Non-Use of Force according to the UN Charter: Are There Any Recent Changes?

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Let me start by thanking the Japanese Society of International law for this invitation. It is a great honour for me to have the opportunity to come here and share a part of the work that I am doing back at the Université libre de Bruxelles, in Belgium. More specifically, I would like to present the thesis I developped in my book, *Le droit contre la guerre*, published last year in French, and which will be published in English next year, by Hart publishing, Oxford, under the title: ’The Law against War’.

What is this thesis?

Some authors, notably in recent years, have claimed that the rule prohibiting the use of force in international law is undergoing an important metamorphosis as a result, in particular, of the so-called ’war against terror’. This group of scholars contends that the systematic prohibition laid down in the UN Charter should be more flexible in the current context of international relations, allowing further development of new concepts as ’humanitarian intervention’, ’pre-emptive war’ and self-defence against non-State actors. In other words, the those scholars would answer the question which constitutes the title of my presentation —Non-Use of force according to the UN Charter : Are There Any Recent Changes?— in the affirmative : *there are* indeed some recent and important changes in the international law of peace and security.

As far as I am concerned, however, my answer to this question would rather be to the opposite. I do not dispute the fact that recent practice had some legal effects on the interpretation of certain relevant provisions of the Charter. The increasing power of the Security Council and its renewed ability to authorize the use of force in many instances is certainly one of the major changes that took place in international law since 1990. The concept of ’threat to the peace’, which enables the Council to take action by military means, seems now much broader than it was during the Cold War. A UN Member State can no longer object to an authorized armed intervention by invoking its ’internal affairs’, even in cases of civil strife or internal troubles. In this sense, the international law of collective security has evolved radically in the latest years. But this evolution is limited, since it merely represents

the effective implementation of mechanisms already embodied in the text of the Charter, namely Articles 42 and 48. Moreover, and this must be clearly emphasized, it is limited to *collective* armed intervention, carried out or authorized by the UN according to Chapter VII of the Charter. By contrast, *unilateral* armed intervention, undertaken *without* an authorization of the Security Council, is still clearly prohibited. Recent changes did not weaken this peremptory rule. Rather, in my view, a careful study of recent texts and State practice suggests that new justifications to the unilateral use of force were not accepted by the international community of States as a whole. The UN Charter has not been revised, either in a formal way —no conventional procedure of revision or amendement was initiated— or in an informal way —new customary rules or new interpretation of the Charter did not emerge. In this sense the Charter system is still based on a true 'jus contra bellum' and not on the 'jus ad bellum' characterizing previous periods.

This general thesis will be illustrated in three different ways.

First, I will demonstrate that a humanitarian intervention by a State or a group of States without a clear authorization by the Security Council is still prohibited.

Secondly, I will show that the concept of 'pre-emptive war' has been strongly condemned in recent years, notably after the Iraqi War of 2003.

Thirdly, I will argue that the prohibition to use force pursuant to the UN Charter remains applicable only between States, not between States and private actors. At this stage, my presentation will be complementary to that of professor Asada we heard today.

I. The persistent illegality of 'humanitarian intervention'

First point: the persistent illegality of 'humanitarian intervention'.

Article 2-4 of the Charter provides that: '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*'. Some authors argue that, *a contrario*, this provision does not prohibit a genuine *humanitarian* intervention since, in this exceptional and very particular case, it would

not amount to a use of force against the territorial integrity or political independence of a State. Rather, the purpose of this kind of intervention is to protect elementary human rights, as requested by the UN Charter, Articles 1 §3 and 55§3.

In my opinion, this line of argument is rather unpersuasive.

