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The Use of Force and International Law: New Threats and Concepts

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Avant-propos

The current English text is based on an (factually and doctrinally) unupdated version, which for reasons beyond my control, I was unable to complete. Nevertheless, I have decided that the text is well documented (Iran, Iraq, North Korea, the Near East, the African Union, non-state actors), and the concepts presented in it (including humanitarian intervention, pre-emptive self-defence, preventive military operation or attribution of responsibility) have not lost their significance and relevance – also in the context of subsequent cases of the use of force in the Middle East, as well as in Ukraine. Not only in the text, but also in the extensive footnotes, the reader will find a lot of information useful in the analysis of contemporary problems. Last but not least, this study retains its didactic value in discussing selected use-of-force issues.

The reason I became interested in the topic of the use of force was and is the dynamics of changes in the international environment, especially with regard to new weapons, threats and warfare methods.

This study examines the rise of regional and internal conflicts, the phenomenon of failed states, and irregular armed groups. Particular attention is devoted to the challenges posed by international terrorism, and to the proliferation of weapons of mass destruction, which has destabilized fragile regional balances and tested the effectiveness of international control regimes.

It also explores the evolution of concepts and practices concerning the use of armed force, situating them within the broader context of shifting geopolitical realities, technological change, and the emergence of new actors and new weapons. It analyses the interpretation of key legal terms, including self-defence, armed attack, and the attribution of responsibility for the actions of non-state actors. The criteria of necessity and proportionality are assessed as well as the interplay between politics and law.

The persistence of tension – between security and legality, legality and legitimacy, sovereignty and human rights, stability and change – underscores the need for renewed reflection on the limits and possibilities of regulating the use of force in the era of global politics.

By engaging with both state practice and scholarly debate, this study argues that international law is undergoing a process of adaptation, though not without contradictions and risks.

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This study does not address the Russian aggression against Ukraine and Georgia, as I have devoted several academic articles to these issues (all available at https://kozminski.academia.edu/JerzyKranz):

- Russian aggression in Ukraine: Demons in the War for "Peace" or Crime without Punishment?, *Archiv des Völkerrechts*, Vol. 60 (2022), n° 3, pp. 243–267

- Russian Crimes in Ukraine: Between Guilt and Responsibility, *Polish Yearbook of International Law*, Vol. XLII (2022), pp. 33-54

- Imperialism, the Highest Stage of Sovereign Democracy: Some Remarks on the Annexation of Crimea by Russia, *Archiv des Völkerrechts*, Vol. 52 (2014), n° 2, pp. 205-221

- Der Kampf um den Frieden und sein besonderer Facilitator. Anmerkungen zur Georgienkrise, *Archiv des Völkerrechts*, Vol. 46 (2008), n° 4, pp. 481–501

- Closely watched Georgia, *Polish Quarterly of International Affairs*, 2008, n° 4, pp. 61-78

- Appeasement - Peace for our time: silva rerum (PRO MEMORIA)

- Appeasement - Peace for our time (mourir pour Dantzig?) (PRO MEMORIA)

Ukraine has the right to self-defence. However, we confront a singular situation: the armed reaction against an aggressor is not prohibited by law, but the self-defense against him is hampered by politics. Despite Russia's aggression, many NATO countries were initially reluctant to provide significant military assistance to Kyiv.

This situation has been slowly changing, but the support continues to be delayed or restricted. As justification for this policy, some NATO countries emphasize their will not to 'escalate' the conflict, i.e. not to provoke Russia and not to become a party to an international armed conflict.

These arguments take on a caricatural dimension. It is defence against the aggressor that is considered escalation (an extra-legal argument), rather than the aggressor's intensifying international crimes and military attacks on civilian targets. NATO seems to be helping Ukraine to fight but not to win, however the concept of "no winner, no loser" is a sophism. This peculiar approach is a political ploy and amounts to a deliberate limitation of Ukraine's right to self-defence. It is Ukraine, not Russia, that needs security guarantees.

After 1990, Western policy towards Russia was regarded somewhat perversely as an investment in European peace. It is thus easy to conclude that armed resistance of Ukraine threatens peace. An appeaser is one who feeds a crocodile, hoping it will eat him last. Will the world be safer in this way?

In turn, the definition of a party to an armed conflict (*Kriegspartei*) appears today to be insufficiently adequate to reality. The view that this status is obtained only after sending one's own troops to an area of armed conflict ('boots on the ground') is a kind of another sophism. The source of this attitude is politics, not law.

The peculiarity of the current situation and the policy of NATO and European Union countries lie in providing significant assistance in the form of sophisticated military equipment, intelligence, providing data to Ukrainian command centers, as well as financing Ukraine's civilian infrastructure. Without this support, Ukraine would have long since lost its independent existence, either through forced incorporation into Russia or the installation of a Russian proxy (little Putin) in Kyiv.

The more the West insists that it does not want to be party to the conflict, the more Putin hopes that NATO will allow the devastation of Ukraine's statehood and its civilian infrastructure, especially thanks to Beijing's undisguised support. It is in China's interest to have the West militarily absorbed by the protracted Russian-

Ukrainian conflict. One wonders whether such a policy strengthens international order and its values.

The reaction to Russian aggression against Ukraine is a good illustration of the dystopian world and international law – a perspective that seems to be overlooked. Against this background, even if the impact of international protest remains limited, the contemporary situation can be viewed more as a crisis of politics than a crisis of law. In fact, we are witnessing and, to some extent, participating in a spectacle of *sui generis* haggle driven by dictators or emotionally disturbed *commis voyageurs*. This is a political spectacle for those with strong nerves.

A Russian attack on the territory of a NATO member state in the form of an open military mass invasion is currently unrealistic, due to limited capabilities. However, fears of Russian escalation are justified for two reasons: first, Russia's already fully engaged in so-called hybrid warfare; and second, the potential for a single provocation, including the use of dirty bombs on NATO territory. In both cases, the intention is to examine the scope and form of NATO's reaction (who will be willing to die for Estonia?) and the consequences of member states' hesitation for the cohesion of NATO's military structure. This may be accompanied by support (including financing) for pacifist movements in some NATO member states, under the banner of necessary war avoidance and deal with Russia (i.e., concessions to its neocolonial and imperial policies).

When it comes to Putin's threats regarding the hypothetical use of nuclear weapons, some arguments should be kept in mind. First, such a threat is effective as long as it has not been carried out. Second, in a nuclear conflict, it is difficult to determine the winner. Third, why should the nuclear weapons of NATO countries have less deterrent power? Western policy allows itself to be hypnotized by Putin's nuclear threats, and yet there must be a rebalancing, which means that Russia and the Russians will be as afraid as the West. Fourth, is possession of nuclear weapons to become a guarantee of impunity? Last but not least, Putin wages its wars at a relatively low cost – the life of a Russian soldier is cheap.

Finally, force is the only remedy to the expected threat, i.e. a cohesive military alliance and cooperation of the arms industries and, consequently, the conviction on the aggressor's side that the West (especially Europe) is ready for a well-conceived and strong reaction (not necessarily by the use of nuclear weapons).

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This study does not address the military operations in Iran (2025-2026) and in Gaza Strife (2023-2026). However, the concepts and notions presented here are sufficient for a broader assessment and analysis. At this moment, we offer only some synthetic remarks.

The massacre perpetrated by Hamas on October 7, 2023, is a grave burden and a political mistake for the Iranian authorities. It has highly negative consequences for the entire Middle East region. The only "positive" effect of this bloodbath was a deterioration of Israel's international image, but there are no positives for the Palestinian cause. Hamas took two million Palestinians hostage during an inevitable battle in a highly urbanized area of Gaza. Previous practices of hijacking planes or the intifada proved similarly ineffective.

The massacre of October 7, 2023, demonstrates that challenging Israel's lack of self-defence is unconvincing. It is, in fact, one of the few examples where we can acknowledge that:

> "The *jus ad bellum* is so complex, uncertain and contested as it applies to Israel and Gaza that it actually has very little useful to say. (...) There are some problems for which the law does not have solutions. (...) Israel/Gaza is one of them when it comes to the *jus ad bellum*. International law does have solutions when it comes to the *jus in bello*."[1]

Contrary to appearances, the Palestinian cause does not seem to enjoy much sympathy from regional Arab or Islamic states (the Jordanian 'Black September' of 1973, the closed border between the Gaza Strip and Egypt), a situation further exacerbated by tensions between the authorities in Gaza and the West Bank. However, the policy of Israeli authorities, particularly Netanyahu's government, regarding the idea of a Palestinian state remains ambiguous at best. A major question mark currently hangs over the future fate of the Gaza Strip and the Palestinian cause.

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Regarding Iran, the US and Israeli military operations (2025 and 2026) are a consequence of the growing threats posed by Tehran. As a major sponsor of international terrorism, Iran's theological dictatorship has been conducting military operations against Israel for many years (terrorist attacks and rocket fire) through its proxies – Hezbollah in Lebanon and Hamas in the Gaza Strip. Since the late 1990s, Tehran has been developing its nuclear program, clearly not only for peaceful purposes, and has used various methods to evade scrutiny by the International Atomic Energy Agency (IAEA). For years, it has also been developing large-scale production of drones and ballistic missiles. These facts are beyond dispute.

A contemporary assessment of the use of force must take into account the accompanying premises and objectives, including, in particular, new forms of threats and weapons. Given the growing threat from Iran not only to Israel but also to the entire region (including US military bases), it seems rational to slow or stop this process. This requires careful and analytical consideration of the effects of the military operation and of the planned objectives after its completion.

The justification for US-Israeli military operations in 2025-2026 is based on self-defence as a response to many years of ongoing military operations against Israel.

This is evidenced by some commentaries.

