by Koskenniemi, Morgan and others, when he warns that the expansion of the right of self-defence against countries that are not the direct aggressors but knowingly support terrorist groups and the Bush doctrine of preemptive self-defence introduces unnecessary ambiguity into international law. When he observes, that such employment of international law would in effect turn the law into "a diplomatic tool to be deployed against the weak states while the most powerful of countries would have more freedom to act as they chose"¹⁷, he is implicitly engaging with the ongoing debate over a 'new world order'.¹⁸ After highlighting how the emergence of the United States as a military superpower has allowed it to adopt foreign policies, particularly the Bush Doctrine, that would seem to undermine international peace and security, Byers finishes his discussion on an optimistic note that there is widespread opposition to such unilateral preemptive actions¹⁹, a finding somewhat echoing Habermas' contention that the 2003 Iraq War might even strengthened rather than weakened the United Nations as a reference point for ongoing attempts to save the international legal order.²⁰ Unfortunately at this point, Byers leaves the reader guessing as to the extent of the impact

¹⁴ Following discovery of a bomb in the president's car in Kuwait, the United States fired twenty-three missiles at the Iraqi Military Intelligence Headquarters in Baghdad, killing six to eight people. See *id.*, 58.

¹⁵ *Id.*, 59-60.

¹⁶ *Id.*, 64.

¹⁷ *Id.*, 79.

¹⁸ ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); see already Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L. L.* 1 (1995); and the response by José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 *EUR. J. INT'L. L.* 183 (2001), and by Christian Reus-Smit, *The Strange Death of Liberal International Theory*, 12 *EUR. J. INT'L. L.* 573 (2001), 574

¹⁹ *Id.*, 89-81.

²⁰ Habermas, *Does the Constitutionalization of International Law Still Have a Chance?*, in HABERMAS, *THE DIVIDED WEST* (2006)

international voice will have on pressuring the U.S. to return to multilateralism, though he does suggest that a public denunciation will not be enough to persuade President Bush to change his course.²¹

In Part Three, Byers turns to address the issues of “pro-democratic” and “humanitarian” interventions, two lines of justification that intervening countries have claimed are unwritten exceptions to the prohibition on the use of force.²² Byers quickly dismisses the pro-democratic argument put forward by the United States and Britain as a last resort in trying to legitimize the 2003 Iraq War, and argues that in fact “the use of force to promote democracy is prohibited under customary international law unless expressly authorized by the Security Council”.²³ The claim of a right of unilateral humanitarian interventions met a similar fate after a close examination of possible precedents revealed that most countries opposed the intervention claims or the aggressor state never actually justified its intervention on humanitarian grounds.²⁴ Byers pointed out that even when the United States sought to justify the Kosovo War on the basis of a right of unilateral humanitarian intervention, the absence of *opinio juris* to accompany the state practice prevents changing the law in favour of a right to intervene.²⁵ Even if there is arguably sufficient state practice and *opinio juris*, Byers reminds us that any new rule of customary law would not override Article 2(4) of the UN Charter unless it somehow achieved *jus cogens* status.²⁶

Moving from the rules that govern nation-states to rules concerning the behaviour and protection of individuals, Part Four of the book looks at what is known as international humanitarian law. Byers outlines the guidelines that separates civilians from those in combat and the issues that arises such as the targeting of ‘dual-use facilities’ and adherence to uniform regulations. While acknowledging the objectives and realities of war, Byers emphasizes that there are a international laws that prohibit means of warfare that cause unnecessary suffering²⁷ and lawful

²¹ *Id.*, 81.

²² For a further critique, see ANNE ORFORD, *READING HUMANITARIAN INTERVENTION. HUMAN RIGHTS AND THE USE OF FORCE* (2003), and Dino Kritsiotis, *Arguments of Mass Confusion*, 15 EUR. J. INT’L. L. 233 (2004).

²³ *Id.*, 86.

²⁴ *Id.*, 92, 94, 97.

²⁵ *Id.*, 101.

²⁶ *Id.*, 102.