Above all, it can hardly be reconciled with the relevant texts. Article 2-4 was not conceived and drafted to allow some kinds of armed intervention pursuing a 'just cause'. To the contrary, its object was to end the *jus ad bellum* area, and consequently to reject any justification based on the ancient 'just war' model. This was confirmed by subsequent texts accepted by all the UN Members and recognized as codifying international law. For example, General Assembly Resolution 2625 (XXV) provides that: 'Every State has the duty to refrain from the threat or use of force to *violate the existing international boundaries of another State or as a means of solving international disputes* […]'. In the same vein, Article 5 of the Definition of aggression annexed to General Assembly Resolution 3314 (XXIV) states that: 'No consideration *of whatever nature*, whether political, economic, military *or otherwise*, may serve as a justification for aggression'. In brief, every unilateral threat or use of force is forbidden, wether its aim is humanitarian or not. The only possibility would be to invoke self-defence, namely a non-humanitarian objective. Of course, a humanitarian intervention authorized by the Security Council would be in conformity with the Charter. But any *unilateral* humanitarian intervention is and still remains illegal.

This pattern was reaffirmed in the most recent text dedicated to the matter, resolution 60/1 of the UN General Assembly, adopted unanimously on the 60th anniversary of the Organization. In paragraphs 138 and 139 of this declaration, named 2005 World Summit Outcome, States accepted the 'responsibility to protect' concept. 'R2P' has often been presented as a remarkable progress in the international protection of human rights. Does it mean that some kind of unilateral humanitarian intervention would have become legal? An affirmative answer would be based on a serious misunderstanding of this concept. Yet, according to paragraph 138 of the declaration, 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. And according to paragraph 139, in exceptional circumstances, i.e. when the territorial State is unable or unwilling to protect human rights, States 'are prepared to take collective action, in a timely and decisive manner, *through the Security Council, in accordance with the Charter, including*

Chapter VII'. In other words, humanitarian intervention *oustide* the framework of Chapter VII of the UN Charter remains clearly illegal.

The examination of declarations and discussions preceding the adoption of this text leaves no doubt about the firm position of the great majority of States. Let me quote first the declaration by the Foreign Ministers of 132 States, adopted in the context of the 'Group of 77' on 24 September 1999. According to this text, those States 'rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or in international law'. In the early 2000's, the 115 States of the Non-Aligned Movement made similar declarations. I quote, for example, a declaration dated February 2003: 'The Heads of State or Government reiterated the rejection by the Non-Aligned Movement of the so-called "right" of humanitarian intervention, which has no basis either in United Nations Charter or in international law'. In the same vein, the Organization of the Islamic Conference (59 States) 'affirmed its rejection of the so-called right to humanitarian intervention under whatever name or from whatever source, for it has no basis in the Charter of the United Nations or in the provisions of the principles of the general international law'. It is obvious, given these numerous declarations, that most States are not ready to challenge the traditional interpretation of Article 2§4. In this regard, the adoption of the 'R2P' concept did not modify the current state of international law, neither *de lege lata* nor even *de lege ferenda*.

This reluctance can also be deduced from an examination of practice. If we take a look at the practice of 'humanitarian interventions' since 1990, two categories of precedents can be distinguished.

In several cases, humanitarian interventions were undertaken on the basis of an existing resolution of the Security Council, like in Somalia (1992), in Bosnia-Herzegovina (1993 and 1995), or in Rwanda (1994). The legality of these interventions was not really disputed, since a clear legal basis could be found in Chapter VII of the UN Charter. In any event, the intervening States (respectively the United States and some of its allies, NATO States and France) expressly grounded their military actions on the clear and precise text of the relevant resolutions. Conversely, no State referred to any general or customary right of 'humanitarian intervention'.

Let us turn now on a second category of precedents, in which no authorization of the Security Council can be found, like in the Kosovo case. Even in this case, one must observe that most of the intervening States did not invoke a right of humanitatian intervention. Rather, they preferred to refer to an ’implied authorization’ given by the Security Council, confirming therefore that such an authorization was required. Some intervening States, like Germany, even stated that Kosovo

’must not set a precedent for weakening the United Nations Security Council's monopoly on authorizing the use of legal international force. *Nor must it become a licence to use external force under the pretext of humanitarian assistance. This would open the door to the arbitrary use of power and anarchy and throw the world back to the nineteenth century*’.

