International Law and use of force

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One of the most important but also one of the most controversial areas of international law is the legal regulation of the use of military force. The nature, content and effectiveness of this domain of international law expresses, much more clearly than any other branch, the very nature of international law. One of the most prominent 20th century international lawyers Louis Henkin wrote, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[1] This observation is true and almost all nations almost all of the time observe also the principle prohibiting use of force and threat of force in international relations. However, use of military force between states belongs to so-called "low probability-high consequence events" and therefore every use of military force, even if relatively minor, has almost incomparable negative consequences in terms of human lives lost, properties and livelihoods destroyed and all kinds of miseries increased. Therefore, the enhancement of the observation of this principle remains one of the most important tasks of international law and international lawyers.

In order to grasp the essence of the current debate in this area of international law it is helpful to have a brief overview of the evolution of the proscription of the use of military force.

1. From the right to war to the prohibition to use force

Thucydides' *History of the Peloponnesian War* demonstrates a complete absence of any legal (or even legal-moral-religious) restriction on the recourse to war in Ancient world. As Thucydides writes, "the Athenians and the Peloponnesians began the war after the thirty-year truce" since "Sparta was forced into it because of her apprehensions over the growing power of Athens."[2] This sounds somewhat familiar and even contemporary. There had been a change in the balance of power in Ancient Greece that caused Sparta to ally with smaller Greek city-states – forming the Peloponnesian League – to counter militarily the Delian League headed by Athens. But differently from today's or even from yesterday's world, Greek city-states did not need any justifications to their recourse to arms. Athenians believed it to be "an eternal law that the strong can rule the weak" as "justice never kept anyone who was handed the chance to get something by force from getting more."[3] Athenian ambassadors explained to the Melians (Melos – a small island city-state) that "those who have power use it, while the weak make compromises. Given what we believe about

1 L. Henkin, How Nations Behave: Law and Foreign Policy, Columbia University Press, 1979, p. 47
2 Thucydides, The Peloponnesian War, W. W. Norton & Company, 1998, pp. 11–12
3 Ibid.

the gods and know about men, we think that both are always forced to dominate everyone they can. We didn't lay down this law, it was there—and we weren't first to make use of it. Each of us must exercise what power he really thinks he can."[4]

Adam Watson writes that 'warfare was not considered reprehensible in the ancient world. Indeed, the ability to decide when to go to war was the hallmark of independence, for a king or city corporation'.[5] The words 'emperor' and 'empire' did sound proud indeed. For the Romans any war, if duly declared, would then be 'just' as well as 'pious'.[6] After Emerich de Vattel, positivism gradually started to prevail in international law and the differentiation between just and unjust wars based on religious laws or the laws of nature (the human nature or the nature of the state) lost its meaning. Although this was not a return to the naked power politics of Ancient Greece it was only thinly veiled power politics where any offense, real or perceived, may have been good enough to justify the use of military force. Even under the international law of 'civilised nations' states could legitimately use military force for a wide range of purposes. The right to resort to arms was an important attribute of state sovereignty. In the nineteenth century the only limitation on the use of force by a state was the requirement that there should have been a previous violation of practically any right of that state. Any violation, and the offended state was the only judge in its own case, gave rightful cause to use military force to restore justice and punish the offender. Ian Brownlie writes that:

"The right of war, as an aspect of sovereignty, which existed in the period before 1914, subject to the doctrine that war was a means of last resort in the enforcement of legal rights, was very rarely asserted either by statesmen or works of authority without some stereotyped plea to a right of self-preservation, and of self-defence, or to necessity or protection of vital interests, or merely alleged injury to rights or national honour and dignity".[7]

For example, in 1914 during the Vera Cruz incident, triggered by the arrest by Mexican authorities of several crewmembers from the USS *Dolphin*, the United States used military force against Mexico when Mexican authorities refused to honor the US flag with a 21gun salute as an official apology.[8] Similarly, Great Britain and Germany used gunboats to force Venezuela to pay its debts to nationals of these states.[9]

Although ideas about a world without wars have existed already for hundreds of years[10] the first attempts at legal limitation of the use of force are no more than a century old. The 1907 Hague Peace Conference adopted the Convention Re-

4 Ibid.
5 A. Watson, *The Evolution of International Society*, Routledge, 1992, p. 10
6 A. Nussbaum, *A Concise History of the Law of Nations* (revised edn.), Macmillan, 1964, p. 11.
7 I. Brownlie, *International Law and the Use of Force by States*, Clarendon Press, 1963, p. 41.
8 *Ibid*. pp. 55-65.
9 *Ibid*. p. 75.
10 See, e.g., Abbe de Saint-Pierre, *Projet pour rendre la paix perpetuelle en Europe* (1713); E. Kant, Toward Perpetual Peace (1795).

