It is always a privilege to be asked to contribute a chapter to a collection of essays in honour of a colleague, but in this case it is also a great pleasure. The present writer is one of many who have benefited over the years from Leslie Green’s writings, teaching, friendship, and encouragement. Leslie’s contributions to the literature on the laws of war have always combined rigorous scholarship with a determination that the subject is a practical one to be approached in a practical way. It is in that spirit that he has grappled with every challenge to that body of law, from the Indian National Army trials in which he took part at the end of the Second World War to the Kosovo crisis. It therefore seems fitting to take the opportunity of this collection of essays to examine the impact of the law on military operations and to take stock of where we are going at the start of a new millennium.

The idea of laws of war is not, of course, a new one. Laws on the conduct of hostilities can be traced back several centuries, while rules of international law restricting the right to resort to force have existed for most of the present century. It is one of the paradoxes of international law that it thus has one body of law designed to prevent war, by restricting the circumstances in which it is
lawful for States to resort to force, and another designed to regulate the conduct of war if the first is disregarded. While other areas of international law may have a bearing on government decisions regarding the use of force, it is these two bodies of law on which this paper will accordingly focus.

While the law on resort to force and the laws of war are separate bodies of law with different objectives and very different histories, the relationship between them is obviously a close one. If the use of force by a State in its international relations is to be lawful, it must comply with both bodies of law. While the law on resort to force is more directly the concern of decision makers at government level than of military commanders in the field, the latter are affected, through the medium of rules of engagement, by that law as well as by the law on the conduct of hostilities (the “law of war” or “law of armed conflict,” properly so-called).

In the last decade, both bodies of law have assumed a more prominent role in discussion of international affairs, and their impact on government decision making and on the whole military chain of command has become more important. The purpose of this paper is to explore that impact in the context of the changing nature of war and changes in the relevant rules of international law at the start of the new millennium. To that end, Part I of the paper will consider developments in the law on resort to force, such as the increased reliance on United Nations mandates as the justification for resort to force and the question of whether there is a right of humanitarian intervention. Part II will make a similar survey of developments in the law on the conduct of hostilities, particularly in the areas of United Nations operations, internal armed conflicts and the use of new technology in warfare. Finally, Part III will examine the impact of the law upon decision making, both at the governmental level and by military commanders.

Part I

The Legal Basis for Using Force

Prior to 1919, international law recognized a right of States to resort to war in furtherance of national policy. The most important change in international law during the twentieth century has been the replacement of that right by a general rule that prohibits recourse to force in international relations, qualified by a small group of exceptions. Thus, Article 2(4) of the United Nations Charter provides that:
All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Since the principal purpose of the United Nations is the maintenance of international peace and security, this provision has generally been interpreted as stating a ban on any threat or use of force in international relations unless that use or threat of force is justified by a specific exception to the general rule. The Charter itself expressly provides for only two exceptions: the right of individual or collective self-defence in the event of an armed attack, which is preserved by Article 51 of the Charter, and the use of force under the authority of the Security Council when the Council takes enforcement action under Chapter VII of the Charter. Although States and writers have from time to time suggested that other justifications for the use of force exist under customary international law and are not affected by Article 2(4) of the Charter—for example, a right of humanitarian intervention, of reprisals, of intervention to promote democracy, and intervention to protect a State’s nationals outside its territory—all of these are disputed. Even the right of humanitarian intervention, which has assumed such importance in the last few years, still arouses considerable controversy (although this writer will argue that this right forms part of the corpus of modern international law).

Since enforcement action by the Security Council was virtually unknown before 1990, until that date the law on resort to force was in practice defined by the limits which international law placed on the right of self-defence. Article 51 of the Charter gives only a partial indication of those limits:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Thus, although self-defence is intended to protect the State, no indication is given of what “the State” means for these purposes. Clearly, an act such as Iraq’s invasion of Kuwait was an armed attack upon the State of Kuwait, but the concept of a State includes more than just territory; it also encompasses
population and government. Is an attack upon a State's nationals abroad, or upon ships flying its flag, or upon units of its armed forces (such as the U.S. forces in Berlin who were attacked by the bombing of the La Belle discotheque in 1986) an attack upon the State itself? This is a question of considerable importance to which international law gives only an uncertain answer, but the practice of those States which can do so has been to invoke the right of self-defence to protect their nationals and shipping and certainly to protect their armed forces. This approach is surely correct, for a State consists of its people as much as its territory, and there would be something very strange, to say the least, about a law which permitted the use of force to protect territory, no matter how remote, barren, or uninhabited, but not to protect the lives of a State's people when attacked outside its territory.7

Nor does the Charter give a definition of what is meant by "armed attack" (or in the French text "agression armée"). The International Court of Justice has said that the use of force constitutes an armed attack only when it reaches a certain level of intensity, so that a minor border incident would probably not qualify.8 It is clear, however, that the use of force need not be by regular forces but can include covert operations and terrorist attacks.9 In addition, while Article 51 is couched in terms which suggest that the right of self-defence may be exercised only once an armed attack has actually commenced, the better view, and one for which there is substantial support in State practice, is that there is a right of anticipatory self-defence when an armed attack is reasonably believed to be imminent.10

One further consideration is that, although Article 51 is silent on this point, the International Court of Justice has recognized that the right of self-defence is subject to the limitation that measures taken in self-defence must be proportionate; excessive use of force by a State which has been the victim of an armed attack is unlawful.11 This requirement is often misunderstood. It does not mean that a State which has been attacked is confined to the degree of force used by the attacker:

