

THE UN CHARTER AND THE USE OF FORCE

by SIR FRANKLIN BERMAN*

No task is more important as we enter the 21st century than finding an agreed framework for the exercise of military force, and for the control of its exercise. I became Legal Adviser to the Foreign Office in 1991. Judging from my past experience, I little thought that my period of office would be dominated by questions about the use of force. If I had been far sighted enough to gauge the future, I suppose that I might just have envisaged being confronted by the need to react to the employment of force by the United States of America or by the Soviet Union. I would certainly not have imagined the succession of demands for the use of armed force by the United Kingdom itself and its European and other allies. The experience of my successor in the last five years has been more striking still.

I. POLITICS AND LAW; LAW AND POLITICS

A question as to whether force should or could be used has powerful political, as well as legal, elements to it. Or should it be the other way round: powerful legal, as well as political, elements? At all events both elements are inescapably there. Could it be otherwise? Surely not. But these elements, although connected, are not the same: just because it would be lawful to resort to force doesn't of itself mean that it would be a good thing to do so; just because it seems like a good thing—or even a very good thing—to use force doesn't of itself mean that it would be lawful. The two statements are surely obvious, the first just as much as the second. Yet, when the rhetoric takes over, both of them tend to get lost, and for the rhetoric I blame the politicians more than the lawyers—though I wish I could pretend that the lawyers were themselves blameless.

I talk to you today simply about the law; the policy I leave in safer hands than mine. But I hope that the view of the law from which I speak is not an arid one, divorced from reality and from policy needs. One of the perils—though also the excitements—of my field, the field of international law, is the fact that the law is constantly on the move, and that it changes in ways and by processes far more elusive than the careful and calculated enactment of fresh legislation. But the excitement brings with it heavy responsibilities. No international lawyer has any right to lay claim to attention without having acquired a sense for the grain of the law, in the same way that a sculptor must have a sense for the grain of the wood or the stone in which he works: a sense of what the law can reasonably be asked to bear, and what it can't; a sense of what will work, and what won't; a simultaneous sense, in short, for international law's unique combination of potential and integrity.

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II. THE PURPOSE OF A LAW ON THE USE OF FORCE

The starting point is therefore that the law is under challenge from increasing demands for the use of force and for its legal validation. The remark may seem obvious, but I make it all the same to distance myself from a point of view that I have detected all too often amongst academic lawyers and legal commentators in my own country: the view namely that the essence of international law is to prevent force being used at all costs, to set up a sort of impenetrable barrier to its use. It is a view I frequently encountered as well amongst my diplomatic counterparts in other European capitals. If that is the characteristic European view, or were to become it, then it is hardly to be wondered at the tensions and strains that have crept into the Transatlantic relationship, as much between the lawyers as between the policy-makers.

It is not a view I share. It is inconsistent with our foundation legal text, the United Nations Charter; and it would make a nonsense of that most successful of all defence alliances we remember today, the North Atlantic Treaty. If it were correct, then every time armed force was resorted to one would have to say that the legal system had failed, that it had broken down. That is not right; it may be true that resort to force shows that diplomacy has failed, that the political constraints on the escalation of disputes have broken down, but not the law. And that is so for at least one simple reason: that one of the prime functions of the law is to regulate the consequences of illegality. This is just as true of international law as of any other legal system. So the way I would phrase the essential purpose of international law is somewhat different. For me, international law has four functions in this vital area: to define (and define properly) the very limited number of situations in which the use of force is permissible; to regulate and control the use of force even when it is permissible; to determine when force that has been used was not permissible; and to regulate the consequences of resort to force, both permissible and impermissible.

It will be seen from this that I am by no means an advocate of a legal system that would open the door to frequent or regular uses of force. Quite the contrary. But no more am I the advocate of a legal system that would shrink from the challenge of defining (and, as I have already suggested, defining properly) the permissible uses of force, and drawing the necessary conclusions that follow from that.

