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THE CURRENT STATUS OF THE PRINCIPLE PROHIBITING THE USE OF FORCE AND LEGAL JUSTIFICATIONS OF THE USE OF FORCE

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Paper presented at the international conference on "Redefining Sovereignty. The Use of Force after the End of the Cold War: New Options, Lawful and Legitimate?"
Frankfurt, June 7-8, 2002

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1. The UN Charter

The UN Charter contains both the principle prohibiting the use of force and exceptions to it. These rules concern individual States. Collective security falls within the competence of the United Nations, and individual States, as a rule, cannot act in the name of collective security.

Other Charter rules, relating to the use of force, were conceived as transitory. This is the case of provisions against the former enemy States or Article 106 allowing the five permanent members to act to maintain peace and security, pending the stipulation of the agreements under Article 43 of the UN Charter.

Do the Charter's rules on the use of force reflect today's international law or is there still room for pre-Charter customary law?

The pre-Charter rules on the use of force did not contain a general prohibition as it is now embodied in Article 2.4 of the UN Charter. The Covenant and the Kellog-Briand Pact prohibited war of aggression, but allowed to take action in numerous instances. If pre-Charter rules were to be applied, even in part, there would contain several exceptions to the prohibition contained in Article 2.4. In this connection, the following arguments have been put forward:

(a) if the system of collective security, embodied in the Charter, does not work, the old law resurrects;

(b) if an international crime, of great magnitude, is committed, States are allowed to intervene, in the name of the international community;

(c) there is no perfect coincidence between the Charter and customary international law. This proposition has been affirmed by a number of States since the Kosovo war.

The proposition under (a) does not stand the test of international case-law. The ICJ, in the Corfu Channel case, stated that a policy of intervention in foreign States is forbidden, notwithstanding the imperfection of the international organization. The statement by the Court, in the Nicaragua case, is even clearer. After having stated that the rule on the prohibition of the use of force belongs to customary international law, the Court affirmed that the prohibition is "not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter (ICJ, Reports 1986, pag.100, para. 188).

The proposition under (b) will be examined later.

As for the argument under (c), we shall see that the Charter provisions on prohibition of the use of force belong to customary international law.

The nature of the principle prohibiting use of force

As stated by the ICJ in the passage quoted above, the prohibition of the use of force is a principle of customary international law. This opinion is shared by the quasi-totality or totality of legal scholars.

At present, the opinion most widely accepted among scholars is that the principle in question has the nature of a peremptory norm of international law. Even though the ICJ is very cautious in admitting the existence of such a category of norms, States, as has been recognized by the Court, often qualify the prohibition of the use of force as embodied in a norm of *ius cogens*. This is also the opinion of the International Law Commission.
Given the *ius cogens* nature of the rule prohibiting the use of force, is it theoretically possible for new permissive norms to come into existence? A *ius cogens* rule can be modified only by a norm of the same character, as stated in Article 53 of the Vienna Convention on the Law of the Treaties. A modification can be conceived to strengthen the rule prohibiting the use of force. It is difficult, however, to conceive a conduct, at variance with the prohibition, giving birth to a customary rule that undermines or erodes a *ius cogens* prohibition. The maxim *ex iniuria ius oritur* is nonsense in connection with peremptory law. A general practice, on which a customary norm is built, cannot be construed as a series of unilateral acts, which are a violation of a peremptory law and, for this reason, deprived of any legal effect.

2. The content of the prohibition

There are two contrasting interpretations of Article 2.4. They date back to the period immediately following the entry into force of the UN Charter.
According to the broad interpretation, Article 2.4 contains a blanket prohibition. States cannot use force, except in self-defence. Hence, self-defence and collective security are the only instances of permissible use of force.
According to the narrow interpretation, Article 2.4 contains a qualified prohibition. Force, in order to be prohibited, must infringe the territorial integrity or the political independence of a foreign State or be contrary to the purposes of the United Nations. There are instances of entry into a foreign State, which do not violate its territorial integrity or political independence, for instance a short stay to rescue its own nationals. Moreover, there are instances in which the use of force is in keeping with the purposes of the United Nations, for instance entering a foreign territory to put an end to a policy of genocide or to promote self-determination.
As a rule, scholars share the theory according to which Article 2.4 contains a general ban on the use of force. This view is also supported by the practice of States, which justifies the recourse to force as an exception to the general prohibition rather than a conduct permitted under Article 2.4.