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[1] M. Milanović, *Does Israel Have the Right to Defend Itself*? (November 14, 2023) – https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2

"The significant links between Iran and its proxies in the war launched against Israel on October 7, 2023, the past rounds of direct clashes between Iran against Israel, which were closely connected to the proxy war, and Iran's continuing threats to strike Israel again, support the proposition that Israel and Iran have been engaged for an extended period in an ongoing armed conflict".[2]

"The implicit resort to an <illegal but legitimate> line of reasoning does not suggest a wholesale repudiation of international law, but rather reveals a willingness to read *jus ad bellum* norms flexibly and alongside other important international law norms which constitute part of the peace and security architecture of the Charter: human rights, non-intervention, prohibition of the threat of use of force, non-proliferation of nuclear weapons, ban of support for terrorism etc. (...) The joint move toward a return to <illegal but legitimate> justification and the possible reemergence of the <right of self-preservation> around Operation Epic Fury presents a grave challenge to the rules-based international order (RBIO). This challenge, however, does not mean that the international legal order has been irreparably broken. (...) It would be desirable if the current (existential) crisis of the RBIO leads to some introspection in the international legal community and to calls for a feasible and pragmatic re-evaluation of international law norms and institutions."[3]

This perspective is not widely accepted[4]; the justification for the US position is also criticized.[5] However, there is a certain degree of restraint on the part of some countries in condemning this military operation. From Iran's perspective, its military

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[2] A. Cohen, Y. Shany, *A New War or a New Stage in an Ongoing War – Observations on June 13 Israeli Attack against Iran* (June 15, 2025) – https://www.justsecurity.org/114641/israel-iran-un-charter-jus-ad-bellum/

[3] A. Cohen, Y. Shany, *The International Community at a Crossroads Over Iran: The reawakening of "illegal but legitimate" or the "law of self-preservation"*? (March 6, 2026) – https://www.justsecurity.org/133292/international-law-crossroads/

[4] For critical opinions see T. Dannenbaum, R. Hamilton, *Aggression, Plain and Simple: A Response to Shany and Cohen on the Attack on Iran* (March 9, 2026) – https://www.justsecurity.org/133417/aggression-iran-response-shany-cohen/ ; B. Finucane, *An Unserious Justification for an Unnecessary War: Assessing the U.S. "Article 51" Letter to U.N. on Iran War* (March 18, 2026) – https://www.justsecurity.org/134290/us-article-51-letter-united-nations/; M. Milanović, *The American-Israeli Strikes on Iran are (Again) Manifestly Illegal* (February 28, 2026) – https://www.ejiltalk.org/the-american-israeli-strikes-on-iran-are-again-manifestly-illegal/

[5] E. Lieblich, *Double Preemption, Imminence, and the U.S. Attack Against Iran* (March 3, 2026) – https://www.justsecurity.org/133093/preemption-imminence-rubio-iran/ ; see also Letter dated 10 March 2026 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council – https://www.justsecurity.org/wp-content/uploads/2026/03/US-Article-51-letter-Iran-11-March-2026.pdf ; *UN Security Council Members Limit Criticism of U.S. over Iran* (March 2, 2026) – https://www.crisisgroup.org/anb/middle-east-north-africa/iran-united-states-israelpalestine-global/un-security-council-members-limit-criticism-us-over-iran?utm_source=mailchimp&utm_medium=email

response in the form of armed attacks on US-aligned Gulf states (using satellite intelligence data from Russia and China) is legally questionable, unwise and may prove detrimental to Tehran in the long run.

That being, what may be open to debate, is the timing, military and political preparation, and consequently the effectiveness of Israeli-American operation. Donald Trump's policy goals toward Ukraine, Gaza, and Iran are only partially clear and their results seem miscalculated. There is some evidence to suggest that we are dealing with political amateurism.

This view does not automatically call into question the grounds for and the necessity of curbing the Iranian dictatorship’s arms build-up and the threat it poses to regional security. The problem, however, is how to achieve this goal. For now, it is difficult to speak of success.

Pro memoria I

« Et s'il prend aujourd'hui fantaisie au maître de toutes les Allemagnes de mettre la main sur Dantzig, qui l'en empêchera ? De là à conclure à la mauvaise volonté unilatérale du Reich et à la nécessité évidente de se battre pour la ville dite libre, il n'y a qu'un pas, allégrement franchi par beaucoup de braves gens. (…) Dans ces conditions, le rattachement au Reich n'était guère qu'une formalité, assurément désagréable, mais nullement catastrophique. Et surtout il ne pouvait être question d'en faire un casus belli. (…) Il ne s'agit pas du tout de fléchir devant les fantaisies conquérantes de M. Hitler, mais je le dis tout net : flanquer la guerre en Europe à cause de Dantzig, c'est y aller un peu fort, et les paysans français n'ont aucune envie de « mourir pour les Poldèves ». (…) C'est Paris et c'est Londres qui doivent avoir la parole d'abord. (…) Combattre aux côtés de nos amis Polonais, pour la défense commune de nos territoires, de nos biens, de nos libertés, c'est une perspective qu'on peut courageusement envisager, si elle doit contribuer au maintien de la paix. Mais mourir pour Dantzig. Non ! »[6]

Marcel Déat, *Mourir pour Dantzig*? (May 4, 1939)

Pro memoria II

Я другой такой страны не знаю,
Где так вольно дышит человек

[*I know of no other country*
Where a man can breathe so freely]

"Wide Is My Motherland" is a Soviet patriotic song from 1936

[6] M. Déat, *Mourir pour Dantzig*?, L'Œuvre, 4 May 1939: "And if today the master of all the Germanies takes it into his head to lay his hands on Danzig, who will prevent him? From there to conclude to the unilateral ill will of the Reich and the obvious need to fight for the so-called free city, there is only one step, cheerfully taken by many brave people. (…) Moreover, the Nazis had long been the masters of the city. (…) Under these conditions, joining the Reich was hardly more than a formality, certainly unpleasant, but in no way catastrophic. And above all there could be no question of making it a *casus belli*. (…) It is not at all a question of yielding to the conquering fantasies of Mr. Hitler, but I say it quite clearly: to flank the war in Europe because of Danzig is to go a bit too far, and the French peasants have no desire to 'die for the Poldavians'. [*pointless sacrifice for a distant or obscure cause*] (…) Paris and London must speak first. (…) Fighting alongside our Polish friends, for the common defense of our territories, our property, our freedoms, is a prospect that we can courageously consider, if it is to contribute to the maintenance of peace. But to die for Danzig. Nope!"

Introduction

1. The prohibition of the use of force, enshrined in the Charter of the United Nations in 1945, remains a cornerstone of international law. Yet the post-Cold War era and the early twenty-first century have witnessed profound transformations in the nature of threats to international peace and security, raising questions about the adequacy of this legal framework.

Si vis pacem, para bellum – if this old maxim has not lost its relevance, then it requires clarification. In each epoch the concepts of peace and war are different, as are the threats to international security. Peace does not just mean no war. Peace should not be confused with cemetery peace, nor be equated with appeasement. War is a function of our understanding of peace.

> "My good friends, for the second time in our history, a British Prime Minister has returned from Germany bringing peace with honour. I believe it is peace for our time... Go home and get a nice quiet sleep. [7]

The threat has long been associated with classical war – for centuries a legal instrument. War, as commonly understood, has a negative connotation, so it's better to use the term armed conflict. However, the use of force is not, by definition, criminal in nature. Depending on the circumstances, goals and author, it can be just (*iusta causa, recta intentio, auctoritas principi*).

The use of force[8] is not an end in itself – it can be sometimes the only means of defence but also an instrument of crime. There are cases of wars resulting from

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[7] "The settlement of the Czechoslovak problem which has now been achieved is, in my view, only the prelude to a larger settlement in which all Europe may find peace" – Neville Chamberlain (September 30, 1938).

[8] For example Ch. Gray, *International Law and the Use of Force,* Oxford 2018; T. Ruys, O. Corten, A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach*, Oxford 2018; *The Oxford Handbook of the Use of Force in International Law* (ed. M. Weller), Oxford 2015; J. Yoo, *Point of Attack: Preventive War, International Law, and Global Welfare,* New York 2014; L. Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror,* Oxford 2010; T. Ruys, *'Armed Attack' and Article 51 of the UN Charter,* Cambridge 2010; R. Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix,* Basel – Bruxelles 2009; J. Green, *The International Court of Justice and Self-Defence in International Law,* Oxford-Portland 2009; K. Chainoglou, *Reconceptualizing the Law of Self-defence,* Athens – Bruxelles 2008; O. Corten, *Le droit contre la guerre. L'interdiction du recours à la force en droit international contemporain,* Paris 2008; M.E. O'Connell, *The Power and Purpose of International Law: Insights from the Theory & Practice of Enforcement,* Oxford 2008; N. Stürchler, *The Threat of Force in International Law,* Cambridge 2007; C. Stelter, *Gewaltanwendung unter und neben der UN-Charta,* Berlin 2007; C. Greenwood, *Essays on War in International Law,* London 2006; T. Gazzini, *The Changing Rules on the Use of Force in International Law,* Manchester 2006; Y. Dinstein, *War, Aggression and Self- Defence,* Cambridge 2005; S.C. Neff, *War and the Law of Nations. A General History,* Cambridge 2005; N. Blokker, N. Schrijver (eds), *The Security Council and the Use of Force, Theory and Reality – A Need for Change* ?, Leiden–Boston 2005; U.K. Preuß, *Krieg, Verbrechen, Blasphemie. Gedanken aus dem alten Europa,* Berlin 2003; T.M. Franck, *Recourse to Force. State Action against Threats and Armed Attacks,* Cambridge 2002; *The Responsibility to Protect. Research, Bibliography, Background* (Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty), International Development Research Center, December 2001; A. Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter,* Athènes 2000; G. Nolte, *Eingreifen auf Einladung,* Berlin 1999; A.M. Weisburd, *Use of Force: The Practice of States since World*

a misconceived conception of peace. International law sometimes needs armed force to maintain its credibility and values. The force continues to be the ultimate instrument of ensuring peace and security. Political purpose and political will are decisive and the use (or not use) of armed force is a political act, which may or may not have legal basis.

With new weapons and threats, the world has become less safe, or rather, less secure. Can this be prevented and how? We are referring here to the terrorist attack on the United States on 11 September 2001, the conflict in the former Yugoslavia (1999) in connection with the mass violation of fundamental human rights, the military operation in Afghanistan (2001), aggression against Ukraine (2014-2022), as well as the nuclear programs of Iraq, Iran and North Korea. Cyberattacks, hybrid warfare and drones are also new phenomena.

These threats have an impact on the evolution of international law and policy, in particular on the concept of force and self-defence, as well as the definition of armed conflict and the parties to such a conflict. For this reason it is necessary to consider whether the system created after 1945 corresponds to current circumstances and to what extent the basic concepts of the UN Charter are evolving.

2. In 1945, a revolutionary rule was formulated in the Charter of the United Nations: "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" – Art. 2(4).

According to the Charter, the use of armed force is not completely prohibited, as it is legal in self-defence and with the consent of the Security Council. The greatest controversy concerns the category of formally illegal actions (lack of a Security Council decision, lack of grounds for self-defence), which creates serious legal and political dilemmas.

The international legal regime relies on states and international organizations and, with their participation, affects the rights and obligations of individuals or groups. Its scope is not always clear and precise and, consequently, the analyses concerning the legality and justification of the use of force are neither easy nor

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War II, Pennsylvania 1999; C. Antonopoulos, *The Unilateral Use of Force by States in International Law,* Athens 1997; S.A. Alexandrov, *Self-Defence Against the Use of Force in International Law,* The Hague 1996; C. Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater*, Berlin 1995; M.S. McDougal, F.P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order,* New Haven and Dordrecht 1994; A.C. Arend, R.J. Beck, *International Law and the Use of Force. Beyond the UN Charter Paradigm,* London–New York 1993; L.F. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts,* New York 1993; L. Henkin and Others, *Right v. Might: International Law and the Use of Force,* New York 1991; R. Sadurska, *Threats of Force,* "American Journal of International Law" (AJIL), 1988, Vol. 82; *Die Durchsetzung völkerrechtlicher Verpflichtungen /The Enforcement of* International Obligations, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht" (ZaöRV), 1987, no. 1; A. Cassese (ed.), *The Current Legal Regulation of the Use of Force,* Dordrecht 1986; J. Zourek, *L'interdiction de l'emploi de la force en droit international,* Leyden 1974; D.W. Bowett, *Reprisals Involving Recourse to Armed Force,* AJIL, 1972, Vol. 66; F. Feliciano, *Law and Minimum World Public Order,* Yale 1961; D.W. Bowett, *Self- Defence in International Law,* New York 1958.

obvious. There is no institution of global police, court and prosecutor, or central government and parliament. The international community lacks a central authority for resolving legality disputes. The Security Council is a political body, and international courts can hardly be considered the final arbitrator (a situation close to the political question doctrine).

