

Lesson Three: Certainty and Clarity of the Law

Lesson Two: Lesson Plan

LEARNING OBJECTIVES:

- Understand the difference between law that is clear and certain and law that is unclear and uncertain
- Understand why some areas of international law are unclear and uncertain
- Understand the importance of clarity and certainty of the law

LEARNING OUTCOMES:

- Be able to give examples of law that is unclear and uncertain within the law of armed force
- Be able to explain what the consequence of lack of clarity and certainty is for those being governed by the law

SKILLS:

- Literacy, applying legal principles to different scenarios, analysing legal frameworks, constructing arguments, weighing up and evaluating evidence, challenging different ideas, expressing reasoned opinions

3.1 Introduction



3.1.1 INTRODUCTION - Certainty and Clarity of International Law - Teacher-led Introduction

Read this out to students or paraphrase:

*In order for the law to be fair, it needs to be clear and certain. Just as individuals need to know what they can and cannot do under the law, countries must also know what they are permitted to do and what they should avoid to comply with **international law**.*

*Some areas of **international law** are particularly uncertain. One of the reasons is that these areas of international law are in a state of constant development to take account of new situations. Generally speaking, international law can be more prone to uncertainty than national law, because one of the ways that international law is formed is through custom. Law-making through custom means that if countries act in a certain way, in the belief that they should act in that way as it reflects the law, then that customary practice is likely to become the law at some point. In other words, if something is done for long enough in the belief that it should be done that way, it becomes the law. While it is completely necessary that the law should change to reflect the changing needs of the **international community**, individuals and countries may sometimes find it is difficult to know exactly what the law permits and what it forbids. Some areas of international law have been criticised for uncertainty allowing some countries to act in a way that other countries would deem illegal.*

In this lesson, we will explore through activities some examples of recent events that show how uncertain the law is, with different countries giving different opinions of what the law is.

3.2 Uncertainty and the Law on the Use of Force



3.2.1 STARTER ACTIVITY

- Uncertainty and the Law on the Use of Force
- Teacher-led Introduction

In this teacher-led starter activity students are introduced to the concept of the sovereign state and the branch of *international law* that governs relations between countries when tensions become extreme and they use military force against each other. The discussion serves as a backdrop to the Activities 1 and 2 which take a closer look at the specifics of the law and some of the uncertainties in the area.

Lead this discussion by writing the following questions on the board and asking students to discuss:

1. What does **sovereignty** mean?
2. Why is the use of force against other countries prohibited?
3. Do you think there should be any exceptions to the prohibition?



3.2.2 STARTER ACTIVITY

- Uncertainty and the Law on the Use of Force - Background for teachers

1. What does **sovereignty** mean?

All countries agree that it is an established rule of *international law* that each country in the world is sovereign and this includes both territorial and political **sovereignty**. This means that its borders cannot be violated by another country, and that it has the right to make policies to govern its own people as it chooses.

2. Why is the use of force against other countries prohibited?

The use of military force against a country is the ultimate violation of its **sovereignty**

and following the Second World War and the creation of the *United Nations*, the general position in *international law* is that the use of force against other countries is prohibited. You may wish to write the following parts of the *UN Charter* (that governs all country members of the UN) on the board.

- Article 2(1) of the *UN Charter* refers to the 'principle of the sovereign equality of all its Members.'
- Article 2(4) of the *UN Charter* states 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*.'¹

If the use of force were not prohibited, we would perhaps see military conflict even more frequently than we do now, with countries resorting to force much more readily to get what they want. You may wish to ask students to consider the parallel if violence between individuals were not prohibited, for example if assault and murder were not illegal. The prohibition on the use of force aims to protect weaker countries from being bullied by more powerful countries, just as the law on *offences against the person* in national law aims to protect weaker individuals from being physically violated by stronger individuals.

3. Do you think there should be any exceptions to the prohibition?

International law specifically allows two exceptions to the prohibition on the use of force against other countries. One exception is specific authorisation from the UN Security Council² which is the UN body made up of permanent and non-permanent member states in charge of trying to ensure international peace and security in the world. It is generally uncontroversial that where the Security Council has authorised it, the use of force is permitted. The other exception is the use of force in *self-defence*³ but there is uncertainty on when this can be claimed. (Students will explore this uncertainty in Activity 1.)

However, some people argue that the meaning of territorial *sovereignty* and exceptions to territorial *sovereignty* have changed since the *UN Charter* was drawn up 50 years ago. One controversial concept that has developed as a basis for intervention is that of 'humanitarian intervention.' Some argue that in countries where there is terrible humanitarian suffering, (such as civilians being oppressed by a government), the law now needs to allow the *international community* to enter into that country and intervene, using force as a last resort, in order to alleviate the suffering. This is so even in cases where the government of that country denies permission to enter or to intervene. Some argue that there is even a duty to do intervene. (Students will explore this further in Activity 2.)



3.3.1 ACTIVITY 1 - The Law on Armed Force and Self-Defence - Printouts for students

There are two sources for the law on **self-defence**. There is little uncertainty about the right to **self-defence** where an attack is ongoing. However, the law is less certain where an attack has already finished or where an attack is threatened in the future.

What does the law say?

The traditional legal test for **self-defence** comes from an old 1837 case called The Caroline Case, where a group of Canadians were rebelling against the British colonial government. Their cause was being supported by some Americans who sent men and supplies in a steamboat called the Caroline to help the Canadian rebels. In response, a British force entered US territory and destroyed the Caroline. This case established the legal principle that in order for **self-defence** to be legal, it must be necessary because the threat is imminent. Further, the measures taken must be proportionate to the threat, in other words only what is necessary to stop the attack.

The later reference in law to '**self-defence**' is Article 51 of the **UN Charter** which refers to 'an inherent right of individual or **collective self-defence** if an armed attack occurs.'

A literal reading of Article 51 requires two elements for **self-defence**: a) an armed attack b) that must already have occurred or still be occurring. The Caroline case on the other hand appears to leave open the possibility that **self-defence** could be used to prevent an attack that has not yet happened but is imminent.