The task is anything but an easy one; passions run high, and high political interests are engaged. Nor is the task straightforward, from a purely technical point of view. One can hardly pretend for example, looking at the record to date, that even our premier legal authority, the International Court of Justice, has made a particularly convincing job of it. Memories are still fresh of the Court's surprising *dictum*, in its *Advisory Opinion on the Wall in the Occupied Palestinian Territory*, that, as Israel did not claim that the attacks against it were imputable to a foreign State, and as the attacks in question originated within the Occupied Territory, Article 51 of the UN Charter "had no relevance" in the case.¹ This *dictum* seemed on the face of it to limit the legal recognition of the right of self-defence to certain kinds of security threat only—a view that looks no less strange now than it did then. And in its most recent judgment, on certain aspects of that especially tragic conflict in the Congo,² it is more by its silences than by clear words that the International Court corrects the unfortunate aspects of its earlier decision in the *Nicaragua* case.³ It ought now to be regarded as not open to doubt—for reasons both of legal principle and practical

¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004), [2004] I.C.J. Rep. 136 at para. 103.

² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (2002-2005), online: <<http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>>.

³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, 1986 I.C.J. Rep. 14. See the criticisms voiced in the Separate Opinions of Judges Kooijmans and Simma in the *Congo* case, *supra* note 2.

effectiveness—that the right of self-defence includes a right to respond in all cases of the unlawful threat or use of force, without abstract distinctions as to the source of the threat (or attack).⁴ This is of course without prejudice to the question what form of response would be permissible in the particular circumstances of individual cases.

Perhaps this is therefore a good moment to stand back and reconsider what it is we want the legal controls on the use of force to do, as part of an international system equipped to deal with present-day problems under present-day conditions. That is certainly the approach taken by the UN Secretary-General's High-Level Panel on Threats, Challenges and Change,⁵ and by the Secretary-General himself in his report "In Larger Freedom".⁶ What they say deserves great respect, and I will touch on it later.

III. NATIONAL INTERESTS AND COMMON INTERESTS

To my mind, the correct way to look at the problem is to map out the entire area against an analytical distinction of a fundamental kind: the distinction between the use of force in the protection of purely national interests, and the use of force in the common interest. The idea is not a new one. It reflects what is already in the UN Charter: in the Preamble to the Charter, it is stated that one of the fundamental aims behind the founding of the Organisation was "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest", and in its coupling with the later reservation in Article 51 that nothing in the Charter "shall impair the inherent right of individual or collective self-defence".

What matters however is not whether the point is new, but the enduring framework it offers for analysing the question before us, a framework consisting of: a set of principles to be accepted and of methods to be used, to ensure that force is either used in legitimate self-defence, or in the common interest, and not for any other purpose.

Why do I lay such stress on this basic proposition? Because the difference between using force in self-interest, and using force in the common interest is a fundamental one, from the conceptual point of view: it conditions the objectives for which force may legitimately be used, and the methods to be followed; and it controls, in an important way, what force may be used.

I will of course take those issues one by one, and ask for your forgiveness in advance if I am not able to give each of them the care and attention it deserves.

Let me start with self-defence, which (as you will have understood) I identify with self-interest. I will not offer you a full exposé of the law of self-defence, as I think it now stands, or of the intolerable strains and distortions to which that branch of international law was subjected during the roughly half-century of the Cold War when the institutional option of the collective use of force was to all intents and purposes non-existent. I want to make instead a few simple points. But I preface them by saying that I hope we are not on the point of allowing our current preoccupations to subject the category of self-defence to another similar period of interpretational torture.

⁴ See, in general, Chatham House, *Principles of International Law on the Use of Force by States in Self-Defence*, ILP WP 05/01 (2005), online: Chatham House <<http://www.chathamhouse.org.uk/pdf/research/ilpForce.doc>>.

⁵ Report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. No. A/59/565 (2 December 2004), online: <<http://www.un.org/secureworld/>>.

⁶ Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. No. A/59/2005 (21 March 2005), online: <<http://www.un.org/largerfreedom/>>.