The requirement of the proportionality of the action taken in self-defence . . . concerns the relationship between that action and its purpose, namely . . . that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered.12
This is an important aspect of the right of self-defence and is indicative of one of the purposes which the international law on resort to force is designed to serve, namely, that if war cannot be prevented, the law should at least seek to contain it. It is this requirement, that the exercise of the right of self-defence should be confined to what is necessary and proportionate, which makes the limits of self-defence important not only in the decision to resort to force but also in decisions about how the subsequent hostilities should be conducted.\textsuperscript{13}

While the right of self-defence remains the legal basis for the use of force which is most frequently invoked, it is no longer the only one. Since 1990, decisions to employ force have increasingly had a United Nations element. The point can be illustrated by contrasting the Falklands conflict of 1982 with the Kuwait conflict of 1990–1991. Both conflicts commenced with the invasion by one State of territory of another and thus with a violation of Article 2(4) of the Charter. In the case of the Falklands, the British Government justified its resort to force in response to the Argentine attack entirely on the basis of the right of self-defence—United Kingdom territory had been the subject of an armed attack and the United Kingdom claimed the right to use the degree of force necessary to repel that attack, which meant, in that case, such force as was compatible with the laws of war and was necessary to retake and secure the islands. The Security Council was only peripherally involved. The United Kingdom scored an important victory, in political terms, at the outset of the conflict in obtaining Resolution 502 (1982) which called on Argentina to withdraw and uttered a thinly veiled condemnation of the invasion. That resolution was not, however, a necessary part of the United Kingdom’s legal justification for the military operations on which it then embarked. The legal questions were, first, was the United Kingdom acting within the scope of the right of self-defence—in particular, were its actions within the proportionality requirement—and, secondly, did those actions comply with the laws of war?

By contrast, when Iraq invaded Kuwait in August 1990, the Security Council determined that that action was a breach of international peace and then took enforcement action under Chapter VII of the United Nations Charter.\textsuperscript{14} The United Nations could not itself undertake military action, as envisaged in the Charter, but it used its powers under Chapter VII to authorize military action by an \textit{ad hoc} coalition of States. Thus, Security Council Resolution 678 (1990) authorized “States co-operating with the Government of Kuwait” (a formula carefully designed to avoid any suggestion that the Council was approving military action by Israel) to use force in order to ensure Iraqi compliance with the various resolutions on Kuwait and “to restore international peace and security in the area.”
The importance of that authorization was evident at both the political and legal levels. At the political level it helped to cement the coalition and to enhance its credibility, especially in the Arab world. At the legal level, Resolution 678 was not essential, in the sense that the coalition States could have justified recourse to force by reference to the right of collective self-defence in the face of what was undoubtedly an armed attack upon Kuwait. However, Resolution 678 had important legal (as well as political) effects, for it provided an entirely new justification for using force, one derived from the Security Council authorization. Moreover, that justification entitled the coalition States, in principle, to go beyond what the same States would have been entitled to do by way of collective self-defence. Self-defence would have justified only what was necessary for the liberation of Kuwait. Resolution 678, on the other hand, justified the use of force to restore peace and security. It is by no means clear, for example, that the right of self-defence would have justified what was in effect a blockade of Aqaba in “neutral” Jordan, or the attacks upon Iraq’s longer term military potential. The peace terms imposed upon Iraq in Resolution 687 (1991) also went far beyond anything which could lawfully have been required by States relying upon their own rights of self-defence.

The lesson is clear. By obtaining the backing of the Security Council for their use of force against Iraq, the principal coalition States not only secured a far firmer political base and, in particular, reinforced their support in the Arab world, they also obtained the authority to go beyond what even an expansive interpretation of the right of self-defence would have permitted in that they were authorized to use force to achieve objectives which would not have fallen within the concept of self-defence. The price was the political complication of having to secure the necessary support in the United Nations Security Council. In practice, however, that price was a small one. Having secured enough votes to pass Resolution 678, the coalition was not then subject to any practical control by the Security Council (although it reported to the Council on the actions which it took) because the mandate conferred by Resolution 678 was very broad and could not have been altered without a further resolution which the United States, United Kingdom, and France could have vetoed even if there had otherwise been a majority for its adoption. While the Security Council provided the authority to use force and defined the limits of that authorization, command and control in the ensuing operation rested entirely in the hands of the States which contributed the forces.

The power of the Security Council to authorize States to use force has been particularly important in a number of cases of humanitarian intervention, a ground for the use of force which has emerged into particular prominence in
recent years. In contrast to those cases, such as the Entebbe raid, in which States have intervened by force in the territory of other States in order to protect their own citizens, humanitarian intervention entails intervention in order to protect the nationals of the target State from their own government or, in some cases, from events occurring in the target State which the government of that State (if one still exists) is unwilling or unable to control. The use of force for this purpose cannot be accommodated, even within the elastic limits of the right of self-defence. If humanitarian intervention is to be considered lawful, therefore, it must be because of the existence of a legal basis for using force separate from the right of self-defence.