Imagine that you are a legal advisor to the government of an imaginary country called Olympus that is facing legal uncertainty about how to act in the scenarios below. The UN Security Council has not given authorisation for you to use force, so in each case, advise the government whether using force would be legal giving your reasoning based on the law of *self-defence*.



1. The government of Olympus has a long-running dispute with a neighbouring country. Tension has been building for a long time and eventually the neighbouring country, Atlantis, sends troops across the border, including stationing soldiers and tanks in some of the towns and villages in your country, along the border. There are reports that some villagers have been injured and killed trying to defend their homes.

(a) You send troops to protect the villagers and to drive the Atlantis soldiers out of Olympus.

(b) You send a widespread bombing campaign over the whole of Atlantis to put pressure on their government to call off their troops from your territory.

2. (a) The government of Olympus has received information that Atlantis is enriching uranium to create nuclear weapons which it intends to use against Olympus at some point in the future. You bomb Atlantis to destroy the warehouses where your intelligence has told you the weapons are housed.

(b) The government of Olympus is aware that Atlantis' government is starting to manufacture uranium (a metallic element) which it says is for producing energy. You strongly suspect that the Atlantis is actually going to use the uranium to create nuclear weapons. You bomb Atlantis to destroy the warehouses where according to your intelligence the uranium is being manufactured to avoid the danger of nuclear weapons being created and used against Olympus.

3. You have been attacked by Atlantis. The attack is over, but there is strong evidence that they will attack you again. You send troops to Atlantis to attack their military and destroy their weapons in order to stop the potential further attack on Olympus.



3.3.2 The Law on Armed Force and Self-Defence - Instructions for teachers

Split the class into small discussion groups, and ask them to consider the different scenarios. Representatives from each group should be prepared to present their answers to the class, explaining the reasoning for their conclusions in different scenarios. Flip charts could be used to present ideas if there is time.



3.3.3 The Law on Armed Force and Self-Defence - Background for teachers

Most countries consider that Article 51 and the law from the Caroline case co-exist so that where an armed attack has happened and is ongoing, Article 51 provides the right to self-defence, but even where an attack has not occurred but is about to occur, the Caroline formulation⁴ provides a basis for **self-defence**. The first point to highlight is the uncertainty with regard to what sort of scenario triggers a right of **self-defence**. Weapons capabilities and methods of armed attack and warfare have moved on since the Caroline case and since Article 51 of the **UN Charter** was drafted. Warfare these days is not confined to combat on the ground. Therefore, there have been arguments that the definition of what is imminent must be adapted to take this into account. For example, someone may be sitting in a control room about to detonate a bomb hundreds of miles away. This surely would meet the definition of imminence required to trigger a right of **self-defence**.

Many countries believe that Article 51 co-exists with the Caroline formulation of legal **self-defence** which allows for situations where attacks are about to occur.

The second point to highlight is that, even where one has successfully established what the law is, there may be great difficulty in establishing evidence. Even if we had established that it was permissible to use force in **self-defence** where an attack was about to occur, it is not always easy to prove that an attack is about to occur. For example, if a country intended to use nuclear weapons against you imminently, how can we prove that intention?

1 (a) On the facts given, it is probably quite uncontroversial to use force in this case as there is an armed attack ongoing. It falls squarely under the wording of Article 51 of the **UN Charter**.

1(b) The Caroline case established that, to be legal, force used in **self-defence** must be only what is necessary to stop the attack. It said that in **self-defence**, there must be “nothing unreasonable or excessive, since the act, justified by the necessity of **self-defence**, must be limited by that necessity, and kept clearly within it.”⁵ It might be that a widespread bombing campaign is excessive and going beyond what is necessary to remove the neighbouring country’s troops. However this will depend on the detailed circumstances which we have not been given, for example, whether less drastic measures have already been tried with no success.

2(a) The uncertainty here as to whether there is a right to self-defence lies in the fact that an armed attack has not happened. Many countries have pointed out that logically, by the time a modern attack using remote methods has taken place, it is too late to act in self-defence. Most countries agree that even where an attack has not yet happened, states have an inherent right to **self-defence** where the threat of an attack meets the required degree of imminence under the Caroline formula. Most countries would consider that if an attack were about to happen imminently, as under the Caroline formula, that force could be used in order to prevent such an attack. This is often called anticipatory **self-defence**. Some countries that do not accept the right to anticipatory **self-defence** are still able to justify **self-defence** before an actual attack by explaining that where another country is already in the advanced stages of preparing for an armed attack, and there is an intention and capability to attack, then the attack has already started.

Whether the situation in this example meets the necessary threshold of imminence to trigger a right to **self-defence** is debatable. Factors that need to be considered include the accuracy of the intelligence, whether the state is in an advanced enough stage in its manufacturing process for an attack to actually be possible, and how soon an attack is planned.

2(b) The wording of this scenario suggests that the necessary degree of imminence for **self-defence** is unlikely to have been reached. The country has only just started manufacturing uranium and is unlikely to be at a point yet where it has the capacity to manufacture nuclear weapons. Nor is it clear that the manufacturing of uranium is not for peaceful purposes.

3 As explained in the previous examples, many countries would regard it as legal to use force in **self-defence** before an attack has happened if it were about to happen imminently. In this scenario, as long as there is clear evidence that a further attack is likely to happen, **self-defence** may be regarded as legal. However, it can be difficult to ascertain that an attack is about to happen, and a criticism that has been made of the law of **self-defence** being applied to this type of scenario is that states could use pre-emptive **self-defence** as a basis for attacking another country for other reasons.