IV. SELF-DEFENCE

Distortions aside, the law of self-defence is by now well understood. It is controlled by the twin parameters of necessity and proportionality, which between them contain the capacity to adapt themselves to regulate both the circumstances in which and the degree to which force can legitimately be used.⁷ All that is needed, in addition, is to recognise that what necessity and proportionality measure themselves against is the threat faced by the defending State. Self-defence is designed to be the last-resort response available to a State to dispose of a threat against itself, and it arises inherently out of the legal nature of the State as the basic unit of international law. So self-defence is not, and never has been, a legal justification for punishment, or for retaliation, or for menacing deterrence; its deterrent effect lies rather in the political realm, in the combination of the practical and rhetorical willingness to stand up for one's rights, within the limits allowed by law.⁸

And by the same token what the law allows by way of self-defence is what is necessary and sufficient to put paid to the unlawful threat. Some have stumbled over what they see as the paradox in the claim that self-defence following an actual use of force may justify more force than in the original attack. But there is no paradox, once the purpose of having a law of self-defence is taken into account. The calculus, of course, works both ways: self-defence may in some cases find its limits in a response less severe than the original attack.

Nothing in what I have said so far should contain the least cause for surprise. It is inherent in what lawyers are prone to use as their tablet of stone, Article 2(4) of the United Nations Charter, which proscribes the "threat" of force on exactly the same footing as the "use" of force. And as the International Court wisely pointed out in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, if an actual use of force would be illegal, then the threat to use it would be equally illegal.⁹ To which I would add "and *vice versa*", from which it simply has to follow, in my view, that the law of self-defence allows a forcible response to an unlawful threat—so long as the response meets the requirements both of necessity and proportionality. If the International Court said anything different in its Judgment in the *US/Nicaragua* case, then it was wrong.¹⁰

However the "threat" has to be a threat—an unlawful threat in the sense the law recognises. That is not of course to say that every threat has to be instantaneous and self-contained; some threats may extend over time and represent a real menace of regular repetition of previous unlawful behaviour. All that one needs to note for legal purposes is, first, that the burden of justification for a use of force always rests with the State using force (a proposition amply justified by actual international behaviour, not abstract legal reasoning); and second, that the further you move along the spectrum from actual armed attack to immediate concrete threat to continuing future threat, the higher the burden of justification becomes, on a steeply rising curve.

So the "threat" has to be a threat; and it stands to reason that the measures justified to counter it now have also to be proportionate to the actual threat posed now. Anything else would contradict those fundamental parameters of necessity and proportionality. And it is the combination of those two unavoidable requirements that, simply on their own, shorn of the reams that have been written both of assertion and denunciation, show that a doctrine of so-called "pre-emption" can never be accommodated within the law of self-defence. The whole essence of the doctrine of pre-emption is its claim to dispose of a future

⁷ Deriving from the Webster/Ashburton correspondence over the *Caroline Incident* in 1841; for a more nuanced contemporary analysis, see the Chatham House Principles, *supra* note 4.

⁸ The long-established posture of NATO; see the *Nuclear Weapons Advisory Opinion*, *infra* note 9 at para. 48, for the International Court's recognition that "deterrence" is not of itself unlawful.

⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996), [1996] I.C.J. Rep. 226 at para. 47.

¹⁰ See *supra* note 4 and related text.

danger before it becomes an actual threat, and that is fundamentally in conflict with the law of self-defence. To which I might simply add the rider that pre-emption would be subversive of law in a deeper sense still: in the sense that it is inherently self-justifying and by its very nature incapable of external assessment. If the essence of pre-emption is to prevent a threat becoming a threat, how is one to judge whether the threat would in fact have emerged in concrete form? Or for that matter whether it is the force used that has in fact suppressed it? Or indeed to apply the proportionality criterion?

The whole question can be put much more shortly, though, by saying that surely the Secretary-General's High-Level Panel was right to conclude that it is time to stop pretending that self-defence has to be limited to responding to an armed attack that has actually happened; and on the other hand that to go beyond self-defence to pre-emption can only be based on collective authorization, not on the unilateral decision-making of individual States. The Secretary-General endorses these important conclusions, in the following words: "Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognised that this covers an imminent attack as well as one that has already happened. Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security."¹¹

In my modest opinion, that is exactly right.