specting the Limitation of Employment of Force for the Recovery of Contract Debts that provided that there should be no recourse to armed force, unless the debtor state should refuse submission to arbitration or should fail to carry out the award.[11] The so-called Bryan Treaties that the United States concluded in 1913-1914 with various states established a 'cooling off' period during which it was prohibited to use military force.[12] The Covenant of the League of Nations purported to put some more brakes of the right of states to use military force.[13] Finally, the Kellogg-Briand Pact of 1928 outlawed 'war as an instrument of national policy'.[14] However, these were not so much shortcomings of these legal documents as political realities that led to the Second World War after which the members of the victorious coalition, creating the United Nations, whose main task should have been to put an end not only to wars but also to any unilateral use of force.

The current UN Charter paradigm concerning the use of force can be called normative positivism since it is based on the consent of states and not upon what states (or at least most of them) do in practice. It is normative since it is not premised on the actual practice of states. It is positivist since it does not make distinctions between just, unjust, more justified, and less justified causes for the use of force.

2. The UN Charter paradigm on use of force

Article 2 (4) of the UN Charter reads: "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". This means that not only is use of military force prohibited but so is the threat to use such force. The Charter makes only two express exceptions to this prohibition: to the use of military force in self-defence if an armed attack occurs (Article 51) and as a collective security measure authorised by the UN Security Council in cases of threats to international peace and security (Articles 39 and 42). However, notwithstanding of its brevity, Article 2(4) has raised some heated discussions and doubts. First, as the article does not clarify what kind of force is prohibited, some authors and even states have tried to include economic and political pressure in the definition of force prohibited by Article 2(4). However, it is clear from the *travaux preparatoir* of the UN Charter as well as from the interpretations given by the majority of states to the content of this article that its prohibition covers only military force. This, of course, does not mean that economic or political pressure is always lawful under international law; this means only that Article 2(4) does not cover such pressure. Secondly, as Article 2(4) singles out for special protection above-mentioned three factors (territorial integrity, political independence of states, and otherwise inconsistent with the purposes of the United Nations) some, especially American, authors have tried to argue that if use of force does not breach any of

11 See, Nussbaum, *op. cit*., p. 217.
12 Brownlie, *op.cit.*, p. 23.
13 *Ibid*. pp. 55-65.
14 *Ibid*. p. 75.

them (e.g., use of force for the sake of protection of human rights or promotion of democracy) such use of force is lawful. We will discuss some of these controversial issue later in the this Chapter, but here it suffice to say that such arguments express a minority view and are not accepted by states.

The prohibition of the use of force is one of the few imperative (*jus cogens*) norms of international law, from which states cannot derogate even with mutual consent. Although it may be surprising, it is nevertheless true that the prohibition of the use of force in international relations became a legally binding norm relatively recently. As a legal principle it started its evolution after World War I and matured as a result of World War II; it was enshrined in the United Nations Charter and its importance has not diminished since, notwithstanding its overly frequent breaches. As the International Court of Justice put it in the *Nicaragua case*: 'If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.[15] Although some international lawyers have claimed that due to the inefficiency of the UN collective security system the Charter prohibition of the use of force has become redundant,[16] no state has made such a claim. While justifying their own transgressions states are usually 'appealing to exceptions or justifications within the rule', and when condemning the use of force by others, they confirm their own adherence to the principle.

a) **The right to self-defence**

Article 51 of the UN Charter provides:

"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".

The right to self-defence is the only right in the UN Charter that is called "inherent". One the one hand, such a reference to the inherent, inalienable, even natural character of this right shows its importance. Indeed, if states would not be lawfully able to protect themselves against armed attacks, their very right to existence would

15 Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) , ICJ Decision of 27 June 1986, para. 186.

16 See, e.g., T. Franck, 'Who Killed Article 2(4) or Changing Norms Governing the Use of Force by States', *The American Journal of International Law*, 1970, Vol. 64; but see also L. Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', *The American Journal of International Law*, 1971, Vol. 65.

be also questionable. One the other hand, this formula has led to some heated discussions and opened doors to wide interpretations and even abuses.