Further, those who don’t accept the right of anticipatory **self-defence** may accept that one attack having happened is sufficient to trigger a right to respond in anticipation of another attack or series of attacks.⁶

3.4 The Legality of Using Force



3.4.1 ACTIVITY 2 - Country example 1 - Kosovo - Printouts for students

Timeline:

1989 - Slobodan Milošević becomes President of Serbia
He brings Kosovo under Serbian rule, removing its autonomy. Tensions between ethnic Albanians and Serbs increase

1997 - Slobodan Milošević becomes the President of the Federal Republic of Yugoslavia

1998 - Conflict between Serbs and ethnic Albanians breaks out

March 1998 - UNSC condemns actions on both sides of the conflict and imposes a trade embargo on Yugoslavia

May 1998 - Operation Horseshoe initiated

Sept 1998 - UNSC calls for ceasefire

Jan 1999 - Racak massacre

March 1999 - NATO begins airstrikes against Serbian military forces

June 1999 - Yugoslav government withdraw troops from Kosovo

The conflict involves:

Government: Serbian government and military forces, Yugoslav government and military forces

Protesters against the government:

Ethnic Albanians in Kosovo

External actors: NATO



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What does the law say on using force against another country?

- Generally prohibited
- Exception permitted in self-defence
- Exception permitted if authorised by the Security Council
- Some countries argue that an exception is also permitted for humanitarian reasons to relieve suffering, but not all countries accept this.

The situation

Kosovo is a region that lay in Southern Serbia. Serbia was itself a **republic** in the former Yugoslavia which was made up of six republics (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia). Until 1989, Kosovo, enjoyed a high degree of **autonomy** and had a mixed population of which the majority were ethnic Albanians. In 1989, Slobodan Milošević became President of Serbia and altered the status of Kosovo, removing its autonomy and bringing it under the direct control of Belgrade, the Serbian capital. The ethnic Albanians in Kosovo initiated a policy of non-violent protest against the abolition of the province's autonomy. Over the coming years, tensions increased between the ethnic Albanians and the Serbs. In 1997, Slobodan Milošević became the President of the Federal Republic of Yugoslavia which by this time only included the republics of Serbia and Montenegro, as the other former Yugoslavian republics had become independent.

In 1998, conflict broke out between the Serbian military and police forces and the Kosovo Liberation Army, an ethnic Albanian **paramilitary group** supporting the independence of Kosovo from Serbia. There was growing concern among the **international community** about the escalating conflict, its humanitarian consequences and the risk of it spreading to other countries. In March 1998, the UN Security Council passed a resolution condemning actions on both sides of the conflict, and imposing an **arms embargo** across Yugoslavia.

In May 1998, a major military operation, Operation Horseshoe, was carried out by Serbian and Yugoslav forces in Kosovo, with the intention of driving the Albanian civilian population out of Kosovo. In September 1998, the UN Security Council approved a **resolution** calling for a **ceasefire** in Kosovo, calling on the Federal Republic of Yugoslavia not to carry out any repressive actions against the peaceful population and to pursue a political solution to the conflict, and calling for unlimited access for international monitors and humanitarian organisations. Milošević agreed to meet most of the terms but failed to implement them. The Kosovo Liberation Army renewed its attacks and the Yugoslav and Serbian forces responded with a counter-offensive.

In January 1999 the massacre of Kosovo Albanians in Racak spurred action from the **international community**. The **North Atlantic Treaty Organisation (NATO)** called for autonomy for Kosovo, the development of democratic institutions, and the presence of NATO forces to oversee the process. It was rejected by the Serbian authorities as they could not accept the presence of a NATO force to guarantee Kosovan autonomy.

NATO began air strikes without UN authorisation against Serbian military targets in March 1999 justifying its actions as necessary to avoid further humanitarian crisis. The number of deaths and displaced persons caused by the conflict is disputed and sources vary so widely that it is difficult to give a meaningful estimate of figures. The operation continued for 11 weeks until the Yugoslav government agreed to withdraw its troops from Kosovo.

Glossary:

Arms embargo – ban on trade in weapons with a particular country

Autonomy – independence

Ceasefire – a suspension of fighting on both sides

NATO – a military alliance of countries from North America and Europe

Paramilitary group – an organised armed group that is not part of the national military

Republic – a sovereign country with a government that represents the citizens in decision-making

Resolution – a formal decision or recommendation made by a UN organ

Your tasks are to answer the following questions:

- Should NATO have intervened using force?
- What arguments could you put forward for the air campaign being seen as legal?
- If you don't think the air campaign was legal, do you think it was nevertheless justified? If so, explain why.
- Comparing your country example with those of other class groups, do any of the other country situations share any of the features that you decided were important as an argument for the use of force being legal?
- Did other groups also identify these features as being an argument for the use of force being legal in this situation?



3.4.2 ACTIVITY 2 - Country example 2 - Afghanistan - Printouts for students

Timeline:

11 September 2001 - Al-Qaeda attacks the World Trade Centre and Pentagon

14 September 2001 - The Authorisation for Use of Military Force Against Terrorists (AUMF) passed

October 2001 – Operation Enduring Freedom begins

December 2001 - Taliban removed from government in Afghanistan. Interim Government formed

July 2002- Afghan Transitional Authority instated

October 2004 - Official Presidential elections held in Afghanistan

The conflict involves:

Government: Taliban

Protesters against the government: Al-Qaeda

External actors: US and other countries

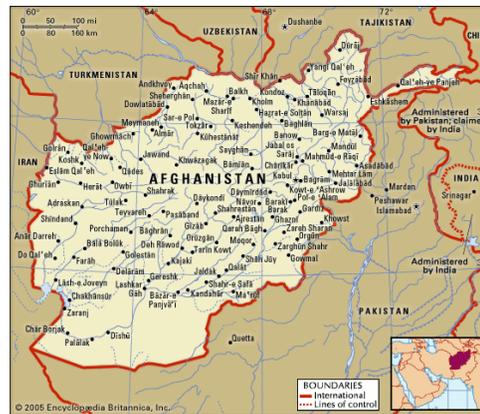


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The situation

The United States military campaign in Afghanistan occurred after the September 11 attacks in 2001, where four commercial airliners were hijacked by men from the terrorist group Al-Qaeda, and intentionally crashed into the **World Trade Center** and **the Pentagon**. Close to three thousand people died in the 9/11 attacks, though the death and injury toll continues to rise as thousands were exposed to dangerous toxins as a result of the attack. Prior to 9/11, the US had already been the target of various armed attacks, organised and carried out by Al-Qaeda, including attacks against US naval vessel U.S.S. Cole, U.S. embassies in Kenya and Tanzania, and other U.S. military and other targets abroad.

