

by the US and coalition forces have generated a renewed interest in the legal norms that govern the use of force at the international level. It is thus not surprising that the legal problems raised by war, aggression and self-defence have become very topical and the subject of various recent studies.

The book under review, however, is not one of those studies carried out as a result of this resurgence of interest in the issue of use of force. It is the fourth edition of Yoram Dinstein's celebrated work on *jus ad bellum*. It was originally published in 1988 following the heightened anxieties of the second Cold War after a number of instances of superpower use of force as well as other cases of resort to military power such as the Israeli intervention in Lebanon (1982), French intervention in Chad (1983) and full-scale conflicts like the Iran–Iraq war. Revised and updated editions followed in 1994 and 2001 respectively, and included the legal aspects of certain developments, such as the issue of humanitarian intervention after the 1998 military campaign in Kosovo, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as that of the International Court of Justice (ICJ). The present edition rises to the task of integrating a discussion of a number of events that have occurred since 2001. These include new sections on the consent of states to the use of force; armed attack by non-state actors; an examination of the Gulf War and the ensuing occupation of Iraq in 2003; and a study of immunities from jurisdiction in the context of crimes against peace.

The book comprises three parts, which broadly correspond to the three concepts of the title. In the first part, Dinstein provides a thorough overview of the legal nature of war, including a detailed discussion of the subject of neutrality, the formal beginning and termination of wars, and suspension of hostilities. Although Dinstein acknowledges a range of situations 'short of war' involving limited use of force, he maintains that in legal terms 'there are only two states of affairs in international relations – war and peace – with no undisturbed middle ground' (at 16). One

Yoram Dinstein. ***War, Aggression and Self-Defence***. Cambridge: Cambridge University Press, 4th Edition, 2005. Pp. 376. £31.99. ISBN 13: 9780521616317.

The tragic events of September 11 and the subsequent military campaigns undertaken

other argument Dinstein develops is that a cease-fire is a 'transition-period arrangement' (at 53), and that there is thus no such thing as a 'permanent cease-fire'. It follows that hostilities may resume without the incidence of an armed attack. When there is no formal peace or armistice agreement, war can be assumed to continue 'unless some supplemental evidence is discernable that neither party proposes to resume hostilities' (at 47). Although Dinstein notes the establishment or resumption of diplomatic relations as one such item of evidence, he does not elaborate further, setting down no clear answer to the question of how one determines whether war is terminated or continuing in the absence of a proper peace treaty.

His 'on-going war' argument is applied to the analyses of legal justifications of various incidents of use of force. For example, the 1981 Israeli raid on a nuclear reactor under construction in Iraq is considered to be justifiable as a continuation of the state of war that had started as a result of the Iraqi invasion of Israel in 1948 and its subsequent pulling out without signing an armistice.

In the present reviewer's opinion, however, Dinstein's argument falls short of explaining situations where cessation of hostilities on both sides may amount to a *de facto* armistice. In this respect, one can assert that just as war in the material sense does not require a formal declaration and that an armed attack may bring about a war, mutual consent to terminate a war can be implied by long periods of time with no exchange of fire between the belligerent parties. If Dinstein's stance is espoused, a number of military campaigns may be considered as part of one ongoing war. Indeed, the author applies this legal reasoning in relation to Israel and Syria and considers that the 'Six Days War' of 1967 was not so much terminated as interrupted by extended cease-fires. Thus, according to Dinstein, several rounds of military hostilities between Israel and Syria have been part of a single continuing war (at 56). In the same way, he considers the US-led invasion of Iraq in 2003 as the 'last phase of the Gulf War,' which began in 1991 following the Iraqi invasion of Kuwait. The present reviewer would however contend that the

'single on-going war' argument remains limited in explaining the role of facts on the ground in determining the state of relations between the two former belligerent states. Although Dinstein seems to take state behaviour as a significant indicator, he does not dwell on why the absence of exchange of fire for long periods of time does not amount to 'substantial evidence' for implied mutual consent to termination of hostilities.

The second part of Dinstein's book, which addresses the illegality of war, constitutes a major contribution to the literature. Providing an in-depth review of the relevant Charter provisions, namely Article 2(4) and Article 51, together with their interrelationship, Dinstein maintains that nothing in the Charter points to 'a unilateral right' to use force by one state with the aim of 'securing the implementation of human rights' in another. He convincingly challenges the relevance of state practice in the 19th and early 20th century in support of humanitarian intervention by stating that 'international law did not hinder the use of force, for whatever reason, good or bad' at the time (at 71). As a matter of fact, contrary to the general perception, post-Cold War UN practice does not lend support to the permissibility of use of force for promoting human rights. True, human rights violations and human plight have given rise to authorizations of military interventions for humanitarian ends. However, the Security Council has emphasized the 'exceptional' nature of these cases, and always chosen to link humanitarian concerns with 'threat to peace'. It has thus avoided setting precedents for interventions on such grounds. In line with this approach, Dinstein argues that the prohibition of force stipulated in Article 2(4) is all-encompassing in that the Charter does not allow any individual state 'to act unilaterally, in the domain of human rights or in any other sphere, as if it were the policeman of the world' (at 90–91).

