INTERNATIONAL LAW AND THE USE OF FORCE

Shabtai Rosenne

If international law is conceived as a standard-setting regulatory pattern for the normal conduct of states towards one another, the question of international law and the use of force--of the relationship between law in force--belongs not to its static parts, but rather to a more dynamic and, truth to tell, less clearly regulated area. Here the essential problem is to balance the dictates of a civilizing, outward-looking, standard-setting agency with the overriding introspective requirements of national security and self-defense. That is the real problem which force and the threat or use of force pose for international law. It is, moreover, the intractable nature of that conflict which leads many to the mistaken view that when reduced to fundamentals, international law is either unimportant or, at best, belongs to the category of moral standards and not those of law in the sense of imperatives. This dilemma is similar to that referred to in a recent article in the *New Yorker* (7 September 1968) on the trial of Dr. Spock where the following sentence appears: "The case was simply too palpably entwined with controversial political issues--with the question of dove versus hawk--for its legal form and its social content to be separable." That sentence also utters the words of caution against the banality which is all too frequent in legal and political science literature dealing with the vexed problem of force. For it can be taken for granted that no responsible government will lightly decide on the employment of armed force, and it is the height of irresponsibility to approach the legal system with platitudes on the evils of force. Moreover, the dilemma of the hawk versus the dove is not confined to any one country or to any one period of time. Insofar as international law gives expression to certain social experiences and, in the view of many, to certain essential requirements of the civilized world, it, too, has to face this dilemma.

In the history of international law several phases can be observed in its approach to the problem of force. Certain aspects which are taken for granted today were not always so, just as today we face new problems for which there is little historic experience to guide us. But running through all this history is the persistent attempt to balance the legitimate requirements of national defense and security and the equally legitimate requirements of the civilized world which regards the indiscriminate use of force with distaste and seeks to place it beyond the pale not merely of the law, but of normal international relations.

The first stage in tempering the rigors of the use of force and subjecting it to legal restraint goes back to quite an early period of civilization. This relates to the protection of the noncombatant, whether civilian or the sick and wounded military. Traces of this type of humanitarian legal regulation can be

found in the Bible, in the teachings of the church fathers and in comparable works of other civilizations. They find formal expression today in the Geneva Conventions of 1949. Although this humanitarian aspect is peripheral to the central problem, the history of this humanitarian law is interesting because it can illustrate the central problem of our theme. That branch of the law has as its assumption that it is possible to make a clear and a logical distinction between the combatant and the non-combatant. But the experiences of modern total wars--whether they are World Wars or whether they are localized wars--cast serious doubts on the validity of the assumption. If that is so, as regards what is no more than a segment of the problem, it follows that the central problem itself is also colored by the same characteristic. For many smaller peoples, loss of a war may mean the loss of national independence, or at least a fundamental change of the national destiny into new directions imposed by the victors. It is the natural unwillingness of peoples to submit forcibly to such changes which makes the problem of the legal regulation of the use of force one of such delicacy and difficulty, and which makes it, in the words of the *New Yorker* so "impossible for its legal form and its social content to be separable."

It may be an oversimplification to state that the topic belongs to the dynamic area of international law. It concerns the dynamics of human intercourse and of international relations in general. It is relatively easy to draw up a legal text such as the Charter of the United Nations and refer to respect for the territorial integrity or political independence of any state. The assumption of these texts is that the very conceptions of "territorial integrity" and "political independence" when applied to concrete situations are inherently static and immutable. It may be true that, in general, law is by nature inclined towards the maintenance of stability. But the relationships with which we are dealing are themselves not static, and the consecration of stability in the words of a text may end up by being mere platitudes. A complicated variety of factors converges to make changes, and particularly territorial changes, almost inevitable. Many of the situations of conflict existing in the world today can be traced to causes of this kind, just as in other parts of the world situations of tranquillity or relative tranquillity are explained precisely by the absence of these factors for rapid and forceful change.

Does this mean that no reconciliation at all is possible between law and force? It is doubtful if a negative answer is justified. The experience of the present century seems to be showing the way in which a reconciliation could be achieved.