3. Permissible use of force

Self-defence, individual and collective, is an exception embodied not only in Charter Article 51, but also in a norm of customary international law. Self-defence pre-dates the Charter. According to the Charter, self-defence should have only a residuary character, since States are under the shield of collective security. However, self-defence has become one of the most important grounds for justifying recourse to armed force.
The most controversial issues relating to the exercise of self-defence are the following (anticipatory self-defence will be examined later):

(a) The target of the armed attack, giving origin to exercise of the right of self-defence. According to the narrow interpretation, self-defence can be resorted to only if the territory of the State or its warships or military aircraft on the high seas are attacked. According to the broad interpretation, the right of self-defence can be exercised even if an embassy abroad or individuals or private ships and airplanes on the high seas are attacked. This second interpretation, for instance, has been followed by the United States in reacting to the bombing of US embassies in Kenya and Tanzania.
(b) Should the attack be attributable to a State, for a reaction in self-defence to be justified? Article 51 of the Charter is silent on this point. Article 1 of the UNGA resolution on the definition of aggression states that "aggression is the use of armed force by *a State* against….".This problem was raised in connection with the attack against the United States by the terrorist movement Al-Qaeda. The Atlantic Council stated, in its resolution of 12 September 2002, that Article 5 of the Nato Treaty, on the exercise of collective self-defence, should be activated, if it were proved that the attack came from abroad. No reference was made to an attack coming from a State (the statement issued at the Ministerial meeting of 6 December 2001 affirms that the events of 11 September are an armed attack and therefore Article 5 was set into motion). The same is true, *mutatis mutandis*, for the SC resolutions 1373 and 1378, which, in their preamble, state the right of individual and collective self-defence.
(c) Self-defence is submitted to the requirements of necessity, proportionality and immediacy. Immediacy is a requirement added by Ago in its eighth report on State responsibility. However, immediacy is a controversial criterion. If self-defence can be exercised only when the attack is in progress, immediacy is tantamount to a reward for the aggression in the case of occupation of a foreign territory. The passing of time does not consume the right of self-defence, unless, and in so far as, possession is protected under international law.
(d) The ICJ, in its advisory opinion on nuclear weapons, referred to "extreme circumstances of self-defence". Even though the Court's statement is connected to the question of *ius in bello* (the legality of nuclear weapons), the reference goes beyond that body of law and one wonders whether the Court is resurrecting, however involuntarily, the old doctrine of self-preservation.

4. Controversial instances

Anticipatory self-defence
Anticipatory self-defence is still an open question and a dividing issue between Western allies. In the Nicaragua case, the ICJ did not take a stance either for or against the doctrine of preventive self-defence. Nor does the New Nato Strategic Doctrine elaborates on this point. The same is true for the International Law Commission and its comment under Article 21 of the Draft Articles on State Responsibility. Article 21 states that a measure of self-defence should be taken "in conformity with the Charter of the United Nations" and does not solve the question of the legality of anticipatory self-defence. Note that the two opposing views can find a (partial) point of contact if one starts from the premiss that all preparatory activities are to be considered the *dies a quo* of an armed attack. In that case, the difference between those holding the two theories is only a question of nomenclature.

Reprisals involving armed force

Unlike belligerent reprisals, armed reprisals in time of peace should be considered forbidden. Charter Article 2.4 does not contain any textual prohibition. However, subsequent documents address reprisals and state that they are forbidden: for instance, the UN Declaration on friendly relations or the 1975 Helsinki Final Act. The ICJ, in its advisory opinion on nuclear weapons, also stated that armed reprisals are forbidden. Article 50 of the Draft Articles on State Responsibility states that countermeasures "shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations". A few scholars are of the opinion that armed reprisals are still lawful.

Dinstein, for his part, takes the view that "defensive armed reprisals", i.e. "post-attack measures of self-defence short of war" are allowed.

Intervention for facilitating self-determination

Intervention for facilitating self-determination was a theory invented during the period of decolonisation to legitimise armed assistance to liberation movements, on the premiss that people under colonial rule were subject to an "armed attack" by the colonial power. The West has rejected this theory and both, the Declaration on friendly relations and the Definition of Aggression, allow third States to help people struggling for self-determination only in accordance with the principles of the Charter.

Intervention for protecting nationals abroad

This is a traditional form of intervention, considered lawful before the entry into force of the Charter of the United Nations. But also after that date, intervention for rescuing nationals abroad has been exerted many times, not only by western States, but also by third world countries (for instance, Egypt). This kind of intervention, therefore, has survived the entry into force of the Charter, and can be considered a lawful exception to the prohibition on the use of force, when foreign nationals are in mortal danger and the local sovereign is unable or unwilling to save them.

