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The Right of Individual Self-Defense in Public International Law

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In Prague, May 2008 Jan Kittrich

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"The maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both legal and legitimate. One of these elements being satisfied without the other will always weaken the international legal order - and thereby put both State and human security at greater risk". [1]

A. Introduction

It is generally accepted that with the adoption of the Charter of the United Nations ("Charter") in 1945 the members of international community have prohibited recourse to war, thus severely restricting the freedom of the use of force in inter-State relations.[2] The legal basis for this proposition is stipulated in Article 2(4) of the Charter, which is by numerous commentators regarded as one of the most important principles of contemporary international law and as an authoritative restatement of the existing customary law.[3] In the atmosphere of victory and in the prospect of future close co-operation the Allied nations that gathered at the San Francisco Conference (1945) have agreed on the following:

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[1] *A More Secure World: Our Shared Responsibility.* Report of the High-level Panel on Threats, Challenges and Change (United Nations, New York 2004) at para. 184.

[2] It must be pointed out that it was not the Charter that invented the restraints on the use of force. It only strengthened and confirmed them. In doing so it caught up and carried forward some of the pre-existing law.
For more see Brownlie, I., *The Principle of Non-Use of Force in Contemporary International Law.* In: Butler W.E. (ed.), *The Non-Use of Force in International Law.* Dordrecht 1989 at 19-21; Mrazek, J., *Prohibition of the Use and Threat of Force: Self-Defense and Self-Help in International Law.* In: 27 Canadian Yearbook of International Law (1989) at 81-83 and Hargrove, J.L., *The Nicaragua Judgement and the Future of the Law of Force and Self-Defense.* In: 81 American Journal of International Law (1987) at 135-137.

[3] Moreover, the International Law Commission and then the International Court of Justice have declared that the principle of non-use of force contained in Article 2(4) in itself constitutes a fundamental or cardinal principle of customary international law and *"a conspicuous example of a rule of international law having the character of jus cogens"*. *See* Harris, D.J., *Cases and Materials on International Law.* London 1998 at 871.
E.g. Professor Humphrey Waldock has described Article 2(4) as the *"cornerstone of the peace in the UN Charter"*. *See* Waldock, H., *The Regulation of the Use of Force by Individual States in International Law.* In: 81 Acad. De Droit Int'l Des Cours (1952) at 492. *See e.g.* Brownlie, I., *The Use of Force in Self-Defence.* In: 37 British Yearbook of International Law (1961) at 263.
The President of the International Court of Justice (I.C.J.) Dr. Nagendra Singh observed that the principle of non-use of force is *"the cornerstone of humanity's efforts to preserve peace on the conflict-ridden earth"*. As quoted in Müllerson, R.A., *The Principle of Non-Threat and Non-Use of Force in the Modern World.* In: Butler, W.E. (ed.), *The Non-Use of Force in International Law.* Dordrecht 1989 at 36.

"*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 other manner inconsistent with the Purposes of the United Nations*".[4]

Besides this negative prohibitive norm the Member States have undertaken the commitment to '*settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*'.[5] As will be shown later, this balancing positive obligation of States to resolve their disputes by peaceful (in particular diplomatic) means is highly important in respect of the legality of the exercise of self-defense.[6] The Security Council was entrusted with the primary responsibility for maintaining international peace and security in order to promote confidence among the United Nations members that these peremptory norms are observed.[7] It has the mandate to determine whether an act of aggression was committed and to execute, in order to restore peace and security, collective enforcement measures.[8]

Despite the fact that Article 2(4) emphasises the general prohibition of use or threat of force binding on the whole community of nations, it does not purport to interdict every instance of the use of force.[9] Absolute interdiction of the use of force would probably not be conceivable in the modern era. In order to make the protection of the rights of Member States and the law enforcement process more efficient there are two exceptions to this rule allowing for the use of force.[10] Justifications for the use of

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[4] United Nations Charter, Article 2, Para. 4.

[5] United Nations Charter, Article 2, Para. 3.

[6] As Professor Waldock correctly observed, "*a legal system which merely prohibits use of force and does not make adequate provision for the peaceful settlements of disputes invites failure*". *See* Waldock, H., *supra* note 3, at 456.

[7] United Nations Charter, Article 24.

[8] United Nations Charter, Articles 39 and 42.