First, Article 51 requests that states, which use military force in self-defence, report all the measures taken in the exercise of this right to the Security Council. The Council then decides what measures to take "in order to maintain or restore international peace and security". If the Council, say, authorises economic sanctions against an aggressor as measure necessary to restore peace and security, does this mean that the victim state and its allies are barred from using military force in self-defence? Such an ambiguous legal situation, existed, for example in the period between the Iraqi invasion of Kuwait on 1 August 1990 and 29 November 1990, when the Security Council adopted resolution 678 authorising the "use of all necessary means" (a euphemism implying the right to use military force) to liberate Kuwait and implement all the relevant Security Council resolutions. Could Kuwait and its allies start using military force in self-defence before the deadline (15 January 1991) given by the Council to Iraq to withdraw from Kuwait? Such an ambiguous legal situation also led to the dispute over the character of *Operation Desert Storm* that led to the liberation of Kuwait. Was it an operation of collective self-defence or an operation of collective security? In our opinion it had characteristics of both of them.

Moreover, the Security Council may find that a state that is allegedly using force in self-defence is wrong in its assessment of its actions, that instead of lawfully using force, it is in breach of the prohibition to use force. The possibility of facing such a situation means that states are not the final arbiters on matters of lawfulness of use of force and therefore the right to self-defence may not be, after all, so inalienable.

However, the term "inherent" in the context of self-defence has had more heated academic discussions and much more serious practical consequences in another respect – in respect of so-called anticipatory self-defence that is sometimes also called pre-emptive or even preventive self-defence. In short, the problem is the following: is it necessary for a victim of an armed attack to wait until, figuratively speaking, bombs and missiles already explode, or is it legally justifiable to take counter-measures, involving military force, at some earlier point, e.g., intercepting missiles or bombers before they reach their targets?

In the positivist era of international law, the right of anticipatory self-defence was grounded on the formula put forward by the American Secretary of State Daniel Webster in the *Carolina* incident of 1837. In that case, the British authorities located in Canada – at that time a British colony – destroyed the US steamboat *Caroline* anchored on the American side of the Niagara river, since *The Caroline* had been used to supply rebels against the British rule in Canada. The United States disagreed with the British government as to the legality of the action. Secretary of State Daniel Webster wrote to Mr Fox, the British Minister to Washington, that it had to be demonstrated that there was the necessity to use force in self-defence that was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation"

and that the act "justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it".[17] It seems to be possible to generalise all these criteria by the terms of necessity, immediacy and proportionality. Every use of force even in self-defence, in order to be lawful, has to be necessary (e.g., it is possible that a limited military incursion by the forces of state A into the territory of state B remained without adequate immediate response; in such a case state B is not entitled to respond *ex post facto* militarily against state A; this would breach both the requirements of necessity and immediacy), proportionate to the situation that calls for the use of force, and exercised within reasonable time period.

Analysing self-defence, Yoram Dinstein distinguishes between 'on the spot reaction', 'defensive armed reprisals', responses to an 'accumulation of events' and 'war of self-defence' that are all different modalities of the use of force that can be resorted to depending on the character of the armed attack that has triggered the right to use force in self-defence.[18] The legality of these modalities of self-defence is dependent on the character of an armed attack. It seems natural that the modalities of the use of force for humanitarian purposes must also correspond to the objectives of the use of force. They have to be adequate and proportionate to these objectives.

Thus, whilst the Caroline incident evidences that the occurrence of an armed attack is not necessary to justify the exercise of self-defence, it qualified the right of pre-emptive action with several rather strict conditions in order to be legally accepted. According to this formula, pre-emptive action is only lawful when the danger is imminent in a way that the defending state has had no time for deliberation or to choose an alternative course of action. This implies that the danger can be identified credibly, specifically and with a high degree of certainty.[19]

The Israeli use of force in the so-called 6-day war in 1967 against Egypt seems to be an example of an anticipatory use of force in self-defence in terms of the *Caroline case*, customary international law, and it is possible to argue, also of Article 51 of the UN Charter since the Charter has to be interpreted in the context of existing customary international law. The withdrawal of the UN peacekeepers at the request of President Gamal Abdel Nasser, mobilisation and movements of Egyptian forces, and last but not least, the closer of the Straits of Tiran for Israeli navigation, seem to indicate, with high probability, that an attack on Israel would have been imminent. Israel, in the UN, referred to the closer of the Straits of Tiran, as an act of war, and therefore didn't raise the defence of anticipatory self-defence. However, it seems that if Israel were relying only on this fact alone, its response may have breached the requirement of proportionality. Israeli response, surely, was much more massive than, say, on the spot reaction in the Straits of Tiran or another proportionate response.

17 'The Caroline', J, Moore, 2 *Digest of International Law*, p. 412 . See also, R.Y. Jennings, 'The Caroline and McLeod Cases'. 32 *American Journal of International Law* (1938).