Today the use of armed force may be legal and politically and morally justified; illegal but justified; legal but unjustified. However, another important aspect should be noted, namely cases of variously justified refraining from using it (non-use). Passivity may take the form of refusing to participate in collective self-defense, tolerating international crimes committed by the state against its own population (inhumane non-intervention) or the state's inability (military or political) to defend itself.

A feature of the modern era is that the state justifies its actions within the framework of the international order, whilst other actors assess those actions on the basis of the rules and principles of that order. However, this political and legal assessment of the use of force is often not only unilateral but also dispersed and politically selective. The role of international courts in this respect is limited. This situation will not change quickly, although after the First and especially after the World War II, progress in the international regulation of the use of force (*jus ad bellum, jus in bello*) has been significant.

At this point, the *dictum* of Prussian General Carl von Clausewitz comes to mind: War is the continuation of policy with other means.[9] It remains relevant today in the sense that the use of force, going beyond the limits of diplomacy, is admissible for the achievement of political goals within the framework defined by international law. Today, the legal framework is more precise than in previous eras, which, however, does not mean the absence of difficulties in defining force (armed attack, self-defence) and assessing its political premises and objectives.

International law sometimes requires armed force to maintain its credibility and values (*vim vi repellere licet*). However due to factual and political reasons or due to the lack of an appropriate legal basis the use of force is not always possible.

Cicero's dictum: *Silent enim leges inter arma* (in times of war, the law falls silent)[10] is sometimes hastily quoted as a denial of the rule of law in relation to armed conflict. However, Cicero limits this maxim to situations of self-defence, including consent for the legal killing of an attacker (ambusher). Contemporary international law recognises the lawful use of force in certain circumstances, even if these are controversial. The UN Charter permits self-defence (Art. 51), whilst international law accepts military necessity and even collateral damage.[11]

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[9] "Der Krieg ist nichts als eine Fortsetzung des politischen Verkehrs mit Einmischung anderer Mittel", C. von Clausewitz, *Vom Kriege.* 1832, Book I, Cap. 1, No. 24.

[10] M. Tvllii Ciceronis Pro T. Annio Milone Oratio.

[11] Pursuant to Art. 15(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950): "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation."

Chapter 1. New challenges and threats

Krieg entsteht aus dem Frieden. Und vielleicht entsteht er, weil wir falsche Vorstellungen davon haben, was Friede bedeutet.

[War arises from peace. And perhaps it arises because we have false ideas about what peace means.]

Otfried Höffe

1.1. A characteristic feature of the period after 1945 is the growing number of regional conflicts, which to some extent result from the competition between great powers and are controlled by them, but are often conducted by proxies. In addition, internal armed conflicts are intensifying.

The causes of this situation are attempts at ideological expansion, dictatorships violating human rights or the weakness of the state. These phenomena have both internal and external sources. In some regions, they encourage armed conflicts, leads to the collapse of state authorities (failed or failing states)[12] and political chaos, which facilitates the domination of fundamentalist or terrorist movements. Stabilizing such states is an extremely difficult task. In many countries the democracy does not work as a system, and universal suffrage does not guarantee stability in structures divided ethnically, religiously and/or economically[13]. In such cases, international peace and security are threatened.

The source of the threat is not only an external armed attack or a dictatorship violating human rights, but also the internal weakness (political, economic, and social) of a state. This encourages armed conflict and leads to the collapse of state authorities and political chaos, so-called failed states. Since the early 1990s, the UN Security Council, acting under Chapter VII, has repeatedly recognized that such conflicts threaten international security.

1.2. The growing wave of international terrorism is accompanied by new goals and forms[14]. New and of significant importance are evidence problems related to the arrest of suspected terrorists and the subsequent guarantees of justice.

The essence of a classic terrorist act is the tripartite relationship between the perpetrator (attacker), the victim and the target. The perpetrator is a person (group) who is not part of the state apparatus. The victim is only a tool to achieve a political goal, mainly a change forced (by violence or threat) on the public authorities that is beneficial to the group on whose behalf the terrorists are acting.

Modern terrorism is characterized by the lack of a target group on whose behalf it fights. It is not interested in solving the problems of a region or country but rather

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[12] R. Geiss, *"Failed States". Die normative Erfassung gescheiterter Staaten,* Berlin 2005; D. Thürer, *The "Failed State" and International Law,* "International Review of the Red Cross", 1989, no. 836, pp. 731–761.

[13] More details: P. Collier, Wars, *Guns and Votes. Democracy in Dangerous Places,* New York 2009; P. Chabal, J.-P. Daloz, *Africa Works. Disorder as Political Instrument,* 1999.

[14] See *infra* 3.2.4.

seeks to change regional or world policy by fighting Western civilization. Its goal is pure destruction. Moreover, the new terrorism inevitably leads to attempts to lower the threshold of reaction to the terrorist activities.

Its object today is usually not representatives of the state, but mainly civilians (hijacking planes and ships, attacks on tourists and athletes, suicide attacks in public places). Although the territorial scope of these actions has expanded to targets outside the area of a conflict (for example the USA, United Kingdom or Spain), most terrorist attacks take place outside European countries.

The globalization of political and economic phenomena, the dependence on technology, and the expansion (positive and negative) of Western cultural patterns have consequences that sometimes lead to fundamentalist defensive reactions and extra-European totalitarianism[15]. Related to this, contemporary terrorism originates mainly from the Islamic world[16], where it is supported by states and non-state actors aiming to create or strengthen orthodox religious states. However, not every cause is sacred just because someone is willing to give his life for it.

It is not true that international terrorism grows mainly out of poverty or immediate injustice. Its sources are rather cultural and economic frustrations, lack of democracy, unequal distribution of income and squandering of international aid by many developing countries (corrupt ruling elites are interested in enriching themselves and maintaining a low level of education)[17]. These are problems of undemocratic societies and those reluctant to modernize. Finally, some countries (for example, Russia) use the fight against terrorism for domestic political purposes and in this way justify crimes against their citizens (e.g. in Chechnya).

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[15] R. Kapuściński, *Dethroning of Europe,* "Gazeta Wyborcza" from August 6, 2005, p. 15: "we are experiencing the third phase of decolonization. The first came in the middle of the 20th century. It was political decolonization. (...) The second phase consisted of an attempt at economic decolonization. It ended in failure. (...) And at the end of the 20th century we entered the third phase - the phase of cultural decolonization consisting of the Third World countries searching for and finding their own identity, different from ours, their own roots. This phase is particularly rapid and painful for Europe, which for the last 500 years has ruled the world not only in the political and economic sense, but also culturally, morally and legally. (...) The fact that it has come precisely now is a result of the enormous demographic development of the world and the accompanying increasing social mobility. Thanks to the extraordinary technological progress, communication in the world has become easier and more accessible. Millions of people have begun to move from continent to continent. (...) This is an awakening in the awareness of wrongs not one's own, but of generations. Wrongs resulting from the era of slavery, from the era of colonial conquest. It is also a sense that centuries of discrimination give a moral right to reclaim".

[16] "[H]isterial irritability that is revealed in relations with the outside world disappears without a trace when it comes to internal conflicts in the Arab world. When Arab Muslims kill Muslims in Iraq, Chad, Darfur or on Afghan soil, the lame dog does not care, and no fatwa is issued", H.M. Enzensberger, *On the radical loser,* "Gazeta Wyborcza" from August 12-13, 2006.

[17] See on the example of the Cairo Institute for Human Rights Studies. *From Exporting Terrorism to Exporting Repression. Human Rights in the Arab Region.* Annual Report 2008; UNDP. *Arab Human Development Report,* 2005; *Democracy and Human Development in the Broader Middle East: A Transatlantic Strategy for Partnership,* "Istanbul Paper" (2004) – www.cer.org.uk/articles/gmf_midd_east_21june04.html.

Terrorism leads to restrictions on civil rights[18]. A significant factor is the evidentiary difficulties associated with the arrest of terrorism suspects, and consequently, their limited access to court, which stems from the protection of intelligence information[19]. As a result, there is a growing tension in democratic societies between recognized and lasting values (freedom, human rights) and state security. We must avoid the false dilemma of values or security and reconcile both of these elements.

1.3. Autocratic states, striving to build a large army, make significant purchases of weapons. One of the main tasks of the international community is to prevent a situation in which nuclear weapons end up in the hands of irresponsible, usually dictatorial states, as well as terrorist groups[20].

Several questions must be answered: whether to allow Iran, North Korea or Iraq to possess nuclear weapons and ballistic missiles, for how long not to antagonize such countries, how much trust should be given to the Iranian or North Korean authorities who disregard and violate the Security Council resolutions, for how long to apply incentives and sanctions, and when to use armed force?[21]

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[18] *In the Name of Security. Counterterrorism Laws Worldwide Since September 11.* Human Rights Watch 2012; A.N. Guiora, *Due Process and Counterterrorism,* Emory International Law Review, 2012, Vol. 26 – http://ssrn.com/abstract=1680009 ; A.N. Guiora, *Relearning Lessons of History:* Miranda *and Counterterrorism,* "Louisiana Law Review", 2011, Vol. 71, pp. 1-28; A. Peters, *Transparency, Secrecy, and Security: Liaisons Dangereuses,* (in:) J. Iliopoulos-Strangas, O. Diggelmann, H. Bauer (eds), *Rule of Law, Freedom and Security in Europe,* Baden-Baden 2010, pp. 183–243; Ch. Michaelsen, *The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German–Australian Comparison,* City University of Hong Kong Law Review, July 2010, Vol. 2:1, pp. 19–43; T. Landman, *Imminence and Proportionality: The US and UK Responses to Global Terrorism,* "California Western International Law Journal", 2007, Vol. 38, No. 1, pp. 76–106; A. Dreher, M. Gassebner, L.- HR Siemers, *Does Terror Threaten Human Rights? Evidence from Panel Data,* CESIFO Working Paper, 2007, no. 1935; *J.D, Zelman, Recent Developments in International Law: Anti-Terrorism Legislation – Part One: An Overview,* "Journal of Transnational Law & Policy", 2001, Vol. 11, No. 1; idem, *Recent Developments in International Law: Anti-Terrorism Legislation–Part Two: The Impact and Consequences,* „Journal of Transnational Law & Policy", 2002, Vol. 11, no. 2.

[19] E.g., *Hamdan v. Rumsfeld, Secretary of Defence, et al.,* Supreme Court of the United States, June 29, 2006 – see also *Military Commissions Act of 2006*; European Court of Justice. Affair T-85/09, *Yassin Abdullah Kadi contre Commission européenne,* arrêt du 30 septembre 2010, *Kadi & Al Barakaat v. Council of the EU & EC Commission,* Judgment of the Court, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P; House of Lords 2008–09. *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action,* [2009] UKHL 28, 10 June 2009; ECHR. *Saadi v. Italy* (No. 37201/06), Judgment of 28 February 2008.