Humanitarian intervention

Unlike intervention for protecting nationals abroad, the legality of humanitarian intervention is extremely doubtful. Before the entry into force of the Charter, the legality of humanitarian intervention was open to question. Thereafter, we can count very few instances of genuine humanitarian intervention. Note that the intervening State has often relied on traditional pleas, such as self-defence, rather than humanitarian intervention. The policy of western States, on this point, changed with the entry into Northern Iraq, in 1991, and the most well-known example is the Nato intervention against the Federal Republic of Yugoslavia, in 1999. However, the doctrine of humanitarian intervention has been contested by many States, *inter alia* by those belonging to the group of 77. It is therefore difficult to say whether there is a general *opinio iuris*, agreeing on the legality of this kind of intervention.

Intervention for preventing the acquisition of weapons of mass destruction

The case of Iraq apart, it is assumed from time to time that it is lawful to violate the sovereignty of a foreign State in order to prevent the acquisition of weapons of mass destruction, which would endanger peace and security. This plea is not a lawful exception to the prohibition of use of force, as proven by the justifications advanced by

the States that have made recourse to armed force. When the US launched a missile attack against a pharmaceutical plant in Sudan (1998) suspected of preparing precursors for chemical weapons, it relied on the doctrine of self-defence, since the US suspected that the plant was linked to the terrorist activities of bin Laden. Moreover, disarmament treaties do not give any right to employ force against wrongdoers, as proven by the 1993 Chemical Weapons Convention, in which the organs of the Chemical Weapons Organization together with the UN (UNGA and SC) are called upon to take the necessary steps to remedy serious violations of the Convention.

Use of force to combat terrorism
This topic is the subject of another paper in this symposium. Suffice it to say here that it is difficult to construe a right to use force for combating terrorism other than from self-defence, as proven by the intervention in Afghanistan.

Collective intervention by regional organizations or a group of States without UNSC authorization
Any justification for intervention should rely on a traditional ground, such as self-defence or authorization by the SC. This is true also for Nato non-Article V missions or EU Petersberg missions under Article 17 of the Treaty of European Union. As Friedman put it, the fact that intervention is carried out by a group of States does not add anything to its legality.

Minor instances of lawful coercion
It is traditionally admitted that a State can use its navigational rights and, if attacked, react in self-defence. The Corfu Channel judgment is a case in question. The ICJ found the passage by the British squadron in conformity with international law. The same is true for other instances, for example the exercise of a right recognized by the freedom of the high seas to oppose an excessive claim by the coastal State. The US carried out naval exercises in the waters of the Gulf of Sidra, which it considered as a part of the high seas and contested Libya's claim to consider the Gulf an historic bay.

5. Unlawful use of force and aggression

The relations between unlawful use of force and aggression should be examined, since the consequences of aggression are particularly serious,
The first proposition is that not every instance of unlawful use of force is aggression. A trivial border incident is not aggression. Article 3 of the Definition of Aggression, in enumerating aggressive acts, refers to a conduct of particular gravity, such as an invasion, bombardment or blockade.
Does only "war" of aggression amount to an international crime? Article 5.2 of the Definition of Aggression states that "a *war* of aggression is a crime against international peace". However, Article 5.1(d) of the statute of the ICC, in subjecting the crime of aggression to the jurisdiction of the Court, does not spell out whether the crime is connected only with the "war" of aggression or with any act of aggression. The notion of aggression, as an international crime, has not yet been defined and the ICC will have jurisdiction on the crime of aggression only when a definition is adopted according to

the amendment procedure established under Articles 121 and 123 of the ICC statute. Note that the definition should be in keeping with the UN Charter.
Article 5 of the Definition of Aggression states that "no consideration of whatever nature, whether political, economic or *otherwise*, may serve as justification for aggression". Can the use of force to prevent genocide, or to put an end to it, be a valid excuse for intervening in foreign territory? Usually humanitarian intervention, even though considered a non-allowable use of force, should not be regarded as aggression. At the same time, this conclusion should be reached by the SC, which has the power to determine if an act of aggression has been committed (Article 39 of the Charter and Article 2 of the Definition of Aggression).
In this connection, one wonders whether the SC can exclude the illegality of an intervention or, at least, its consequences. When Tanzania intervened in Uganda (1979), the intervention was excused by the international community, since it put an end to the harsh and bloody regime in power there. A sort of "amnesty", as I. Brownlie says.

6. The role of the UN Security Council

Enforcement action by the SC
Because Article 43 of the UN Charter has not yet been implemented, the SC cannot rely on its own contingents to carry out an enforcement action. "Robust peacekeeping" or "second generation peace-keeping" cannot be considered a substitute for a genuine enforcement action, as envisaged in Article 42 of the Charter.