V. USE OF FORCE IN THE COMMON INTEREST

Which brings me to the second part: the use of force in the common interest. I have put the matter in those terms, rather than using the labels "humanitarian intervention", "war against terrorism", or "weapons of mass destruction", in order to bring out the common thread between those three very different cases, namely that what is being thought to be achieved by the employment of force is the vindication of a common international interest. The threat, in other words, is not to the particular interests of a given State or group of States, but to the well-being of international society at large. Note that the conditioning factor is once again a "threat". Nor should that surprise us if we return to the United Nations Charter and remind ourselves that the first, and also the most wide-ranging, of the trilogy of malfunctions with which the Security Council is empowered to deal is "threats to the peace". While "breaches of the peace" and "acts of aggression" are relatively confined in their operation, it is in 'threats to the peace' that the greatest inbuilt flexibility resides, and especially so when the issue is prevention not cure.

The important point is, however, that all of these threats imperil common interests, not those of individual States as such. As the Secretary-General again pointedly puts it: "As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?"¹² Yes indeed, is my answer—with the sole exception that the Secretary-General uses 'threats to international peace and security' where I have used "common interests". Why he does so is obvious enough; he is moving within the textual framework of the Charter, and specifically the provisions governing the Security Council. We detect here the glimmering of a problem arising out of the way the Charter is written, a question I will return to later on.

Let us rest, however, for the moment with the proposition that the protection of self-interest correlates with self-defence, and the vindication of common interests correlates with force used collectively. This is a fact which has profound consequences, notably for the critical prior issue: who decides? Given the inherent nature of the right of self-defence,

¹¹ *Supra* note 6 at para. 124.

¹² *Ibid.* at para. 125.

it is axiomatic that only the State itself can assess the threat it faces and how to respond. This is, however, emphatically not to say that the State's own assessment is, as it were, final and binding; nor is it to say that, just because it is self-defence, it somehow escapes the possibility of objective judgement after the event, just like any other claim to exercise a right under international law. Nor, by the way, is it to suggest that the right of self-defence is in some sense hermetically separated from action by the Security Council, as one stream of legal scholarship would have it. Article 51 of the Charter—even on its bare wording—is much more complex and subtle than that. It adapts itself readily to a more realistic model of events in which unilateral and collective action mingle and coincide as a crisis develops and is managed, both before and after the triggering event, but under the fundamental rule that it is the Security Council which has the overriding prerogative and can assert it at any time.¹³ It is good to see the Security Council developing an empirical pattern of action along those lines, taking full advantage of the potential in the Charter text.

When we come back, though, to collective action in defence of common interests, we ought to begin by reminding ourselves that there are two levels (or at least two stages) of decision-making involved: the decision whether a threat to a common interest requires action to be taken, followed by the decision what action is appropriate. These correspond, in other words, to the “necessity” and the “proportionality” elements under self-defence. But it is vitally important to register that there are two judgements involved, and that they are distinct. One of the most depressing aspects of the military intervention in Iraq was to see the States concerned acting as if all that mattered was to derive a line of authority that would justify taking action, without regard to the action itself to be taken; as it were, that once they got over the threshold and through the door, all decisions over what force could be used, for what purposes, and with what means, became matters for them and them alone.

VI. THE POWERS OF THE SECURITY COUNCIL

Returning however to the Security Council, as the seat of collective authority, there can be no doubt that the Security Council does possess the authority to decide both on the “What?” as well as the “When?”, and also the “How?”. The references are of course to Articles 39–43 and Article 48 of the Charter. What I would like to bring out instead is where the Council gets this authority from. It is not, as I see it, something deduced in the abstract from the presumed status of the Charter as some sort of constitutional instrument for the world; it is directly conferred upon the Council by the Member States, individually as well as collectively, in other words also by the States against whom (putatively) action might be taken. And its source lies not just in the much-quoted terms of Article 25 (which lays down the binding nature of Council decisions) or in the conferment under Article 24 of the “primary responsibility” for the maintenance of international peace and security, but in the much-neglected following phrase in Article 24, the segment under which the Members “agree that in carrying out its duties under this responsibility *the Security Council acts on their behalf*” (my emphasis).