[20] Communiqué of the Washington Nuclear Security Summit, April 13, 2010: "Nuclear terrorism is one of the most challenging threats to international security, and strong nuclear security measures are the most effective means to prevent terrorists, criminals, or other unauthorized actors from acquiring nuclear materials"; see also DP Fidler, *International Convention for the Suppression of Acts of Nuclear Terrorism Enters into Force,* "ASIL Insight", July 5, 2007; P. Cornish, *The CBRN System. Assessing the Threat of Terrorist Use of Chemical, Biological, Radiological and Nuclear Weapons in the United Kingdom. An International Security Program Report,* The Royal Institute of International Affairs, February 2007.

[21] See *infra* 2.3.4.

International law does not prohibit the possession of nuclear weapons, although it does establish control regimes. Not every state needs such weapons and not every state can afford to finance them. However, seeking to limit or prohibit the development of a nuclear program for military purposes does not constitute an assault on the state and its sovereignty. Moreover, it may express concern for the security of other countries.

Taking into account the international legal obligations of states, for example those contained in the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), non-nuclear states renounce the development of nuclear technology for military purposes, which does not, however, prevent a nuclear program for civilian purposes, but under the control of the International Atomic Energy Agency (IAEA). The Comprehensive Test Ban Treaty of 1996 (CTBT) has not entered into force.[22]

When some fundamentalist states acquire these weapons, they will become threefold dangerous - it will be easier for them to threaten or use force, they will not hesitate to trade technologies and these weapons, and it will be more difficult to confront them due to the risk of retaliation.

If Iraq, Iran or Syria acquire weapons of mass destruction – with the passive attitude of the international community – other countries will have no qualms about developing their own nuclear programs. This is destroying the current balance of power, especially in the Near and Middle East[23].

An attack using weapons of mass destruction causes destruction on a large scale, it is difficult to anticipate, and it does not have to be preceded by a large military operation. The export and the transfer of nuclear technology are becoming an increasingly serious threat, while they bring huge profits and the exporter often has no influence on the use of the weapons. Dual-use products and the difficulties in separating the civilian and military cycles in nuclear programs make the problem of access to nuclear weapons very complicated. A country that has mastered nuclear

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[22] For example, India, Pakistan and North Korea have not signed it, and the US, China, Iran, Israel, Indonesia and Egypt have not ratified it. See also *Fissile Material Cutoff Treaty* – www.nti.org/e_research/cnwm/ending/fmct.asp.

[23] *Nuclear Programs in the Middle East: In the Shadow of Iran,* International Institute for Strategic Studies, London 2008; *US steps up arms sales this Persian Gulf allies,* The Washington Post, January 31, 2010; *Spread of Nuclear Capability Is Feared*, "The Washington Post", May 12, *2008 (*A01): "At least 40 developing countries from the Persian Gulf region to Latin America have recently advised UN officials here to signal interest in starting nuclear power programs, a trend that concerned proliferation experts say could provide the building blocks of nuclear arsenals in some of those nations. (…) [T]he investment in nuclear power appears to be linked partly to concerns about a future regional arms race stocked in part by Iran's alleged interest in such an arsenal. (…) The big question is: At what point do you reach the nuclear tipping point, when enough countries go nuclear that others decide they must do so, too? (…) Egypt's ambassador to the United States (…) added a prediction: 'Without a comprehensive nuclear accord, you will have a proliferation problem in the Middle East, and it will be even worse in 10 years than it is today'."

Gulf Cooperation Council: "Gulf Arab countries want to acquire nuclear energy capability and have ordered a study on a possible joint atomic program,' a statement read on Sunday at the close of a two-day Gulf Cooperation Council summit said. 'The countries of the region have the right to nuclear energy technology for peaceful purposes,' said Abdul-Rahman al- Attiya, secretary-general of the Gulf Cooperation Council" – "Arab Times" (Kuwait), 14 December 2006.

knowledge and technology (for civilian purposes) is only one step away from starting a military program, and this is a step of a political rather than technical nature.

How to prevent the spread of weapons of mass destruction? How to ensure the effectiveness of international control? What to do when – within the framework of treaty control regimes – a state obstructs this control, in particular by not disclosing all elements of its nuclear program and does not want to bind itself to the International Atomic Energy Agency with additional protocols?

It seems that the current system of control and prevention of the proliferation of these weapons (including the production of uranium and plutonium) does not sufficiently meet the hopes placed in it[24]. Thus, international law is facing new challenges. The question of whether and under what conditions of international control each state can pursue a nuclear program for civilian purposes, without the risk that it will transform into a nuclear program for military purposes, is becoming increasingly urgent[25].

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[24] O.F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It,* "Michigan Journal of International Law", 2007, Vol. 28, pp. 337–430 ("The nuclear non-proliferation regime worked well for its first 25 years, converting the spread of nuclear weapons from an act of national pride into an act of international outlawry. Today, however, the nuclear non-proliferation regime is on the verge of collapse, p. 429); JI Garvey, *A New Architecture for the Non-Proliferation of Nuclear Weapons,* Journal of Conflict & Security Law, 2007, Vol. 12, pp. 339–357.

"Mohamed Elbaradei, Director General of the IAEA, said the (…) Agency's legal authority was severely limited in some countries because many States had not concluded the required agreements with it. Thus, in more than 90 States, it either had no verification authority at all, or its authority was inadequate and it could not verify whether a country was engaged in clandestine nuclear activities. Moreover, the verification mandate centered on nuclear material. If IAEA was expected to pursue possible weaponization activities, it must be given the corresponding legal authority, he emphasized. (…) He went on to emphasize that the Agency itself must be strengthened. Given its dilapidated infrastructure and lack of state-of-the-art technology, which was key to modern-day verification, it would be unable to fulfill its mission at current funding levels" – Security Council, 24 September 2009 (SC/9746) – http://www.un.org/News/Press/docs/2009/sc9746.doc.htm

A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change (2004): "109. The second longer-term, concern is about the erosion and possible collapse of the whole Treaty regime. Almost 60 States currently operate or are constructing nuclear power or research reactors, and at least 40 possess the industrial and scientific infrastructure which would enable them, if they chose, to build nuclear weapons at relatively short notice if the legal and normative constraints of the Treaty regime no longer apply. (…) 111. "But the nuclear non-proliferation regime is now at risk because of lack of compliance with existing commitments, withdrawal or threats of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons to escape those commitments, a changing international security environment and the diffusion of technology. We are approaching a point at which the erosion of the non-proliferation regime could become irreversible and result in a cascade of proliferation."

[25] *Global Zero Action Plan,* 29 June 2009: "Concurrently with the negotiation of the global zero accord, all nuclear capable countries develop and agree to the establishment of a comprehensive and universal system of safeguards on the civilian fuel cycle to prevent diversions of nuclear materials to build weapons. The plan includes: For the first time, putting the entire fuel cycle of all countries under international safeguards, including uranium mining/milling, all reactors and all spent fuel; the adoption of the IAEA 'Additional Protocol' by all countries to allow for wideranging inspections for detecting undeclared nuclear material or activities; the establishment of new safeguards that could include an international fuel

Regardless of various treaty regulations, the prohibition of possession of nuclear weapons may result from a resolution adopted by the Security Council (under Chapter VII of the UN Charter), obliging a state to partial or complete disarmament in the field of nuclear weapons and their means of delivery[26]. The problem, however, is ensuring the implementation of these resolutions. In some cases, the UN Security Council manages to reach an agreement and ban nuclear programs or attempt to strictly control them internationally. However, practice shows that the effectiveness of these measures is sometimes unreliable (e.g. North Korea, Iran, Iraq).

In the case of states developing nuclear programs for civilian purposes, a certain safeguard could be the acceptance of the proposal that nuclear fuel should be supplied from outside, for example by special international centers, and that used fuel should be returned for processing in these centers, which would prevent the character of the program from changing from civilian to military[27].

Some questions remain open: is nuclear disarmament realistic, to what extent will it change the global balance of power, and is it (even in the long term) the best guarantee of security[28]? Should we renounce in advance the use of force against

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bank and international fuel cycle management for uranium enrichment and plutonium re-processing" – http://www.globalzero.org/files/pdf/gzap_presentation.pdf

[26] For example, SC Res. 687 (1991) concerning Iraq or SC Res. 1718 (2006) concerning North Korea.

[27] *Remarks of President Barack Obama,* Prague, Czech Republic, April 5, 2009: "[W]e should build a new framework for civil nuclear cooperation, including an international fuel bank, so that countries can access peaceful power without increasing the risks of proliferation. That must be the right of every nation that renounces nuclear weapons, especially developing countries embarking on peaceful programs. No approach will succeed if it is based on the denial of rights to nations that play by the rules"; *Remarks by President Barack Obama. On the meeting of the P5+1 regarding Iran* (October 1, 2009) – http://www.ft.com/cms/s/0/273858b8-aec4-11de-96d7-00144feabdc0.html;

See also *Text of Iran letter on nuclear fuel swap offer,* http://www.iranfocus.com/en/index.php?option=com_content&view=article&id=20498:factbox-text-of-iran-letter-on-nuclear-fuel-swap-offer&catid=8:nuclear&Itemid=45; *Iran creates illusion of progress in nuclear negotiations,* "The Washington Post" May 17, 2010; *Request by the Russian Federation regarding its Initiative to Establish a Reserve of Low Enriched Uranium (LEU) for the Supply of LEU to the IAEA for its Member States.* Resolution adopted by the Board of Governors on 27 November 2009 (GOV/2009/81); IAEA. *Communication dated 13 March 2009 received from the Resident Representative of the Russian Federation to the IAEA on the Russian initiative to establish a guaranteed reserve of low enriched uranium* (INFCIRC/748), 1 April 2009; *Global Nuclear Energy Partnership* (GNEP), *Announced by US Department of Energy on February 6, 2006* – www.gnep.energy.gov/; IAEA. *Multilateralizing the Nuclear Fuel Cycle. German Proposal,* April 26, 2007; offer West – www.isis-online.org/publications/iran/Diplomatic_Offer_16June 2008.pdf; offer Iran – www.isis-online.org/publications/iran/IranProposal20May2008.pdf

"Middle East Economic Digest", 1 November 2007: "Arab Gulf states are offering to provide enriched uranium to Iran as a way of resolving the stand-off with the West over its nuclear program. (…) Under the plan, the six GCC states – Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE – will develop a uranium enrichment plant in a neutral state outside the region. The facility will produce nuclear fuel that the consortium would supply to Middle East states seeking to use atomic energy. Many countries in the region are looking to help them meet growing electricity shortages. (…) Prince Saud said that Iran was considering the offer.

[28] A. Applebaum, *Yes, We Can... Disarm?,* "The Washington Post", April 7, 2009: "[R]idding the world of nuclear weapons would be very nice, but on its own it won't alter the

dictatorial states that refuse to submit their nuclear programs to international control or limit it?

During the Cold War, the premise for the effectiveness of the concept of mutual assured destruction was the acceptance of the status quo by the nuclear powers. The same cannot be said of the states currently striving to possess nuclear weapons[29] and which question the existing order (global, regional).