Intellectual and informed pacifism, as opposed to purely emotional, ideological, and dogmatic pacifist movements, has in the last hundred years looked in two directions as it approaches towards the creation of an international order which, when it is constructed, will contain built-in elements enabling it to cope with the inherent dynamism of international relations. The first is the search after acceptable international machineries for facilitating the necessary changes in the international status quo, the so-called problem of "peaceful change." The second is the attempt to regulate the use of force itself by a mixture of political machinery and legal controls.

If each of these approaches must be treated separately as a matter of systematic presentation, in fact as well as in intellectual conception, they are inseparable. Indeed, in their modern guise the two approaches grew out of a single intellectual endeavor, being the reaction of a small group of farsighted men--lawyers, statesmen, and officers of the armed forces--who were able to observe

in the year 1870 on the one hand the two major continental European powers tearing themselves to pieces in a short but devastating war, and the two leading English-speaking powers, themselves on the verge of war, pulling back at the last moment and settling their differences by arbitration. The Franco-Prussian War and the *Alabama* arbitration took place almost simultaneously.

The approach to the regulation of peaceful change started with the idea that apart from the secondary, and, in a way, technical aspects of improving the actual formulation of international law (a process which, by the way, has produced very significant results during the last 20 years in the specialized area of codification of international law with, indeed, a highly sophisticated mechanism for this process), new internationalized institutions to substitute themselves for the individual wills of the sovereigns in dealing with this type of situation must be established and made operational. Apparently on the basis of what was thought to be the lesson of the organic social development which led to the creation of the modern state as we now know it, what was looked for was a way to centralize the control of force in the international area, much in the same way that inside each state private force is not allowed, and all controlled force is theoretically dependent upon the government. This was paralleled with the creation of new or improved international machineries for peaceful change and dispute settlement. These machineries fall into two general patterns: namely, those whose functions are essentially limited to factfinding (the theory being that in many cases the impartial establishment of controverted facts may itself lead to the settlement of disputes), and those aiming at the creation of more far-reaching regulatory mechanisms involving particularly machineries for conciliation and mediation and machineries for arbitration and even international judicial settlement--corresponding to some extent in practice, though not necessarily in theory, to the political role performed by the national legislature inside the states. Regardless of technical and characteristic differences between these different institutions, their underlying approach is the same: namely, that the parties in dispute should have to lay their cards on the table, clarify their objectives, and leave it to third parties to find the reconciliation, whether by mere persuasion or by more compulsive means.

Experience has shown that in producing these machineries, for which some of the forms of internal state organization were taken, their essential substance could not easily be transferred into the international area, mainly because of the tremendous impact of national sovereignty and the concept of the sovereign equality of states. In all modern states the central authority has at its disposal force which can be used, and is used, both to prevent breaches of the law and to enforce decisions of the dispute-settlement organs inside the state. This is the manifestation, on the internal plane, of the concept of "sovereignty," and this has its international parallels too. In normal cases this works without much difficulty. The police in a criminal case and the bailiffs or the sheriffs in a civil case exist to ensure that the adjudged person carried out what he is supposed to do. Yet, in complicated situations with deep political and social overtones this system does not work so well. This can be illustrated by reference to two areas of social conflict frequently involving the use of force, with which the modern state system is showing itself increasingly unable to cope on the basis of traditional patterns. The first is the area of labor relations, and the other is the area of race relations. In both of these areas of conflict--as well as in others--legal and traditional governmental processes, while they may have immediate efficacy, rarely are able to get to grips with

the root causes of the tensions and by their failure to do this produce a kind of chain reaction in the form of contempt and frustration towards the law enforcement and even the lawmaking processes, if not towards society itself.

These two particular areas of social tensions are close to the type of international tensions which endanger peace; and if the relatively closely integrated national societies are engaged in deep heart searching to find appropriate ways of handling these tensions and removing their explosive potentialities, how much greater are the differences in the uncohesive international community.

The second approach has turned more directly to the problem of force itself. It was at one time thought, for instance, that disarmament by itself would go a long way towards providing an answer to the problem, but disarmament was not effective between the two World Wars, possibly because it took the symptom for the cause, and the international debate on disarmament did not touch the roots of the suspicions and fears which have made the massive armament of nations so commonplace today.