It now appears to be widely accepted that the Security Council has the power to authorize intervention on humanitarian grounds. Since 1990, the Security Council has done so in relation to Somalia and Haiti, as well as giving subsequent approval to the ECOWAS operation in Liberia, while humanitarian intervention was one of the features of the United Nations operations in the former Yugoslavia between 1991 and 1995. Such actions have required the Security Council to take a broader view of what constitutes a threat to international peace and security, extending it from situations involving the use of force between States to conflicts within a State. That was an easy step to take where the conflict within a State affected a neighbouring country or threatened to spill over an international boundary (as happened in Liberia).

In both the Somalia and Haiti cases, however, the Council acted at a time when the threat to other States was minimal, and it seems that it was the situation within those two States which was considered to be the threat to international peace. In the Somalia case, the Council effectively admitted as much when it determined, in the Preamble to Resolution 794 (1992), that "the magnitude of the human tragedy" within Somalia posed a threat to international peace and security. No mention was made of any effect upon neighbouring States and, in fact, at the time that that resolution was adopted, the effect upon neighbouring States was minimal since the fighting was contained within Somalia and few Somalis were able to flee the country. In the case of Haiti, the flow of refugees to neighbouring States was undeniably a political problem, but it could not be said to have threatened the peace of the region or the security of any other State.

A more difficult question is whether there are any circumstances in which it is lawful for a State, or group of States, to intervene by force on humanitarian grounds without the authorization of the Security Council. This question has, of course, received much attention as a result of the NATO operations over Kosovo which began in March 1999.
Prior to 1990, the legality of humanitarian intervention in the absence of United Nations authorization was widely questioned. Nevertheless, there were occasions when States invoked a right of humanitarian intervention. When India intervened in Bangladesh in 1971, and when Vietnam invaded Cambodia and Tanzania Uganda in 1979, they claimed to be acting in exercise of such a right, although they did so only as a secondary justification and their claims met with considerable resistance.\textsuperscript{19}

Since 1990, however, there has been a more substantial body of State practice sustaining a right of intervention in a case of extreme humanitarian need.\textsuperscript{20} The Economic Community of West African States (ECOWAS) intervention in Liberia in 1990 could only have been justified as an exercise of a right of humanitarian intervention, yet not only did it meet with no condemnation from the international community, it eventually received the express endorsement of the Security Council some two years later.\textsuperscript{21} The interventions by United States, British, and other forces in northern Iraq in 1991 and southern Iraq the following year are an even more striking assertion of the right of humanitarian intervention. Although the intervention was preceded by the adoption of Security Council Resolution 688 (1991), which condemned Iraq's attacks upon its civilian population, that resolution was not adopted under Chapter VII of the Charter and did not authorize military action. The justification for the operation rested, therefore, on the assertion of a right of humanitarian intervention under general international law. While Iraq protested at these incursions into its territory, they again met with almost no opposition in the rest of the international community.

In asserting a right of humanitarian intervention in Yugoslavia, the NATO States were not, therefore, writing on an empty page. As was the case in Iraq, military action was not authorized by the Security Council but the Security Council had condemned the Federal Republic of Yugoslavia's treatment of the population of Kosovo as a threat to international peace and security.\textsuperscript{22} Moreover, the Security Council had expressly recognized that there was overwhelming evidence of widespread violations of human rights and consequent loss of life in Kosovo (much of the evidence for which came from the United Nations High Commissioner for Refugees and other impeccable sources) before NATO action commenced. These factors have led a number of writers to conclude that the NATO action was necessary and morally justified, but that it was nevertheless unlawful.\textsuperscript{23} If true, that is a damning condemnation of international law. The present writer, however, does not accept that it is true. International law is not static and modern international law can no longer be regarded as giving the protection of State sovereignty absolute primacy over the protection of
life. In this writer's opinion, a right of humanitarian intervention is part of contemporary customary international law, and the rejection in the Security Council—by the substantial majority of twelve votes to three—of a Russian draft resolution which would have condemned the NATO action tends to reinforce that conclusion.

Another change of considerable importance is illustrated by the earlier United Nations involvement in the fighting in the former Yugoslavia. For most of its history, the United Nations has distinguished between enforcement action, where the Security Council either established a United Nations force to fight an aggressor or authorized States to conduct a war against the aggressor on behalf of the United Nations, and peacekeeping operations, in which the United Nations established a force to police a cease-fire or perform other tasks of an essentially neutral character. While a peacekeeping force might become involved in fighting, especially if it were itself attacked, it was not intended that such a force should become a party to a conflict. The distinction between the two types of operation was rightly considered to be of the utmost importance (although, in practice, almost all United Nations operations were of the peacekeeping kind).

The revitalization of the Security Council in the 1990s, however, has led to the United Nations attempting to mount operations which had some of the attributes of both peacekeeping and enforcement action. In Bosnia-Herzegovina, for example, UNPROFOR was originally established with a role which was primarily one of peacekeeping, at least in the sense that UNPROFOR was charged with a humanitarian mandate, to be discharged on an impartial basis, and was neither intended nor equipped to fight a war. Over time, however, this basic mandate changed as the Security Council used its enforcement powers under Chapter VII of the United Nations Charter to give UNPROFOR new tasks, such as monitoring (and, perhaps, protecting) the safe areas established by the Security Council, while NATO air forces, operating outside the United Nations chain of command, were authorized by the Council to use air power in support of specific UNPROFOR objectives.