This view was clearly shared by a majority of States. The NATO intervention was firmly criticized in the name of the duty to respect the UN Charter. For instance, the ’Rio Group’ (namely the majority of Latin American States) ’regrets the recourse to the use of force in the Balkan region in contravention of the provisions of Article 53, paragraph 1, and Article 54 of the Charter of the United Nations […]’. Moreover, the International Court of Justice declared itself ’profoundly concerned with the use of force in Yugoslavia, which under the present circumstances raises very serious issues of international law’. It is thus difficult to use Kosovo as a precedent establishing an emerging customary right of humanitarian intervention.

Finally, ’Just cause’ does not open the way to any armed intervention not specifically authorized by the Security Council. This organ is the only competent authority to decide wether a humanitarian cause could justify a use of force or not. The only possibility to use force without its authorization is the exceptional case of self-defence. But, according to Article 51 of the Charter, it requires the existence of a previous ’armed attack’ by another State. This leads me to the second part of my presentation devoted to the concept of ’pre-emptive war’ which, in my view, is clearly illegal.

II. The persistent illegality of ’pre-emptive war’

Pre-emptive war is a core concept of the ’Bush doctrine’, which was elaborated after 9/11. According to a well-known document titled ’The National Security Strategy of the United States of America’,

‘For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack […]. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries’.

Accordingly, States should be allowed to act ’pre-emptively’ against terrorist organizations and States harbouring them. Here again, international law should be adapted to the evolution of international relations.

This position was actively discussed within the United Nations, during the debates preceding the adoption of the 2005 World Summit Declaration I mentioned above. And the ’pre-emptive war’ concept raised a firm opposition from a great majority of States.

It is true that the possibility of anticipatory self-defence was recognized by the Secretary general’s High-Level Panel on Threats, Challenges and Change, in 2004, and by the Secretary General himself. According to the Secretary General’s Report, published in March 2005, self-defence would be admissible in case either of an ’armed attack’ or an ’imminent threat’ of armed attack. This was welcomed by the United States and some of its allies, such as the United Kingdom, Australia, Israel, or Uganda. Can we therefore conclude that there is an agreement between UN member States admitting anticipatory self-defence, at least in the exceptional case of an imminent threat?

Certainly not. A significant number of member States strongly protested against any possibility of ancitipatory self-defence. According to these States, Article 51 of the Charter expressly requires the occurrence of an ’armed attack’. ’Threats’, imminent or not, give competence to the Security Council to act, according to Chapter VII of the Charter, which does not distinguish between ’imminent’ and ’non-imminent’ or ’actual’ threats. Let me quote, for instance, the official position of China: ‘[a]nticipatory self-defence or preventive use of military force is not advisable ; the use of force must be authorized by the Security Council’. One could quote similar statements from a variety of States such as India, Turkey, Indonesia, Costa Rica, Iran, Algeria, Costa Rica, or Belgium. This reluctance to accept any kind of anticipatory self-defence is manifestly shared by a majority of States. The NAM was unambiguous on that point, as evidenced by this significant declaration:

‘[t]he Non-Aligned Movement emphasizes that Article 51 of the UN Charter is restrictive and recognizes ‘the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations’. This Article should not be re-written or re-interpreted. This is supported by the practice of the UN and in accordance with international law pronounced by the International Court of Justice, the principal judicial organ of the UN, concerning this question. The Non-Aligned Movement stresses its deep concern over the intention of a group of States to unilaterally re-interpret or re-draft the existing legal instruments, in accordance with their own views and interests. NAM reemphasises that the integrity of international legal instruments must be maintained by Member States’.

In view of this statement, one understand that, unlike the Secretary General’s Report, the final declaration annexed to Resolution 60/1 does not mention any kind of anticipatory self-defence. Considering the evolution of this debate during the 2000’s, it would be rather excessive to assert the conformity of the Bush doctrine with the current state of international law.