At the same time the international community has been groping towards a form of organization which will supply political machineries to deal with the situations of tension and maintain international peace. This international effort today is epitomized by the United Nations. This is, in its external trappings, a highly sophisticated international administrative machinery, but in substance it is not very different from the more discreet system of preserving international peace of the Concert of Europe. The underlying theory in each case--and herein lies one explanation for the so-called right of veto in the Security Council today--is that the big powers, in fact and not merely in theory, bear the primary responsibility for the maintenance of international peace. This theory worked well enough so long as the big powers were able to regulate their own relations between themselves. If it has not been effective since 1918, this is mainly because they have not been successful in regulating to the fullest extent their own relations.

In the growth of this system the formal texts are now based on the proposition that war, as a matter of national policy, is renounced. In whatever form the proposition is to be framed, whether as in the Briand-Kellogg Pact of 1928, which now exists in revised language in article 2, paragraph 4 of the U.N. Charter, or in the form of the so-called Stimson Doctrine of nonrecognition of territorial changes brought about by the illegal use of force, or in the so-called Litvinov formula of nonaggression, the proposition is one which will hardly stand up to critical analysis; furthermore, the superficial attraction of the slogan-like language blinds the unwary to the unreality of the proposition. It depends far too much on interpretation which, except when you have agreed interpretation, is at best a highly controversial exercise and at worst no more than a decoy for a naked political power struggle.

Texts of this kind--perhaps stating the obvious--explicitly reserve what the United Nations Charter calls the inherent right of self-defense against armed attack. The formulas used vary, but their purpose remains the same. The idea is that in principle the aggressive use of force is renounced as an instrument of national policy, but that if, in spite of this ban, another state employs force, its victim is legally entitled to defend itself until the organized international society takes appropriate measures to put a stop to the violations of peace.

In the Charter this system is based on three assumptions, namely: (a) that the Security Council--the organ on which is conferred primary responsibility for the maintenance of international peace and security--would have at its disposal non-

military and military machineries of compulsion which it could use against recalcitrant states; (b) that the Security Council would have a sufficiently united sense of purpose in the discharge of its primary responsibility, that it would be prepared to use these machineries through the devices of nonmilitary or military sanctions when faced with threatened or actual breaches of international peace and security; and (c) that the Security Council would be objectively capable of determining when an unlawful breach of the peace has occurred. Side by side with the Security Council there exists an all but defunct Military Staff Committee (which, in fact, has never met except on formal or social occasions) whose function, according to article 47 of the Charter, is to advise and assist the Security Council on all questions relating to the Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament. That is the teeth of the theoretical system of collective security established at San Francisco in 1945 with its groping attempt at the centralization of force on the international level. The U.N. Charter, taken simply as a text, appears to be a stronger document than the League Covenant, professing to learn from the failure of collective security as conceived in the interwar period by combining political procedures for peaceful change with military procedures for the maintenance of peace.

Taking the Charter as a legal text, attention may be called to two major and interconnected problems of interpretation for which the solution is still elusive. The two notions requiring definition and interpretation are the central ones of "aggression" and of "force."

The main problem of the definition of force is whether it should be limited to armed force (which, of course, is fairly easily identifiable), or whether, for the purposes of constructing an adequate modern international order, the concept is now a broader one altogether, including such intangible elements as psychological, economic and political pressures. If there is a strong reaction today, and rightly so, against the "gunboat diplomacy" of the 19th century, there is an equally strong reaction against its so-called "gin-bottle diplomacy"; for the great colonial empires now disintegrating are said to have been established by a sinful combination of these two methods of coercion. Most of the countries of the world are militarily and economically weak, and if the matter is approached simply as one of head-counting in international conferences, in which all states participate on a footing of formal equality, there is little doubt that the majority, indeed the overwhelming majority, with memories of Munich (1938) very much in their mind would prefer the broadest possible interpretation as including all forms of pressure which one state can bring upon another. In practical terms this is obviously quite unreal; just as in ordinary human relations pressures can be used quite legitimately, until the fine dividing line of the illegal area of undue pressure is reached.

