

Book Review: War Law Understanding International Law and Armed Conflict, by Michael Byers

Jillian M. Siskind

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Book Review

Citation Information

Siskind, Jillian M.. "Book Review: War Law Understanding International Law and Armed Conflict, by Michael Byers." *Osgoode Hall Law Journal* 44.4 (2006) : 767-772.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol44/iss4/8>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT BY MICHAEL BYERS (VANCOUVER: DOUGLAS & MCINTYRE, 2005) 214 pages.¹

BY JILLIAN M. SISKIND²

Michael Byers' new book on the laws of war is an excellent guide for any layperson interested in this topic. He provides a thorough, yet simple, explanation of how decisions are made in the context of war and military intervention at both the national and international levels. Byers examines the technical aspects of the laws that govern nations and combatants in the conduct of war. In the context of UN Security Council operations, the author discusses the reality of how the law operates in practice and how it has been applied in past conflicts.

Byers presents *War Law* in a logical manner, beginning with an explanation of the role of the United Nations and the significance of having the Security Council's authorization for military intervention. These early chapters provide excellent examples of how the Security Council's authorization or non-authorization for military intervention has played out in reality. A picture emerges of how, despite its limitations, the Security Council furthered the progress and evolution of international law in some cases and hindered it in others. An example of the former can be seen in the Security Council's de facto expansion of the concept of "threats to international peace and security"³ to include international humanitarian crises. For instance, the Security Council used its authority under Chapter VII of the UN Charter to create safe havens for Bosnian civilians affected by the 1990s conflict in Bosnia and Herzegovina.

Any discussion of military intervention in recent history necessarily requires a discussion of the role of the United States, the global hegemon—its military decisions and its tactics. Byers takes a political approach to this highly controversial discussion. The

¹ [*War Law*].

² LL.M., Ph.D. candidate (Osgoode Hall Law School), Senior Advisor for public safety and security issues for Ontario's Solicitor General. The author would like to thank Heidi Rubin and Cecilia Parker for their insightful input.

³ *Supra* note 1 at 25.

introduction explains that much of the book focuses on the United States because, relatively speaking, it is militarily more powerful than any political entity since the Roman Empire. Interestingly, the early chapters tend to be fairly objective in their discussion of U.S. intervention in foreign countries: Byers focuses on the facts without excessive commentary. However, in the final chapters, Byers is increasingly critical of U.S. foreign policy. Like much of the commentary in humanitarian law literature, Byers is highly critical of the “Bush doctrine,” which emphasizes pre-emptive military action in the face of potential danger. His concern follows from his belief that this approach may induce other countries to obtain weapons of mass destruction and may give all countries permission to use full force in the face of potential threats. This criticism becomes much more pronounced and political as the book reaches its conclusion. Byers uses a critique of American foreign policy as a means of explaining how international humanitarian law should operate in a perfectly lawful world. Despite the political rhetoric, this method is very effective in illustrating the *realpolitik* framework within which the law of war exists.

Byers’ use of examples to illustrate how the law has evolved—starting with the Korean war, including the conflicts in Southern Rhodesia, Iraq, the former Yugoslavia, Haiti, East Timor, and ending with the worsening situation in Darfur, Sudan—is very effective. Through the use of these examples, Byers provides an excellent explanation of the intricate conflicts and the complexities involved in the Security Council’s authorization of the use of force. Following this analysis, Byers poignantly observes that the “Security Council remains a political body that cannot itself be forced to act. Frequently it will not take action even when, as in the case of Darfur, the moral case is overwhelming.”⁴

The early chapters of the book also cover the concept of “self-defence” and necessarily begin with the initial event that articulated the test for the conditions to invoke this inherent right: the Caroline incident. It was this incident, which occurred during the war of 1812 between the United Kingdom and the United States, that led to “self-defence” being lawful when there is “instant necessity leaving no choice

⁴ *Ibid.* at 39.

of means and no moment of deliberation.”⁵ The discussion then turns to the codification of this right in the UN Charter. In the early chapters, Byers explains that international lawyers tend to use the positivist approach to law, according to which each legal problem has a correct answer. In the context of self-defence, however, he suggests that a legal claim to self-defence will depend on the facts of each case and thus requires a greater degree of flexibility than the positivist approach offers.

Using a recent and highly contentious example of self-defence, Byers explains that there is no clear support for self-defence actions taken against countries implicated in acts of terrorism. This is particularly so, he explains, in situations that do not meet the requirements of necessity and proportionality. It is at this point that the criticism of U.S. foreign policy begins in earnest. Byers comments on how the U.S. government actively attempts to change any law that stands in its way and yet has failed to convince others of its need for a pre-emptive strategy of self-defence. Interestingly, he observes that as a result of these strategies used by the United States, and the heightened concern about terrorism generally, the right to self-defence now includes military responses against countries willingly harbouring or supporting terrorists. This conclusion is, however, premature and overly simplistic. This area of the law is still emerging and there is clearly no custom on how to treat states that harbour or support terrorists. Similarly, there is no consensus on whether there should be a difference in treatment for states having differing degrees of complicity with terrorist groups.