As the conflict progressed, some States which were major contributors to UNPROFOR became increasingly concerned about the safety of their contingents in Bosnia-Herzegovina and deployed forces, under national not United Nations control, to the region to assist in protecting UNPROFOR and, if necessary, in evacuating their UNPROFOR contingents. Had such an evacuation been attempted in, for example, the winter of 1994 against armed opposition, the legal authority to use force against those attacking UNPROFOR units or attempting to prevent their redeployment would have been derived from a
complex mix of the various United Nations mandates and the right of self-defence of the various contributor States. Given the military and political complexity of such an operation, this additional level of legal complication would have been far from helpful.

Although enthusiasm in the United States for United Nations involvement in armed conflicts has diminished since the Somalia conflict, and the number of United Nations peacekeepers is unlikely to climb back to its peak of 1994–1995 in the near future, it is also unlikely that the United Nations will return to its comparatively passive role of the 1970s and 1980s. The position of the Security Council in the international legal system as a body which can authorize States to use force in circumstances where they could not otherwise lawfully do so makes it too useful for that. The other options—disregarding the law or attempting to develop new customary law rules permitting the use of force—are problematic. The first course entails abandoning the advantages which legitimacy bestows; the second would encounter serious opposition and would be very much a mixed blessing, since rules developed for the benefit of one State or group of States are, of course, equally available to others.

One further development requires comment. A majority of modern conflicts occur within a State, or, at least, have their origins in an internal conflict, even if they subsequently involve other States. The law on resort to force traditionally had nothing to say about internal conflicts. Rebellion did not violate international law but nor was it the exercise of a right under international law, except where force was used to vindicate a right to self-determination, something which until recently was assumed to be confined to colonial and quasi-colonial cases. Similarly, international law left the incumbent government free to employ force against any challenge to its authority. Article 2(4) of the United Nations Charter prohibited the use of force by States only in their international relations, not in their dealings with their own peoples. International law did prohibit assistance to rebels and, once the situation in a State reached the level of civil war, to governments. In practice, however, the latter part of that rule was almost entirely disregarded and States continued to provide military assistance to governments even after those governments had lost control of most of the territory and population of their States.

There has been no formal change in the law. There are, however, signs of a change in practice in the way that the law is interpreted and applied. First, the Security Council has been willing to treat the use of force within a State as giving rise to a threat to international peace and security and to take action in respect of it. For example, in the early stages of the conflict in what was then still treated as a single Yugoslavia, the Council imposed an arms embargo in
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Resolution 713 (1991); more recently, in Resolutions 1160 (1998), 1199 (1998) and 1244 (1999), it has first imposed sanctions on the Federal Republic of Yugoslavia, because of the latter’s military crackdown in Kosovo, and then authorized the deployment there of a multinational and essentially NATO-dominated force in the wake of the NATO air operations against the Federal Republic of Yugoslavia.

Secondly, the speed with which much of the international community recognized the new States which emerged from the former Yugoslavia and the insistence upon non-recognition of boundary changes resulting from the use of force suggest that the concept of self-determination may be acquiring a broader meaning than hitherto.

Thirdly, there are indications that the use of force by an incumbent government may, in certain circumstances, be regarded as unlawful, for example if it involves the use of federal troops against a breakaway province (as in Yugoslavia in 1991) or against an entity which has carved out some kind of de facto international status (such as Taiwan). These are tentative steps. The fighting in Chechnya and Sri Lanka, for example, has not attracted the same degree of attention. Nevertheless, it seems unlikely that international law in the next century will continue to ignore the use of force within a State in the way that it has for most of the twentieth century.

Part II

Law and the Conduct of Hostilities

While the law on resort to force seeks to prevent, or at least to contain war, the principal goal of the laws of war today is the preservation of certain humanitarian values in war, particularly by limiting violence against those who do not take a direct part in hostilities. This emphasis on humanitarian values helps to explain one of the apparently paradoxical aspects of the laws of war—the fact that they apply with equal force to both sides in a conflict, irrespective of which is the aggressor and which the victim.25

In contrast to the law on resort to force, which consists almost entirely of broad principles with considerable flexibility, the laws of war are detailed—more than thirty treaties, running in total to several hundred pages—and, in most respects, very precise. While the most detailed regimes concern the treatment of persons who are clearly not participating in hostilities—the wounded, sick, shipwrecked, prisoners of war, and civilian detainees

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and the civilian population of occupied territory—recent years have seen an increased emphasis on what may be termed "front line law," that law dealing with the actual conduct of combat operations. This law requires, *inter alia,* that the armed forces distinguish at all times between combatants and civilians, direct attacks only against the military and military objectives and not against civilians or civilian objects, and refrain from attacking a military objective when it is likely that to do so would cause collateral civilian loss and damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack. It is evident that principles of this kind, if properly observed, have a significant impact on the way in which the military conduct operations, which is quite different from, *e.g.,* the requirement of humane treatment of prisoners of war.

This paper cannot review the whole of the laws of war, and even a brief survey of the treaties and other developments of the last decade would exceed what is possible here. Instead, this part of the paper will examine certain issues likely to prove particularly important in the wars of the future.