The question of the definition of aggression has been under international discussion since the late 1920's, although it is actually older and is connected with treaties of guarantee and of nonaggression. In terms of the discipline of the law, the necessity for a definition of this term is now said by its proponents to arise from the obligation of members of the League of Nations, or today of the United Nations, to come to the assistance of the victim of aggression within the framework of the concept of collective security. It has been said, for instance, that a definition of aggression would assist the Security Council in its work, though this suggestion is undoubtedly tendentious.

There is no difficulty over the obvious and blatant cases of direct aggression, which can easily be observed and listed. The difficulty arises over the far more dangerous and insidious forms of indirect aggression deliberatly carried out in a way which enables a government to deny responsibility for them. Techniques of this kind were commonly used in Europe as tensions preceding World War II were building up, and they have continued to be used ever since. Words like "Auslandsdeutsche" in the Nazi period, "Volunteers" in the Korean war, or "Fedayeen" or "El Fatah" in the Middle East illustrate this. These phenomena also illustrate in practical terms the problem of the so-called preventive war and the risks to international peace and security which are created, if one thinks of defining aggression in exclusively enumerative terms. Such a definition of aggression is appropriate, perhaps, for the identifiable instances of direct aggression but quite inappropriate if one takes a broader look at the whole problem of the international regulation of the use of force.

On the whole, the Security Council as an organ operating collectively and the powers represented on it working individually have displayed a marked reticence towards formally condemning a state as an aggressor, even in quite obvious cases, except where, for some fortuitous circumstance, the parliamentary situation was favorable to one point of view as in the case of Korea in June 1950, and even then the North Korean action was called only a "breach of the peace." There are at least two explanations for this. One is the deep political cleavage existing among the permanent members of the Security Council which is responsible for the noncreation of international peacekeeping forces at the disposal of the Security Council such as are envisioned in the U.N. Charter, and in general for the Council to act as planned in the Charter. In the major conflicts which have come before the United Nations since 1945, the divisions between the major powers, deriving from the deep clash of interests in terms of global strategies, have prevented them ever being at one and saying that an act of aggression has taken place, or that joint and universal action was needed to restore the peace. The second is a matter of diplomatic technique. If the objective is the restoration of peace and the adjustment of a situation that has given rise to serious tension, pejorative assertions that one side or another had been guilty of aggression are not likely to be helpful in terms of reaching a settlement. Instead of this we find the Security Council adopting a more pragmatic approach and concerning itself rather with preventing the spread of violence and bringing it to an end than with condemning states. This has been coupled with the virtual abandonment by the Security Council of any idea that it could legislate a new situation into existence. This has been left to the parties, the international organizations at best providing a set of recommended guidelines. In the same line of thought, internationally controlled and internationally composed military forces have been created ad hoc and have operated under the United Nations flag, working not under the compulsory powers of the Security Council but by agreement of the states concerned, something which the U.N. Charter did not foresee. Many think that in the long run this is a more satisfactory approach towards intractable problems, and one closer to international realities, than any attempt to operate the Security Council as though it were a kind of world policeman intervening automatically to prevent real or threatened breaches of the peace and a world legislature dictating settlements.

One of the common techniques to cover up the use of force in foreign relations is that of intervention at the

invitation of the responsible authorities of an invaded state. Armed intervention is nothing new in international relations, it being the traditional manner in which strong states imposed their will on weaker states or prevented the emergence in weaker states of elements hostile to their own policies. Today, under the regime of the U.N. Charter, intervention of this type is banned. It is in order to overcome that ban that the procedure has been evolved by which a government "invites" some outside power to send in its armed forces to "protect" it. Sometimes this happens when internal turmoil may threaten the internal regime without necessarily leading to a change in the general international orientation of a state; at others, the internal turmoil may even be produced or accompanied by external elements themselves aiming at producing a change in the country's external orientation. In the first type of case, where the international status quo is not really threatened, this form of intervention, while not commendable, may not always be open to serious reproach, provided the invitation to intervene is real, that it leaves the government in command of the situation and is not excessive, and that it is terminated as soon as feasible. The other type of case, on the other hand, will have serious international repercussions, possibly of the most far-reaching kind. Nevertheless, the fact that the intervention is in response to an apparently authorized invitation from some responsible authority may be of purely nominal significance.

