

Chapter 1

Introduction

According to Thucydides, a delegation from Athens, then at the height of its powers, told the conquered inhabitants of the small island of Melos that right was only in question between equals in power. The Athenian delegation reportedly said that ‘the strong do what they can and the weak suffer what they must’.¹ A thousand years later, those sentiments were also cited by Grotius in the opening passages of *De Jure Belli ac Pacis*.² The Athenian concept of imperialism is now supposedly outdated, in an age when the United Nations’ (UN) Charter upholds the rights of independent and equal sovereign states. Modern states have agreed to be bound by the UN Charter and are supposed to refrain from the use or threat of force in their relations with one another, unless the use of force is either sanctioned by the UN Security Council, or they are acting in self-defence.

Did the United States of America (US) and the United Kingdom (UK) act lawfully when they employed force against Afghanistan on 7 October 2001? States are permitted to use force in individual or collective self-defence. That is a right which is preserved by Article 51 of the UN Charter. That provision has been interpreted in different ways by states, scholars and judges. The reference to an ‘inherent’ right of self-defence in Article 51 implies that a right existed before the UN Charter came into being, thus necessitating an historical inquiry. This book is not only concerned with the lawfulness of the use of force against Afghanistan; it is also concerned with the broader picture which encompasses inter-connected issues regarding terrorism, war and international law.

The analysis begins in Chapter 2 with a broad sketch of the changing nature of conflict. That chapter examines the evolving nature of threats faced by states, including the progression from large-scale inter-state conflict to smaller-scale, intra-state conflict, as well as the increasingly significant threat posed by non-state actors. Chapter 3 moves away from conflict generally to terrorism in particular. It analyses the origins of both the concept and the term ‘terrorism’ and it traces

1 Thucydides, *The Complete Writings of Thucydides: The History of the Peloponnesian War*, Book V, Chapter XVII, para 89 (Crawley, R. trans.) (New York: Everyman’s Library, 1951) at 301. A passage with similar meaning appears in Book VI: ‘Besides, for tyrants and imperial cities nothing is unreasonable if expedient ...’: *ibid.*, Book VI, Chapter XX, para 85 at 350.

2 Grotius, H., *The Law of War and Peace (De Jure Belli ac Pacis)*, Prologomena (Loomis, L. trans.) (Roslyn, New York: Walter J. Black, 1949) at para 3: ‘On most men’s lips are the words of Euphemus, quoted by Thucydides, that for a king or a free city nothing is wrong that is to their advantage.’

historical and contemporary attempts to define it. In Chapters 4 and 5 the focus shifts towards the limitations on the resort to force which have evolved across two ‘epochs’ of international law. In Chapter 4 the period from 1919 to 1944 is analysed to understand what the ‘inherent’ right to self-defence mentioned in Article 51 may mean. In Chapter 5 the developments that have occurred from 1945 until the present are discussed. Throughout Chapters 4 and 5 the focus is on tracing the evolution of legal limitations on the use of force through five distinct lenses: the use of force generally, the use of force specifically in self-defence, pre-emptive self-defence,³ forcible measures short of war, and the use of force by, and in response to, non-state actors. What is apparent from the historical inquiry is that the current international law regarding the resort to force has not arisen out of a vacuum and that modern interpretations must have regard to historical antecedents.

In Chapter 6 the international law on the resort to force is applied to the facts of the 2001 intervention in Afghanistan. Although the use of force against Afghanistan was roundly justified on the grounds of self-defence, the analysis therein shows that serious doubts can be raised as to whether it was a lawful use of

