INTERNATIONAL LAW AND THE USE OF FORCE

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Summary

War is at the core of the efforts to submit the use of military force in international relations to legal rules. For millennia the decision to wage war was not subject to any legal restrictions. Furthermore, war was regarded as a legitimate means of policy, its foremost aim changing territorial boundaries. In the early years of the twentieth century, nearly all states agreed on a ban on the use of force with the explicit exception of self-defense, thus legally accepting only peaceful changes to the status quo. Obviously, the objectives of peace and security call for strict interpretation. But then, since in international relations there is neither a compulsory jurisdiction nor a police-like force ready to enforce the rule of law, situations may occur in which the use of force might be believed to be legitimate by moral standards although illegal. Thus, bound between the dichotomy of security and justice, the requirements of legality and legitimacy might not always coincide in international law.

In the Westphalian Peace Treaty of 1648, European states agreed to end a devastating long war waged on religious and territorial boundaries. One of its essentials, the separation of domestic, especially religious, and international affairs, has strongly influenced both the drafting and interpretation of the prohibition of the use of force. According to the traditional view, domestic affairs cannot serve as an exception from the prohibition of the use of force in international relations.

In the last decades of the twentieth century these fundamentals of international legal doctrine were challenged in practice. In certain situations a majority of states had been willing to give preference to justice over security. Although in a formal view a domestic matter, the overcoming of colonial and racist regimes led to a discussion on legalizing any means to achieve the legitimate objective of self-determination. These cases concerned the protection of most of the population of the state concerned and in general did not question territorial boundaries. Today, with a global community growing together and sharing a core of common ideas of justice, many believe recourse to war to be not only legitimate but also legal in order even to protect minorities from their government, especially in cases of genocide. But successful protection might allow the minority to secede from that state, thus questioning territorial boundaries and once again highlighting the tension between security and justice.

At the beginning of a new millennium, international law faces the difficult task of finding a new balance between security and justice in international relations, bearing in mind the danger of abuse by states. Furthermore, since any war causes immense grief to the people concerned and is subject only to the limited rules of international humanitarian law, one may question whether war is a suitable means for achieving justice at all. In legal terms, this relates to the problem of the proportionality of means employed.

1. Introduction

In international law the notion of "use of force" has always been concerned with the relationship between states, not regarding the purely domestic use of force by a state's authorities against its civilians **(see *International Law Regarding the Conduct of War*).** In international law, acts such as the latter may be ruled by treaties on human rights and on the rights of minorities. Thus, dealing with the use of force in international law relates only to a very specific sector of perils to human life. In the twentieth century, war became a threat not only to combatants but also to humankind as a whole. Technological development has led to nuclear, biological, and chemical weapons with potentially devastating effects, thus not only erasing the line drawn by international humanitarian law between military and civil objectives but also endangering all humankind. For a long time the East–West conflict inserted this potential of mass destruction even into small armed conflicts.

Although at first glance developments in the last decade of the twentieth century seem to have diminished these perils, they continue to exist. With the dissolution of the communist bloc, regional limited wars are less likely to become the nucleus of a new world war. However, they may bear the same dangers for the population concerned, since several states seek to gain weapons of mass destructions. Moreover, rather small regional conflicts have made the world witness to massive killings under the label of so-called "ethnic cleansing" aiming at the destruction of whole groups of people or at least their expulsion from the area they lived in. In contrast, the development of high technology weapons promises to wage so-called "clean wars" restricted to military personnel and objectives. This has increased the willingness of states to deploy armed forces in the framework of collective state measures in reaction to armed challenges to the current legal order. Still, practice shows the lack of any safeguard to civilian lives in times of war. This leaves the prevention of war as one of the most important tasks of the twenty-first century.

To this end, modern conflict and peace research takes a broad approach, relying not only on the formal absence of military force but also covering even non-belligerent structural force. Such a substantial understanding of peace focuses on ideas of justice and fairness in international relations. Although the view of international law is much narrower, it should not be underestimated as a tool for the prevention of war. In a broad sense, it influences the awareness of the global community of its underlying moral principles. Admittedly, in a narrow understanding it may be doubtful whether law has ever prevented a war, for the decision to wage war in itself may be regarded as a truly political one. However, international law erects an additional obstacle, urging every state to justify its use of force. The decision to wage war may not only be reviewed by political bodies such as the United Nations Security Council (S.C.) but also, as it is subject to law, it may be challenged directly or indirectly before national or international judicial bodies within their jurisdiction.