The reader may detect in this article a tone of pessimism, as though the lawyer and diplomat are resigning from their professions in face of the enormous problems confronting them. But such a conclusion would be premature. There is no doubt that the international society, with all its deep-rooted schisms and heterogeneity, has advanced a long way in strengthening the peace-preserving mechanisms in comparison with what was the position as little as half a century ago. Perhaps the greatest advance has been in the realization that an adequate legal order can only be constructed on the basis of a realistic approach which fully recognizes on the one hand that no self-respecting nation will jeopardize its supreme national interests, as it conceives them, on the altar of legalism or idealistic perfectionism, and on the other that there do exist collective interests beside the egoistical interests of the individual states. This is undoubtedly balanced by the fact that thanks to the destructive force of modern weapons and the totality of modern war the subjective weighing of the national interest is a far more delicate and profound operation than it appears to have been even as late as 1939. To overcome the present suspicions and fears is a major political task which the lawyer is perhaps not the best equipped to perform. Indeed, one might easily say that just as war is too serious a matter to be left to the generals, so is the international legal regulation of force and its various manifestations too serious a matter to be left to the lawyers and politicians. The U.N. Charter attempted, on the basis of its pragmatic approach to the matter, to combine the political, economic, legal, and military aspects under the aegis of the Security Council. For political reasons the original scheme has failed, and its replacement has not yet begun to take clear shape. But that it can only be based on that kind of combination of professional talents and interests is now widely recognized. When that ideal situation will have been reached, the world will be in a better position to provide effective international machinery for making objective determinations of whether the supreme national interests are at stake. So long as that determination is left to the individual subjective appreciation of each state, as it now inevitably is, the matter is going

to be left to political judgment with the law following suit.

In the development of the concept of collective security, with its concomitant of sanctions against the state guilty of the breach of the peace, the naval arm of the armed forces occupies a prominent place. For many centuries the naval forces have formed the main instrument by which force has been brought to bear (except as far as concerns the immediate limitrophe states). Furthermore, as a syllabus in the Naval War College puts it, naval force provides the dynamics for "bilateral as well as multilateral and often abrasive confrontations between discreet sources of power and military force." It is frequently overlooked today that many of the details of the concept of sanctions as they exist in books about the League of Nations and in certain official papers of the United Nations have their direct inspiration from the economic warfare measures applied by the Allied and Associated Powers during each of the two World Wars, in which the naval forces played a key role. The old system of prize law, now largely relegated to the limbo of naval and legal history (where it makes fascinating reading), provides the inspiration for much of the contemporary conceptions of collective applications of sanctions, and even of individualized applications of force, in exceptional circumstances. The quarantine of Cuba has its historic parallels in the Anglo-French economic warfare in the Napoleonic wars, in the long-distance blockade of the American Civil War (the *Alabama* arbitration previously mentioned was an outgrowth of that), and in the elaborate controls of all seaborne trade initiated by the Allies in 1914 and perfected in 1940, and in post-1945 controls of the movement of strategic materials from one part of the world to another.

It is stated in the Naval War College syllabus that the naval officer must be in a position with sureness and firmness to understand, evaluate, and effectively exploit the legal advice and counsel which he solicits. The naval officer is not, of course, the only public servant to which that admonition should apply (it should certainly apply to the diplomat). If this article has conveyed the impression that there is little firm in the legal rules governing the employment of force, one may at the same time safely assume that a responsible government--and one cannot legislate for irresponsible governments--will determine the limits of the freedom of action of a commander in any military or quasi-military action, and that adroit use of modern communications in unforeseen situations, in the context of the general humanizing mission of the contemporary international law, will provide a fair course on which to sail. For in the final result, international law, like all law, is common sense writ large, and common sense coupled with good faith goes a long way towards remedying formal deficiencies which the unsatisfactory state of contemporary law exhibits.

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