18 Y. Dinstein, *War, Aggression, and Self-Defence* (2nd edition), Cambridge University Press, 1994, pp. 213-245.

19 T. Franck, "Terrorism and the Right of Self-Defence", note 69 supra, p 841

Developments related to the "war on terror" have given support to two hitherto somewhat controversial interpretations of self-defence: it is now more widely accepted that there is a room for anticipatory self-defence as well as for what Oscar Schachter, Yoram Dinstein and some others have called *defencive reprisals*, i.e. reprisals whose main purpose is not to punish (so-called *punitive reprisals* are prohibited by international law). Or rather, in responses to terrorist attacks these two wider interpretations of use of force go hand in hand. Effective responses to typical terrorist pin-prick attacks have to be either carried out *ex post facto* or in anticipation of a new probable attack from the same source. Here, responses can be characterised both as defencive reprisals or acts of anticipatory self-defence.

Often military responses to terrorist attacks have to draw a fine balance between two controversial modalities of the use of military force in self-defense—the Scylla of anticipatory self- defense and the Charybdis of reprisals. As Gregory Travalio writes, "if the anticipated action by terrorists is not sufficiently imminent, the right to use force is not available for purposes of deterrence. On the other hand, if past terrorist actions by a group are too remote in time, the response by force is likely to be characterized as an illegal reprisal."[20] Because terrorist warfare usually consists of a series of relatively small-scale attacks that often need to be prevented by measures that combine some elements of retaliation (since a response comes after the attack) and anticipation (since a response comes in anticipation of a new attack), the exercise of the right to self-defense against terrorist attacks requires at least some (sometimes quite considerable) practical use of concepts of a anticipatory self-defense and defensive reprisals.

However, there is a different interpretation of the right to self-defence that is often called the "Bush doctrine" or "preventive self-defence". In response to its perception of a fundamentally changed international situation, in 2002 the USA adopted a new *National Security Strategy* that stated: "While the US will constantly strive to enlist the support of international community, we will not hesitate to act alone if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them form doing harm against our people and our country."[21] What the "Bush Doctrine" implies is that the traditional conditions of anticipatory self-defence and the requirement of clear demonstration of the threatening intentions of the adversary are no longer tenable, since an attack by weapons of mass destruction could be launched at any time, anywhere, without warning. Rather than wait for that to happen or waiting for the last moment that would reduce the chance of forestalling such an attack, states have the right to use force preventively to eliminate such a threat in its early stage. Thus, the strategy would be better described as "pre-

20 G.M. Travalio, 'Terrorism, International Law, and the Use of Military Force', 18(1) Wisconsin International Law Journal 165.

21 The National Security Strategy of the United States of America, September 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf.> [Hereinafter National Security Strategy]

ventive" rather than "pre-emptive", because the aim is to prevent materialization of generalized threats, rather than to avert an identified, imminent threat.[22]

Michale Reisman has defined preventive self-defence as "a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that *is not yet operational* and hence is *not yet directly threatening*, but which, if permitted to mature, could be neutralized only at a high, possibly *unacceptable, cost*. It is not hard to imagine circumstances in which PSD (preventive self-defence) might appear justified. Yet if universalized, the claim, by increasing the expectation and likelihood of violence, could undermine minimum order'.[23] German author Michael Bothe believes that to adapt the right to self-defence to these new perceived threats is unacceptable and would lead to vagueness and increase the risk of abuse. He argues:

"If we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts, such as the just war concept, to justify military force we are stepping on a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal".[24]

This seems to be a dominant position of international legal scholarship.

To clarify the differences between anticipatory self-defence, which under certain strict conditions is arguably lawful, and preventive self-defence, which is contrary to existing international law, it is possible to compare two uses of military force both involving Israel: the June 1967 6-day war (discussed shortly above) that many international lawyers have considered to be within the frame of legitimate self-defence and the 7 June 1981 attack on the Osirak nuclear centre in Iraq that in the eyes of most international lawyers, as well as of the UN Security Council, has been a case of breach of international law.

The concept of self-defence is inherently linked to the concept of an armed attack. The mere possession or attempts of acquisition of of nuclear weapons cannot be equated with an armed attack notwithstanding how wide an interpretation we give to the concept of "armed attack". Proliferation of WMD and self-defence are phenomena from different legal domains or branches of international law. Proliferation of nuclear weapons may be considered as a threat to international peace and security. When we talk about possible use of force against nuclear proliferation we are not in the domain of self defence; we are in the domain of arms control or in the domain of threats to international, including regional, peace and security and this is a matter for the UN Security Council to decide.