This doctrine cannot find any confirmation in the ancient or recent practice. Anticipatory self-defence was not invoked in cases such as the missiles crisis in Cuba (1962), the six days War (1967) and, of course, the Iraq War (2003). Intervening States prefered to use classical justifications rather than resorting to the controversial concept of anticipatory self-defence. In the first case, the missiles crisis, the Kennedy administration referred to a regional security mechanism in conformity with Chapter VIII of the Charter. In the second, the six days War, Israel argued that Egypt had previously launched an actual armed attack against Israeli villages close to the border. In the third case, the Iraq War, the Bush administration avoided to use the concept of ’pre-emptive war’. It rather argued, without great success, that a legal basis could be found in existing Security Council resolutions. In fact, as far as I know, the anticipatory self-defence argument was only used once in the history of the United Nations. It was after the israeli strike against the Iraki nuclear reactor of Osirak, in 1981. Nevertheless, the Israeli legal justification was far from universally accepted. After numerous debates, the Security Council and the General Assembly condemned the Israeli attack as incompatible with the UN Charter.

Finally, one can mention that, even if it never expressly condemned anticipatory self-defence, the International Court of Justice emphasized the necessity to respect the ordinary meaning of

Article 51. For instance, in the *Armed Activities on the territory on the Congo* Case, the Court stated that:

'Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council'.

In sum, relevant texts and state practice show that Article 51 of the Charter was never re-written or re-interpreted by the UN member States. In this regard, one must also underline that this article is still applicable only between States, even after the proclamation of the 'War against terror'. This leads me to the third and final point of my presentation, devoted to the persistent inter-State character of the prohibition to use force according to the UN Charter.

III. The persistent inter-State character of the prohibition to use force according to the UN Charter

Since September 11, 2001, some scholars have claimed that the Charter provisions on the use of force, that were traditionally applicable only to relations between States, should be extended to terrorist groups that were now capable of using force. This adaptation had supposedly already been made by States, which had purportedly recognised the possibility of invoking and exercising self-defence within the meaning of Charter article 51 in such situations, as shown by the war against *Al Qaeda* in Afghanistan.

This view suffers from several flaws.

Indeed, a reading of the text of the Charter as a whole clearly suggests that the prohibition of the use of force is essentially an inter-State rule, a point that is confirmed for that matter by the *travaux préparatoires*. It is true that Article 51 does not formally specify that it applies only to inter-State relations. But it must be recalled that self-defence according to this article exists only as an exception to the general prohibition of the use of armed force embodied in Article 2§4. And Article 2§4 explicitly restricts its scope of application to 'international relations', e.g., in the context of the United Nations, to relations between States. In the same

vein, Resolution 3314 (XXIX) defines aggression as 'the first use of force by a State against … another State', and only gives as examples acts of one State against another State.

This does not mean that private actions against a State, including by military means, are lawful. Such actions are incompatible with the national law of the State attacked, and also with its *internal* sovereignty. However, such criminal actions cannot be equated to a violation of the *external* sovereignty of a State, unless another State is involved in the attack. In this regard, it must be recalled that an armed attack by a State can be established in the case of 'the sending by or on behalf of a State of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another State […] or its substantial involvement therein' (Article 3g) of the GA Resolution 3314 (XXIX) (Definition of aggression).

In this context, it seems excessive to claim that existing international law leaves States powerless. Three situations can be distinguished, at this stage.

First, if the private group is on a territory or space which does not come under the sovereignty of any State (for example, on the high seas) —or *a fortiori* if the group is on the State's national territory—, the notion of self-defence is not needed. The rules prohibiting the use of force do not in any way oppose any police operation, including, under certain circumstances, of an extraterritorial scope. In such an instance, the State targeting a 'terrorist group' does not take on any other State and there is no need for it to rely on article 51. In terms of international law, were are simply in the domain of exercise of national sovereignty.

Second, mention must be made of the case of a State on whose territory a 'terrorist group' is situated and that State does not have the *capacity* to act against that group. This hypothesis seems purely theoretical, though. Supposing that the State does not have sufficient police or military resources, nothing would prevent it from accepting that an operation be conducted on a part of its territory by another State that was previously the victim of a terrorist action. In other words, a State that is attacked and wishes to bring to book a private group engaging in activities from the territory of another State can always ask that other State to react. These actions could be either to apprehend and arrest those responsible or at the very least to consent to a cross-border police operation. The existence of failed States does not seem to constitute, of itself, an impediment to effective action.