Three days after the attacks, **US Congress** passed a **resolution**, The Authorisation for Use of Military Force Against Terrorists (AUMF), authorising the US government to use force against those responsible for attacking the United States on 9/11. The Taliban, an Islamic fundamentalist group, held power and was the effective government in much of Afghanistan at the time. It was thought that they were **harbouring** Al-Qaeda members and in particular Osama bin Laden, the founder of Al-Qaeda. The President of the United States at the time, George W Bush, demanded that the Taliban hand over Osama bin Laden and expel al-Qaeda from Afghanistan. The Taliban declined to hand over Bin Laden and ignored demands to shut down terrorist bases and hand over other terrorist suspects. In October 2001, the US military, with British support, began a bombing campaign against Taliban forces. Called 'Operation Enduring Freedom', and aiming to combat the perceived future threat to the US, it was intended to disrupt the use of Afghanistan as a terrorist base of operations, to capture Osama bin Laden and to find members of Al-Qaeda.

Operation Enduring Freedom was successful in removing the Taliban government from power in Afghanistan in December 2001. The Bonn Conference, sponsored by the UN, was held in Germany with Afghan anti-Taliban leaders who then formed a temporary administration called the Interim Authority. The Interim Authority was replaced by the Afghan Transitional Authority in July 2002, where a new Head of State, Hamid Karzai, was elected. He was elected as President in Afghanistan's official presidential elections in 2004.

Glossary:

Harbouring - giving protection to or allowing to reside in one's country

Resolution – a law or legal measure

The Pentagon – the headquarters of the US Department of Defence

US Congress – the branch of the US government that makes laws

World Trade Center – a financial centre in New York, notable for its two 110-storey buildings

Your tasks are to answer the following questions:

- Should the US, UK and other countries have intervened in Afghanistan using force?
- What arguments could you put forward for the military campaign in Afghanistan being seen as legal?
- Comparing your country example with those of other class groups, do any of the other country situations share any of the features that you decided were important as an argument for the use of force being legal?
- Did other groups also identify these features as being an argument for the use of force being legal in this situation?



3.4.3 ACTIVITY 2 - Country example 3 - Iraq - Printouts for students

Timeline:

- **18 March 2003** - US launches military attack against Iraq
- **April 2003** - Saddam government overthrown
- **June 2004** - Iraq Interim Governing Council formed
- **2010** - Troops withdraw and the occupation ends
- **June 2009** - Chilcot Inquiry into Iraq war announced
- **6 July 2016** - Release of Chilcot Inquiry results

The conflict involves:

Government: Saddam Hussein's government

External actors: US, UK and around 37 other allied countries



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The situation

Saddam Hussein had been in power for more than two decades. His regime had carried out serious human rights violations, including restrictions on political participation and religious freedom as well as oppressive government policies which led to the **internal displacement** of hundreds of thousands of Iraqis, primarily Kurds. There have also been documented chemical attacks by the regime and the use of **arbitrary** executions and rape as a political tool.

On 18 March 2003, the United States led a military attack (involving the UK and 30 other countries) against Iraq, which resulted in the overthrow of the Baathist party and the removal of Iraqi president Saddam Hussein. The US and the UK put forward several justifications to the **international community** for the military action.

- a. The US and UK alleged that the use of force against Iraq was necessary to prevent the Iraqi government developing and using weapons of mass destruction (WMDs) including biological weapons, chemical weapons and long-range missiles, which posed a threat to international peace and security.
- b. They declared that Iraq violated **disarmament** obligations under Security Council Resolution 1441 (the legal decision made by the UN body in charge of peace and security) and presented evidence to the Council, notably in a meeting on 5 February 2003, where US **Secretary of State** Colin Powell told the Security Council, "What we're giving you are facts and conclusions based on solid intelligence." The Council, however, did not authorise military action.
- c. The US claimed that Saddam Hussein was giving support to Al-Qaeda and promoting international terrorism that threatened the United States.
- d. Both countries cited the need to liberate the Iraqi people from Saddam Hussein's repressive dictatorship and bring freedom and democracy to Iraq.

Following the invasion, a military occupation was established and run by the Coalition Provisional Authority (CPA), administered by the US and UK. The CPA exercised powers of government on a temporary basis and later granted limited powers to the Iraqi Interim Governing Council in June 2004. Security Council Resolution 1483 set out the responsibilities of the **occupying powers** and aimed to provide for the security and administration of Iraq, rebuild the military, security, economic and governmental institutions and facilitate efforts of the Iraqi people to create a representative government. The Coalition, however, faced increasing opposition from the Iraqi people; and clashes between anti-occupation resistance and the Coalition forces continued throughout the years of the occupation, which ended in 2010.

Glossary:

Arbitrary – not objectively justified

Disarmament – reducing or abolishing of weapons

Internal displacement – where someone has been forced to flee his or her home but remains within the same country

Occupying powers – countries with a physical presence in another country's territory, usually holding some sort of control over that territory. In this case it refers to the US and other coalition forces in Iraq.

Secretary of State – The chief foreign affairs advisor to the President of the United States.

Your tasks are to answer the following questions:

- Should the US and UK have intervened in Iraq using force?
- What arguments could you put forward for the military campaign in Iraq? Which of the arguments put forward by the US and UK do you agree with?
- Comparing your country example with those of other class groups, do any of the other country situations share any of the features that you decided were important as an argument for the use of force being legal?
- Did other groups also identify these features as being an argument for the use of force being legal in this situation?