**The Scope of Application of the Laws of War.** One of the most difficult questions raised by the laws of war is when those laws apply. Declarations of war are today almost unknown and the laws of war are no longer confined to the handful of cases—such as the Arab-Israel conflict—in which a formal state of war may be said to exist. It is common ground that the laws of war today apply to any armed conflict between two or more States, whether or not the belligerents recognize that they are at war. Moreover, there has been a tendency to give the concept of armed conflict a very broad definition. The United States, for example, maintained that when Syrian anti-aircraft batteries in the Bekaa Valley shot down a United States Navy plane and captured its pilot, that incident gave rise to an armed conflict and the pilot was accordingly entitled to be treated as a prisoner of war. The U.S. note to Syria added that the conflict had ended after only a few hours and Syria was therefore under a duty to return the pilot. This interpretation of "armed conflict" is, perhaps, somewhat elastic, but the International Criminal Tribunal for the Former Yugoslavia and the International Committee of the Red Cross have both treated the concept as broad enough to cover any fighting between two or more States, even if the scale of the fighting is small and the duration brief. In this respect, the popular use of terms such as "Operations Other Than War" tends to mislead, since military operations by one State against another become subject to the laws of war as soon as they result in the use of force between the
States concerned, irrespective of the term which may have been used to describe such operations.

Thus, there is no doubt that the recent air operations by the NATO States against the Federal Republic of Yugoslavia over the latter's atrocities in Kosovo constituted an international armed conflict between the NATO States and the Federal Republic of Yugoslavia. The fact that the NATO States' motives were humanitarian and the operation was conducted for strictly limited goals does not alter the fact that there was an armed conflict to which the Geneva Conventions and the whole corpus of the laws of armed conflict applied.3 3

Non-International Armed Conflicts. Although the laws of war never wholly ignored conflicts within a State, their rules were primarily designed for international conflicts. Not until 1949 did the international community adopt a treaty provision specifically concerning internal armed conflicts. Common Article 3 of the Geneva Conventions was undeniably a major step, but it did little more than require the parties (government and insurgent) to a conflict to observe a few minimum humanitarian standards in their treatment of the wounded, prisoners, and civilians who took no part in hostilities. In 1977, Additional Protocol II added considerably to the law on this subject but only in the case of conflicts in which the insurgents actually controlled part of the territory of the State. Even then, the provisions of the Protocol were far less extensive, particularly in relation to the actual conduct of military operations, than were the comparable provisions of the law on international conflicts.

In the last few years, however, there has been a dramatic change in the law. Most of the recent treaties on weapons—the Chemical Weapons Convention, 1993, the Land Mines Convention, 1997, and the amended Land Mines and Booby Traps Protocol to the United Nations Conventional Weapons Convention—are applicable to internal as well as international conflicts. Even more important are the developments in customary law. The International Criminal Tribunal for the Former Yugoslavia has held that the customary law applicable to the conduct of armed conflicts within a State is far more extensive than had generally been thought.3 4 In relation to such matters as the targeting of civilians and the precautionary measures which should be taken to protect them, it is clear that the Tribunal, whose decisions are likely to have considerable influence, considers that the customary law on internal conflicts is now essentially the same as that for international conflicts. It has also held that violations of the law applicable in internal conflicts constitute war crimes. The Tribunal's ruling on this point has now been partially reflected in the list of war crimes included in Article 8 of the Statute of the International Criminal Court, adopted
in 1998, which confers upon the Court jurisdiction in respect of certain crimes committed in non-international armed conflicts.

Nevertheless, it remains important to determine the borderline between internal and international conflicts and, in particular, to know at what point the involvement of outside forces has the effect of internationalizing a conflict and subjecting it to the full body of the laws of war. Unfortunately, international law gives no clear answer to that question. As a matter of law, the laws of war apply only where the armed forces of one State meet those of another. Accordingly, if outside forces intervene in a civil war to assist the government of a State against rebel forces, the resulting conflict continues to be a civil war and to be subject only to the smaller body of law applicable to such conflicts. This principle has been strictly applied by the International Criminal Tribunal for the Former Yugoslavia.\textsuperscript{35} There is something deeply unsatisfactory about this uncertainty. At the very least, where the forces of State A become involved in fighting in State B, they should be subject to the laws of war in their entirety, even if their local allies are not.

**United Nations Operations.** The growth in the number and variety of United Nations military operations since 1990 has already been discussed in Part I. This development has highlighted the fact that there exists considerable uncertainty regarding the applicability of the laws of war to the operations of United Nations forces.\textsuperscript{36} This is not a problem when a United Nations force, or a force authorized by the United Nations, is sent out to fight a war, since it is agreed that the laws of war would apply in full to hostilities between such a force and the forces of a State. Nor should it be a problem where a United Nations force operates in a traditional peacekeeping mode, since such a force would remain impartial and not become a party to an armed conflict of any kind. As shown in Part I, however, some recent United Nations operations have had both peacekeeping and enforcement elements. Moreover, in a number of cases, forces with a pure peacekeeping mandate have been drawn into fighting (usually by attacks upon their personnel which have caused them to exercise their right of self-defence).\textsuperscript{37} In such cases, it is far from clear whether the laws of war are applicable to the activities of the United Nations forces concerned.

The United Nations has accepted that, as a minimum, its forces are obliged to comply with the "principles and spirit" of the laws of armed conflict. As a matter of principle, however, in cases where a United Nations force becomes involved in fighting to such an extent that it is a party to an armed conflict, it should comply not merely with the principles and spirit, but with the entirety of
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the law. That much appears to be taken for granted in the provisions of the recently adopted Convention on the Safety of United Nations and Associated Personnel, 1994. The Convention makes attacks on United Nations personnel an offence, but Article 2(2) provides that:

This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies. (Emphasis added.)