As the prohibition of the use of force is at the core of international legal efforts to prevent war, today it is embedded in a more complex international legal framework. The prohibition is secured by means of collective measures and assisted by the obligation to resort to peaceful means for the settlement of disputes. Regulations on arms limitation and reduction diminish military facilities or at least some of their worst effects. In a broad perspective, international legal provisions on human rights and the structuring of a world economic order can be regarded as supporting measures. Although international

law still offers very few rules on peaceful change, some convincing examples occurred in state practice during the dramatic changes in Europe in the 1990s.

Since the Westphalian Peace Treaty of 1648 the concept of international security has disregarded the internal affairs of a state because the intervention by other states has been a major threat to international peace. With the close of the twentieth century, international law faces a new development shifting the focus of security from primarily defending territory to protecting people **(see *Section 4.4.6. Humanitarian Intervention*).** This leads to a legal dilemma of non-intervention, because on the one hand national sovereignty is the cornerstone of international security, but on the other hand it may be used as a shield wantonly to violate the rights and lives of human beings.

2. Historical Development

2.1. The Hague Peace Conferences

The medieval theory of a just war (*bellum justum*) developed by theologians tried to establish barriers to war but was never effective in practice. The lack of agreement on what may be a just cause to wage war led to the interpretation of war as a trial of ordeal and later to the theoretical variation that recourse to war could be just for either side. With the loss of the common religious ground of these theories, international legal scholars could not find any legal restrictions to war (*jus ad bellum*). Warfare was regarded as being part of sovereignty, leaving the legal society with a situation where minor inflictions on the rights of other states called for justification while the worst interference was beyond legal reasoning.

At the end of the nineteenth century, not least in a spirit of humanism first steps were taken to change the attitude towards the unrestricted resort to war. While the Hague Peace Conferences of 1899 and 1907 concentrated on the rules of warfare (*jus in bello*) in general, the Hague Convention III of 1907 relating to the opening of hostilities drew up some formal rules for the start of wars. In the small sector of the recovery of contractual debts, the Hague Convention II (Drago Porter Convention) even erected a substantive ban on recourse to armed force on the condition of the debtor state's obligation to accept and submit to an arbitrational settlement. Restrictions similar to the formal approach towards the resort to war were agreed on in the Bryan Treaties concluded from 1913 onwards between the United States and several over states. Hostilities were allowed only after recourse to a conciliation commission and its final report was to be delivered within one year.

2.2. The League of Nations Covenant

In response to the experiences of World War I, the League of Nations Covenant of 1919 was the first attempt to create a collective security system whose main task was to ensure peace (Article 11). It elaborated on the formal approach of restrictions on the resort to war. Members of the League of Nations were first and foremost obliged to submit a dispute to inquiry, arbitration, or to the Council of the League. Any war had to be postponed until three months after the arbitrators' award or the Council's report and it was definitely prohibited in the case of a state complying with these statements

(Articles 13, 15). A violation of these rules could lead to coercive measures of the League (Article 16). However, in practice the League, of which the United States never was a member and the Soviet Union, Germany, Italy, and Japan were for only a short time, failed to achieve its ambitious objectives.

2.3. The Briand–Kellogg Pact

The Briand–Kellogg Pact of 1928 outlawed for the first time the notion of a right to wage war. The contracting parties condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another (Article 1). Since most states of the world joined the pact and the remaining states of South America agreed on similar restrictions in the Saavedra Lamas Treaty of 1933, for the first time a worldwide ban on war was achieved, subject only to the right of self-defense by tacit agreement of the contracting parties. In 1939, Germany relied unlawfully on this exception to camouflage its aggression at the beginning of World War II. Unfortunately, the Briand–Kellogg Pact lacked any further sanctions than the deprivation of a state's rights under the pact. Moreover, its wording was restricted to wars. States such as Japan in the 1930s tried to circumvent the pact by not declaring an armed conflict to be a war.

2.4. The Charter of the United Nations

After World War II, with the creation of the United Nations Organization (U.N.), member states attempted anew to prevent war by a system of collective security and to avoid old deficiencies. Article 2(4) of the U.N. Charter establishes a ban on "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 U.N." The approach comprises not only war but also measures short of war and has been confirmed by several international treaties since. With nearly all states having become U.N. members, the prohibition on the use of force nowadays must be regarded as a general rule of international law, although still subject to the expressed right of self-defense. The general prohibition is secured by the possibility of coercive measures by the U.N. (Article 39) and the obligation to resort to peaceful means for the settlement of disputes (Article 33). Although the experience of the holocaust could have given rise to another class of exceptions to the prohibition of the use of force, the wording of the U.N. Charter clearly stands in the tradition of the Westphalian Peace Treaty, blind to a state's domestic affairs. This is underlined by Article 2(7), subjecting the U.N. to the principle of non-intervention.