It seems then that the only problem likely to arise is that of a riposte that is made difficult not by a lack of capacity but by a lack of *willingness* of a State sheltering a terrorist group responsible for an attack. If this unwillingness can be equated with an aggression pursuant to article 3g) of the definition of aggression quoted above, self-defence can be exercised against that State. If it is not the case, international law prescribes in principle applying for Security Council authorization to be able to act. Such an authorization may perfectly well be granted against a State which, by its behaviour, is threatening international peace and security within the meaning of Chapter VII of the Charter. In these two case, however, we will be within the context of inter-state relations, with the intervening State reacting both to the attack initially conducted by the terrorist group and to the behaviour of the State.

In view of these hypotheses, it does seem that we are faced with an alternative: either one can react to a terrorist attack without affecting another State, and self-defence is useless; or the riposte is conducted on the territory of another State and self-defence may come into play, but shall then have to be contemplated from an inter-State perspective. In any event, the applicable legal regime in no way renders a State that is the victim of an attack powerless.

This pattern remains valid after 9/11 and the war against Afghanistan. Justifying its intervention on the basis on self-defence, the United States specified that its actions 'include measures against Al-Qaeda terrorist training camps *and military installations of the Taliban Regime in Afghanistan*'. While it is true that the United States affirms its right to self-defence very generally, it seems clear that a military action affecting a third State is justified here by that State's behaviour. In this sense, the precedent of the war against Afghanistan also raises the question of the degree of implication beyond which it can be considered that a State that tolerates the activity of irregular groups having carried out military attacks against another State is itself responsible of an act of aggression. However, it is not certain that it can be deduced from this that the prohibition of the use of force, and its counter argument of self-defence, must henceforth be envisaged outside relations between States or more specifically that one can attack a State in self-defence without having shown that the State was guilty of a prior armed attack. Finally, regarding Security Council resolutions 1368 and 1371, which were already commented by my Colleague Professor Asada, it seems obvious that these texts are extremely vague. Anyway, there is nothing in these resolutions that opens a general right in the name of self-defence to conduct attacks on the territory of any State, even an innocent one, for the simple reason that a terrorist organisation has set up there. For that matter, it can

be seriously questioned whether the Security Council would be competent, in principle, for (re)defining self-defence generally through some sort of authorised interpretation of Charter article 51.

Let us turn now to the recent case law of the International Court of Justice, and in particular the *Wall* case. The Court was confronted with an attempt by Israel to extend the scope of application of self-defence to relations between States and terrorist groups. It is this line of argument that the Court rejected in affirming that Charter article 51 'has no relevance in this case' since that provision recognises:

'[T]he existence of an inherent right of self-defence in the case of armed attack by one State against another State'.

The Court thus considers self-defence only as the riposte to a prior action of a State, that State having acted either directly or having supported a group committing violence to such an extent that the acts of violence become attributable to it. This line of argument was confirmed in the more recent *Armed Activities (DRC v. Uganda)* case, even if the wording of the Court was less explicit.

Finally, even if the general and imprecise assertion of a right to self-defence against a terrorist group is sometimes voiced, the exercise of such a right against a State logically remains subordinate to the establishment of its own responsibility. Any other conclusion would lead to a manifestly absurd and unreasonable result, with an innocent State being liable to attack without any violation of Charter article 2(4) being attributable to it. It will not be surprising therefore that the inter-state character of that article has been confirmed in State and ICJ practice since September 11, 2001.

Conclusion

In conclusion, the precedent of 11 September was certainly a turning point in the fight against terrorism insofar as it prompted States to speed up their cooperation in this domain, including by enforcing the Security Council's powers. It is not established, though, that this turning point has led to a radical change in the rules of the *jus contra bellum*. As emphasized by all

Member States in the 2005 World Summit Outcome, ‘the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security’. This can be applied to various contemporary debates. And, in my view, this must lead to the conclusion that humanitarian intervention, pre-emptive war and self-defence against private actors have not become part of positive international law.