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THE INTERNATIONAL PUBLIC LAW AND THE USE OF FORCE BY THE STATES

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Abstract

The paper in front of you presents an attempt to give an answer to the hypothesis – is the use of force in accordance with the public international law and several issues arising from it – if the use of force is allowed then when it receives international legality and legitimacy? If it's legally prohibited, whether such prohibition is general rule without any derogations or there is an exception to that rule? The research was done using the method of contextual analysis of international documents (UN Charter, relevant UN Security Council and the UN General Assembly resolutions, and court cases from the practice of International Court of Justice). Some of the main conclusions are: UN member states are obligated to refrain from threat or use of force against territorial integrity and political independence of another state. The exclusive right of using force is situated only in the Security Council.

Key words: International public law; use of force; United Nations; Security Council; NATO; Kosovo.

INTRODUCTION

Not so many topics of international law cause a greater interest as the use of force. The roots of this discipline (*Ius ad Bellum)* lie on trying to find an answer to the question of when force can legitimately be used in the international arena. In the period before 1945 any use of force, regardless of its duration and purpose, was considered as war. The reason for that was the nonexistence of international legal framework governing the use of force in the mutual relations of states. First attempts for its regulation date back to so-called doctrine of just war that has been developed under the influence of the scripts of Ss. Augustine and Ss. Thomas Aquinas. In sequence this doctrine of just war to be equitable, the use of force had to be approved by a sovereign, to have equitable cause (force is directed against that party which did something wrong). People that were in war or city that was involved in war should have equitable intention, preference of good and evil avoidance. In the beginning of XIX century certain attempts have been made by states in order to provide some justification for the use of force. During this period, the most common argument of justification was use of force in the name of humanitarian intervention**.** The history of nations knows few examples of such use of force which was established as practice of states. As most suitable examples could be listed: the intervention of France in Syria (1840) in order the repression against the population which was undertaken by the Ottomans to be stop; the intervention done by Austria, France, Italy, Prussia, and Russia in order the Christian population of Crete to be protect in the period between 1866 to 1868; interference of the European powers to support the Macedonian revolutionary movement (1903-1908), etc. States have been using new argument since

1921 to justify the use of force titling the same as use of force for protecting own citizens and goods on foreign territory. The force has been used against states which abused its sovereignty and cruelly treated population regardless of whether they are foreigners or its nationals. The third argument for justification of the use of force was using force due to overthrow or retaining certain regime. These three arguments represent the basic of customary law of self-defense. In the beginning of XX century the two Hague Conventions were adopted, therefore the law of war (*Ius ad Bellum*) became subject of interest and regulation. Provisions of these conventions for peaceful settlement of disputes (adopted in 1899 and 1907) oblige the parties to maintain their good behavior and to accept mediation in order to resolve the disputes before using force. After the period of World War I, the mode of using force was also tightened.

As result of it the Covenant of the League of Nations was formed. The same declared that mutual disagreements and disputes between member states must be exposed to arbitration or to the Council of the League before using force which means the war was still considered as illegal. The force that Japan used against Manchuria in 1931 had been justified by the principle - protection of own citizens in Manchuria, but the League of Nations took a different point of view and stressed that the military operations undertaken by Japan were not undertaken in self-defense. The limitation of use of force is reflected throughout the League's attitude towards the intervention undertaken by Italy against Ethiopia in 1935. Italy's argument that force was used in order to protect itself against future attacks planned by Ethiopia was not accepted by the League of Nations. The League's attitude was that Italy was not allowed to decide on its own regarding the use of force in self-defense.

In this period before the entry into force of the UN Charter there are opposing views about the use of force by states. One group of states considered that the use of force on behalf of the right of self-defense is *ius naturale*, absolute right and it should not be limited. Another group of states represented the view that unlimited measures for using force in self-protection should not be undertaken. However, from 1945 onwards, there is continuous effort to limit the unilateral use of force by states.

International law and the use of force in accordance with the UN Charter

The UN Charter which serves as a guide for solving problems related to international peace and security made some progressive development of rules and principles in international law previously established by international conventions, treaties and covenants. The central norm for the use of force contained in Article 2, paragraph 4 is subject to substantive disagreements. It is stated 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". Hence not only the use of force is prohibited but also the threat of using force is prohibited too. The states agree that this prohibition is not only a contractual commitment but also *ius cogens*. There is no general agreement regarding the exact scope of this prohibition. Disagreement concerns whether the last part of Article 2 (4) should be read as a strict prohibition on any kind of use of force against another state, or the use of force is allowed when it's objective is not displacing the government or occupying the state territory, as well whether this type of action is consistent with the objectives of the UN. This controversy has reached its culmination during the use of force by NATO in Kosovo