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22 Sapiro, M. "Iraq: The Shifting Sands of Preemptive Self-Defence", 97 AJIL, 2003, p 599; Falk, R. "What Future of the UN Charter System of War Prevention", 97 AJIL, 2003, p 598

23 M. Reisman, Self-defense in an Age of Terrorism, ASIL Proceedings, 2003.

24 M. Bothe, Terrorism and the legality of pre-emptive force, (2003) EJIL 227.

The necessity to use military force in self-defense against terrorist attacks shows that the dividing line drawn, for example, by the International Court of Justice in the *Nicaragua Case* between armed attacks and "less grave forms" of the use of force,[25] is no longer tenable, if it ever was. Yoram Dinstein, referring to J.L. Hargrove and J.I. Kunz, has rightly emphasized that "in reality, there is no cause to remove small-scale armed attacks from the spectrum of armed at- tacks. Article 51 in no way limits itself to large, direct or important armed attacks."[26] The same criticism also applies to Article 3(g) of the Definition of Aggression, which emphasizes that actions by armed bands, groups, irregulars or mercenaries "sent by or on behalf of a state," which carry out acts of armed force against another state "of such gravity as to amount to an actual armed attack conducted by regular forces" could be considered as acts of aggression.[27] Why only attacks of such gravity? Why this difference? It is the requirement of proportionality between a legitimate purpose for the use of force and the character and scale of force necessary to achieve that purpose that has to take care that relatively minor incidents involving the use of military force do not escalate (sometimes unintentionally) into whole-scale wars.

Finally, it is necessary to draw attention to the fact that Article 51 speaks of both individual and collective self-defence. The right to collective self-defence, i.e. defencive use of military force by two or more states in the case if one of them is attacked, may be exercised in accordance with bilateral or multilateral treaties on collective self-defence but also without any previous agreements on the matter.

3. Collective security and use of force.

Article 39 of the UN Charter provides: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". Further, Article 42 stipulates: "Should the Security Council consider that measures provided for in Article 41 (i.e., measures not involving use of military force) would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".

These articles of the UN Charter, and more widely Chapter 7 of the Charter as a whole, provide for the possibility of use of military force for the purposes of collective security. Such uses of force have to be decided or authorised by the UN Security Council. For example, in its resolution 678 of 29 November 1990 the Security

25 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, I.C.J. Reports 1986, para. 191.

26 Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE, Cambridge University Press, 2001, p. 192.

27 See 1974 U.N. Definition of Aggression, 29 U.N. GAOR, Supp. 31, art. 3(g), U.N. Doc. A/RES/3314 (XXIX) (1975).

Council authorised "Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, *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". It is important to note that here the Security Council did not decide or order to "use all necessary means" but authorised states individually and collectively to do that. The reason for such a nuance is that the initial idea of the drafters of the UN Charter of creating the UN armed forces, as provided in Article 43 of the Charter, was never realised in practice. Instead special operations, involving relatively lightly armed UN military personnel, were invented whose main task has been to help keep peace serving mostly as buffers between conflicting states or factions within the same states. These operations are called UN peace-keeping operations and forces participating in them are called peace-keepers. Later, some regional organisations, like the European Union, African Union and the Commonwealth of Independent States (CIS), have also resorted to peace-keeping operations. However, where there is no peace to keep but the situation constitutes a threat to international peace and security, the United Nations has to authorise states individually or collectively to use all necessary means, including military force, in order to maintain or restore international peace and security.

Chapter VIII of the UN Charter foresees the creation of regional organizations of collective security and provides for the use of enforcement actions by such organizations. However, Article 53 stipulates that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council". Notwithstanding this clause in the UN Charter, some regional organizations have not only taken such actions without the Security Council's authorization (e.g. the ECOWAS – the Economic Community of Western African States – at the beginning of the 1990s in Liberia and Sierra Leone), but the ECOWAS and the African Union have changed their respective constitutive documents in order to provide for such enforcement actions without the Security Council's authorization.[28]

African Union (AU) has formally claimed for itself the right to intervene in Member States in instances of gross human rights violations. In accordance with Art. 4 (h) Constitutive Act of the African Union, the organization may intervene in a Member State pursuant to a decision of the Assembly of Heads of State and Government in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity. In accordance with Art. 7 (1) Constitutive Act of the African Union, the Assembly may take such a decision on the basis of a 2/3 majority. Apart from arguing that the AU would be claiming a 'right of emergency' for itself, it is also arguable that Art. 4 (h) constitutes a collective, *ex ante* form of *intervention*

28 See, e.g., A Abass 'The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organisations?' in D Lewis (ed) Global Governance and the Quest for Justice vol 1 International and Regional Organisations (Hart Oxford 2006) 91–112.

