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USE OF FORCE IN INTERNATIONAL RELATIONS AFTER 11 SEPTEMBER 2001 A COMMENT ON PAPERS PRESENTED BY PROFESSORS LOUIS SABOURIN AND PAUL KIRCHHOF

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1. Professor Sabourin raises the issue of 'how to steer the world order' and 'how to manage globalization'. He points out (p. 10) that

> the challenge is all the more urgent since the international context is undergoing profound mutations, notably in view of the events of 11 September 2001, military intervention in Afghanistan and now the war in Iraq.

2. Professor Kirchhof says that

> (t)he military conflict in Iraq reminds one of the elementary starting conditions under which the modern State emerged (p. 101).

He also draws our attention to what he calls 'a strict prohibition of force' under the Charter of the United Nations (p. 100).

3. The foregoing statements are a point of departure for making some comments on the law and politics of the use of force in the circumstances which those statements refer to. Managing use of force is one of the primary issues of globalisation. My comments are guided by a basic provision of the Charter of the United Nations, indeed one of its principles embodied in Article 2, paragraph 4:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

4. The attack by the terrorist organization Al Qaeda against the World Trade Centre in New York City and the Pentagon in Washington, D.C. on 11

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September 2001 has demonstrated that, first, international terrorism has acquired a new dimension and, second, intergovernmental cooperation to combat it, also in its previous, more traditional forms, has been highly insufficient. Had real efforts been undertaken in the past to eliminate the scourge of terrorism, perhaps the tragedy of 11 September would not have taken place.

5. It was still the League of Nations which, in reaction to the terrorist assassination of King Alexander I of Yugoslavia in Marseilles on 9 October 1934 (another victim being the then French Foreign Minister Louis Barthou who accompanied the King), took up the issue and led to the drafting of the first treaty on the subject, i.e. the Convention against Terrorism dated 16 November 1937; a supplementary Convention provided for the setting up of an International Criminal Court to try terrorists.[1] None entered into force, a fact which significantly attests to the lack of interest on the part of States to deal seriously with the danger of terrorism. Incidentally, such a court became a reality only more than 65 years later when it inaugurated its activities on 11 March 2003 at The Hague by virtue of another treaty, viz. the Rome Statute of the International Criminal Court of 17 July 1998.[2] While that Court's jurisdiction on the crime of aggression remains, for the time being, suspended,[3] it should be noted, in the context of our problem, that the Court is competent to try persons accused of having committed the crime of genocide, crimes against humanity, and/or war crimes. Certainly, some acts of terrorism fit the meaning of a number of acts that fall under the head of these three categories of crime.

6. It is only several decades after the initiative of the League of Nations failed that various international organizations, including the United Nations, resumed work on terrorism. However, executive and judicial activity of individual States did not always follow the warnings emanating from international bodies; nor did States make much use of normative instruments adopted by these bodies to combat terrorism.

7. On 11 September 2001 the United States proclaimed 'the war on terrorism'. The word 'war' is a term of art, especially in classical international law. Though today there is a preference for the expression 'armed conflict', the word 'war' has its implications regarding the use of force by States against each other.

[1] Manley O. Hudson, International Legislation, vol. VII, pp. 862 and 878.

[2] International Legal Materials, vol. 37, 1998, p. 999.

[3] Its revival depends on the fulfilment of conditions set out in Article 5, para. 2, of the Statute.

8. As a result of 11 September the United States declared that it would use force against terrorism in accordance with its interests, in particular when there is a direct threat to US security.[4] The Washington Administration was clear on the possibility of a preventive strike. It may be added that preventive use of force is not a new problem in the practice of States. Contemporary history abounds in examples of such resort to force. While the Charter of the United Nations has to be interpreted as curbing that practice, there were, nonetheless, numerous instances when States resorted to force in the absence of a prior armed attack and without prior authorization from the Security Council. Today the scale of the problem seems to increase.

9. However, in the first phase of its 'war on terrorism' the United States did not need to resort to any action based on the concept of prevention. In its military action in and against Afghanistan the United States could and did rely on self-defence.[5] Under Article 51 of the Charter of the United Nations States retain their

> inherent right of individual or collective self-defence if an armed attack occurs [...], until the Security Council has taken measures necessary to maintain international peace and security.