[9] As Professor Badr observed the "*absolute and definitive break with the past did not win universal acceptance*" and that is why exceptional resorts to force were provided for. *See* Badr, G.M., *The Exculpatory Effect of Self-Defence in State Responsibility*. In: 10 Georgia Journal of International and Comparative Law (1980) at 10.

[10] It was confirmed in the *Judgement of the Military tribunal for Far East* (Tokyo) where it was declared "*any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense*". *See Judgement of the Military tribunal for Far East* (Tokyo), ADRPILC, 1948 at 364. Additionally, it is apparent that all major legal systems recognise the excuse of self-defense. *See* Nydell, M.S., *Tensions between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor*. In: 24 Virginia Journal of International Law (1984) at 465.

force claimed by individual States must, therefore, be based upon the Charter's framework and be specific and exceptional.[11]

The older exception is an exception known as the *right of self-defense* (*le droit de légitime défense*; *das Recht der Selbstverteidigung*), which under contemporary international law represents the only justifiable resort to unilateral force. At first sight it seems that the Charter has drawn a clear-cut division between permissible and impermissible uses of force. In practice, the Charter in dealing with the non-use of force principle has used terms whose ambiguity and indeterminacy (such as 'armed attack', 'force', 'inherent right', 'aggression' or 'threat of force') made the whole concept open to divergent and ambiguous interpretations.

The first part of this thesis will deal with the notion of 'armed attack'. There is an obvious uncertainty in scholarly literature and State practice about what kind of international conduct would amount to the intensity of an armed attack. This issue becomes enormously important, as the majority of international lawyers consider the occurrence of armed attack to be the only condition for the lawful exercise of the right of self-defense. Special attention shall be paid to self-defense as a potential measure against terrorist attacks, and in particular, the situation prior and post the September 11th, 2001 attacks. This will enable an understanding of the historical development (with special reference to cases such as the United States air raid on Libya in 1986 and on Baghdad in 1993 and the relatively recent air strikes on Sudan and Afghanistan in 1998) and also help to assess what might be the current approach of sovereign States and scholarship on the issue. The attacks on the United States in 2001 have had a significant effect on the law of self-defense. Although it is probably too early to state that there has been a new customary law of enlarged self-defense, it is without doubt that more sovereign States are probably willing to accept some cases of terrorist attacks as being armed attacks under the scope of Article 51 of the Charter. This shift also reflects the principle that armed attacks do not necessarily have to be conducted by a State, but may be carried out by a non-State entity.

Special attention shall be drawn to the factual relationship between the host State and the terrorist organization residing and operating on its territory. The types of factual

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[11] The other exception allowing the use of force is the collective enforcement measures conducted by the Security Council under Chapter VII. of the Charter. The Charter in Articles 53 and 107 also contains provisions governing the use of forcible measures against ex-enemy States. But this special category of lawful use of force has become anachronistic.

relationships that may be imputed to a State for respective terrorist attacks emanating from its territory will also be analyzed. The doctrine of the *state of necessity* will be examined to assess whether it might serve as a legitimate tool for destroying terrorist bases on the territory of another State. In this respect, the doctrine of *state of necessity* has regrettably attracted only very little attention.

The exercise of the right of self-defense is subject to several conditions that have evolved over the last 150 years (following the *Caroline* Case in 1837). Fulfilment of the conditions serves as a 'test' of the legality of the exercise of self-defense. One of the chapters of this thesis shall examine the creation and evolution of these conditions and assess their current status and relevance.

Surprisingly enough, an explicit regulation of the right of self-defense in the Charter has, over the last fifty years, caused great controversy. For example, whether Article 51 reserves or declares customary self-defense or grants the right of self-defense and whether the Article restricts the right of self-defense to cases of an armed attack or incorporates also threats of imminent attacks, i.e. if it allows the exercise of self-defense in anticipation of an attack, have been disputed. This question shall be examined in the second chapter of this thesis. Special attention shall be focused on the Israeli aerial raid on the Iraqi nuclear reactor in *Osiraq* (1981). The main theoretical explanations of anticipatory self-defense shall be reviewed. The two main approaches to anticipatory self-defense - 'restrictive' and 'traditional' - shall be discussed in detail. The nature of so-called 'pre-emptive' self-defense indicating its current position under international law shall be briefly analysed.