in 1999. States and scholars expressed substantial disagreements about the legitimacy of the intervention in terms of Article 2 (4). Some of them claimed that a new right of humanitarian intervention has emerged, while others state that NATO's air military campaign was flagrant violation of the UN Charter. The Security Council (further in the text as SC) is not always able to act efficiently because of the veto power of five permanent member states (USA, Great Britain, France, Russian Federation, and People's Republic of China). Hence according to me, Article 2 (4) should be broadly interpreted in a way which allows use of force in order to the maintenance of international peace and public order and the principles and purposes of the UN. Very narrow interpretation of Article 2 (4) was manifested by Israel in Uganda in 1976 at the Entebbe airport in order to rescue Israeli hostages in Air France plane kidnapped by a terrorist organization. The official position of the Israeli Government was that "the force used on foreign territory was performed on behalf of the right of self-defense in order to protect its own citizens." (Grej 2009, 32-33). This argument was not supported in the SC debate except by the US. The US ambassador noted that the violation of Uganda's sovereignty was only temporary. Israeli argument was rejected by Sweden, Japan, and the Soviet Union. All of them, in the most vigorous manner, condemned the Israeli aggression against the sovereignty and territorial integrity of Uganda.

A convincing majority of states that took part in the debate evaluated the action of Israel as a violation of Article 2 (4). Those who did not condemn Israel did not defend the legality of the action in terms of a narrow interpretation of Article 2, too. The first derogation from Article 2 (4) is Article 42 (Chapter VII), also known as remedy, because the exclusive right of using force is situated only in the SC. It is stated that "the Security Council may take action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the UN." This was made in order to exist sovereign who will use force to impose peace and security in that part of the world where peace, stability and security are violated.

The second derogation from Charter is Article 51 (Chapter VII). It is stated that:

> (…) nothing in the Charter impairs the inherent right of individual and collective self-defense in case of committed armed attack against any member state of the UN until the SC has taken necessary measures for restoring international peace and security (…) Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the SC and should not affect in any way the authority and responsibility of the SC in maintaining international peace and security.

Analyzing the Article 51, easily could be recognized the intention of those who created it, emphasizing the collective security system which gets activated in the moment when state submitted a report to the SC that used force in self-defense. From that moment on, the Council is authorized to take all necessary measures against the aggressor. On the other hand, only the provided report by the state to the Council that acts on behalf of the right of self-defense does not necessarily mean that the use of force is legally permissible. (Hadzi-Janev 2009, 20-21). It means that SC is obligated to carry out investigative measures and to make decision about the legal permissibility of the force used in self-defense. Although SC has 'moral' obligation to carry out investigative measures and to

make decision about the legal permissibility of the force used in self-defense, Article 51 does not require from the Council to present its opinion on the legality of every reference to self-defense. The Council does not come out with statements as this very often, in practice. Only a small number of SC resolutions explicitly refer to Article 51. They usually confirm, in the most general sense, the right of state to take action in self-defense.

For example, the SC Resolution 1234 (1999) concerning the conflict in the Democratic Republic of Congo (further in the text as DRC), in general sense, confirmed the right of individual and collective self-defense according to Article 51. It is stated that:

> (…) the Security Council, expressing its concern at all violations of human rights and international humanitarian law in the territory of the DRC, is recalling the inherent right of individual and collective self-defense in accordance with Article 51 of the UN Charter; (…) reaffirms the obligation of all States to respect the territorial integrity, political independence, and national sovereignty of the DRC; (…) demands an immediate halt to the hostilities [and] (…) condemns all massacres carried out on the territory of the DRC and calls for international investigation into all such events. (S/RES/1234 (1999).

As stated above, Articles 42 and 51 grant central role to the SC, in terms of using force in international relations. Article 24 also reaffirms the primary responsibility of the Council for the maintenance of international peace and security. It is stated that: "(…) in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the SC acts on their behalf." (Article 24, para. 1, the UN Charter).

The use of force in self-defense

The right of self-defense causes profound disagreements among states and authors. Number of dilemmas over the scope of the right of self-defense occurs; in particular the issues of (il)legality of preemptive self-defense[1] and protection of own citizens are debated since the creation of UN. The United States are one of the countries that accept this doctrine of preemptive self-defense. Bush's administration made it clear that the force will be used against any potential threat from 'renegade states' before they are able to threaten with using weapons of mass destruction or actual use of weapons of mass destruction. This attitude of Bush's administration was applied in practice, although it goes beyond any acceptable understanding of preemptive self-defense in the international law. On the other hand, except in their own case, the US aren't willing to accept the same practice in relation to other states, such as in the case of Russia's intervention in Georgia in 2002. Namely, after the hostage crisis that Chechen terrorists created, Russia used force in Georgia's territory with justification that acted on behalf of the right of preemptive self-defense, something that the US protested.