I come back now to that potential problem with the text of the Charter which I mentioned briefly earlier: “use of force in the common interest” versus “maintenance of international peace and security”. Is the Secretary-General right to imply that any threats to the common interest serious enough to warrant a pre-emptive response will indeed fall within the Security Council's responsibilities for the maintenance of international peace and security? It seems to me that he is right, but only of course on the proviso that that segment of the Security Council's powers which refers to “threats” to international peace and security is recognised

¹³ For a fuller treatment of this theme, see the present author's chapter, “The Authorization Model: Resolution 678 and Its Effects”, in David M. Malone, ed., *The UN Security Council: From the Cold War to the Twenty-First Century* (Boulder, Colorado: Lynne Rienner Publishers, 2004).

as carrying within itself a wide degree of flexibility, and the parallel proviso that it has also to be recognised that the Charter confers on the Security Council a wide and unfettered discretion to decide whether the circumstances of particular cases do amount to a threat of that kind. Moreover, we must be willing to recognise that when the Charter does things that way, it does so consciously and deliberately, as part of the institutional structure of the organization. Of course the Security Council's powers are not arbitrary and unlimited. But it seems to me to mean something, and something significant, when the "threat to international peace and security" power is conferred in terms so general and unlimited and when the Council alone is given the key that unlocks the organisation's coercive powers under Chapter VII. So I have always found myself profoundly sceptical of the clamour that rises up every so often for the decisions of the Security Council to be subject to judicial review, if only for the reason that I simply fail to grasp what benefit it would bring to the operational effectiveness of the United Nations to raise a negative barrier of that kind. I will come back to the point in a more general context at the end.

I conclude with the obvious point: those who pin ultimate faith—and quite rightly—on a collective not a unilateral trigger for the use of force, can't at the same time try to cramp the Council's powers into a restrictive mould. Unless the Council's powers to determine, and then to act upon, threats to international peace and security are accepted to be widely flexible, and in practice untrammelled, then they will not be available when they are needed. The check on the Council's activities must centre chiefly round the wisdom of its decisions, not the extent of its legal powers.

So much, therefore, for what we could call the "positive side", the powers of the Security Council to act. But what if the Council doesn't act? Again, the question is not new; though it has come into dramatic focus over the past two decades. To rephrase the question: can States act in the Council's place?

We can start once again with two obvious points—or at least ones that should be obvious, though it does not always seem so. They are linked together in fairly close harness, so I will take them together. The first is that no State is authorised to enforce the Security Council's decisions for it, and the second is that there is a world of difference between a State claiming the right to act to vindicate the international common interest and a State claiming the power to determine what the international common interest is.

VII. THE SECURITY COUNCIL'S WATCHDOG

The second of these goes back, of course, to the distinction I drew earlier between necessity and proportionality and between determining a threat to the common interest and deciding what action is appropriate to deal with it. It must be plain that no State could conceivably claim to be acting in the Council's stead unless it was acting in pursuit of purposes the Council itself had already laid down. The fact that the Council had already laid down clear purposes and goals was crucial to the legal argument put forward by my own country as the basis for creating the "Safe Havens" in Northern Iraq in 1991, and then elaborated in somewhat less convincing circumstances by the North Atlantic Alliance for Kosovo in 1999. This element of the legal argument has been widely misunderstood in the legal literature, so let me take the opportunity to correct the misunderstanding now. The common assumption has been that what was being put forward represented a devious attempt to give operative force to non-binding Security Council resolutions; or that it was an illegitimate way of constructing the grant by the Council of implied authority to act. Neither of those could be further from the truth—at least so far as the United Kingdom is concerned. What the commentators missed was that this element, one of several in a compound argument, was not being advanced as a positive empowering factor in its own right, but in a purely negative sense; in other words, it was there to make plain that the States in question were precisely not claiming for themselves the right to lay down the purposes of the international community

in whose name they were acting, but were operating in aid of common purposes laid down by the only duly authorised organ, the Security Council.