As it was noted above, the purpose of the thesis is a detailed analysis of the right of self-defense. It is doubtlessly one of the most controversial, serious and topical issues of current international law. It has long been debated among international legal scholars as well as Member States at various international forums. The aim of the thesis is to analyse and comprehensively and systematically describe the right of self-defense in its complexity, taking into account the historical context, latest development in State practice as well as novel jurisprudence of the International Court of Justice. In light of the present deliberations about self-defense and the current struggle for a solution, the thesis may contribute to better orientation and suggest *de lege ferenda* situations. Scholarly literature and State practice shall be evaluated and analysed in order to

indicate whether there are any new trends surrounding self-defense and its perception by the international community. However, it will be repeatedly noted in the thesis that this exceptional right should be carefully circumscribed and reinforced by an effective forum for determining the legitimate or abusive use of this right. It is manifest that an undefined and unregulated right of self-defense, particularly anticipatory self-defense, could overthrow the purpose of the prohibition to use force in international law. The dismissal of the prohibition of the use of force would inevitably have devastating consequences for the peace and security within the international community endangering the world order. At the same time, a narrow and restricted doctrine of self-defense could lead to problems of rigidity and excessive dependence on non-written justifications.

The other exception to the general prohibition of the use or threat of force is the exercise of collective enforcement measures of the Security Council, as stipulated in Articles 39, 41 and 42 of the Charter.[12]

A.1 The Use of Force in Historical Perspective

The process of outlawing unilateral use of force between States did not happen overnight. Rather, it was a gradual and difficult struggle in limiting a State's right to resort to war. Although in theory, States were willing to limit their sovereignty, the implementation of this principle was fraught with difficulties. The possibility of unilateral use of force in inter-State relations has been for many centuries reflected in the subjective right of a State to wage war (*ius ad bellum*), i.e. a State's right to use military force while pursuing its national interests and claims towards other States as a part of its national foreign policy. Therefore, as a State was not limited in its international conduct, legal justification of self-defense did not play any significant role.

[12] There are other situations in which the use of force is permissible, but these are special cases that must come under one of those two aforementioned exceptions - collective self-defense under Article 51 or enforcement measures in accordance with regional arrangements or agencies on the basis of an authorisation made by the Security Council (Article 53). Additionally, there is one more case of permissible use of force, which has become rather obsolete. Article 107 allows for the use of force against any State, which was an enemy of any signatory to the present Charter during the Second World War.

Various philosophical schools introduced certain 'limitations' on waging wars. Greek philosophers introduced the idea of a just war (*bellum iustum*) aiming at limiting a State's liberty to wage war against its neighbours. Rather than being a pure legal doctrine this teaching represented a moral justification of war. Advocates of this approach, including Aristotle, demanded that a State can only wage war against another State if they have what is called a '*just cause*'.[13] If one considers that it was ultimately the State who decided about a just cause it might be concluded that its restrictive impact cannot be overestimated.[14]

In fact, the right of the State to wage offensive war remained unrestricted as late as World War I. As already described, the use of force was only 'limited' by moral or ethical principles of the ambiguous *bellum iustum* doctrine. The 'peacemakers' in Versailles in 1918 finally realised that it is necessary to establish a universal international institution that would restrict or control States' right to use military force, thus preventing the recurrence of similar military conflicts. It is beyond any doubt that only procedural rules explicitly limiting States' right to use force might fulfil such goal.

Probably the most significant landmarks on the way to the general prohibition of the use of force were the adoption of the *Covenant of the League of Nations* in 1919 and the *General Treaty for the Renunciation of War* of 1928 (known as the *Briand-Kellogg Pact*[15]). The former did not yet stipulate an explicit prohibition of aggressive war but very significantly narrowed the possibility of waging such war.[16]

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[13] Aristotle considered war to be justified if it was to save or free the inhabitants from slavery (this cause might from modern perspective concur with the notion of self-defense). In line with other Greek philosophers Aristotle thought that the ultimate aim of a just war is to promote peace and stability. Waging war to redress or compensate the injustice and injury previously caused was also justified (as St. Augustine and St. Thomas Aquinas held). *See* Arend, A.C. - Beck, R.J., *International Law and the Use of Force: Beyond the UN Charter Paradigm*. London 1993 at 13-14.

[14] The doctrine of *bellum iustum* has evolved over the centuries in close connection with philosophy. It reflected the early Christian influence (mainly moral and religious beliefs of early mediaeval times) as well as the *ius naturale* perspective represented by Hugo Grotius. In *De Iure ac Pacis* he described in detail what types of wars can justified. He concluded that just war could only be waged by lawful authority with the aim of protecting individuals and property. *See* Arend, A.C. - Beck, R.J., *supra* note 13, at 15.