3.4.4 ACTIVITY 2 - Country example 4 - Libya - Printouts for students

Timeline:

- February 2011** - Demonstrations against Gaddafi regime. "Day of Rage" protests across Libya
- March 2011** - UNSC issues no-fly zone over Libya
Multi-state coalition begins air-based military intervention
- July 2011** - International recognition of the National Transitional Council (NTC)
- October 2011** - Gaddafi killed by rebel forces
- November 2011** - Interim government formed
- July 2012** - Parliamentary elections held

The conflict involves:

- Government:** Gaddafi government
- Protesters against the government:** Various rebel forces
- External actors:** US, UK, France, NATO



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The situation

Inspired by revolts in neighbouring Arab countries, a popular uprising took place in Libya. In February 2011, demonstrations took place in Benghazi demanding an end to Muammar al-Gaddafi's oppressive 40-year regime, which was characterized by censorship, banning of other political parties and imprisonment of **dissenters**. The demonstrations led to clashes between security forces and anti-Gaddafi rebels. On 17 February, protesters defied a security crackdown and took to the streets in four cities for a "Day of Rage".

The government responded to the protests with severity. The International Federation for Human Rights (IFHR) stated that Gaddafi was eliminating Libyan citizens who stood up against his regime and repressing civilians. The International Criminal Court estimated that 500-700 people were killed by security forces in February 2011 and the IFHR reported a case where 130 soldiers who refused to fire on protesters were executed. Human rights groups documented severe violations of human rights and evidence of war crimes including torture, **summary execution**, rape as a weapon of war, **forced disappearances**, using civilians as human shields and indiscriminate attacks on civilians.

The civil war led to a dire humanitarian situation in Libya. By the end of February 2011, supplies of medicine, fuel and food were very low in urban areas. Attacks on civilian and medical facilities prevented staff from working. The UN expressed concern over the outbreak of water-borne diseases. The conflict triggered a massive outflow of people to neighbouring countries, especially Tunisia to the west and Egypt to the east.

In March 2011, the UN Security Council authorized the protection of civilians by all necessary means (which included the use of force). A **multi-state coalition**, largely led by the UK, US and France, began an air-based military intervention in Libya to disable the Gaddafi government's military capabilities. The **North Atlantic Treaty Organisation (NATO)** quickly took over the military operation. In July 2011, the International Contact Group on Libya, which includes 21 countries including the UK and the US as well as **inter-governmental organisations**, formally recognised the main **opposition group**, the National Transitional Council (NTC), as the legitimate government of Libya. Gaddafi went into hiding in August and was captured and killed in late October by rebel forces. Three days after his death, the NTC declared Libya to be officially liberated. An **interim government** was formed in November and the first parliamentary elections were held in mid-2012. The political situation has been unstable since then and a series of successive governments have not been able to command widespread support or to overcome the conflict between the many different factions operating in the country.

Glossary:

Dissenters – political opponents and people disagreeing with the government's policies

Factions – groups with different allegiances and political interests

Forced disappearances – detention by the state without information about the purpose or timeframe for which the detainee is being held

Intergovernmental organisations – organisations made up of several different countries, for example, the United Nations and the European Union

Interim government – A temporary government to bridge a gap until a permanent government is put in place

Multi-state coalition – an alliance or group of countries sharing an aim

NATO – a military alliance of countries from North America and Europe

Opposition group – the political party opposing the party in power

Summary execution – execution without trial or without genuine trial

Your tasks are to answer the following questions:

- Should the international community have intervened in Libya using force?
- What arguments could you put forward for the air strikes in Libya being seen as legal?
- Comparing your country example with those of other class groups, do any of the other country situations share any of the features that you decided were important as an argument for the use of force being legal?
- Did other groups also identify these features as being an argument for the use of force being legal in this situation?



3.4.6 ACTIVITY 2 - Country example 5 - Ukraine - Printouts for students

Timeline:

- **November 2013** - President Yanukovich refuses to sign EU agreement
Mass protests take place
- **February 2014** - President Yanukovich is ousted
- **Late February, early March 2014** - Pro-Russian troops seize Crimea
- **11 March** - *Supreme Council of Crimea* declares Crimea to be an independent republic
- **16 March** - Crimeans vote in *referendum* to separate from Ukraine and to join the Russian Federation
- **18 March** - Russian President signs into law the absorption of Crimea into the Russian Federation

The conflict involves:

Government: Russian government
Ukrainian government
Supreme Council of Crimea



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The situation

2014 Ukrainian revolution

In 2010, Viktor Yanukovich became the President of Ukraine. In November 2013, mass popular protests took place after his refusal to sign an EU agreement on **free trade**, instead choosing to align Ukraine more closely with Russia. Yanukovich tried to quash the protests and assert control, leading to violent clashes. On 22 February 2014, the President was **ousted** and protesters took control of the government and the city. Yanukovich eventually fled Kiev due to security concerns and a **coalition government** formed from the opposition.

Unrest in Southern and Eastern Ukraine

Crimea is a **peninsula** to the south of the Ukrainian mainland that was part of Southern Ukraine. Although Crimea was part of Ukraine before 2014, most of those living there are Russian-speaking and identify themselves as ethnic Russians, (although there was a significant minority who were Tartars) as before 1954, Crimea was part of Soviet Russia.

After the revolution and the ousting of Yanukovich, protests by pro-Russian activists began in Crimea and were followed by demonstrations in cities across eastern and southern Ukraine. Pro-Russian activists gradually began to take over the peninsula, seizing airports and government buildings.

Crimean independence and joining Russia

Russia supported pro-Russian activists, with the Russian President Vladimir Putin declaring that he would provide assistance to respect the wishes of the Crimean people which was to join the **Russian Federation**. In late February and early March 2014, pro-Russian troops seized control of Crimea with minimal bloodshed. On 11 March the **Supreme Council of Crimea** declared Crimea to be an independent republic. On 16 March, a **referendum** was held in which Crimeans voted to **secede** from Ukraine and to become part of the Russian Federation. The Russian government then declared Crimea as part of the Russian Federation. Most of the **international community**, and Western countries in particular regarded the **referendum** as illegal and invalid, and view the joining of Crimea to Russia as **annexation** by Russia.