The French text of Article 51 is even more explicit in preserving the said right: it speaks of a 'natural' right of self-defence (*droit naturel de légitime défense*). States also have the right to collective defence, i.e. to defend the victim or victims of aggression. Collective defence, or defence of others, must be distinguished from collectively exercised self-defence. Such an interpretation of Article 51 has been universally accepted. Hence the lawfulness of defensive alliances under Article 51, like the one set up by the North Atlantic Treaty. On the other hand, the language of the Charter excludes pleas of forcible action in self-preservation and/or self-help if raised independently of self-defence or of a Security Council authorization.

[4] See President George W. Bush's statements after the attack of 11 September. See also The Sunday Times, 16 September 2001, pp. 22-23 and *ibid*., "America at War" (Special Section), p.1.

[5] See T.M. Franck, 'Terrorism and the Right of Self-Defense', American Journal of International Law, vol. 95, 2001, p. 839. However, when talking to journalists several months after U.S. forces had started their operations in Afghanistan, Secretary of Defence R. Rumsfeld described these operations as a preemptive attack adding that it was not Afghanistan which attacked the United States. This was done by Al Qaeda. To stop it, he continued, it was necessary to attack it on the territory of Afghanistan, see Gazeta Wyborcza (Warsaw), 11 February 2003, p. 11 whose reporter was present at Rumsfeld's press conference.

10. At the moment of the 11 September attack Al Qaeda and its leader, Osama bin Laden, had their headquarters in Afghanistan. The territory of that State was thus used as a base for an armed attack against the United States. The action of the United States and Great Britain in October 2001 against Afghanistan when it was ruled by the Taliban was lawful. The Taliban Government harboured and supported Al Qaeda and refused to liquidate its links with it and to remove it from Afghan territory, though prior to military action it was called upon to do so. That Government also flouted various Security Council resolutions on terrorism. What the Taliban Government did constituted aggression by virtue of any definition of that notion. Using the language of the UN Definition of Aggression one can say that the Taliban Government was guilty of 'substantial involvement' in the 'acts of armed force' committed by Al Qaeda 'against another State (i.e. the United States) of such gravity as to amount' to what is regarded as 'an act of aggression' (cf. Article 3, para. (g) of the said Definition.).[6]

11. Use of armed force against terrorists is, like against pirates, lawful. By calling upon all States to act against terrorists Security Council Resolution 1368 (2001) *eo ispo* authorizes forcible measures against them. In its third preambular paragraph the resolution recognizes the right of self-defence under the Charter. Does this mean that we are faced with an armed attack in the sense of Article 51 of the Charter not only when a State acts against another State, but also when a terrorist organization (which is not a State) acts against a State? This seems to be the position of the Security Council.[7]

[6] UN GA Res. 3314 (XXIX) of 1974. In several non-aggression pacts concluded by the Soviet Union with its neighbours in 1932 (including the Baltic Republics, Finland and Poland) and also in the Balkan Pact of 1934 the definition of aggression comprised support given by a State to armed bands that were created on its territory or had already penetrated into another State, or refusal, when so requested, to take all measures in its territory to deprive such bands of any assistance or protection.

It may be added that the Declaration on Principles of International Law adopted by the UN General Assembly (Resolution 2625 (XXV) of 1970) states, *inter alia*, as follows:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

[7] Cf. Franck, *op. cit.*, p. 840.

12. It has already been said (paragraph 8 above) that the position the US Government and, it appears, also some other States took with regard to 'war on terrorism' went beyond mere self-defence. A year after the attack on the World Trade Center and the Pentagon the United States formulated a new doctrine on the use of force.[8] That doctrine starts from the premise that

> [g]iven the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as [it had] in the past, ... anticipatory action is permitted, even if uncertainty remains as to the time and place of the enemy's attack.