The problem is that there is no agreement as to when the line identified in this provision is crossed. The scale of the fighting in which UNPROFOR and supporting forces became involved in Bosnia would unquestionably be sufficient to cross the very low threshold of armed conflict identified earlier in this paper, but it appears that the 1994 Convention was drafted on the assumption that the additional protection which it affords to United Nations personnel would have been applicable in Yugoslavia. This problem is one which is likely to recur and to cause real difficulty in the future, since the threshold for the application of the laws of war has now also become the ceiling for the application of the 1994 Convention.

Moreover, even if a particular United Nations operation is not subject to the laws of war, it does not take place in a legal vacuum. The United Nations, no less than its Member States, is a subject of international law and is bound by customary international law. Concern about the behaviour of what was admittedly a very small minority of United Nations troops in Somalia and certain other operations has led to calls for a clearer identification of the legal standards with which members of United Nations forces must comply. That has led the United Nations, after consultations with the International Committee of the Red Cross, to draw up a set of Draft Directives for the conduct of peacekeepers, drawn from the laws of war. It is arguable that at least some of the provisions of human rights law are also applicable to United Nations peacekeepers, either because of the adherence of Member States to human rights treaties or because those provisions have become part of customary international law.

The problem is that there remains far too great a degree of uncertainty on this subject. To be effective in a military context, the law must be clear and must not be so complex that it is incapable of practical application. The law on United Nations operations does not yet meet those requirements, and its
clarification and, perhaps, reform, ought to be treated as a far more urgent priority than it has been so far.

The Laws of War and New Technology. Much of the law of war can be traced back to the beginning of the twentieth century (even further in the case of the law of naval warfare). Can such law be applied to the very different technology of warfare which exists today and which was so dramatically demonstrated in the Kuwait conflict? Some parts of the law are clearly ill-suited to modern conditions. The law of naval warfare still emphasises the right of visit and search at sea despite the fact that this practice is almost impossible to conduct in an age of comparatively small surface fleets and containerised shipping (which cannot be searched at sea, since it is usually impossible to gain access to the containers). This is an area of the law which would benefit at the very least from clarification of what is a legitimate target—the Iran-Iraq War having demonstrated the very considerable differences of opinion which existed on that subject even between the United States and other NATO countries.39 At present, however, it seems unlikely that there is sufficient political support for any such move.

In other areas, the picture is better. The Kuwait conflict showed that the principles of customary international law regarding the distinction between civilian objects and military targets and the principle of proportionality—i.e., that even a military target should not be attacked if to do so would cause civilian casualties which would be excessive in relation to the concrete and direct military advantage anticipated—remain capable of application, although the proportionality principle requires a measure of fresh thought, given that the collateral casualties in Iraq tended to come not from the direct effects of the bombing but rather the damage to infrastructure such as the power system which in turn led to a breakdown of sanitation and medical facilities with consequent severe effects on the civilian population.

The principles of the law in relation to the conduct of hostilities can generally be adapted to new methods of waging war, precisely because those principles are so general in character. The International Court of Justice had no difficulty in holding them applicable to the possible use of nuclear weapons in its recent opinion.40 Suppose that it became possible for a State to cause havoc to an enemy through the application of electronic measures or the selective planting of computer viruses which brought to a standstill whole computer systems and the infrastructure which depended upon them. Such a method of warfare would appear to be wholly outside the scope of the existing law. Yet that is not really so. The application of those measures is still likely to affect the
civilian population and possibly to cause great damage and even loss of life amongst that population. As such, it should be subject to the same principles of distinction and proportionality considered above and there is no compelling reason why its legality cannot be assessed by reference to these principles, notwithstanding that the principles were devised in the context of attacks carried out with weapons of a wholly different kind.

Part III

The Impact of the Law on Decision-Making

What impact, then, do these rules of international law have upon decisions regarding the use of force? To the “realist” school of international relations, the answer is “none.” For them, international law is no more than “the advocate’s mantle artfully draped across the shoulders of arbitrary power.” Theirs, however, is a “realism” far removed from the reality of the way in which most governments conduct international relations. Governments do not, for the most part, employ legal advisers merely to provide an apologia for decisions already taken on policy grounds, but because legal considerations are one of the factors which have to be taken into account in the process of decision, particularly where the question for decision is whether, or how, to use force in order to achieve a particular goal. While it would be naïve to imagine that legal considerations are invariably the controlling factor, it is equally unrealistic to assume that they have no influence at all.

Indeed, even if the cynical view were correct, and the role of the lawyer is no more than to drape a mantle over the projection of power, law would retain a degree of significance. Such a mantle is employed only because most States are concerned at least to appear to be acting within the law. It is, therefore, of some importance to States that the mantle is not threadbare—as it was with at least some of the arguments advanced by the United States to justify its 1989 intervention in Panama—still less manifestly illusory, as was the case with the USSR’s attempts to justify its intervention in Afghanistan a decade earlier or the British Government’s arguments over the Suez intervention in 1956.

That is particularly so when the use of force has any kind of multilateral character and especially where the decision to use, or at least to authorise the use of, force is taken within the United Nations or another international organization. To obtain the authorization of the Security Council for military operations, a State must be able to deploy a plausible case that there is a threat to
international peace and security within the meaning of Article 39 of the United Nations Charter, so that the Security Council has the legal power to act, and that the use of force of the degree and kind proposed is a legitimate method of addressing that threat. Otherwise, it will not be able to secure the support needed to obtain a mandate from the Security Council.