Members of the **international community** expressed concerns over the Russian intervention in Ukraine and criticized Russia for its actions, including the United States and the UK. The EU condemned Russia, accusing it of breaking international law and violating Ukrainian **sovereignty**. Many of these countries implemented economic sanctions against Russia, Russian individuals and companies.

Glossary:

Annexation – to claim control over a piece of land

Coalition government – a government made up of two or more parties sharing power

Free trade agreement – an agreement between two or more countries to allow trade without tariffs (taxes), making trade easier

Ousted – overthrown

Peninsula – a piece of land that is joined to the mainland on one side and has water on three sides

Referendum – a vote by a population on a single issue

Russian Federation – the legal and official name for Russia

Secede – to separate from a country to become a new independent country

Supreme Council of Crimea – the Parliament of Crimea at the time

Your tasks are to answer the following questions:

- Should Russia have used military force in this situation?
- Do you think the military action taken in Crimea was legal?
- Comparing your country example with those of other class groups, do any of the other country situations share any of the features that you decided were important as an argument for the use of force being legal?
- Did other groups also identify these features as being an argument for the use of force being legal in this situation?



3.4.7 ACTIVITY 2 - The Legality of Using Force - Instructions for teachers

Split the class into groups of around 4 or 5 students, giving them each one country situation to consider. Each group should receive a country printout and discuss among themselves what they think the relevant features of each situation are in deciding whether military force should have been used to intervene in the countries in question.

It may be helpful to prompt students to consider the consequences of intervening and not intervening. *Self-defence* has already been discussed in Activity 1 in this lesson, but other relevant points to consider include humanitarian intervention and the right to independence. Explain to the students that all of these areas of law are in constant development and that there is not always consensus on what the law is. In general, law develops to serve the needs of society, but where there are conflicting needs and interests, it is not always clear what the law should be.

If time is short, you may find it helpful to give students their country information sheets in advance of the lesson so that they come prepared to discuss.



3.4.8 ACTIVITY 2 - The Legality of Using Force - Background for teachers

The point of the activity is to give an example of an area of *international law* that has many grey areas. It explores competing needs and interests in real-life situations to gain an understanding of the uncertainties of the law, how this impacts the rule of law and what the consequences of this uncertainty can be.

It shows students that while there are certain rules that countries can agree on and apply in the law surrounding the use of force, there are some elements that are disputed and make the law uncertain. Countries that use force or support the use of force in a certain situation seek to justify it with legal arguments, while those that do not support the use of force in that situation claim that it is illegal, putting forward competing arguments and interpretations.

A point to note about all of the examples in this activity is that they have been simplified to suit the level of study and in order to be run in a timeframe that is realistic for classrooms. The legal analysis to illustrate the point in this lesson about uncertainty of the law refers only to one area of law applicable in these cases, namely, the law on the use of force. There are other areas of law that are relevant to these situations that are not discussed.

A second point to note is that only a small number of examples of conflict have been chosen to illustrate the application of the law in a range of circumstances. It has not been possible to include all major conflicts for the purposes of this activity. For example, the conflict in Syria has not been included as it is ongoing at the time of writing and it is unclear what the outcome will be.

The conclusion that students should take away is the extent of uncertainty with regard to this area of law and the importance of certainty for the rule of law. It often appears that states seem to decide on a course of action and then try to find a legal justification for it and, as the case studies indicate, the lack of consistency in how the Security Council and the international community act shows that the law is not only uncertain, but that countries may have a slightly different interpretation or at least public statement of what the law is in order to suit their own interests. This area of law has profound consequences for those involved, potentially including rights violations, displacement and loss of life. Students should be able to see that such uncertainty in the law, which could open up opportunities for abuse, is unsatisfactory. This uncertainty is something that the rule of law tries to avoid.

Below are suggested answers for each of the scenarios relating to the five countries in the printouts for students.

Kosovo

There are two issues to consider here: firstly, whether the intervention of NATO was legal, and secondly whether it was justified even if not legal.

Illegal?

NATO bombed Serbia (part of the Federal Republic of Yugoslavia) in 1999 without UN Security Council authorisation and it was not an act of *self-defence*. Therefore, many critics of the intervention describe it as an illegal use of force contrary to Article 2(4) of the *UN Charter* which prohibits "threat or use of force against the *territorial integrity* or *political independence* of any state."

Legal?

Supporters of the intervention claim that the Security Council gave retrospective authority for the intervention by establishing in a resolution the UN Interim Administration Mission in Kosovo.⁷ That is, even if not legal

at the time, this subsequently made it legal. This idea of retrospective authorisation was not accepted by all countries internationally or by all organisations working in the region.

Illegal but justified?

NATO countries claim that even if the intervention was not legal at the time, it was justified because of the humanitarian disaster happening in Kosovo. NATO regards its intervention as a success because Serbian troops withdrew from Kosovo and NATO troops put an end to the ethnic cleansing of the ethnic Albanian population. They argue that had they not bombed Serbia, the regime of ethnic cleansing of ethnic Albanians would have deteriorated. Supporters of the doctrine of humanitarian intervention argue that it is wrong for the international community to do nothing when there is a humanitarian disaster happening.

Where an intervention is successful, it may be easy to justify in retrospect. The difficulty with this sort of argument is that it is often hard to say before an intervention takes place whether it is going to work or, after the intervention, whether the situation would have been better had there been no intervention at all. There are many other situations where critics argue that the situation has been made worse by intervention. A frequently cited example of this is the Western invasion of Iraq.

Some supporters of the doctrine of humanitarian intervention claim that by consensus of the international community, the law is moving towards a duty to intervene in humanitarian crises.