by invitation. Since the Member States of the AU have given their express consent to military intervention under certain conditions, the use of force would fall outside the scope of the prohibition in Art. 2 (4) UN Charter and not be in violation of the UN Charter. However, this argument in turn raises the question whether such an invitation can be extended for an open-ended period of time, or whether it has to be limited to a particular conflict.[29]

4. Use of force for humanitarian purposes.

In the 1990s, after the collapse of the bi-polar world with its discipline and relative stability, there was an increase of internal conflicts in the different parts of the world. Somalia and Rwanda in Africa, Haiti on the Western Hemisphere, the former Yugoslavia in the Balkans have been the most prominent examples. Such conflicts involved massive human rights violations (even acts of genocide) that often escalated into prolonged humanitarian crises. Some of these crises indeed constituted threats to regional peace and security. Therefore the UN Security Council started adopting so-called Chapter VII resolutions (on Somalia, Haiti, the former Yugoslavia etc.) whereby the Council, having found that certain situations involving massive human rights violations, constituted threats to international peace and security, decided to send peace-keepers whose mandate among other tasks (maintaining or restoring peace, helping find political solutions to the conflict etc.) included humanitarian component. As such operations were authorised by the UN Security Council, there have not been serious doubts about their legality or legitimacy, though such practice rather creatively enlarged the competences of the Security Council, extending it to humanitarian crises that traditionally had been beyond the mandate of the Security Council.

However, there is a much more controversial question of unilateral, i.e. not authorised by the UN Security Council, use of military force for humanitarian purposes or as it is usually called "humanitarian intervention". Historically, eminent authors such as Hugo Grotius and Emerich Vattel had supported the idea that in certain extreme circumstances states could lawfully use military force to protect nationals of other states from their own governments (however, one should not forget that at that time use of military force was not prohibited and was even considered as an attribute of state sovereignty). However, when the frames of lawful use of military force became increasingly restricted and especially after the adoption of the UN Charter with its Article 2(4) prohibiting the use and threat of force, it became also more and more difficult to justify use of military force for humanitarian purposes.

Today, in most circumstances, the use of military force for humanitarian purposes is not only counterproductive, but in the absence of the Security Council's authorisation it is also unlawful. As a general proposition, such a conclusion corresponds to political realities, existing legal norms, and maybe most importantly, it is

29 E. De Witt, M. Wood, Collective Security, Max Planck Encyclopedia of Public International Law (http://www.mpepil.com/).

even morally sound notwithstanding a noble aim in the use of force – the protection of human rights in cases of their massive violation. The important point to be made is that any use of military force, even one genuinely carried out for the sake of saving human lives, contains in itself a significant potential for even greater loss of life, the infliction of grievous bodily harm on a massive scale, the loss of property and the infringement of other values, which are protected as fundamental human rights.

Of course, the same may be said about the use of force in exercising one's inherent right to self-defence "if an armed attack occurs", as confirmed in Article 51 of the UN Charter. However, wars of self-defence (though this right is often abused) are by their very nature wars of necessity - they are never wars of choice if we discount surrendering as an acceptable moral choice (it may also be a choice but then there is no use of force). Yet, the use of force by state A with humanitarian purposes against state B, in a case where B does not threaten A's security, can never be a war of necessity in the same sense (both in a physical and moral sense) as wars of self-defence are (though a humanitarian crisis in neighbouring country C may constitute a security threat for A due, for instance, to refugee flows, but this is a different issue to be addressed separately). However, one may ask: can there not be any circumstances in which the use of force by state A in the territory of and against state B, in case of a severe humanitarian crisis in the latter, even if the crisis does not constitute a security threat to A, may be considered a "war of necessity", if not in the physical sense (in that respect there is always a choice: intervene militarily or not) as wars of self-defence are, but in a moral sense, which wars of self-defence also are? We believe that in certain circumstances it would be possible to give a positive answer to this question. In situations where the use of military force is the only means of preventing or stopping massive human rights violations such as genocide or crimes against humanity, the absolute prohibition to use force would deprive these prohibitions of their enforceability even in principle, and in such a case these prohibitions cannot be considered as valid human rights norms. Therefore the use of military force in certain extreme circumstances may have the characteristics of a 'war of necessity' – a war of moral necessity. For example, both the world community of states and individual states that had the necessary capacities, first to prevent and then stop genocide in Rwanda (this would have clearly been a lesser evil than allowing the foreseeable and preventable genocide to happen and once started to stop it), failed in their duty both collectively and individually. Their's was a moral surrender similar to the behaviour of those nations, which surrender without a fight, or attempt to fight, when attacked by an enemy, resisting whom is not foreseeably a lost cause.