[15] The Pact became effective a year later, on July 24, 1929 originally signed by fifteen nations.

[16] The *Covenant* stipulated in Articles 12 to 15 certain procedural rules in order to solve disputes by peaceful means. Although Article 12 compelled the Member States to agree that "*if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war*"[16], certain provisions of Article 15 explicitly recognized a right of State to go to war. Article 15 clearly stipulated that "*if the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice*".

It was primarily the latter document, which notably limited States' sovereignty bringing about the universal interdiction of aggressive war as an 'instrument of national policy'. The signatories declared in Paris that "*in the names of their respective peoples that they condemn recourse to war for the solution of their international controversies, renounce it as an instrument of national policy in their relations with one another*"[17] and that "*the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin may be, which may arise among them, shall never be sought except by peaceful means*".[18] The Pact did not allow for any exception to the general rule. Nonetheless, the signatories generally accepted that the customary law of self-defense was not outlawed by the *Pact* and that war exercised in self-defense would be permissible even after the ratification of the *Pact*.[19]

It can be assumed that the signatories thought it unnecessary to insert any specific reference of self-defense into the *Pact* because as they stated "*the right of self-defense is inherent in every sovereign state and is implicit in every treaty. No specific reference to the inalienable attribute of sovereignty is therefore necessary or desirable*".[20] Further, the note which was sent by U.S. State Secretary Kellogg to other signatories affirmed that "*every nation is free at all times and regardless of any treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action*". During a speech before the *American Society of International Law* in 1928 Kellogg stressed the fact that explicit recognition of the right of self-defense in a treaty would be very complicated since it would have to be closely related to the same difficulty encountered in any effort to define aggression. As he concluded "*it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense*".[21] Notwithstanding the fact that self-defense was considered as *inherent in every sovereign state* by the drafters of the *Pact* its absence in the document may appear to be a serious deficiency. It left unanswered

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See Articles 12 and 15 of the Covenant at http://www.yale.edu/lawweb/avalon/leagcov.htm#art12 (accessed online on October 20, 2006).

[17] *See* Article 1 of the *General Treaty for the Renunciation of War* of 1928 (Kellogg-Briand Pact of 1928) available at http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm#art1 (accessed online on November 20, 2007).

[18] *Ibid.*, Article 2.

[19] *See* Arend, A.C. - Beck, R.J., *supra* note 13, at 22-23.

[20] *See* Asrat, B., *Prohibition of Force Under the United Nations Charter: A Study of Article 2(4).* Uppsala 1991 at 199 and Whiteman, M.M., *Digest of International Law.* Volume 5. Washington D.C. 1965 at 972.

[21] *See* Asrat, B., *supra* note 20, at 199-201 and Whiteman, M.M., *supra* note 20, at 972.

what international conduct may trigger the right of self-defense, thus leaving the issue open to divergent and ambiguous interpretations.[22]

In hindsight, it is obvious why these provisions did not prevent the outbreak of the most atrocious military conflict in the history of mankind. The failure can be found in two major facts. Firstly, they did not provide for any enforcement mechanism. Secondly, they did not specify any means of conducting international relations by uniquely peaceful means (although the signatories agreed not to seek to settle their disputes by other than peaceful means). Moreover, the principles were difficult or impossible to enforce, owing to the fact that the external policies of States were traditionally regarded as not being subject to review by any international tribunals. Nevertheless, these two documents have significantly prefigured the regime of the Charter.

Since the adoption of the Charter, the principle of non-use of force has been further confirmed and developed by various international legal instruments. Of these the most significant examples are, *inter alia*, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (United Nations General Assembly Resolution No. 2625), the 1974 Definition of Aggression (United Nations General Assembly Resolution No. 3314) and the Helsinki Final Act of 1975.

[22] As a matter of fact it has to be mentioned that the right of self-defense was often abused for offensive or aggressive wars. A good example is the invasion of Poland on September 1st, 1939. Based on the Nazi propaganda, German forces were acting in self-defense against alleged Polish attacks. The infamous 'Gleiwitz incident' was in fact a provocation carefully prepared by highest Nazi officials (Reinhard Heydrich and Heinrich Müller) as to create the appearance of Polish aggression against Germany, which would be used to justify the subsequent invasion of Poland.