The next section deals with humanitarian intervention, which is a very recent—and still uncertain—development in international law. As Byers aptly explains, there are no credible precedents, no state practices, no *opinio juris*, and therefore, no customary international law that supports this practice. Unless expressly authorized by the UN Security Council, humanitarian intervention is illegal; it is, however, often widely supported and demanded in the political arena. Byers cites a number of examples of humanitarian intervention, which include India’s intervention in East Pakistan in 1971, Vietnam’s intervention in Cambodia in 1978, Tanzania’s intervention in Uganda in 1979, and the

⁵ *Ibid.* at 54.

intervention in Northern Iraq by Britain, France, Italy, the Netherlands and the United States in 1991. Byers notes that with the exception of Britain in 1991, none of the intervening countries advanced an argument of humanitarian intervention and thus there is no *opinio juris* on this practice. This observation, however, tells only part of the story. The interventions referred to occurred on humanitarian grounds, and though the phrase "humanitarian intervention" was not used, each was arguably based on humanitarian reasons. Thus, *opinio juris* may well be slowly evolving to include humanitarian intervention in certain circumstances. Still, this type of intervention has not become a part of customary international law and remains highly controversial.

Inspired by the need to address the legality of humanitarian intervention in international law, Canada established an independent body to study this problem. The working group concluded that although the UN Charter's strong bias against military intervention is not absolute, it would be difficult, as a political matter, to reach a consensus on when intervention is justified. Byers urges an emphasis on the duty to prevent, rather than the duty to protect: intervention, then, should only be undertaken in the most extreme situations. Prevention could be achieved, he argues, by directing military budgets to foreign aid and development.

The final section focuses on international law during armed conflict. Byers provides a good, basic explanation of the significance of the Geneva and Hague conventions as the bases for the laws of war. He also describes how the protection of civilians plays a central role in international humanitarian law. Byers makes an interesting criticism of U.S. foreign policy: since war technology has resulted in the deaths of fewer soldiers, the United States has been able to resort to war as a way to deflect attention from internal political problems, scandals, and economic decline. This practice, he argues, has the effect of a more cavalier approach to the *jus ad bellum*, or justification for war; a good example is the "Bush doctrine" of pre-emptive self-defence.

Byers' anti-Bush sentiments are most pronounced in the final chapter on war crimes courts and tribunals. This chapter includes a description of the Iraqi Special Court and the trial of deposed Iraqi president, Saddam Hussein. Byers notes that this is a highly political trial, as the court is primarily staffed by American lawyers, and the trial was perfectly timed to coincide with the U.S. elections. The media was provided with only limited and controlled access to the proceedings. By contrast, Byers lauds the legitimacy of the International Criminal

Tribunal for the former Yugoslavia's (ICTY) trial of Slobodan Milosevic. In support of this position, he refers to the Chapter VII mandate of the tribunal from the Security Council, which necessarily required the votes of China and Russia. He argues that vindicating the victor is not the purpose of the tribunal's trial. In making that claim, Byers ignores the fact that the United States and other NATO countries are the main funders of the ICTY, and that no NATO leaders were ever indicted for bombings in Kosovo that severely affected civilians and thus may have violated the laws and customs of war.

Byers criticizes the Hussein trial and argues that the trial further endangers legitimacy in the fledgling international legal system, but his distinction between the ICTY and the Iraqi Special Court is tenuous. Both institutions reinforce victor's justice; Byers is simply attaching his own value judgment to the form of victor's justice he agrees with. It is beyond question that both Hussein and Milosevic committed international crimes worthy of international condemnation, or at a minimum, a public airing of the allegations. Whether or not the prosecution is instigated by the victors in a conflict, it advances the cause of international justice because it represents the hope that was initiated in Nuremberg and Tokyo following World War II—that perpetrators of such grievous crimes would not go unpunished, regardless of their political position.

Following the publication of Byers' book, two important events have occurred: Slobodan Milosevic died in prison prior to the conclusion of his trial and Saddam Hussein was convicted, sentenced to hang, and executed. The public airing of the allegations in both cases served a useful purpose: to give voice to the victims and the quest for justice. However, in both cases, the international lawyer is left cold. In the example of Milosevic, his untimely death meant that no determination could be made of the former leader's responsibility for the deaths of tens of thousands of people. In the case of Hussein's conviction, even Ramsay Clark, former U.S. Attorney General and counsel to Hussein, pronounced that the trial was a sham. As the first conviction of a former head of state, it will likely be of little assistance in the advancement of international law due to its apparent questionable legality. Thus, while it may have provided Hussein's victims with a degree of satisfaction, it gives the world very little in terms of a valuable example of international justice.

This book provides the layperson an excellent introduction to the complexities and ongoing arguments alive in the realm of war law. It

will educate even the uninitiated with a simple and well-argued description of how law and politics interact in this forum. The topic of humanitarian law is one that has interest beyond the circle of lawyers and academics that study it. For making this complex area of law accessible to any interested reader, this book is a welcome addition to the body of literature on the topic of humanitarian law. Although this book does not replace the standard texts commonly used by international law practitioners and academics, it explains the importance and realities of the political environment of the United Nations. For those working in or studying international law, the book provides a good basis for seeing how international law operates in a political context. However, without a single footnote throughout, it can only provide a general overview as well as a good basis to begin one's research. The political undertones merely add colour and must be regarded as commentary rather than as statements about the current status of international law.