Illegal and unjustifiable?

Critics of humanitarian intervention argue that there is no right in *international law* to intervene without Security Council authorisation, and that if there is no legal right to intervene, then intervention is unjustifiable. They argue that a 'humanitarian intervention' justification for using force against countries is a slippery slope, because countries could start to use it as a pretext for using force for other reasons such as political or resource gain. Furthermore, the uncertainty of the threshold of suffering that needs to exist before an intervention is justifiable means that it is not clear when it would apply. The uncertainty of the law means that there is potential for abuse, where countries may try to justify entering and using force against another country for illegitimate purposes such as political or economic gain.

There is no clear-cut answer on whether humanitarian intervention is legal and/or justifiable. For the law to be clear and certain countries should know whether an action is legal or illegal without having to carry out the action. This is crucial to the rule of law.

Afghanistan

As previously discussed, the only established legal exceptions to the prohibition on the use of force are **self-defence** and authorisation by the Security Council to use force. The US justified its military action as **self-defence** and this was generally accepted by the international community. Students may point out the US law that was passed authorising military force against the perpetrators of the attacks, but it is important to note that this only makes the use of force legal on a national level within the US. The fact that a national law authorises the use of force does not make it legal in **international law**.

The fact that the international community accepted **self-defence** as the basis for military action makes it relatively uncontroversial. However there are several issues here relating to **self-defence** that might have been controversial and are unresolved as the international community did not necessarily analyse the law and determine the grounds on which **self-defence** was legal in this case.

- a. The US used force against the Taliban government allegedly in **self-defence**. However, it was not the Taliban government that had attacked the US. The role of the Taliban was that of harbouring Al-Qaeda members, non-state actors, who had attacked the US. The acceptance of **self-defence** as a justification for military action suggests that harbouring perpetrators of an attack is sufficient to trigger a right of **self-defence** against those harbouring those responsible for the original attack.
- b. By the time the US acted in **self-defence** the attack against the US was over. The military action in **self-defence** must logically have been to defend the country against a future attack. As discussed in the previous activity, many states agree that under the Caroline formulation, there is a right to **self-defence** to avoid a future attack where there is clear evidence that an attack is imminent, and this requires the attacking country to have both the intention and the capability to attack. Considering the fact that the 9/11 attack was the last in a long line of attacks, it was arguable that another attack was imminent.
- c. Critics of the US and UK military operation in Afghanistan point out that one of the aims and in fact the outcome of the operation was regime change in Afghanistan. The Taliban government was overthrown and a new government was set up, led by Hamid Karzai who was backed by the US. Regime change is not a legal basis for the use of force against another country and is an infringement of a country's **sovereignty**. Article 2(4) of the **UN Charter** specifically prohibits 'the threat or use of force against the **territorial integrity** or **political independence** of any state.' Some argue that changing the government of a country goes beyond what is 'necessary and proportionate' to defend against a future attack.

Iraq

The 2003 Iraq invasion and occupation afterwards has now become an infamous example of an illegal use of force. Even in the lead up to the invasion, strong objections were raised by key US allies and major global powers, including France, Russia, China and Germany, who were members of the Security Council at the time military operations began. These countries maintained their positions throughout and after the invasion.

Anti-war groups across the world organised public protests and prominent figures such as former US President Bill Clinton and Nelson Mandela publicly voiced their opposition.

Taking each of the justifications given in turn:

a. The US and the UK claimed that Iraq was developing and planning to use weapons of mass destruction and that this would be a threat to international peace and security. While this may have been so, it is up to the Security Council to determine that there is a threat to international peace and security and authorise action against the offending country. As previously discussed it is only with Security Council authorisation (or in **self-defence**) that force may legally be used against a country. We now know that there were no weapons of mass destruction in Iraq, making that argument even less valid.

Had Iraq been manufacturing weapons of mass destruction, the US might have been able to claim a right to **self-defence**, but as discussed in previous examples, it would still have had to show that Iraq intended to use the weapons imminently.

b. There was no current Security Council authorisation for the use of force in Iraq, but in the 1990s SC Resolutions were passed allowing the use of force against Iraq in the context of the Iraq-Kuwait war.⁸ The US and the UK sought to revive these in 2003, claiming that 10 years on, they still provided the authorisation to invade Iraq.

c. The US claimed there was a link between Saddam Hussein's regime and Al-Qaeda and other terrorist organisations. After the September 11 attacks in the US, the President of the United States, George W Bush, declared a 'global war on terror'. The term has no specific meaning from a legal point of view, and certainly does not give the legal right to use force against any country suspected of harbouring terrorists or supporting terrorists. Critics have commented that the term has come to symbolise a more aggressive foreign policy towards certain countries, without necessarily having a legal basis for it.

d. As discussed above, regime change is not legal as a reason for the use of force, even if it is claimed that the government is not free and democratic. It is undeniable that the regime under Saddam Hussein was

brutal and that there were grave human rights abuses committed under his command. However, military intervention to overthrow a regime does not fall into one of the two legal exceptions to the prohibition on the use of force (*self-defence* and Security Council authorisation). In extreme circumstances, some might argue that there is a case for humanitarian intervention as a third basis for the use of force – but as discussed in previous examples, this is still a controversial doctrine. There would not be much peace in the world if countries were entitled to invade any country where they did not support the regime.

There have been widespread criticisms about the invasion of Iraq, perhaps more than any other military intervention in recent times. Critics argue that the intervention was carried out for illegitimate reasons and that Western countries had their own agenda in carrying out the operation in Iraq. For example, some have commented on the profits made by UK and US companies involved with reconstruction in Iraq following the war.⁹ If we examine this from a rule of law perspective we can see that it is because the law is uncertain that countries are able to take actions that much of the international community views as illegal. This undermines the very point of having laws that are intended to be a standard that all countries abide by. If some countries are able to get away with behaving differently, some argue that this leads to disorder and potential bullying of weaker countries by more powerful countries.

