Chapter 11

International Humanitarian Law, Human Rights and the UK Courts

Christine Chinkin

The view that war – international or internal armed conflict – is an essentially lawless and unregulated affair mitigated only by the pragmatism of international humanitarian law is now widely debunked. War, especially in western societies\(^1\) has become a highly legalistic, juridified regime.\(^3\) Lawyers, often at the behest of civil society movements including humanitarian and human rights organisations, use creative international legal argument to challenge government decisions about the waging of war and its conduct. This has been especially visible in Israel with the jurisprudence that has evolved out of its armed conflicts and occupation.\(^4\) In recent years this trend has emerged in the UK and rapidly so in the context of Iraq. It is seen in the debates and claims about the legality of recourse to war; during combat when lawyers advise on legal targets and strategies;\(^5\) and in the claims commenced and public inquiries sought in the aftermath

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\(^2\) This is not to suggest that other societies have not also sought to bring armed conflict within the framework of legal argumentation as seen in the cases brought before the ICJ by the Democratic Republic of Congo against Uganda and Rwanda.

\(^3\) “The Iraq war has been thoroughly juridified”, according to G. Simpson, “The Death of Baha Mousa’, 8 Melbourne Journal of International Law, 2007, 340, 341.

\(^4\) D. Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (Albany: State University of New York Press, 2002).

\(^5\) In the context of Kosovo the House of Commons Foreign Affairs Committee noted that “every single action in warfare is liable to be analysed to see whether it was or was not lawful.” UK House of Commons, Foreign Affairs Committee, Fourth Report, Kosovo, Vol. 1, lvii–lviii,
of combat. Military behaviour during combat and belligerent occupation is now widely assessed against legal standards in a range of formal and informal arenas including internal disciplinary hearings, national, regional and international courts. Where no such arenas are available civil society may seek recourse in so-called Peoples’ Tribunals. This “lawfare” leads to a number of consequences. First, traditional approaches to the relationship between international law and domestic law are challenged. Second, the scrutiny of international legal texts by lawyers seeking language to support their position exposes the chameleon-like quality of much international law and often its inherent unsuitability for application by judges in national courts. Weak textual argument becomes bolstered by moral argument, sometimes presented as purposive interpretation. As “law is employed in claims for legitimacy,...interpreted to fit war-specific objectives” the notions of legitimacy and legality become blurred. Third, differences between the objectives and applicability of so-called self-contained regimes of international law are exposed, contributing on the one hand to its fragmentation and on the other to its constitutionalisation through diverse methodologies such as asserting hierarchy, international community values or other means of resolving textual conflicts. Fourth, are consequences for the separation of powers, for the line between legal and political argument. Once war (still pri-


7 ‘Lawfare’ has been used by David Kennedy to describe the process of “managing law and war together”: D. Kennedy, Of War and Law, (Princeton: Princeton University Press, 2006), p. 125.


9 The fragmentation of international law has been studied by the International Law Commission, M. Koskenniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006.


11 E.g. the concept of *lex specialis*; rules relating to successive treaties, Vienna Convention on the Law of Treaties, 1969, article 30.