The legal basis for resorting to force has an important impact both at the strategic level of decision making and, through the medium of rules of engagement, at lower levels of command. We have already seen that the existence of a Security Council mandate can affect the purpose for which force may be used and, therefore, the degree of force which may be employed. In the case of the Kuwait conflict, the existence of a Security Council mandate enlarged the scope of the Coalition’s right to use force beyond what would have been permitted in self-defence. A mandate which is drawn more narrowly than that in Resolution 678 may, however, have an important limiting effect. In the operations in Bosnia-Herzegovina between 1992 and 1995, the mandate given to UNPROFOR and the secondary mandate conferred upon NATO to use air power in support of UNPROFOR were limited both as to ends and means. To take just a few examples:

- The authorization given by the Security Council to NATO to use air power to enforce the ban on military flights over Bosnia-Herzegovina was for a long time limited to the air space of Bosnia itself, so that, for a considerable time, NATO was not authorized to use force against Serb air bases in the Serb-held parts of Croatia, even though these were being used for air operations over Bosnia.

- It was unclear to what extent the mandate permitted the use of air power to protect the “safe areas” in Bosnia, nominated by the Security Council, although the real problem here lay less in the clarity of the mandate than in the ill-thought-out nature of the “safe areas” and the lack of willingness to defend them in 1995.

- When agreements restricting the use of heavy weapons in certain parts of Bosnia were concluded under the auspices of the UNPROFOR commander in 1994, it is unclear to what extent, if at all, either UNPROFOR or NATO was empowered to use force in response to violations of those agreements.

It is clear that these issues had an effect upon the rules of engagement issued to UNPROFOR and NATO forces and that, in some respects, they were more restrictive of NATO action than would have been the case had NATO relied not upon a Security Council mandate but upon collective self-defence. It should, however, be realized that the proportionality principle in self-defence
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(which was discussed in Part II) also has an effect upon the freedom of action of a force affecting for example, such questions as the degree of force which may be used and the area within which it is legitimate to take military action. For example, insofar as there are grounds for questioning the legality of the British action in sinking the General Belgrano during the Falklands Conflict in 1982, that is not because the sinking occurred outside the exclusion zone which the United Kingdom had proclaimed around the Islands, but because it can be argued that the sinking of the cruiser was not a necessary step in retaking the Islands.

The laws of war also have a significant impact on command decisions, again through the medium of rules of engagement, if these are properly drawn. While much of the laws of war relates to matters taking place behind the combat zone—e.g., the treatment of prisoners of war—the need to comply with these rules has implications for the conduct of the commander, as the problems in handling the large numbers of prisoners taken in the Falklands and the Kuwait conflict demonstrate. In the case of the rules prohibiting attacks on civilians and requiring commanders to observe the principle of proportionality, the impact is even more apparent. For example, Article 57 of Additional Protocol I requires those who plan or decide upon an attack to take all practicable steps to ensure:

(a) that the target to be attacked is a legitimate military objective;

(b) that it can be attacked without causing collateral civilian losses or damage to civilian objects which is excessive in relation to the concrete and direct military advantage anticipated from the attack;

(c) that the methods and means of attack are selected with a view to minimising the collateral losses and damage; and

(d) that the attack is called off if it becomes clear that these tests will not in fact be met.

Properly drafted rules of engagement will take account of all these legal constraints, although it has to be remembered that they are by no means the only constraints which will feature in ROE, which will also restrict the commander’s freedom of action in response to military and political factors. The impact of the law should also be enhanced by its role in military education and training. Moreover, the recent decision to establish an International Criminal Court is likely to increase awareness of the laws of war and to lead to greater press and public scrutiny of military operations.

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International Law and the Conduct of Military Operations

If one takes stock of the part which international law has played in military operations and the influence which it has today, the picture which emerges is distinctly mixed. Much of the century which is just ending has been a catalogue of violations with a total disregard for the law. Yet the century has also seen unprecedented development of the law itself, with the adoption of an extensive body of treaty law and the development of important rules of customary law. At least in the democracies, that law is taken a great deal more seriously by governments and the military than were the far less detailed rules which existed at the start of the century.

There is an enormous temptation to assume that where the law is not working today, the answer is that we need more and better law. International law on military operations will, of course, continue to develop; however, the priority should be not to legislate but to ensure greater respect for the law that already exists. In the military context, that means more than the prosecution of offenders—it requires the development of a culture of compliance with the law. That in turn requires that the practical effects of the law on military operations be properly understood. It is for that goal that Leslie Green has worked so tirelessly for more than fifty years and which makes the publication of this volume in his honour so appropriate.

Notes

1. For example, the law which determines disputes about title to territory and the efficacy—or otherwise—of the international machinery for the peaceful settlement of disputes can have a bearing on whether a State decides to resort to force or agree to end a conflict. The boundary case between Cameroun and Nigeria, currently before the International Court of Justice, and the similar dispute between Yemen and Eritrea, currently the subject of international arbitration, have both involved the use of force.

2. Some indication of the extent of what has been achieved in this area of international law can be seen in S. Korman, The Right of Conquest (Oxford, 1996).


4. It is not, however, created by the Charter but by customary international law; see the decision of the International Court of Justice in Nicaragua v. United States of America, ICJ Reports, 1986, p. 3.