Enforcement action authorized by the SC
If an enforcement action is carried out by a regional organization under Chapter VIII of the Charter, it should be authorized by the SC. Article 53 is unequivocal on this point. The regional organization may wish to conduct an action on its own or may act as a decentralized organ of the UN. In both instances, the SC's blessing is necessary.
Recent practice shows that individual States, acting alone or as a group, have been authorized by the SC to intervene in foreign territory, after the SC established that a threat to peace or a breach of peace had occurred. Scholars have qualified such a practice as a sort of forceful action in franchising or a kind of privateering. Theoretically, this practice should be justified by affirming that it has given origin to a custom, within the Charter, or by reference to Article 48 of the Charter, which states that action required to carry out SC decisions shall be taken by all UN members or *some of them*, as the SC may determine.
Authorization means a clear resolution by the SC allowing States to take action. Given the gravity of the measure, implied authorization is difficult to conceive. For instance, it is not enough for the Council to declare that a situation is a threat to peace, if this is not followed by an explicit invitation to take action.

Enforcement action validated by a subsequent resolution of the Security Council (ex post facto authorization)
The SC can endorse a practice already in existence with a subsequent resolution, as it did with resolution 1132 (1997), calling upon ECOWAS to continue the operation of naval interdiction which, at the beginning, was carried out without any authorization. Or

the SC can validate a situation, which originated in a military action carried out without SC authorization. This is the case of Kosovo.
From a logical point of view, there is no obstacle to admit the legality of a *post facto* authorization: since the SC can give an a priori authorization, it can also give an *ex post facto* authorization.

7. De *lege ferenda* considerations

Does the inaction of the Security Council constitute a violation of international law?
The SC is a political organ and it is difficult to conceive of its inaction constituting a violation of international law. It does not constitute a violation of the Charter, since the SC has discretionary powers in connection with the determination of an act of aggression, a threat to peace or a breach of peace. Even if it is assumed that the SC violates the law of the Charter, it would be difficult to admit that States may violate their UN obligations as a sort of *inadimplenti non est adimplendum*. Relying on the inaction of the SC, to allow States to take action resembles the theory by which pre-Charter law resurrects, when the Charter system is not working. As said before, the ICJ has repudiated this line of reasoning.

A Security Council resolution formulating criteria for intervention?
After the Kosovo's war, proposals have been put forward for amending the Charter in order to admit the legality of humanitarian intervention. These proposals are not realistic. Amending the Charter on the provisions related to the use of force will not easily attract the consensus of two thirds of UN members including all permanent members of the SC, as required by Article 108. A more acceptable proposal would be the adoption of a resolution by the SC formulating criteria for intervention. The SC, instead of authorizing intervention on an *ad hoc* basis, might give a general authorization, provided that a number of criteria are met, for instance a prior determination that the situation constitutes a threat to the peace. A SC resolution could be adopted notwithstanding the abstention of a permanent member. On the contrary, an amendment could be adopted only with the ratification of all permanent members.

Violations of erga omnes obligations and intervention by individual States or a group of States (actions in the interest of the international community)
Several scholars admit that individual States can take a countermeasure against a State violating an *erga omnes* obligation, for instance human rights, even though the States in question are not directly affected. The most common example is an embargo taken against a State that violates the basic human rights of its citizens.
The ILC, in its Draft Articles on State Responsibility, has followed a very soft approach on this point. Under Article 48 of the Draft, a State, not directly injured, can invoke the responsibility of the wrongdoer in case of violation of an obligation owed to the international community as a whole. However, it may claim only the cessation of the violation and the performance of the reparation *vis à vis* the injured State or the beneficiaries of the obligation breached. Countermeasures are not allowed, since they can be taken only by the injured State.
Given this narrow interpretation of the subjects entitled to take "peaceful" countermeasures, it is difficult to construe a consensus, within the international

community, giving the right to take a forceful action in the interest of the international community.

8. Conclusion

Does a loosening of the Charter's constraints on the use of force better serve the interests of the international community? The question deserves an answer from both a legal and a normative point of view. It is difficult to identify new clear-cut grounds for permissible use of force, going beyond self-defence and collective action (and the possible plea of the use of force for rescuing nationals abroad, a right which has survived the entry into force of the Charter). Self-defence may be construed as encompassing actions needed by States when they decide to employ force (for instance, combating international terrorism) and the SC may authorize (or excuse) actions, which would otherwise be prohibited (for instance humanitarian intervention). The resurrection of pre-Charter law would precipitate the international community into a state of anarchy, which would not help the cause of justice and international security. A broad interpretation of the right of self-defence and of permissible use of force authorized by the SC serves the interests of the international community better than the resurrection of the old freedom to go to war - since the law can put constraints on the conduct of States. At the Nato Summit in Rome, on 28 May 2002, the Nato States and the Russia Federation expressed their strong will to combat international terrorism. However they reaffirmed the obligation to abide in good faith by international law, including the Charter of the United Nations.