In this context, it is not about preserving the privileged position of the powers possessing nuclear weapons, but above all about limiting access to these weapons by the other states[30]. The arms export policy of some powers has in the past brought numerous disappointments, concerning the supply of both conventional weapons and nuclear technology. In 2006, an India-US agreement was reached[31] on nuclear technology (an attempt to strengthen the regional competitor of China), although India is not a party to the NPT; the effects of this step can only be assessed in the future[32]. In 1982, China secretly transferred enriched uranium to Pakistan for the production of nuclear bombs[33].

At the threshold of the 21st century the world is facing an escalation in the production and proliferation of weapons of mass destruction. On the one hand, serious politicians are calling for nuclear disarmament[34], while on the other, military

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international balance of power, stop al-Qaeda or prevent large authoritarian states from invading their smaller neighbors. However, unsuccessful the promotion of democracy has been, it is, ultimately, the only way to achieve these goals. Plus I'm not sure the French (…) have much interest in giving up their force de frappe. Ditto the British. And since they don't pose a threat, to us or anyone else, it's not clear why we should waste diplomatic capital trying to make them do so."

[29] M. Rubin, *Can a Nuclear Iran Be Contained or Deterred?* (November 5, 2008) – www.aei.org/publications/pubID.28896,filter.all/pub_detail.asp.

[30] L.F. Damrosch, The Permanent Five as Enforcers of Controls on Weapons *of Mass Destruction: Building on the Iraq 'Precedent'?,* "European Journal of International Law" (quoted below as EJIL), 2002, Vol. 13/1, pp. 305–321.

[31] Council on Foreign Relations. *The US-India Nuclear Deal* – www.cfr.org/publication/9663/; *International Group Backs Nuclear Accord for US, India,* "The Washington Post", 7 September 2008 (A18); cooperation with India in the field of nuclear She made contact Too Union European, *EU-India Joint Press Communiqué,* Marseille, 29 September 2008.

[32] See e.g. FZ Ntoubandi, *Reflections on the USA – India Atomic Energy Cooperation,* "Journal of Conflict & Security Law", 2008, Vol. 13, No. 2, pp. 273 – 287; V. Serchuk, Th. Donnelly, *Ink the India Deal. The Pact with New Delhi Is Too Important to Derail,* June 5, 2006 – www.aei.org/publications/filter.all,pubID.24476/pub_detail.asp; see Too *United States Legislation and Conference Report: Henry J. Hyde United States–India Peaceful Atomic Energy Cooperation Act of 2006 (PL 109–401) (December 2006),* "International Law in Brief", January 19, 2007.

[33] *A nuclear power's act of proliferation,* "The Washington Post", November 13, 2009: "China's refusal to acknowledge the transfer and the unwillingness of the United States to confront the Chinese publicly demonstrate how difficult it is to counter nuclear proliferation. (…) Khan's view was that none of this violated the 1968 Non-Proliferation Treaty, because neither nation had signed it at the time."

[34] *Global Zero Action Plan* (fn. 25); *Remarks of President Barack Obama,* Prague, Czech Republic, April 5, 2009; GP Shultz, W. Perry, H.A. Kissinger, S. Nunn, *Towards A Nuclear-Free World,* "The Wall Street Journal", April 15, 2008 (A13); GP Shultz, WJ Perry, H.A. Kissinger, S. Nunn, *A World Free of Nuclear Weapons,* The Wall Street Journal, January 4, 2007 (A15); Ch. Bertram, *Ein Globus ohne Atomsprengköpfe,* "Zeit Online", 17 Januar 2008; H. Schmidt, *Atomare Aufrüstung und Raketenabwehr: Die Welt steht vor einem*

strategists are reflecting on the reform of NATO and the possible preventive use of nuclear weapons[35]. There is no escape from these dilemmas[36].

1.4. Cyberattacks pose a new threat,[37] enabling the collection of information (cyber espionage) or paralyzing part of a country's civilian infrastructure (making it impossible to manage a facility or sector). They also have a military dimension, consisting in disrupting the management of armed forces or nuclear programs, and may also constitute preparation for an armed attack and/or be part of combat in an armed conflict.

A new type of weapon and deterrent is therefore emerging on the horizon. A new field of combat and competition is opening up, which should be taken into account in international law, especially in the context of the concepts such as armed attack or self-defence, the definition of which becomes more complicated in this context.

1.5. The emergence of new threats is associated with the phenomenon of asymmetry[38], which consists, on the one hand, in the loss of the monopoly of force by the state, and on the other hand, in the confrontation of the state with a weak but dangerous, differently organized, non-state and acting from hiding opponent, who uses unusual or forbidden methods of combat or types of weapons.

No country can feel completely safe in the face of new threats. It is also possible that international armed conflicts will intensify due to threats arising from nuclear programs, energy problems (energy blackmail) and fights for access to water resources[39]. However, not all countries are equally exposed to new threats, and not all of them perceive these threats in the same way.

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bedrohlichen Wettlauf, "Die Zeit", 8 Mar 2007. Critically in this respect GJ Schmitt, H. Sokolski, *Advice for the Nuclear Abolitionists,* The Weekly Standard, May 5, 2008; M. Rühle, *Irans Nuklearprogramm lässt sich nicht aufhalten,* "Zeit Online", April 30, 2009.

[35] K. Naumann, J. Shalikashvili, The Lord Inge, J. Lanxade, H. van den Breemen, *Towards a Grand Strategy for an Uncertain World. Renewing Transatlantic Partnership,* Noaber Foundation, Lunteren 2007: "The first use of nuclear weapons must remain in the quiver of escalation as the ultimate instrument to prevent the use of weapons of mass destruction, in order to avoid truly existential dangers" (p. 94) – www.csis.org/media/ csis/events/080110_ grand _ strategy.pdf.

[36] *Spread of Nuclear Capability Is Feared,* "The Washington Post", May 12, 2008 (A01): "IAEA officials say they have never previously seen such widespread interest in starting a domestic nuclear power industry. (…) a particular concern is rising interest in nuclear enrichment and reprocessing, the commercial enterprise that creates nuclear fuel and then, after its use, separates plutonium from the spent fuel. The business has long been dominated by the United States, Russia and a consortium of European nations. (…) 'They're all rethinking enrichment, even countries that did it in the past and gave it up', said a senior IAEA official. (…) ' They already mine uranium and sell it, and now they realize they could make a lot more money if they enrich it'."

[37] See *infra* 3.2.3.

[38] R. Thornton, *Asymmetric Warfare: Threat and Response in the Twenty–First Century,* Polity, Cambridge 2007; H. Münkler, *Die Asymmetrisierung des Krieges,* "Internationale Politik ", 2004, no. 2; idem, *Die neuen Kriege,* Reinbeck at Hamburg 2002 (*Wars ours times,* Warsaw 2004); R. Geiß, *Asymmetric conflict structures,* "International Review of the Red Cross", 2006, Vol. 88 (No. 864), pp. 757–777.

[39] *Climate Change and International Security.* Paper from the High Representative and the European Commission to the European Council, 14 March 2008 (S113/08).

Before 1989, thinking about global conflict focused on the East-West axis. This bipolar system, which provided some transparency and at the same time a specific order, based largely on concepts of deterrence, balance of fear or containment, has become obsolete today. Economic and political globalization, combined with the development of new weapons and methods of warfare, raises the question of the shape and definition of international security.

The line of defence of states does not end at their borders but sometimes reaches distant regions. Therefore, the difference between internal and external security is becoming blurred. Moreover, it is increasingly not only about defending a state against aggression, but about shaping the international order based on a wide range of values and about defending against global threats.

Both the nature of the use of armed force and the reactions to the use of force are changing. There is no doubt that in this area the contemporary world is confronted with a qualitatively new situation. On the one hand, the use of force is offensive-aggressive, dictated by the imperial interests of states, and, on the other hand, it serves to prevent conflicts and international (multilateral) crisis management.

The concepts of pre-emptive self-defence and preventive use of armed force, as well as of humanitarian intervention, are the result of a clash with new international realities, which is not without influence on the transformation of armed forces and changes in military tactics and strategy. Controversies are also related to combating irregular groups, especially terrorists, which operate across borders on a global scale and from deep hiding.

After 1989, we are not dealing with the end of history so much as with a new international balance of power. In this context, is multipolarity a description of a specific situation or is it also a goal (desirable way) of preventing conflicts? The multilateralism is a tool, not an end in itself. The choice of means and the evolution of legal norms remain a complicated issue and the form does not automatically determine the goals.

The contemporary challenge is for international law and its institutions to effectively ensure security and international cooperation. Furthermore, this legal framework must be adequate to address new threats and weapons, and above all, flexible enough to ensure that its formal aspects do not block conflict resolution, even through the use of armed force. As a result, we are faced with an adaptation of the existing – legal and political – methods and criteria for the use of force.

If states are, in practice, rewarded for violating international law, then the use of military force appears to be an appropriate instrument. And when victims are denied aid and justice, it serves to perpetuate the premises that led to the conflict. In this context the most difficult question must be asked: when does a violation of law occur, and who is to assess it?

Chapter 2. Prohibition of the use of force and the United Nations

Wann Krieg beginnt, das kann man wissen,
aber wann beginnt der Vorkrieg.
[We can know when war begins, but when does the pre-war period begin?]
Christa Wolf (Kassandra, 1983)

The limitations on the use of armed force are by no means new, but the practice of using armed force was and is often arbitrary and unilateral. History shows that prohibitions turn out to be not always effective. The UN Charter contains a legal prohibition, adopted under great pressure resulting from the cruel experiences of the first half of the 20th century. Has the world become safer this way?

2.1. The United Nations Charter[40]

2.1.1. The prohibition of the use of force is intended to protect states and ensure international peace. The main function of international law is to regulate relations between its subjects, taking in consideration some common goals and values. Its purpose is not only the absence of the use of force or peace at all costs. The contemporary international law increasingly concerns the way in which power is exercised within a state, for example the protection of the population.

Focusing on the state, the signatories of the UN Charter did not foresee in 1945 that, in addition to aggression, devastating civil wars, massacres of people by one's own state, and international terrorists would become a plague. The power of the strong state was feared (a thesis that is still true today), but its weakness, which constitutes a very serious threat to international peace and security, was not considered. In some regions, this weakness encourages armed conflict and leads to the collapse of state authorities and political chaos (so-called failed states). Since the

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[40] On the historical aspects related to the negotiation of the UN Charter, see SC Schlesinger, *Act of Creation: The Founding of the United Nations,* Boulder CO 2003; on the contemporary aspects – B. Simma (ed.), *The Charter of the United Nations: A Commentary,* München 2004 ; J.-P. Cot, A. Pellet, M. Forteau (eds), *La Charte des Nations Unies,* Paris 2005; B. Conforti, *The Law and Practice of the United Nations,* Leiden–Boston 2005; E. de Wet, *The Chapter VII Powers of the United Nations Security Council,* Oxford 2004; N. Krisch, *Selbstverteidigung und kollektive Sicherheit,* Berlin/Heidelberg 2001; D. Schweigman, *Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice,* The Hague 2001; F. Cede, L. Sucharipa-Behrmann (Hrsg.), *Die Vereinten Nationen. Recht und Praxis,* München 1999; D. Sarooshi, *The United Nations and the Development of Collective Security,* Oxford 1999; M. Fraas, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmässigkeitsprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen im Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof,* Frankfurt am Main 1998; J. Herbst, *Rechtskontrolle des UN-Sicherheitsrates,* Frankfurt am Main 1999; B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective,* The Hague 1998; M. Lailach, *Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen,* Berlin 1998.

early 1990s, the UN Security Council, acting under Chapter VII, has repeatedly recognized that such conflicts threaten international security.