Libya

The use of force against the Libyan regime was uncontroversial in this case as it was authorised by the Security Council. The Security Council passed a resolution calling on the Libyan government to immediately and completely cease violence against civilians.¹⁰ It authorised Member States to take all necessary measures (therefore including the use of force) to protect Libyan civilians, but specifically excluded any form of occupation of Libyan territory. It strengthened an existing arms embargo, banning flights of Libyan airlines to protect civilians from attacks by government forces and freezing Libyan financial assets as already defined a previous resolution.¹¹

What was controversial was the aid given by Western countries to rebel forces to procure regime change. The Security Council resolutions authorising force were centred on what was necessary for civilian protection. The fact that the Gaddafi regime was subsequently toppled with Western backing has fuelled criticism that the action taken went beyond merely civilian protection and therefore what was legally authorised.

Ukraine

Most countries, and in particular, Western countries have declared Russian deployment of military forces in Crimea to be illegal (along with the subsequent Crimean *referendum* and joining of Crimea to the Russian Federation).

Legality of Russian deployment of forces in Crimea

First, there is the issue of whether this was a 'use of force'. Russia asserts that its troops were present simply to make sure that the **referendum** went ahead without violence, and that with no blood shed, there was no 'use of force'. Ukraine and Western countries argue that the presence of Russian troops was a violation of Ukraine's territorial **sovereignty** and thus, with military forces deployed, constituted a use of force.

Secondly, if it was a use of force, was it legal? The deployment of Russian troops in Crimea before and during the **referendum** did not have the authorisation of the Security Council so there was no legality on that basis. Russia, however, has suggested that it was acting in **self-defence**, arguing it was protecting Russian citizens in Crimea, which, in theory, can provide a basis for a **self-defence** use of force (though we will not discuss that aspect of the law here). However, this has not been accepted by the international community as a legitimate exercise of **self-defence** because it was not accepted that Russian nationals were under threat by Ukrainian authorities.

A further argument that Russia has made is that the deployment of troops was legal because they were in Ukraine at the invitation of the Ukrainian authorities; that is, the ousted pro-Russia, President Yanukovich. Russia considered Yanukovich still to be the Ukrainian President as it considered his ouster to be illegal. The argument that force was legal on these grounds is not generally accepted by the international community, which did not consider Yanukovich to represent the Ukrainian government at that point.

Legality of declaration of independence

Most countries, and particularly Western countries did not recognise Crimea's declaration of independence from Ukraine. Russia argues that the declaration of independence was legal, relying on the decision of the **International Court of Justice** which had found Kosovo's second declaration of independence in 2008 not to be illegal.¹² The declaration was also recognised by the US and many Western countries. Russia argues that the circumstances of the Crimean **referendum** are similar and accuses the West of hypocrisy and double standards in recognising the independence one country but not of another.

Legality of referendum

Russia argues that the **referendum** shows the overwhelming will of the people. The West regard the **referendum** on secession from Ukraine to be illegal, for reasons including that it was held at very short notice and that although the results appear to show that Crimeans voted overwhelmingly to join Russia, the turnout was not as high as the Crimean and Russian authorities claim.



3.5.1 PLENARY - Legal Certainty - Teacher-led Discussion

Ask students to consider the following questions:

- a) *What are the potential consequences of the law being uncertain? For example, does the law being applied differently in similar scenarios mean that it is difficult to know how the law applies in future situations?*
- b) *Who is most likely to suffer those consequences of the law being uncertain?*

Lesson Three: Glossary

Collective self-defence: the right of states to defend another state against an attack, by using military force

International community: the collective governments (and sometimes people) of the world

International Court of Justice: the main judicial organ (court) of the UN considering questions on international law which rules on disputes between states and provides advice on legal questions raised by UN organs and agencies

Offence against the person: a crime caused by one person using force against another

Political independence: the right of states to complete control over their own domestic and foreign affairs and to make laws and exercise authority over its own people

Referendum: a vote by an electorate on a particular issue

Self-defence: refers in this context to military actions taken by states in response to an armed attack, or threat of armed attack

Sovereignty: in this context, the right of a government to exercise control and authority within its territory without interference and not to have its borders violated by other states

Supreme Council of Crimea: the Parliament of Crimea before Russia's military intervention

Territorial integrity/sovereignty: the right of a state to the security of its borders and not to have its territory violated by other states or any other non-state actor

UN Charter: the document that sets out the purposes, rules and principles of the United Nations, signed on the 26th of June 1945

United Nations: an international organisation with 193 member states, established in 1945 after the end of WWII to maintain international peace and security, to promote cooperation between states on global issues, to promote human rights and to aid in the process of decolonisation

United Nations Security Council: the UN body responsible for maintaining peace and security in the world

Footnotes:

¹ This has also become a principle of customary international law, meaning that most or all countries agree that this is what the law is, and that all countries are obliged to follow the law.

² Under Chapter VII of the UN Charter.

³ The exception is found under Article 51 of the UN Charter and under the definition given in a case called the Caroline case in customary international law.

⁴ The case said that the necessity of self-defence had to be 'instant, overwhelming, leaving no choice of means, and no moment of deliberation.'

⁵ The principle that use of force in self-defence must be proportionate to the armed attack and necessary to respond to it has been confirmed several times by the International Court of Justice. (Nicaragua case, para.176; see also, para.41 of the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.)

⁶ As in the Caroline incident, and in the case of the intervention in Afghanistan in 2001, which was categorised by the US and the UK as the exercise of the right of anticipatory self-defence (see UN Doc. S/2001/946 and UN Doc. S/2001/947).

⁷ Resolution 1244 (1999).

⁸ Resolution 678 (1990), Resolution 1441 (2002).

⁹ https://web.archive.org/web/20080708222309/http://news.independent.co.uk/world/middle_east/article350959.ece

¹⁰ Resolution 1973 (2011)

¹¹ Resolution 1970 of 26 February 2011

¹² Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Reports 2010, p.43.