Moral justification for the use of military force for the sake of the protection of human rights in a foreign country can be best based on ideas developed by British political and legal philosopher Lord Raymond Plant. As human rights are real only in the case of their enforceability (at least in principle though not always in practice, but this is another, though no more less important, matter which belongs more to the

realm of practical politics and law than moral philosophy), their unenforceability, even in principle, deprives them of their quality as human rights. Lord Plant writes:

'Our responsibility for the rights of others is therefore not confined to *non-interference* in those rights, but also has to involve responsibility for doing what we can to secure those *enforceability* conditions, just because these are part of having a right and therefore must be involved in what respecting rights means. This seems to me to be the best way of linking a concern for rights and the possibility of intervention in a particular country, which may not be securing the enforcement conditions'.[30]

If there are circumstances when the use of military force is the only means of protecting rights, and the resort to such an extreme measure, which in itself is wrought with the danger of massive violations of most fundamental human rights, is proportionate to the seriousness of the human rights violations (genocide, crimes against humanity and systemic massive violations of international humanitarian law), then the use of military force may be morally justified as a necessary condition of these rights being rights. The most important general guiding principle in such a situation should be that extreme human suffering, which one attempts to stop or prevent, has to be significantly and foreseeably higher than the human suffering that inevitably results from the use of force to end the suffering. And always, the objective should be to stop or prevent extreme human suffering and not to effect regime change, though this might occur as an inevitable or even necessary corollary of the intervention.

From these arguments of moral philosophy it is possible to move to the legal justification of the use of military force for the sake of the protection of human rights.

The UN Security Council's authorization would make interventions on humanitarian grounds both lawful under international law and legitimate in the eyes of most people, and though even they may, in principle, do more harm than good, in such cases there is less chance that hasty decisions, dictated by narrow self-interest and facilitated by an ignorance of the risks that any military operation involves, are made. However, in extreme circumstances, we believe, there may not only be a moral-philosophical, but also a legal justification for intervention on humanitarian grounds, even without the Security Council's authorisation. It is necessary to emphasise, first, the importance of the words 'in extreme circumstances' since any use of military force, as we have just discussed, inevitably leads to a serious loss of life, i.e. it always creates circumstances conducive to massive violations of the right to life – the most basic human right without which the enjoyment of all other rights becomes meaningless and impossible. Nevertheless, there may be circumstances when the use of military force may be justified not only on moral but also on legal grounds.

30 R. Plant, 'Rights, Rules and World Order' in *Global Governance: Ethics and Economics of the World Order* (M. Desai, P. Redfern eds.), Pinter, 1995, p. 207.

First, let us deal with a preliminary point. It is often said that if there were a right to use military force for the sake of human rights, states would constantly abuse it. It may well be the case, and in some military interventions allegedly carried out for humanitarian purposes, such justifications have been used to conceal other aims. However, so far states have more often referred to the right to self-defence when using force aggressively, i.e. they abuse this inherent right. Moreover, the fact that the use of military force with the purported aim of protecting human rights in cases of their gross and massive violation is often abused, should not in itself serve as an absolute obstacle on the road to human rights protection even by means of force, if other means have proven to be, or would clearly be, inadequate, and it is also one of those rare situations when the use of force foreseeably does less harm than the abstention from the use of force. Almost every right, almost every good may be open to abuse. As the former President of the International Court of Justice Dame Rosalyn Higgins has written, 'we must face the reality that we live in a decentralised international legal order, where claims may be made either in good faith or abusively'.[31] The fact that claims over some goods or rights are made abusively should not mean that these goods or rights thereby become less valuable.

Now, there comes the main, in our opinion, argument in favour of both the legality and legitimacy of the use of force for humanitarian purposes. There is no doubt, as we have discussed above, that the principle of the prohibition of the use of force is one of the fundamental principles of international law. The United Nations International Law Commission, in its various reports dealing with the issue of peremptory norms in international law (*jus cogens* norms), from which states cannot deviate or derogate even with the consent of other states, has always given as an example of such norms the norm prohibiting the use of military force.[32] As we saw above, this norm has not lost its fundamental importance notwithstanding its all too frequent violation. On the contrary, its significance is only enhanced by such breaches; the reason being is that if a norm protects something that people continue to value highly (peace in this case) then violations of such a norm indicate that it is necessary to strengthen the norm instead of discarding it. In legal terms, we may say that in such cases strong *opinio juris* compensates for a less than perfect observance of the norm in practice. However, the prohibition of the use of force is not the only fundamental principle of international law. The principle of respect for and protection of human rights has acquired the same status. In its Draft Articles on Responsibility of States the International Law Commission emphasises not only the importance of the non-use of force principle as a peremptory norm of international law but also the same character of certain human rights norms, such as the prohibition of genocide, slavery and torture.[33]