The prohibition of the use of force is formulated in Article 2, paragraph 4 of the UN Charter: "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" (force is understood as armed force[41]).

The Charter also provides that the prohibition of intervention[42] by the UN in the internal affairs of Member States does not apply to actions undertaken or accepted by the Security Council under Chapter VII, i.e. actions that may involve the use of armed force (Article 2, paragraph 7 *in fine)*[43].

In Chapter VII (entitled "Actions in Relation to Threats to the Peace, Breaches of the Peace and Acts of Aggression") the UN Charter permits the legal use of force in two cases[44]: in the exercise of the natural right to self-defence (Article 51) and with the consent of the Security Council (Article 39 et seq.)[45].

The premise for the Security Council's action under Chapter VII is a threat to international peace and security – a broad concept, the content of which depends on the practice and decisions of the Council. The determination by the Security Council of this threat (Article 39 of the UN Charter) does not always have to be preceded by the use of armed force against one of the UN members. Moreover, the application of military sanctions by the Security Council is not dependent on the prior adoption of non-military sanctions.

In turn, the premise for self-defence is an armed attack – a concept that is not easy to interpret. The purpose of self-defence is primarily to repel an armed attack (and prevent it in the future), while the Security Council's actions under Chapter VII usually have a broader goal of ensuring international peace and security.

The rules of the United Nations Charter regarding the prohibition of the use of force are far from precise. The states negotiating the text of the Charter intended to leave their specification to practice, especially the Security Council and the great powers. Such terms as force, aggression, intervention, self-defence or armed attack are not defined in the UN Charter, and their content remains the subject of constant disputes in the practice of states and doctrine (it is usually believed that the use of

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[41] See K. Skubiszewski, *Quelques remarques sur la notion de force dans la Charte des Nations Unies,* (in:) *Mélanges Georges Perrin,* Lausanne 1984, pp. 293–301.

[42] About the concept intervention see J. Kranz, *Entre l'influence et l'intervention. Certains aspects legal assistance financial multilatérale,* Frankfurt/M. 1994.

[43] Article 2 (7) of the UN Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[44] Another specific but now outdated exception is Article 107 of the UN Charter, concerning actions against former enemy states from World War II.

[45] Article 39 of the UN Charter: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures should be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

force is the broadest concept, aggression is narrower, and armed attack is even narrower[46]).

According to some opinions, the prohibition of the use of armed force is a *ius cogens* rule*,* that is, accepted and recognized by the international community, from which no derogation is permitted, and which can only be changed by a norm of international law of the same nature. This view seems to be inaccurate, because the use of armed force takes on diverse – evolving – forms and purposes in the context of various threats. Only the prohibition of aggression has a *ius cogens* character[47]. The problem, however, is that neither aggression nor other concepts of the UN Charter are precisely defined in a legally binding manner[48].

International practice shows that in the case of the use of force in police activities (especially in the area of the law of the sea or the law concerning airspace, as well as some pursuit actions), it is not a violation of Article 2, paragraph 4 of the UN Charter that is invoked, but a violation of specific treaty norms concerning the aforementioned areas or a violation of sovereignty in general[49].

2.1.2. According to Article 24(1) of the UN Charter, the Security Council has "primary responsibility for the maintenance of international peace and security" and - by virtue of Article 25 - its decisions, especially those taken under Chapter VII of the UN Charter, are legally binding on all Member States[50].

Acting under Chapter VII, the Council "determines the existence of a threat to the peace, breach of the peace, or act of aggression and makes recommendations or decides what measures should be taken in accordance with Articles 41 and 42 [military or non-military sanctions, JK] in order to maintain or restore international peace and security" (Article 39), i.e. after establishing the premises, it decides on the type of measures.

The security system provided for in the UN Charter is a significant breakthrough, but the ban on the use of force is not absolute. With the exception of self-defence, this ban means that the UN (especially the Security Council) has assumed responsibility for effectively guaranteeing and protecting international security.

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[46] *The Inter-American Treaty of Reciprocal Assistance of 1947* (Rio Treaty): "Article 6. If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack (…)".

[47] See: International Law Commission. Addendum. *Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility,* part 1 (A/CN.4/318/Add.5–7), "Yearbook of the International Law Commission", 1980, Vol. II(1), §§ 56–59, 66.

[48] See fn. 161.

[49] More in O. Corten (fn. 8), pp. 65–121.

[50] Article 25 of the UN Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 48 of the UN Charter states: "1. Action required to give effect to the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations, or by any of them, as the Security Council may decide. 2. Such decisions shall be carried out by the Members of the United Nations directly as well as by their action in appropriate international organizations of which they are members." In turn, Article 103 of the UN Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, the obligations under the present Charter shall prevail."

The UN system can function only if the Security Council operates effectively and it is conditioned by the fulfilment of the relevant procedural requirements, but also by a certain degree of congruence of interests, goals and values – especially among permanent members of the Security Council and their veto right. The solution adopted in the UN Charter is therefore characterized by an extremely high threshold of requirements for the Security Council[51].

In the opinion of Thomas M. Franck:[52]

> "The noble plan for replacing state self-help with collective security failed because it was based on two wrong assumptions: first, that the Security Council could be expected to make speedy and objective decisions as to when collective measures were necessary; and second, that states would enter into the arrangements necessary to give the Council an effective policing capability. The first of these assumptions was simply taken for granted on the strength of the allied powers provide the new organization with a police force, was not so easily made. It was questioned by Secretary Hull in a 1943 memorandum to President Roosevelt raising the possibility that states, at first, might not be willing to pledge forces to UN command. He proposed that 'in the absence of such agreement' the Council should be free to make such ad hoc arrangements 'as [it] may deem appropriate'".

After 1945, we are dealing with dualism, in which the security guarantees resulting from the position of some powers compete with the UN system. The advantage of the UN system is not so much its effectiveness, but the creation of a permanent – political and legal – framework and point of reference for existing conflicts and the public debate around them. The Security Council is a political body responsible for maintaining international peace and security, and not a judicial body or an institution changing the world for the better.

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[51] K. Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations,* "Chicago Journal of International Law", 2009, Vol. 10, No. 1: "UN collective security was born out of two contradictory impulses. On the one hand, it began with the realist recognition that collective security must be enforced by the Great Powers and, as a consequence, must be consonant with their interests – or at least not too directly contrary to any one of them. On the other hand, it internalized an idealist expectation that the Security Council would gradually evolve as an institution not just of Great Power confabulation, but of genuine global governance – into what Annan described, as recently as 2006, as 'our fledgling global collective security system' [UN Press Release SG/SM/10793 (2006)]. "The UN collective security system is, first, typically not a system of mutual benefit, but in its most important features is a system of altruism, at least as the system's security providers see it – always optional, however much they say otherwise in the time-honored fashion of insincere promise at the UN. Second, contrary to Kennedy's suggestion that UN collective security be seen as an understanding that the system rests on big, powerful 'providers' of security and small, weak 'consumers' of security banding together in an implicit contract, the one-sided nature of the 'bargain' means that it is not an 'exchange'. It is instead better understood (…) as merely an option exercisable when and if the providers of security want It lacks mutuality" (p. 74).

[52] T.M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?,* "Washington University Journal of Law & Policy", 2001, Vol. 51, No. 5, pp. 51–52.

2.1.3. Granting the right of veto to the permanent members of the Security Council inevitably leads to decision-making blockades, justified more by political than legal considerations. Without the veto the security system provided for in the UN Charter, and the Charter itself, would never have come into being. In other words, the Security Council is nothing more than a reflection of the balance of power. What should be seen here is more an excess of politics than a deficit of law.

This is a predetermined squaring of the circle, which could not and probably will not be avoided. While a majority in the Security Council is needed to undertake actions based on Chapter VII (including at least the absence of opposition from five permanent members[53]), the opposition of one permanent member is enough to block them. Consequently the Chapter VII system of the Charter is condemned to constant tensions.

In fact, the veto system of the permanent members of the Security Council is based on the assumption that measures taken against the interests of one of them would be more harmful to international peace than they would be beneficial. This system effectively means that disputes between permanent members are exempt from the Council's control.

In practice, the veto under Chapter VII[54] is the last stage, preceded by difficult, informal negotiations during which the lack of consent of the great powers makes it impossible to prepare a draft resolution. Moreover, since the early 1990s, we have been dealing with the adoption of compromise resolutions, sometimes deliberately sparing or not entirely clear, which allows to avoid a veto.

This decision-making model is primarily useful for the great powers, and its paradoxical consequence is the view that law creates obligations primarily for the weaker.

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[53] In practice, despite the rather unambiguous wording in Article 27(3) of the UN Charter, the lack of objection by one of the great powers is not treated as a veto.

[54] *Subjects of UN Security Council Vetoes* – www.globalpolicy.org/security/membship/veto/vetosubj.htm.

2.2. Peacekeeping missions

The system of collective security provided for in the UN Charter has not been fully implemented. There is no structure based originally on the UN military command and the obligation of member states to provide military contingents (Articles 43–47 of the UN Charter).

With the exception of several Security Council resolutions concerning the Korean conflict (1950)[55] and a few applications of General Assembly (GA) resolution 377 (V) (Uniting for Peace) adopted in 1950, which allowed the GA to authorize the use of armed force, the politically blocked UN[56] has not dealt with major armed conflicts[57].

In practice, the UN has applied a flexible interpretation of the Charter, creating new forms of use of force by this organization or authorization of its use by states. Over time, a specific system of *ad hoc* military operations has been formed not provided for in the UN Charter but based on resolutions of the Security Council or the General Assembly. On the one hand, in peacekeeping operations[58] the UN directs multinational forces established to stabilize the situation after an armed conflict (the use of force is usually limited to the self-defence of the forces involved in the operation). On the other hand, in armed peace-enforcement operations[59], it authorizes a group of states or a regional international organization, and the Security Council exercises political control and determines the time and form of action.

The legal basis for such operations is usually Article 39 of the UN Charter (in combination with Article 48), with the Security Council usually referring to Chapter VII of the UN Charter, without mentioning a specific article. Until 1989, peace-enforcement operations were an exception, while the number of peace-keeping operations increased significantly after that year.

Peacekeeping operations have the consent of the state on whose territory they take place and are not offensive (they do not include – unlike peace enforcement operations – a heavy weapons component). Peacekeeping operations, initially based on monitoring the parties to the conflict while maintaining a neutral attitude towards them, began to focus on protecting civilians and transformed into an international crisis management in the country and stabilising it (monitoring the internal situation, disarming irregular forces, monitoring or organising elections, building the rule of

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[55] SC Res. 83 (1950), 84 (1950). Resolution 83 (1950) of 27 June 1950: "The Security Council, Having determined that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace, (…) Recommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."

[56] K. Skubiszewski, *The Problem of the Application of Military Measures by the General Assembly of the United Nations,* (in:) *Mélanges offerts à Juraj Andrassy,* The Hague 1968, pp. 248–268.

[57] TM Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States,* AJIL, 1970, Vol. 64, pp. 809–837.