2.5. Defining the Prohibition of the Use of Force by the General Assembly

The onset of decolonization at the end of the 1950s led to a change in the tasks and structure with which the U.N. was entrusted. A majority of states, mainly composed of developing countries, tried progressively to develop international law through the General Assembly (G.A.) by implementing substantial ideals of justice into the notion of peace instead of relying on a definition by the mere absence of force. For instance, the G.A. adopted the "Declaration on the Granting of Independence to Colonial Countries and Peoples" (A/RES/1514 (XV) of 1960) and the "Declaration on the

Elimination of all Forms of Racial Discrimination" (A/RES/1904 (XVIII) of 1963) with the aim *inter alia* of qualifying racial discrimination and colonialism as violations of the prohibition of the use of force. In justifying armed countermeasures, this substantive approach gave rise to a revival of the idea of a just war.

In other resolutions, the G.A. tried to interpret aspects of the prohibition of the use of force on a more abstract level. Of specific importance are the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty" (A/RES/2131 (XX) of 1965), the "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations" (A/RES/2625 (XXV) of 1970), both of which have been adopted by consent, and the so-called "Definition of Aggression" (A/RES/3314 (XXIX) of 1974). Although in legal doctrine and according to the U.N. Charter, G.A. resolutions are clearly of a non-binding character, unlike S.C. resolutions, practice shows them to be more persuasive than mere political statements. In its advisory opinion on the threat and use of nuclear weapons of 1996, the International Court of Justice (ICJ) in correspondence with the prevailing view in legal writings noted that G.A. resolutions may sometimes have normative value. In certain circumstances they can provide evidence of a rule of international customary law or the emergence of an *opinio juris*. The elaborate analysis of a G.A. resolution requires a look at its content and the condition of its adoption. Furthermore, *opinio juris* has to exist as to its normative character. These prerequisites are largely fulfilled by the Friendly Relations Declaration, but to a lesser degree by the Definition of Aggression.

2.6. Development of a Legal Framework

In the 1980s, the G.A. adopted several resolutions in order to foster the acceptance of the prohibition of the use of force, including the "Manila Declaration on the Peaceful Settlement of Disputes" (A/RES/37/10 of 1982), the "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from Threat or Use of Force in International Relations" (A/RES/ 42/22 of 1987), and the "Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the U.N. in this Field" (A/RES/ 43/51 of 1988). An increase in the capacity of the U.N. for peacemaking and peacekeeping was called for by the statement of the S.C. summit in 1992 and the millennium summit in 2000.

On the regional level, the general prohibition of the use of force has been confirmed in a number of treaties, including the Charter of the Organization of American States of 1967, the Final Act of the Conference on Security and Co-operation in Europe 1975, the Charter of Paris for a New Europe of 1990, and the Treaty on the Final Settlement with respect to Germany (also called the 2+4 Treaty) 1990.

2.7. Enforcing International Law by the Use of Force

Strengthening human rights and the rights of minorities in the last decades of the twentieth century has enlarged the common ground of the global community, thus reducing the potential for international disputes. At the same time, this has become a

basis for the use of force by the S.C. in order to enforce its resolutions, not only to preserve international peace. In the 1990s, the S.C. authorized on several occasions the use of force by member states, not only in cases of self-defense but also of the protection of the rights and lives of the people of other states or even, as in the case of Haiti, to implement a government democratically elected. In 2000, in his millennium report the Secretary General of the U.N. demanded the threat of conflict be tackled by "protecting the vulnerable" (e.g. in the cases of mass murder by armed intervention authorized by the S.C.). But if the S.C. is not able to adopt the measures required, the question arises whether states may act without authorization by the S.C. The Kosovo war of ten NATO states against Yugoslavia in 1999 because of alleged severe violations of human rights and rights of the Kosovar minority is an example of states waging war outside the formal U.N. system in pursuit of similar objectives. Thus, today the legal community faces the reincarnation of the idea of a just war in form of operations primarily aimed at the enforcement of international law. The current period of international law may be described as *jus contra bellum* (laws against the waging of war) only with respect to the aim of a belligerent changing of national boundaries.