In his discussion of the contentious issue of pre-emptive action, Dinstein adopts a restrictive reading of Article 51. His argument is that legitimate self-defence is contingent on the incidence of an armed attack. Thus, for example, Dinstein argues that the US quarantine on

Cuba in 1962 was precluded by Article 51, since self-defence is not permissible in the absence of an armed attack. Similarly, the Israeli bombing of an Iraqi nuclear reactor under construction in 1981, in Dinstein's view, does not qualify as an act of self-defence, as mere mobilization or 'bellicose utterances' do not justify self-defence in the framework of Article 51.

The book's strong contribution to the interpretation of relevant provisions of the Charter, however, is somewhat undermined by Dinstein's conceptualization of anticipatory self-defence. Notwithstanding his restrictive interpretation of Article 51, Dinstein develops the concept of 'interceptive self-defence', according to which the key for invoking legitimate self-defence is not who fired first, but who has engaged in a clear irreversible course of action. Hence, when there is compelling evidence that an armed attack is in the process of being launched, interceptive self-defence is permissible under Article 51. In Dinstein's words, 'whereas a preventive strike anticipates a latent armed attack that is merely "foreseeable" (or even just "conceivable")', an interceptive strike counters an armed attack which is in progress, even if it still is incipient: the blow is "imminent" and practically "unavoidable" (at 191). In the present reviewer's opinion, the distinction should rather be between pre-emptive and preventive strike. 'Interceptive self-defence' is really another word for pre-emptive action in its classical meaning, i.e. resort to armed force when 'the necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation'.¹ This is in contrast to the way in which it is utilized in the US National Security Strategy of 2002, i.e. as prevention of a future threat based on 'assumptions, expectations or fear'. Thus, introducing an additional concept to the existing debate risks convoluting the mat-

ter further without adding much conceptually or practically.

In addition, it is not clear how the 'Six Days War' of 1967 stands as an example of the Israeli exercise of interceptive self-defence on the basis of the argument that war was inevitable given the aggregate of Egyptian measures (such as the closure of the Straits of Tiran, the build-up of Egyptian forces along Israel's borders and statements about the imminent fighting). In fact, the anticipation of war could also be seen equally as an assumption that led Egypt to undertake such acts, given that Israel had been training for a coming war since the early 1950s. By failing to consider the dangers of abuse apparent in such reasoning, and employing prevention and pre-emption interchangeably, Dinstein's analysis not only complicates the understanding of conditions of self-defence, but also contradicts his earlier restrictive approach to Article 51.

Similarly, regarding armed reprisals, Dinstein is at odds with his interpretation of Article 51. He asserts that armed reprisals are allowed only when they are defensive and fulfil the requirements of legitimate self-defence, namely necessity, proportionality and immediacy. Yet, this formulation leaves the question of application of the conditions of 'necessity' and 'proportionality' open, and thus does not provide a clear distinction between punitive and defensive counter-force. On the one hand, if force is used in response to a *past* attack, it is not necessarily *necessary* and remains punitive, as the harm is already done. If it is used to deter or prevent future attacks, on the other hand, it is equally difficult to apply the key criteria of necessity and proportionality. Thus, it is not clear how armed reprisals might be considered a permissible form of self-defence from a customary international law point of view, let alone under the conditions set by Article 51.

Dinstein's analysis of the Gulf War and the Iraqi invasion deserves special attention not only as a controversial new issue added to this edition, but also as an unpersuasive argument. As noted above, Dinstein argues that the Gulf War and the 2003 invasion were part of the same *collective self-defence* action,

¹ See note of Webster to British authorities, 27 July 1842, quoted in T. L. H. McCormack, *Self-Defence in International Law, The Israeli Raid on the Iraqi Nuclear Reactor* (New York: St. Martin's Press), 1996, 183.

the exercise of which was blessed by Security Council Resolution 678 (1990), that authorised the Member States 'to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. According to Dinstein, by virtue of its language, Resolution 678 authorised the use of force for a material breach of Resolution 687 (1991) which defined terms of cease-fire.