5. See, e.g., the submissions of Professor I. Brownlie, QC, to the International Court of Justice in May 1999 in the Cases concerning the Legality of the Use of Force brought by the Federal Republic of Yugoslavia against the United Kingdom, the United States, and eight other NATO Member States (CR/99/14, available on the Court's website at http://www.icj-cij.org). The decisions of the Court, rejecting the Federal Republic's requests for provisional measures of protection, given on June 2, 1999, do not rule on this question.

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6. The one real instance of enforcement action involving the use of force was the Korean conflict 1950–1953, although United Nations intervention in the Congo is regarded by some as an instance of enforcement action.


11. Nicaragua case, loc. cit., note 4, supra, at p. 94. This matter had been common ground between the parties. See also the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ REPORTS, 1996, p. 225 at paras. 40–41.


13. See Part III, below.


16. Under Article 27 of the United Nations Charter, that required the proponents of the Resolution to secure the affirmative votes of nine of the fifteen members of the Council and to ensure that none of the five permanent members voted against. In fact, Resolution 678 obtained eleven affirmative votes. One permanent member—China—abstained. Despite the wording of Article 27(3), it has long been established practice that the abstention of a permanent member does not prevent a resolution from being adopted. See the Advisory Opinion of the International Court of Justice in the Namibia case, ICJ REPORTS, 1971, p. 3.

17. This is in marked contrast to the formal position in peace-keeping operations, where command and control is normally held to reside in the United Nations and is exercised by the Force Commander and/or the Special Representative of the Secretary-General.

18. Under Article 39 of the Charter, the existence of such a threat, or of a breach of international peace or an act of aggression, is a prerequisite to Security Council action under Chapter VII of the Charter.

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20. For discussion, see S. Murphy, Humanitarian Intervention (1996); F. Teson, Humanitarian Intervention (2nd ed., 1997); Greenwood, loc. cit., note 19, supra.


23. See, in particular, B. Simma, NATO, the United Nations and the Use of Force: Legal Aspects, 10 EJIL (1999), p. 1. A. Cassese, Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, loc. cit., p. 23, thinks that the law is changing but accepts that the action is unlawful under the present law.

24. There was, in fact, no peace to keep, so the main activities of UNPROFOR differed from those of a classic peacekeeping operation. Moreover, since the force was intended to be impartial and not to become a party to the conflict, at least initially, it was not equipped for a combat role.

25. See, e.g., paragraph 4 of the Preamble to Additional Protocol I, 1977, to the Geneva Conventions.

26. Defined in Article 52(1) of Additional Protocol I as “those objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

27. Additional Protocol I, Article 51(5)(b).

28. A few landmarks should, however, be noted. Since 1990, the two 1977 Additional Protocols to the Geneva Conventions have at last attracted a broad measure of acceptance, although the United States has not become a party to either and France has so far declined to become a party to Additional Protocol I. New treaties have been adopted outlawing chemical weapons (the Chemical Weapons Convention, 1993) and anti-personnel land mines (the Land Mines Convention, 1997) and establishing a permanent International Criminal Court (the Statute of the International Criminal Court, 1998). In addition, the Security Council has established tribunals with jurisdiction to try suspected war criminals in the former Yugoslavia and Rwanda.


32. In its decision in Prosecutor v. Tadic (Jurisdiction) in 1995, the International Criminal Tribunal held that the laws of war applied “whenever there is a resort to armed force between States,” 105 ILR 419 at p. 453, para. 70. The view of the ICRC is stated in J. S. Pictet (ed.), Commentary on Geneva Convention III (Geneva, ICRC, 1960), p. 23.

33. That was the view taken from the outset by the ICRC (see Public Statement of April 23, 1999, available at http://www.icrc.org) and accepted by NATO and the relevant governments.


35. See Tadic, loc. cit., note 34, supra, and the decision of the Trial Chamber in Tadic (Merits), 112 ILR 1 (1997). At the time of writing, the decision of the Appeals Chamber in Tadic’s appeal from the 1997 decision had not yet been delivered.

36. On this subject, see ICRC, Symposium on Humanitarian Action and Peace-Keeping Operations (Geneva, ICRC, 1994); L. Condorelli and others, eds., The

37. In this context, it should be borne in mind that the United Nations has traditionally taken, at least in theory, a very broad view of the right of self-defence of United Nations forces. Thus, in a report on the operations of UNPROFOR in the former Yugoslavia, the Secretary-General stated:

It is to be noted that, in this context, self-defence is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate. (United Nations Doc. S/24540 (1992), para. 9)

38. Part II (a), supra.


41. In addition, throughout the conflict, Resolution 713 (1991) prohibited the supply of weapons to any party in the former Yugoslavia. It was repeatedly claimed by the Government of Bosnia-Herzegovina and others sympathetic to it that this resolution unreasonably (and, in the eyes of some, unlawfully) restricted the exercise by Bosnia-Herzegovina of its right of self-defence. The challenge to the legality of Resolution 713 is, in the view of this writer, wholly untenable, but the restriction on the right of self-defence was real.

42. Any limitations derived from that proclamation were entirely self-imposed and were political, rather than legal, in character. In any event, the proclamation had made clear that it did not affect the right of the United Kingdom to take action in self-defence outside the zone.

43. The present writer, however, considers that the sinking was legitimate since the destruction of the cruiser ensured that the Argentine surface fleet was effectively removed from further participation in the conflict, thus making the task of the British fleet significantly easier.