3. Content of the Prohibition of the Use of Force

3.1. Prohibited Force

Although the wording of the prohibition of the use of force contained in Article 2(4) of the U.N. Charter seems quite clear on first glance, its scope and content has neither in state practice nor in scientific writings yet been defined beyond doubt. First, this is because the prohibition is part of a system of provisions concerning peacemaking and peacekeeping, such as Articles 39, 51, and 53 of the U.N. Charter, which rely on different wordings: "threat to the peace," "act of aggression," or "armed attack." Second, this system lays down restrictions on the right of self-defense that have triggered controversy not only about the scope of that right but also about the notion of "force." The interpretation may rely on the judgments of the ICJ and on the binding resolutions of the S.C., such as S/RES/678 of 1991 and S/RES/686 of 1991 (Iraq), S/RES/748 of 1992 (Libya), and S/RES/807 of 1993 (Croatia). Reference to the resolutions of the G.A. is only persuasive under certain circumstances **(see *Section 2.5. Defining the Prohibition of the Use of Force by the General Assembly*).**

The prevailing view restricts the prohibition to the use of military armed force. In respect to former provisions banning war, the scope has been significantly broadened. Thus, its application remains unaffected by the dispute on the prerequisites of "war." It comprises the use of any weapons by a state directed against another state. The Charter does not give any hint of a prerequisite of a certain level of armed force, thus even minor violations of boundaries are forbidden.

Developing countries and the former socialist countries especially have tried to extend the notion of force even to political and economical coercion, arguing that its effects may be equal to military force. Although the wording of Article 2(4) of the U.N. Charter is open to such an interpretation, it must clearly be rejected. In other provisions the Charter uses the word "force" only in connection with military force. Moreover, at the San Francisco Conference in 1945 a proposal of Brazil to extend the scope of the

prohibition to economic coercion was explicitly rejected. In accordance with this opinion, while interpreting the fundamental Charter principles the Friendly Relations Declaration deals solely with military force in respect to Article 2(4) while submitting political and economic coercion to the principle of non-intervention. Under the latter, non-military coercion is not generally banned but has to be proportionate. Thus, the ICJ was correct in not applying the prohibition of use of force to economic measures taken by the United States against Nicaragua in its decision of 1986.

It is uncontested that the wording of Article 2(4) comprises the indirect use of force regardless whether the direct force is actually applied by regular troops of another state or by unofficial bands organized in a military manner (e.g. mercenaries or insurgents). While it is common ground that the acts carried out directly towards the other state have to amount to the use or threat of force (i.e. incursions into foreign territory or cross-border shooting), it remains controversial which activities may qualify for an indirect use of such force. In this respect, the Friendly Relations Declaration mentions the organizing of irregular forces or armed bands, encouraging their organization, instigating, assisting, or participating in acts of civil strife or terrorist acts or acquiescing in such organized activities. In the Nicaragua judgment, the ICJ stated that not every act of assistance might qualify for an indirect use of force, holding the arming and training of "contras" by the United States to be a violation of the prohibition but rejecting the mere supply of funds to them.

Under the prevailing view, clearly all non-military effects on another state, such as environmental pollution, remain outside the scope of Article 2(4) of the U.N. Charter. But some commentators question such a finding in cases in which the effects of the use of mere physical force equal military measures (e.g. the expulsion of population or the diversion of a river by an upstream state). Although in any case these situations are governed by the principle of non-intervention, the application of the prohibition of the use of force is promoted if the effects equal an armed attack, allowing for the right of self-defense under Article 51 of the U.N. Charter.

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Biographical Sketch

Florens Sebastian Manuel Heselhaus, born December 16, 1960 in Muenster/Westphalia, Germany, graduated from high school in 1979. After two years of military service, he studied in law at the Justus Liebig Universität, Gießen. First state examination in law 1987; in 1988 Magister Artium in political science and philosophy. From 1988 to 1991 he held a state law clerk traineeship, and took the second state examination in 1991. From 1991 to 1998 he was wissenschaftlicher Mitarbeiter (assistant lecturer) at the Justus Liebig University of Gießen, Lehrstuhl für Öffentliches Recht, insbesondere Völkerrecht, Recht der internationalen Organisationen und Europarecht. In 1999 he took his doctoral degree (Dr.Iur.). Since 1999 he has been wissenschaftlicher Assistent (assistant professor) at the Justus Liebig Universität, Gießen, Law Faculty; lecturer at the Faculty of Chemical Science; vice-director of the European Documentation Centre of the Justus Liebig University, Gießen; and legal expert in European law and international environmental law.