[1]Situation when a state, which consider itself as a potential victim, used force against another state (potential enemy) under pretext that prevents any future attack without possessing reasonable evidence. So the use of force is based on assumptions of the potential victim. Under Article 51 of the UN Charter, outlined above in the paper, preemptive self-defense is prohibited because the right of (individual and collective) self-defense is activated only in case of committed armed attack.

Israel also broadly supports and practices the policy of preemptive use of force in self-defense. Australia not only declaratively but also practically supports the policy of preemptive self-defense to deal with new security threats, by participating in the mission "*Freedom for Iraq*". Records on the position of the European Union about preemptive use of force in self-defense can be found in the Treaty of Lisbon (further in the text only as: the Treaty) and other relevant documents. The Treaty clearly defines EU's role in the common foreign and security policy. EU missions undertaken outside of Union's territory are aimed at peace keeping, conflict prevention, and strengthening the international security in the context of the UN Charter. According to Article 21, paragraph 1 of the Treaty:

> (…) the action of the Union on the international scene is guided by principles which inspired its creation, development and expansion, principles which the Union aims to promote worldwide: democracy, rule of law, the universality of human rights and fundamental freedoms, respect for human dignity (…) and respect for the principles of the UN Charter and international law.

According to the Article 42, para. 1,7 of the Treaty:

> (…) Common Security and Defense Policy is an integral part of the common foreign and security policy. It provides the operational capacity of the Union, relying on civilian and military resources. Those resources are used on missions outside the Union in order to maintain peace, prevention of conflicts and strengthening international security in accordance with the principles of UN Charter. Resources are provided by the Member States. (…) If a Member State is victim of an armed attack on its territory, the other Member States are obliged to provide its assistance and support with all resources at their disposal, in accordance with Article 51 of the UN Charter.

This clearly shows that there are not legal norms which would allow collective self-defense in the name of EU. It is clear that EU has no competence in the area of collective security and thus in the so-called doctrine of preemptive use of force in self-defense. I must criticize the position of the US, Israel, Australia, and other states that support the so-called doctrine of preemptive self-defense, listing the reason that it is illegal and contrary to Article 51 of the Charter. It is more a matter of policy of preemptive use of force rather than international legal norm. The right of individual and collective self-defense is activated after committed armed attack. The disagreement among scholars over the scope of self-defense often comes down to the interpretation of Article 51. Those who support a wider right of self-defense, which goes beyond the right to counteract armed attack on national territory, argue that Article 51 actually kept the former common law on self-defense, by pointing out the inherent right of self-defense. Thus, at the time when the Charter was adopted there was a broad right of self-defense which allowed protection of own citizens and preemptive self-defense.

I am supporting the position of the second group of scholars – the meaning of Article 51 is clear: the right of self-defense is activated only in case of occurred armed attack. This right is derogation from the general prohibition on the use of force in Article 2 (4) and therefore it must be interpreted in very narrow terms. By reading Article 51 it appears that several requirements must be cumulatively fulfilled in order the use of force in self-defense be legally permissible:

- Force may be used in self-defence only in relation to an 'armed attack' whether imminent or ongoing. The 'armed attack' may include not only an attack against a state's territory, but also against emanations of the state such as embassies and armed forces. (Wilmshurst 2005, chap.1). It means that the force is permissible only if there is direct act of aggression against state that activates article 51 of the UN Charter;
- The performed act of aggression, or the armed attack, has to be serious. The Charter empowers the Security Council to decide whether it is a serious armed attack in question;
- The right of self-defense activates only in case of committed unlawful act. Member states are not allowed to invoke the right of self-defense in order to implement coercive measures of the UN (for example: it is illegal using force in order to impose peace and security when previously has not been committed an armed attack);
- The exercise of the right of self-defense must comply with the criterion of 'proportionality' and 'necessity'. The force is used to shot back the attacker and it stops at the moment when the threat is removed due to the force has been primarily used;
- The force is legitimate only if there is actual attack or the attack has already been committed. The force is not allowed to be used in order to establish a certain type of justice, conquering territories and carrying out reprisals;
- At the moment when UN Security Council has taken appropriate action against the aggressor, the individual right of self-defense turns into collective right of self-defence.

Measures taken in the exercise of the right of self-defense must be reported immediately to the SC. The Council retains the right and responsibility to authorize collective military action to deal with actual or latent threats. Any military action must be in accordance with the rules of the international humanitarian law that is governing the conduct of hostilities.