31 R. Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, 1944, p. 247.

32 See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 112.

33 Ibid., pp.112-113.

In cases of gross and massive violation of such fundamental human right as the right to life, which are always accompanied by egregious violations of many other rights, the prohibition of the use of military force may yield to the obligation to respect and protect human rights. In such cases we have two equally important and weighty principles of international law that cannot be observed at the same time and in the same context; one has to give way. Such potential for collision is enshrined in the very nature of the principles of international law. As one of the greatest twentieth century international lawyers, Oscar Schachter, wrote, 'principles, in contrast [to rules], lack the element of definiteness, they are "open-textured", leaving room for various interpretations'.[34] And he emphasises that 'particular situations are covered by more than one principle. … They point to different legal conclusions. Indeed, it has often been observed that principles like proverbs can be paired off into opposites'.[35] In particular situations the prohibition to commit acts of genocide or crimes against humanity, and even more importantly, the obligation to prevent such acts being committed,[36] may outweigh the prohibition to use military force. In such extreme situations the use of force for humanitarian purposes, even without the Security Council's authorisation, may be both legitimate and lawful.

There have been three significant, relatively large-scale and successful foreign invasions that have put an end to massive human rights violations which may be characterised either as genocide, crimes against humanity or war crimes, though quite interestingly and even understandably, none of the invading states referred to humanitarian concerns as the only or main reason or justification for their actions. The overthrow of the regimes of Idi Amin in Uganda in 1979, the ousting of Pol Pot in the same year in the so-called Democratic Kampuchea, and the Indian 1971-72 intervention in Eastern Pakistan, which all put an end to massive crimes against the civilian populations, all also ended up with a change of the regimes that had committed those atrocities (in the case of the Indian intervention it led to the breakup of Pakistan and the creation of a new state in Eastern Pakistan - Bangladesh). None of these interventions was sanctioned by the United Nations and the intervening states preferred to refer to self-defence as the justification instead of 'purely humanitarian

34 O. Schachter, *International Law in Theory and Practice. General Course in Public International Law*, Recueille des Cours de l'Academie de Droit International, 1982, vol. V, p. 43.

35 *Ibid.*

36 Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide provides that 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'. (http://www2.ohchr.org/english/law/genocide.htm). As we emphasised above and it is not superfluous to reiterate this here, crimes against humanity and systemic war crimes are often not less grave than acts of genocide. Crimes against humanity are, by definition, 'widespread and systematic', while war crimes, if not individual excesses, but state policy (or policy of other organised groups), are always massive and heinous.

concerns'.[37] Naturally, in all these cases, besides the humanitarian issues, there were other concerns and interests present, if not dominant, though none of these military operations could be qualified as actions of self-defence. There is something significant in the fact that these three large-scale, successful foreign military interventions, which were responses to genuine humanitarian catastrophes (even if not justified by references to them) and put an end to those catastrophes, were carried out by non-Western nations. One of the reasons for their success in the sense of the sustainability of the main results of their interventions (the end of mass atrocities and not democracy building) may have been in that after overthrowing bloody dictators (Idi Amin and Pol Pot) and putting an end to Islamabad's repressions in Eastern Pakistan, the intervening states did not attempt to put in place pro-Western or Western-sounding and Western-looking governments, and did not carry out nation building exercises with the aim of "widening the circle of liberal democracies" in the world.

Some concluding remarks

In a textbook on international law, it is not possible to cover all the aspects of this important branch of international law. There are some problems such as use of military forces at the invitation of a foreign government on the territory of that foreign state, which may under certain conditions be lawful; intervention in internal conflicts (civil wars) in foreign countries that in the absence of a Security Council authorization is unlawful and some other uses of force not covered in this Chapter. Some of the newest problems are the issue of cyber-attacks and possible countermeasures to them, use of force in outer space, and use of drones (unmanned areal vehicles) in armed conflicts.

Although armed conflicts that are taking place today in different parts of the world (mostly internal by origin but often involving also foreign states) are due not to the deficiencies of the legal regulation of use of force, but to political, economic and military-strategic interests of states, numerous grey zones and indeterminacies in this domain of international law are due to the desire of most powerful states to leave their hands free to further their vital interests, using all, including military, means.

37 In December 1971, immediately after the Indian intervention had started, the Indian Ambassador to the UN declared: '[W]e have on this particular occasion absolutely nothing but the purest of intentions: to rescue the people of East Bengal from what they are suffering' (UN Doc. S/PV.1606, 4 December 1971, p. 86). Soon, however, the Indian Government denounced this statement of its Ambassador and referred to the right of self-defence instead.