But a “common purpose” on its own is clearly not enough, and that brings me back to my first point, namely that there is no legal basis under which any State (which for present purposes would include any group of States) can appoint itself the Security Council’s enforcement arm. The Charter could not be clearer: the Security Council is given the sole prerogative to act, and part of its prerogative is to “determine” whether the action required to carry out its decisions for the maintenance of international peace and security is to be taken by some Member States (Article 48 of the Charter). Since we first developed this mode of explicit authorisation by the Council in Resolution 678, on the expulsion of Iraq from Kuwait, it has now come into regular use—another useful example of the latent potential of the Charter being developed in the interests of effective action. It does however surprise me that so little politico-legal attention has been paid to the chaos that would ensue from the establishment of a doctrine that Member States were empowered to take upon themselves the enforcement of Council decisions. If one State or group of States in one crisis, why not another very different State and its friends in some other crisis; how on earth would one distinguish, in a legally valid way?

This combination leaves us however with a deep paradox: the very precondition for the possibility of unilateral action (that it serves purposes laid down by the Security Council) is by the same token implicitly negated (because the Council, having been seized of the situation, manifestly did not mandate any Member State or group to carry out those purposes).

VIII. HUMANITARIAN EMERGENCIES

Does this rule out any possibility for the lawful use of individual or collective force by States where the Security Council has failed to act? If so, how do we account for the cases of Northern Iraq in 1991 and Kosovo in 1999?

I do not myself believe that it does—provided that the conditions and limitations are properly weighed. Article 2(4) of the Charter, for example, the prohibition on the threat or use of force, is so clearly predicated, by its very wording, on the concepts of consistency or inconsistency with the purposes and principles of the United Nations, and infringements of sovereignty and territorial integrity, that I see little virtue in a refusal, as a matter of principle, even to examine whether particular uses of force may, or may not, be compatible with those predicates. And the “Safe Havens” operation in Northern Iraq was unambiguously and credibly based (the Kosovo intervention less convincingly so) on temporary emergency relief of extreme humanitarian need, which certainly bears comparison with those two Charter predicates.

One thing must however be clear. A State or group of States assuming this role incurs an enormous political risk and takes on itself a huge burden of justification. I have suggested elsewhere that a viable legal regime of forcible intervention on humanitarian grounds would have to satisfy five prime criteria, which I called altruism, authority, purposes, means, and consequences.¹⁴ Some aspects of some of them have been touched on above, and there is no time to do more. All that I would say is that, cumulatively, these five criteria erect themselves into a formidable barrier, leading one to think that unilateral action will only be justifiable in a very limited number of extreme cases. That, however, is as I think it should be.

¹⁴ Sir Frank Berman, “Moral versus Legal Imperatives” in Charles Reed & David Ryall, eds., *The Price of Peace* (Cambridge: Cambridge University Press, 2006).

IX. ACCOUNTABILITY

Let me round off this far too rapid *tour d'horizon* with a comment of a different character. The law on the use of force is undoubtedly at an important stage of its development; new doctrines are emerging and old ones being reshaped. For that to happen successfully, chances are going to have to be taken and confidence built. But people will resist doing so if they think they are being asked to sign blank cheques, and in justification they will look back on the not very edifying experience of the last half-century. I have spoken at various places earlier in this lecture about different processes being subject to legal review after the fact or about not being subject to legal review at all. That may have sounded contradictory, but I hope it is not, because I regard legal review as only one part (though obviously an important part) of a broader system of control I would call "accountability". Accountability takes many forms, some legal, some political, some institutional, some financial, and some of them more powerful than others in particular sets of circumstances. But they represent an essential part of what people now rightly regard as their due from the systems that govern them, and the daily news shows how that is just as true in all societies, not simply in the developed democracies. Our system for regulating and controlling the use of force has proved particularly deficient in the creation of effective processes of accountability, whether nationally or at the international institutional level. If we want to meet the emerging challenges, we are going to have to do better.