3 The terms ‘pre-emptive self-defence’ and ‘anticipatory self-defence’ are used interchangeably in this book to refer to the concept of a state using force before an armed attack has occurred. This approach is consistent with the observation that ‘pre-emptive’, ‘preventive’ and ‘anticipatory’ are terms commonly used to refer to the same concept, although there is some degree of inconsistency between scholars: some use one term to the exclusion of the others, whilst others prefer to use the terms interchangeably: see, *inter alia*, Byers, M., *War Law* (London: Atlantic Books, 2005), 72–81; Gray, C., ‘A New War for a New Century? The Use of Force Against Terrorism After September 11, 2001’, in Eden, P. and O’Donnell, T. (eds) *September 11, 2001 – A Turning Point in International and Domestic Law?* (New York: Transnational Publishers, 2005), 107–13; Maogoto, J., *Battling Terrorism* (Aldershot: Ashgate, 2005), 5–7 and 111–37; Gardam, J., *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), 146–7; Gray, C., *International Law and the Use of Force*, 2nd edn (Oxford: Oxford University Press, 2004), 95 and also chapter 6; Karoubi, M., *Just or Unjust War – International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century* (Aldershot: Ashgate, 2004), 204; Brownlie, I., *Principles of International Law*, 6th edn (Oxford: Oxford University Press, 2003), 701–2; Shaw, M., *International Law* 5th edn (New York: Cambridge University Press, 2003), 1028–30; Franck, T., *Recourse to Force – State Action Against Threats and Armed Attacks* (Cambridge; New York: Cambridge University Press, 2002), 97–108; McCormack, T., *Self-Defense in International Law – The Israeli Raid on the Iraqi Nuclear Reactor* (New York: St Martin’s Press, 1996), 122 ff; Arend, A. and Beck, R., *International Law and the Use of Force* (USA and Canada: Routledge, 1993), 71–80. For examples of where an intentional distinction is drawn between the concepts of ‘anticipation’ and ‘pre-emption’, see Anton, D., Mathew, P. and Morgan, W., *International Law – Cases and Materials* (South Melbourne: Oxford University Press, 2005), 545; and also O’Connell, M. ‘The Myth of Preemptive Self-Defense’, *ASIL Presidential Task Force on Terrorism* (Washington, DC: ASIL, 2002). For further discussion of this issue, see Chapter 5, ‘Pre-emptive Self-defence’ and Chapter 6, ‘Pre-emptive Self-defence’.

force. In particular, concerns are raised as to whether there was an ‘armed attack’ that triggered the Article 51 UN Charter right of self-defence; whether the right to respond forcefully had expired by the time that the invasion began; whether responsibility for the terrorist attacks was adequately attributed to the targets of the military action and whether the customary law elements of the right of self-defence, such as necessity, proportionality and immediacy, were satisfied. Chapter 6 also addresses whether other grounds for intervention could potentially have been relied upon, such as humanitarian intervention, Security Council authorisation and intervention by invitation. The purpose of Chapter 6 is to discuss all aspects of the justifications for resorting to force against Afghanistan to determine whether any of those grounds, or potential grounds, were satisfied. The analysis suggests that this use of force may have had more in common with the ideals of Athenian imperialism than the rule of law embodied in the UN Charter.

In Chapter 7, the concluding chapter, some general comments are offered on the current status of the law regarding the resort to force, and self-defence in particular. Chapter 7 attempts to forecast the implications of accepting that the use of force against Afghanistan was lawful. Reference is made to the use of force against Iraq in 2003 and Lebanon in 2006 as further examples of the way in which militarily powerful states are able to impose their will and their interpretations of international law on less powerful states, thereby weakening the effectiveness of legal limitations on the recourse to force.

It will become evident that the historical perspective is an important aspect of the analysis undertaken herein. As Robert Ago has noted, international law is not a new phenomenon; any scholar who seeks to understand current relations between states without appreciating the historical nexus is bound to be misled.⁴ In the context of the law regarding the resort to force, connections between the past and the present, and the present and the future, are ignored at our peril. Studying the history of inter-state relations may provide us with lessons which are useful: ‘ancient realities may help us to appreciate how dangerous it is to persist in certain errors of judgment.’⁵

4 Ago, R. ‘The First International Communities in the Mediterranean World’ (1982) 53 *BYIL* 213.

5 *Ibid.*