This interpretation is not tenable for many reasons. To begin with, the structure of Resolution 678 suggests that 'all subsequent resolutions' refers to the 10 resolutions cited in the preamble, which are related to Iraqi withdrawal from Kuwait, return of Kuwaiti nationals and property, and other matters (but not related to weapons of mass destruction). Secondly, if a collective self-defence action is authorised by Resolution 678 'to restore international peace and security in the region' in 2003, then the question is whether Resolution 678 authorises the use of force indefinitely to restore peace and security in the area. Following this logic would yield to scenarios whereby any outside state could claim such an authority to intervene in Iraq or any other regional country for that matter, say, for example, Syria or Iran, as it sees fit to restore international peace and security in the area. In neither of the previous authorisations by the Security Council of collective security actions (Korea and Southern Rhodesia),² was the authorisation subsequently explicitly terminated. Yet neither authorisation was later considered valid or at hand for further action after

the initial crisis had passed. Likewise, the post-Resolution 678 authorisations were not also expressly terminated. Rather, in the light of the subsequent resolutions which brought alternative means to deal with the threat to the peace, the authorisation should be regarded as having dissolved. Given that Resolution 678 is an exception to the general norm proscribing the use of inter-State force laid out in Article 2(4), the broad interpretation of Resolution 678 proposed by Dinstein is not plausible.

Thirdly, Resolution 678 indicates that States that are 'co-operating with the government of Kuwait' are authorised to use all necessary means. In 1991, Kuwait notified the Security Council that it had requested the assistance of a coalition of states to repel Iraqi forces from its territory. The coalition States also communicated to the Security Council that their assistance had been requested by Kuwait. In 2003, however, there was no such communication to the Security Council neither by Kuwait nor by the coalition. In fact, although Kuwait allowed the US-led forces to use its territory during the invasion, the Kuwaiti representative at the Security Council expressed that Kuwait had not participated and would not participate in any military operation against Iraq and all the measures they had taken were to protect Kuwait's own security, safety and territorial integrity.³

In this connection, Dinstein also fails to note that the ICJ in the *Nicaragua* case limited applicability of collective self-defence by asserting that the illegal acts involving force short of an armed attack do not raise such a right:

In the view of the Court, under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'.⁴

Thus, even though Dinstein correctly points out that the concept of armed attack can be

² Before Resolution 678, there were two resolutions by the Security Council allowing states to use military force. See Resolutions 83 and 84 (1950) calling upon all Members to provide military forces and other assistance to the Republic of Korea in order to repel the attack from forces in North Korea and to restore peace and security in Korea; and Resolution 221 (1966) authorising the United Kingdom to impose an embargo on trade with Southern Rhodesia by the use of force if necessary.

³ See UN Doc. S/PV.4726 (2003).

⁴ *ICJ Reports* (1986), para. 211.

expanded to include acts of terrorism post-9/11, it is not clear how the US-led action may be considered as an act of collective self-defence, in the absence of an Iraqi armed attack and evidence of Iraq's connection with the 9/11 events.

Finally, in arguing that the 2003 invasion was a resumption of hostilities, Dinstein employs very general, unscholarly language by asserting that 'everybody' had believed that Iraq had not fully observed its disarmament obligations. This is not only a simplistic characterisation; it is also a misleading one which overtly disregards enormous discussions by many specialists to the contrary. In contrast to his argument that even the UN inspectors were of a similar opinion, former UN chief weapons inspector Hans Blix has repeatedly blamed the US and the UK for exaggerating the threat posed by weapons of mass destruction in Iraq, and has been quoted as saying that they had 'put exclamation marks where there had been question marks'. A simple search only in the BBC website gives about 177 pages of news items containing the aforementioned Blix's argument both before and after the military action against Iraq. Hence, Dinstein's argument regarding the 2003 invasion of Iraq is both legally and politically unsustainable.

In his conclusion, Dinstein refers to the general ban on the use of force as 'aggressive war'. By qualifying 'war', he leaves the reader with the impression that in his view the use of force is permissible unless it is 'aggressive'. This notion is confusing as he argues elsewhere in the book that any unilateral use of force, for instance on humanitarian grounds, is forbidden by the Charter framework. Further, Din-

stein asserts that collective self-defence even by a broadly based coalition is likely to generate political doubts and legal confusion. That the author's observation of such doubts and confusion arose as a result of the occupation of Iraq in 2003 is interesting given that he has not discussed any of the contending arguments regarding this episode. Finally, his conclusion that the range of options available in exercise of the right of self-defence is widened also stands in contradiction with his restrictive analysis of self-defence under Article 51.

As a fourth edition of an influential book published at a time when the topic addressed is as controversial as ever in certain respects, one would have expected more attention and detailed scrutiny of the recent challenges brought to international law of war and aggression by the invasion of Iraq, alternative legal arguments and their merits, and the Security Council's role in law-making with respect to individual and collective self-defence. Nonetheless, the critical assessment of certain parts of Dinstein's work in this review is not to dismiss the value of Dinstein's work as an important textbook and guide to the students and practitioners of international law and international relations in several other respects. With its broad scrutiny of the legal aspects of this highly significant subject as well as its extensive references, the fourth edition of Dinstein's book remains a notable reference work in the literature.

Dr. Muge Kinacioglu

Department of International Relations

Bilkent University, Turkey

Email: mkinaci@bilkent.edu.tr

doi: 10.1093/ejil/chm040