²⁷ *Id.*, 124-125.

combatants must be accorded certain privileges in the event that they are captured as prisoners of war.²⁸ Once again, the United States is condemned by Byers for its disregard of the law and human rights, ranging from the use cluster bombs in Afghanistan to the abuse of detainees by U.S. forces at Abu Ghraib prison in Iraq.²⁹ His attack on U.S. foreign policy hits home in the final chapter, which contends that even where there are legal mechanisms in place to punish those who have committed war crimes, powerful countries bully their way out while subjecting weaker countries to a 'victor's justice'. His insightful discussion of the United States' deliberate attempts to undermine the International Criminal Court and Resolution 1422³⁰ underlines his rationale that the United States is seeking to modify the law in accordance with its own interest.³¹ Byers is quite outspoken when he seeks companionship in his frustration and his losing "patience with the Bush Administration's contemptuous attitude toward international law".³²

The relentless attack on the United States' treatment of international law drives the concluding chapter to *War Law* - Byers may as well have named his book after the Epilogue: War Law and the Single Superpower. His conclusion that the actions of the United States has shown its renewed commitment to a unilateralist course and "a maniacal disregard for international humanitarian law"³³ are indicative of his belief that by placing national interests above international law, the unrivalled superpower returns the world to the pre-UN Charter era. The consequences may be disastrous: marginalization of the Security Council makes it more difficult for governments to draw upon the UN as a source of legitimacy of for the use of military force and diminishes fundamental human rights protections.³⁴ Byers further adds that the actions of the US have also made it more difficult to criticize violations of international law by other countries. The analogies that he draws between the military tactics and atrocities of the U.S. and Israel are strikingly

²⁸ *Id.* 131-132.

²⁹ *Id.*, 132, 145-146.

³⁰ Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement>, last accessed 5 September 2007

³¹ *Id.*, 145-146.

³² *Id.*, 146

³³ *Id.*, 147.

³⁴ *Id.*, 154.

disturbing, serving to add more weight to the argument that America's 'war on terror' is merely a "smokescreen for the pursuit of less worthy goals".³⁵

Byers calls out to "America's friends" to support the United Nations in the return to a multilateral dialogue and to oppose the "rule-twisting megalomaniacs who have corrupted US and global politics since 11 September 2001".³⁶ Though fervently urging for a "global system of justice and human rights"³⁷, Byers gives only vague suggestions as to how this utopia can be achieved. His solution that America's allies should only provide support when doing so would result in the promotion of international law's 'integrity' seem somewhat empty when he has spent over 200 pages in illustrating the military, political, and economic dominance of the US, and more importantly that despite strong international opposition, America is simply "a single superpower that hardly seems to care."³⁸ Byers seems to try to clarify this contradiction by stating that even a superpower cannot entirely ignore international laws and the existence of an American hegemony does not necessarily have to mean the end of global rules on the use of force, but that other member states of the world as well as non-governmental actors have a role to play.³⁹

Yet Byers's assumption of the United States as the single superpower is somewhat shaken by recent global events, such as the increasingly unpopular war in Iraq that has drained both America's military resources and its credibility abroad. Bush's response to North Korea's test-launch of missiles in 2006 might indicate a re-shift in foreign policy to collective action and diplomacy: this time, there were no threats of 'you're either with us or against us' that followed 11 September 2001. Instead, President Bush spoke of a promise to "make sure we work with our friends and allies... to continue to send a unified message".⁴⁰ If this really signals the end of American hegemony (or what *Times Magazine* termed "Cowboy Diplomacy")⁴¹, then Byers' message is more relevant than ever: international law does matter - regardless of how powerful you are, there is a price to pay for ignoring world

³⁵ *Id.*, 154.

³⁶ *Id.*, 155.

³⁷ *Id.*, 155.

³⁸ *Id.*, 146.

³⁹ *Id.*, 11.

⁴⁰ Available at: <http://www.whitehouse.gov/news/releases/2006/07/20060706.html>, last accessed 5 June 2007

⁴¹ Available at: <http://www.time.com/time/magazine/article/0,9171,1211578,00.html>, last accessed 4 June 2007.

opinion and breaking the rules, and, as Byers quotes at the beginning of this informative and insightful book, “we all have to recognize – no matter how great our strength – that we must deny the licence to do as we please”.⁴²

⁴² BYER, note 1, 3.