[58] The prototype was the UNEF (United Nations Emergency Force) in 1956 in the context of the conflict around the Suez Canal.

[59] Originally used in operations during the Korean conflict in 1950 (SC Res. 82 and 83).

law)[60], to some extent by forcing changes (sometimes turning into enforcing peace, for example in Bosnia and Herzegovina and Somalia)[61]. This blurring of the boundaries between the two types of operations is related to the change in the nature of conflicts and is evidence of the pragmatic and adaptive attitude of the UN (for example in the new form of international administration of the territory).

In the case of peacekeeping we are often confronted with a situation that cannot be brought under control unless the (most often internal) causes of the conflict are removed, for which a military operation is necessary but not always sufficient[62]. The transition from acute internal conflict and autocratic power based on tribal structures is not possible overnight, just as the transition from dictatorship to even a modest level of democracy is not possible. Most often, it seems reasonable to replace extreme dictatorship with a milder one.

The increasingly numerous peacekeeping operations do bring positive results in the form of stopping bloodshed, but their balance is not impressive. These operations, the legality of which is not questioned, encounter barriers to effectiveness and often become practical examples of helplessness on the part of the international community. They thus demonstrate the scale of the difficulties faced by the UN.[63]

In practice, the fundamental problem is that there is no peace to keep.

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[60] See, for example, SC Res. 1706 (2006) concerning Darfur or SC Res. 1739 (2007) concerning Côte d'Ivoire.

[61] More on this subject: Ch. Gray (fn. 8), pp. 272–326; P. Daillier, *Les operations multinational consequences of conflicts armés en vue du rétablissement de la paix,* « Recueil des cours de l'Académie de droit international », 2005, Vol. 314, pp. 233–432; *Handbook on UN Multidimensional Peacekeeping Operations* (2003); *Report of the Panel on United Nations Peace Operations (*Brahimi Report), 21 August 2000 (A/55/305, S/2000/809); *The Peacebuilding Commission* – A/RES/60/180 (30 December 2005); W. van Genugten, *UN Peacekeeping in Africa and Good Governance : Challenges and Prospects* (2008) – http://ssrn.com/abstract=1066964.

[62] *Brahimi Report (*fn. 61): "[S]ome of the missions of the past decade would be particularly hard to accomplish: they tended to deploy where conflict had not resulted in victory for any side, where a military stalemate or international pressure or both had brought fighting to a halt but at least some of the parties to the conflict were not seriously committed to ending the confrontation" (p. viii).

[63] L. Arbour, *L'avenir des opérations de maintien de la paix dans les conflits contemporains,* Discours prononcé par la Présidente-Directrice Générale de l'International Crisis Group, à l'Université de Montréal, le 7 octobre 2009: « Le Conseil de sécurité continue à déployer des opérations dans des situations de plus en plus difficiles et risquées, où la distinction entre le maintien et l'imposition de la paix est floue ou non-existante, sans le soutien politique et militaire nécessaire et souvent même sans le soutien du gouvernement d'accueil. Il suffit de regarder la mission hybride Union africaine-Nations unies au Darfour. (…) Les Nations unies en général, et le Conseil de sécurité en particulier, représentent un ensemble d'intérêts nationaux plutôt qu'un intérêt public international comme tel. (…) Les opérations onusiennes de maintien de la paix fonctionnent au mieux quand un membre permanent du Conseil de sécurité s'engage pleinement et que les autres ne s'y opposent pas. (…) La question de la contribution de troupes révèle également la tendance des grandes puissances à ne s'intéresser qu'aux opérations de maintien de la paix qui impliquent leur sécurité nationale »

2.3. The turn of the 90s – new practice and its limits

Given the general prohibition of the use of armed force in the UN Charter, the question arises whether and to what extent interpretation of the Charter norms result from the practice of UN bodies, and to what extent from the practice of the member states, especially the most representative ones. We often observe a lack of independent legal assessments (the jurisdiction of the ICJ is limited and not compulsory), and on the other hand a demonstrative disregard of some countries for legally binding Security Council resolutions adopted under Chapter VII.

In the post-war practice of the UN, especially in the 1990s, we observe new phenomena and a certain evolution in this respect.

2.3.1. ECOWAS and ECMOG

The Security Council rarely authorise the use of armed force (peace enforcement), although it has certainly done so more often since the early 1990s, as a result of the military action in Iraq with the consent of the Security Council (1990/1991 – resolutions 678, 687). Since then, the Security Council has more frequently identified threats to international peace and security and adopted non-military sanctions[64].

In some cases it also expressly allowed the use of armed force, for example in Somalia (1992 – resolution 794), Yugoslavia (since 1992 – resolutions 757, 781, 787, 816, 836, 1031, 1639 concerning Bosnia and Herzegovina, resolution 1244 concerning Kosovo), Haiti (1993/1994, 2004 – resolutions 841, 875, 940, 1529, 1542), Rwanda (1994 – resolution 929), the Great Lakes region (1996 – resolutions 1078, 1080), Albania (1997 – resolution 1101), East Timor (1999 – resolutions 1264, 1272), Sierra Leone (1997 – resolution 1101), and the Democratic People's Republic of China (1999) (1997, 2000 – resolutions 1132, 1270, 1289), Afghanistan (2001 – resolution 1386), Liberia (1992 – resolution 788 and 2003 – resolution 1497), Congo (2003 – resolution 1484) and Côte d'Ivoire (2003 – resolution 1464, 2004 – resolution 1528), Libya (2011) – resolutions 1970, 1973, 2017.

These resolutions mostly concerned internal conflicts, including humanitarian aspects. The Security Council authorized member states to use armed force, opting for a camouflaged formula allowing the use of „all necessary measures" (all necessary means). The management of the operation was entrusted to the Member States, which were obliged to submit reports to the Secretary-General, and which were granted consent usually for a specific period (with a few exceptions, indefinitely)[65].

Ex post Security Council acceptances of military actions undertaken by states (which can hardly be considered peacekeeping operations), for example the military actions of the US troops (1990) or of the Economic Community of West African States Monitoring Group (ECOMOG) in Liberia (1990, 1992, 1995) and Sierra Leone (1997–1998), related to threats resulting from the civil war and were justified by self-

[64] J.M. Farrall, *United Nations Sanctions and the Rule of Law,* Cambridge 2007.
[65] See fn. 64.

defence[66]. Disputed (in the context of seeking legalization in earlier Security Council resolutions) were the short-term military operations in Iraq conducted in 1992, 1996 and 1998 by the US and United Kingdom (until 1996 also France) in connection with the protection of Kurdish refugees, Iraq's violation of the so-called no- fly zones and his expulsion of UN disarmament inspectors[67]. Moreover, the Council has sometimes accepted the consequences of previous military action without assessing (given the inevitability of a veto by one of the powers) its legality, for example in Kosovo (resolution 1244) and Iraq (resolution 1483)[68].

In some cases there has been collective use of force on the African continent without prior approval of the Security Council,[69] although the Council was informed of the actions taken. This tendency, although controversial in light of the rigorous interpretation of the UN Charter, should be treated as evidence of the vitality of regional structures, sometimes capable of acting in cases where the Security Council action is doomed to failure due to the lack of will for political involvement of the great powers or as a consequence of the opposition of one of them.

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[66] See for example in the context of ECOMOG and ECOWAS activities – SC Res. 866 (1993), SC Res. 1132 (1997), SC Res. 1162 (1998).

[67] J. Cockayne, D. Malone, *Creeping Unilateralism: How Operation Provide Comfort and the No-Fly Zones in 1991 and 1992 Paved the Way for the Iraq Crisis of 2003,* "Security Dialogue", 2006, Vol. 37, No. 1, pp. 123–141.

[68] If NATO's military action in Yugoslavia (1999) or the US military action in Iraq (2003) constituted a violation of a peremptory norm of international law, the Security Council would be obliged not to recognize the resulting legal consequences. See ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) – article 41 (2): "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [breach by a State of an obligation arising under a peremptory norm of general international law, note JK], nor render aid or assistance in maintaining that situation."

[69] S. Nouwen, *The Importance of Frames: The Diverging Conflict Analyzes of the United Nations and the African Union* (September 27, 2013) – http://ssrn.com/abstract=2332359; T. Kabau, *The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions,* "Goettingen Journal of International Law", 2012, Vol. 4(1), pp. 49-92; IT Sampson, *The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention,* Journal of Conflict & Security Law, 2011, Vol. 16(3), pp. 507-540; African Union. *The Common African Position on the Proposed Reform of the United Nations* : "The Ezulwini Consensus", 7–8 March 2005 – Ext/EX.CL/2 (VII): "The African Union Agrees with the Panel [*A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change (2004),* note JK] that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action. M. Roscini, *Neighborhood Watch? The* African *Great Lakes Pact and jus ad bellum,* „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", 2009, Vol. 69, pp. 931–959; GA Aneme, *The African Standby Force: Major Issues under 'Mission Scenario Six'*, „Political Perspectives", 2008, Vol. 2 (1); B. Kioko, *The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention,* "International Review of the Red Cross", 2003, no. 852, pp. 807-824; A. Abass, M.A. Baderin, *Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union,* "Netherlands International Law Review", 2002, Vol. XLIX, pp. *1-38* ; *and Conduct of ECOMOG Operations in West Africa,* Institute for Security Studies, Monograph No. 44 – Boundaries of Peace Support Operations (2000); C. Ero, *ECOMOG: A Model for Africa?,* Institute for Security Studies, Monograph No. 46 – Boundaries of Peace Support Operations (2000); see also *ECOWAS Conflict Prevention Framework* (Regulation MSC/REG.1/01/2008)

Thus, the members of the Economic Community of West African States (ECOWAS) agreed to the use of armed force by ECOMOG when a state falls victim to aggression[70], but in practice they used force in internal armed conflicts (in Liberia, Sierra Leone, Guinea-Bissau). In some of these cases ECOWAS/ECOMOG invoked self-defence, the consequence of which was sometimes the overthrow of the government.

The 2000 Statute of the African Union grants it the right to (collectively) use armed force in a Member State where war crimes, crimes against humanity or

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[70] ECOWAS. *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security,* Lomé, 10 December 1999: article 10: "[T]he Mediation and Security Council shall: (...) authorize all forms of intervention and decide particularly on the deployment of political and military missions"; article 9: "Decisions of the Mediation and Security Council shall be taken by a two-thirds majority vote of Members present"; article 25: "The Mechanism shall be applied in any of the following circumstances: In cases of aggression or conflict in any Member State or threat thereof; In case of conflict between two or several Member States; In case of internal conflict: a) that threatens to trigger a humanitarian disaster, or b) that poses a serious threat to peace and security in the sub-region; In event of serious and massive violation of human rights and the rule of law. In the event of an overthrow or attempted overthrow of a democratically elected government; "Any other situation as may be decided by the Mediation and Security Council"; Article 26: "The Mechanism shall be put into effect by any of the following: a) Upon the decision of the Authority; b) Upon the decision of the Mediation and Security Council; c) At the request of a Member State; d) On the initiative of the Executive Secretary; e) At request of the Organization of African Unity or the United Nations"; article 27: "The Mechanism shall be applied according to any of the following procedures: (…) The Mediation and Security Council shall consider several options and decide on the most appropriate course of action to take in terms of intervention. Such options may include recourse to the Council of Elders, the dispatch of fact-finding missions, political and mediation missions or intervention by ECOMOG"; article 40: "ECOWAS shall intervene to alleviate the suffering of the populations and restore life to normalcy in the event of crises, conflict and disaster"; Article 52: "In pursuit of its objectives, ECOWAS shall cooperate with the Organization of African Unity (OAU), the United Nations Organization (UNO) and other relevant international organizations. (...) In accordance with Chapters VII and VIII of the United Nations Charter, ECOWAS shall inform the United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism."