The Nicaragua Case

Central role in the debate over the scope of collective self-defense played the judgment of the International Court of Justice (further in the text as: ICJ) in *Nicaragua* case, regarding the legality of the force used in Nicaragua by the USA. At his trial, the Court first examined what is an armed attack: sending armed bands rather than regular military forces may constitute an armed attack if the scale and effects of the operation could be related with an armed attack, rather than ordinary border incident[2]. Supplying the rebels with weapons, logistical, and other support could be equated with threat or use of force, but does not constitute an armed attack (Nicaragua case, para. 195). Secondly, it is clear that a state which is victim of an armed attack must declare that it was really attacked. There is no existence of a rule in the international law that allows another state to exercise the right of collective self-defense on the basis of its own evaluation of the situation. Thirdly, the Court considers that there is no a rule that allows exercise of collective self-defense in absence of request made by the state which considers itself as victim of an armed attack. Hence,

[2]Regarding the central issue – what is an armed attack, ICJ was guided by the *Definition of aggression* (UN General Assembly Resolution 3314 (1974). According to Article 3, paragraph (g), "*the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State qualify as an act of aggression.*"

according to Article 51 of the UN Charter, a state must submit request to the SC informing him that uses the right of individual or collective self-defense. The absence of a report of this kind may be the reason to doubt that the state really acts on behalf of self-defense (*Nicaragua* case, para. 200). In case as this, the state may be convicted and sentenced for illegal use of force. That was the main reason for the ICJ, in its legal reasoning, to found that the US illegally used force on the territory of Nicaragua.

Kosovo: the new role for NATO

The use of force by NATO in Kosovo in 1999 caused substantial disagreements about the legitimacy of the armed intervention in terms of Article 2 (4) and Chapter VII of the UN Charter. NATO launched an air campaign titled Operation *Allied Force*, in March 1999, to halt the humanitarian catastrophe that was unfolding in Kosovo in that period. The operation was launched as a response to the repression of ethnic Albanians, in the region of Kosovo, by the federal government of Yugoslavia under leadership of Slobodan Miloshevich. After the use of force in order the Albanians in Kosovo to be protect, there was some uncertainty in terms of the official statements by NATO, regarding the legal arguments for military actions against former Yugoslavia. The initial authorization of the North Atlantic Council about the airstrikes in January 1999 only referred to the fact that crisis in Kosovo is a threat to peace and security in the region. NATO's strategy was halting the violence and avoiding humanitarian disaster. So the justification for undertaking the Operation titled *Allied Force* was focused on moral and political explanations, rather than on legal arguments. Despite the different views on the justification for the armed intervention, I consider the concrete NATO action as an obvious violation of the UN Charter. My point of view is based on several arguments.

Firstly, unilateral use of force by NATO was violation of Article 2, para. 4, elaborated above in the paper. The use of force was also violation of Article 24 of the UN Charter which gives the SC, not the regional organizations like NATO, OSCE, etc., primary responsibility for the maintenance of international peace and security.

According to Chapter VII, the SC must give explicit authorization of use of force as a measure that shall be taken to maintain or restore international peace and security. In this case, not only the SC did not give mandate for intervention by NATO forces, but also two permanent members, Russia and China did not give approval for NATO operations. The USA. Congress also rejected the proposal made by USA. President Bill Clinton to attack targets in former Yugoslavia explaining that it will be an obvious act of rudeness and also illegal if the bombing continues.

Secondly, there was violation of Chapter VIII: Regional Arrangements. According to the Article 53, para. 1 it is clear that: "(…) the Security Council shall utilize regional arrangements or agencies like NATO, OSCE, etc. for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council". As I have stated above, there was not authorization of that kind. Thirdly and last, there was violation of Article 1 and Article 7 of the North Atlantic (Washington) Treaty: "the Parties undertake, as set forth in the Charter of the UN, to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations. (…) This Treaty does not affect the primary responsibility of the Security Council for the

maintenance of international peace and security". It is noticeable that NATO Operation in Kosovo affected the primary responsibility of the SC because the force was used without his explicit authorization. As never before, the international reaction about the Operation *Allied Force* confirmed the absence of unequivocal norm that allows use of force, not only for prevention, but also in response to significant humanitarian suffering. In terms of future operations like this one, the international community should take in consideration: degree of human rights violation, efforts of exhaustion the peaceful means for resolving the crisis, the level of international support, and participation in the intervention.

CONCLUSION

The exclusive right of using force is situated only in the UN Security Council. Nothing impairs the inherent right of individual and collective self-defense in case of committed armed attack against any member state of the UN until the Security Council takes the necessary measures for restoring international peace and security. The use of force by regional organizations like NATO, OSCE, etc. must be mandated by the UN Security Council. If we agree that the NATO Treaty does have a hard legal core which evens the most dynamic and innovative (re-)interpretation cannot erode, it is NATO's subordination to the principles of the UN Charter.

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