A semi-official comment[9] on the American doctrine referred to the distinction, sometimes made in legal writings, between, on the one hand, 'pre-emption against an imminent threat' considered legitimate by a number of jurists and, on the other hand, '"preventive action" taken against a developing capability', which international lawyers 'regard[ed] as problematic' (or, to put it clearly, unlawful). Assuming that that distinction has been and is part of law, the US doctrine now abolishes it with regard to three categories of States.

First, 'states that abet, support, or harbor international terrorists, or are incapable of controlling terrorists operating from their territory' (semi-official comment). Generally speaking, such conduct amounts to aggression and can be dealt with accordingly (paragraph 10 above).

The so-called 'rogue' States constitute the *second* category. The criteria that make it are 'a history of aggression', 'support for terrorism' and pursuance of weapons of mass destruction 'thereby endangering the international community' (as the semi-official indicates) or using these weapons as "tools of intimidation and military aggression against their neighbors" (the wording of the doctrine itself). Some of these criteria are not clear and the essential problem is that their existence need not be determined, according to the US doctrine, by the United Nations but it suffices that the determination is made by the State or States which consider themselves menaced in their vital national security interests.

[8] The National Strategy of the United States of America, 17 September 2002. For excerpts from this document and its summary, see American Journal of International Law, vol. 97, 2003, p. 203.

[9] By the Director of the Policy Planning Staff of the US Department of State, R.N. Haas, 'Sovereignty: Existing Rights, Evolving Responsibilities', Remarks made at Georgetown University, 14 January 2003, *ibid*., p. 204 (excerpts).

Finally, in the *third* category are States that (as the semi-official comment has it) commit or fail

> to prevent genocide or crimes against humanity on [their] territor[ies]. The international community then has the right – and, indeed, in some cases, the obligation – to act to safeguard the lives of innocents.

13. It may be said that, to some extent, there is room for reforming the law relating to the use of force by States. In the past, humanitarian reasons were invoked by some States to intervene in other States actually in defense of strictly national and egoistic interests. It was a perversion of humanitarian intervention. The result was that by mid-twentieth century the lawfulness of humanitarian intervention became highly problematic unless it received some sort of consent, be it implied or silent, from the United Nations. It is to be noted that thanks to a Canadian initiative an international commission prepared a highly useful report on the subject.[10] In connection with other dangers, in particular those created by the proliferation of nuclear weapons, one may ask whether the nature of some of the present-day conflicts would not permit a partial vindication of the lawfulness of collective forcible action in a state of necessity. Here a situation is envisaged where it could be proved that such action has to take place to avoid a human catastrophe. I am referring to circumstances which, to quote the words in the *Caroline* incident of 1837 (well known to international lawyers), leave 'no choice of means and no moment for deliberation'.[11] Some work on the issue of action in state of necessity is now in progress in the Institut de Droit International, a world academy assembling some 120 jurists.

14. The war on Iraq has dampened the initial hope that after the end of the cold war in the early nineties the Security Council would recover its constitutional role. An earlier signal in this respect was the military action against Yugoslavia by the forces of the North Atlantic Alliance in 1999 with-

[10] The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty. International Development Research Centre/Centre de recherches pour le développement international, Ottawa 2001. For the position of the Holy See on humanitarian intervention, see O. Fumagalli Carulli, Il governo universale della Chiesa e diritti della persona, V&P Università, Milano 2003, p. 285.

[11] British and Foreign State Papers, vol. 30, p. 193; J.B. Moore, A Digest of International Law, Washington, D.C. 1906, vol. 2, p. 409.

out an authorization from the Security Council.[12] Today the 'coalition of the willing' takes the place of an established alliance. More generally, what seems to fade away is the hope that at last the moment has come when States will do what Secretary-General Dag Hammarskjöld always wished they did, namely that they would conceive of the United Nations 'primarily as a dynamic instrument of governments'.[13]

[12] Addressing the Hague Peace Conference in that year the Secretary-General recognized to some extent the admissibility of that action (though not its conformity to Article 53, paragraph 1, of the UN Charter).

[13] In the introduction to his annual report for 1960-61, United Nations, Official Record of the General Assembly, 16th Session, Supplement No. 1 A, 1961, p.1.