ECOWAS. *Protocol Relating to Mutual Assistance of Defence,* Freetown, 29th May 1981 – Article 4: "Member States shall also take appropriate measures such as specified in Articles 17 and 18 of the present Protocol in the following circumstances: (a) In case of armed conflict between two or several Member States if the settlement procedure by peaceful means as indicated in Article 5 of the Non-Aggression Protocol mentioned in the Preamble proves ineffective; (b) In case of internal armed conflict within any Member State engineered and supported actively from outside likelihood to endanger the security and peace in the entire Community". Article 6: "3. The Authority shall decide on the expediency of the military action and entrust its execution to the Force Commander of the Allied Forces of the Community (AAFC)"; article 16: "When an external armed threat or aggression is directed against a Member State of the Community, the Head of State of that country shall send a written request for assistance to the current Chairman of the Authority of ECOWAS"; article 17: "When there is a conflict between two Member States of the Community, the Authority shall meet urgently and take appropriate action for mediation. If need be, the Authority shall decide only to interpose the AAFC between the troops engaged in the conflict"; Article 18: "1. In the case where an internal conflict in a Member State of the Community is actively maintained and sustained from outside, the provisions of Articles 6, 9 and 16 of this Protocol shall apply; 2. Community forces shall not intervene if the conflict remains purely internal."

genocide are being committed[71]; in the version amended by the 2003 Protocol (not yet in force) also in the event of a serious threat to the legitimate regime in a Member State in order to restore internal stability and peace in that State[72]. Decisions are taken by the Peace and Security Council of the Union (by consensus or qualified majority) – the Security Council's acceptance is not expressly provided for (the 2002 Protocol on the Establishment of the Peace and Security Council, which entered into force in 2003[73]).

[71] B. Kioko, *The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention,* RICR, December 2003, Vol. 85, No 852, pp. 807-824.

[72] African Union. *The Constitutive Act* (2000): "Article 4. The Union shall function in accordance with the following principles: (…) (h): the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." Proposed amendment (*Protocol on Amendments to the Constitutive Act of the African Union,* 2003): "(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to a legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council." At the same time, Article 4(g) of the AU Statute prohibits member states from intervening unilaterally in the internal affairs of another state ("non- interference by any Member State in the internal affairs of another").

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009): "Article 8.1. The African Union shall have the right to intervene in a Member State pursuant to a decision of the Assembly in accordance with Article 4(h) of the Constitutive Act in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity. 2. The African Union shall respect the right of States Parties to request intervention from the Union in order to restore peace and security in accordance with Article 4(j) of the Constitutive Act and thus contribute to the creation of favourable conditions for finding durable solutions to the problem of internal displacement.

[73] *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (2002), Article 4: "The Peace and Security Council shall be guided (…) by the following principles: (…) j. the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act"; Article 7(1): "e. recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments; f. approve the modalities for intervention by the Union in a Member State, following a decision by the Assembly, pursuant to article 4(j) of the Constitutive Act"; Article 13: "3. The African Standby Force shall, inter alia, perform functions in the following areas: (…) c. intervention in a Member State in respect of grave circumstances or at the request of a Member State in order to restore peace and security, in accordance with Article 4(h) and (j) of the Constitutive Act; d. preventive deployment in order to prevent (i) a dispute or a conflict from escalating, (ii) an ongoing violent conflict from spreading to neighboring areas or States, and (iii) the resurgence of violence after parties to a conflict have reached an agreement; e. peace-building, including post-conflict disarmament and demobilization. Article 17(a): "This Pact shall not derogate from and shall not be interpreted as derogating in any way from the obligations of Member States contained in the United Nations Charter and the Constitutive Act, including the Protocol, and from the primary responsibility of the United Nations Security Council for the maintenance of international peace and security."

African Union Non-Aggression and Common Defence Pact (2005): Article 2(b): "This Pact seeks to define a framework under which the Union may intervene or authorize intervention, in preventing or addressing situations of aggression, in conformity with the Constitutive Act, the Protocol and the Common African Defence and Security Policy."

The African Union carried out such an operation in the Comoros (2008)[74]. Similar, although not identical, solutions are provided for in the Southern African Development Community *(*SADC)[75]. The threat of use of force was made by ECOWAS in December 2010 in connection with the crisis in Côte d'Ivoire[76].

2.3.2. Iraq

Doubts have been raised as to whether US troops, acting for the purpose of "repelling armed attack and restoring international peace and security" (Res. 83 of the Security Council of 1950), could enter the territory of North Korea and overthrow its regime; an indirect affirmative answer to this question was given by Resolution 376 (V) of the UN General Assembly.

The same happened in 1991 during the military operation against Iraq under SC Resolution 678 (1990), which did not impose any explicit limitations, authorizing member states "to use all necessary means" to implement previous resolutions and restore international peace and security "in the area." There is no doubt that in Iraq's aggression against Kuwait in 1990 a Security Council decision was not necessary to undertake collective self-defence. However, Resolutions 678 (1990) and 687 (1991) provided the legal framework for broad-based military action, the disarmament of Iraq and the strengthening of regional security, including the establishment of a UN monitoring mission.

In the case of the operation in Iraq in 2003,[77] the debate focused on the analysis of the legality of anew (after 1990/91) military operation. In the result of strong pressure from the USA (including the concentration of American troops near the borders of Iraq) it was possible in 2002 to persuade Iraq to readmit UN inspectors and to pass SC Resolution 1441 (adopted under Chapter VII of the UN Charter) which

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[74] Union Africaine. Conseil de paix et de sécurité – 124ème réunion, 30 avril 2008, PSC/PR/2(CXXIV). *Rapport du Président de la Commission sur la situation aux Comores depuis la 10ème Session ordinaire de la Conférence de l'Union, tenue à Addis Ababa du 31 janvier au 2 février 2008* – http://www.africa-union.org/root/AU/organs/Microsoft%20 Word%20-%20124%20Rapport%20sur%20les%20Comores%20Fr.pdf

[75] Within the Southern African Development Community, *the Protocol on Politics, Defence and Security Co- Operation was signed* (14 August 2001), which provides (similarly to ECOWAS) for armed operations in the event of inter-state or intra-state conflicts. According to Article 11 al. 3: "c) Where peaceful means of resolving a conflict are unsuccessful, the Chairperson acting on the advice of the Ministerial Committee may recommend to the Summit that enforcement action be taken against one or more of the disputant parties. d) The Summit shall resort to enforcement action only as a matter of last resort and, in accordance with Article 53 of the United Nations Charter, only with the authorization of the United Nations Security Council." Article 11 al. 4 explains that: "a) In respect of both inter- and intra-state conflict, the Organ shall seek to obtain the consent of the disputant parties to its peacemaking efforts."

[76] ECOWAS. Extraordinary Session of the Authority of Heads of State and Government on Cote D'Ivoire. *Final Communique* (Press Release N°: 192/2010 24 December 2010): "10. In the event that Mr. Gbagbo fails to heed this immutable demand of ECOWAS, the Community would be left with no alternative but to take other measures, including the use of legitimate force, to achieve the goals of the Ivorian people."

[77] Documentation conflict Iraqi M. Weller, *Iraq and the Use of Force in International Law,* Oxford 2010; see also www.casi.org.uk/info/scriraq.html

found that Iraq had violated legally binding resolutions of the Council. It was deliberately worded in an ambiguous manner[78] in order to satisfy its main negotiators and thus allow for the interpretation of the passages concerning the "last chance" for Iraq to fulfil its international legal obligations and to fulfil the "grave consequences" announced therein. It is no coincidence that - in the event of its non-fulfilment - the resolution was silent on the necessity of passing a new resolution authorising the use of armed force[79].

This diplomatic compromise was the premise for the unanimous adoption of the resolution 1441 (2002), but it resulted in a dispute over the legality of the American-British operation. In any case, both the United States and United Kingdom, as well as the main opponents (Russia, China, France) voted with an awareness of the ambiguity of the adopted text. It is striking that that some countries immediately

[78] See. B. Simma, "Süddeutsche Zeitung", 1 February 2003, p. 11; D. Thürer, "Neue Zürcher Zeitung", 20 March 2003; RC Holbrooke, "Süddeutsche Zeitung", 27 February 2003, p. 2; "Der Spiegel", 16 December 2002, p. 36 and "Frankfurter Allgemeine Zeitung", 8 February 2003, p. 2.

[79] SC Res. 1441 (2002): "Recognizing the threat Iraq's noncompliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security; Recalling that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 (1990) of 2 August 1990 and all relevant resolutions subsequent to Resolution 660 (1990) and to restore international peace and security in the area; (…) Determined to ensure full and immediate compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991) and other relevant resolutions (…) Acting under Chapter VII of the Charter of the United Nations: 1. Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991); 2. Decides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; (…) 4. Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below; (…) 11. Directs the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution; 12. Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security; 13. Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations."

A similar avoidance in SC Res. 1154 (1998), when it threatened serious consequences without specifying what and in what procedure they were adopted: "Acting under Chapter VII of the Charter of the United Nations, (…) 3. "Stresses that compliance by the Government of Iraq with its obligations, repeated again in the memorandum of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and the IAEA in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq."

after its adoption began to publicly interpret its unclear content and define not only their own position, but also that of other powers[80].

The official position of the US and United Kingdom was based on the concept of Iraq's violation of the Security Council previous resolutions that were binding on it, including the breach of the temporary ceasefire. In later resolutions the Security Council accepted the existing situation, without directly addressing the problem of the legality of the initial operation[81].

According to some authors,[82] the armed operations of the coalition of states in 1991 and 2003 were self-defence in nature, for which the Security Council resolutions provided a legal framework. Iraq's violation (as stated in Resolution 1441) of the ceasefire, which only suspended military operations, authorized the coalition of states to resume military operations without the need to pass another Security Council resolution authorizing it.

2.3.3. North Korea

Lessons were learned from the Iraqi experience in subsequent years, which was reflected in particular in the resolutions on North Korea and Iran[83]. In this context, the Security Council clearly stated that it was acting on the basis of Article 41 of the UN Charter (non-military sanctions) and stipulated that any use of force would

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[80] See House of Commons. *Iraq and UN Security Council Resolution 1441.* Research Paper 02/64 (21 November 2002), pp. 22–24 – www.parliament.uk/commons/lib/research/ rp2002/rp02-064.pdf; *British Attorney General's Advice to Blair (General Analysis on Iraq),* March 7, 2003 (declassified) – http://www.globalpolicy.org/component/ content/article/168/36072.html

Iraq/UNSCRes 1441 - *Joint statement by the People's Republic of China, France and the Russian Federation,* New York, November 8, 2002: "Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. In this regard, we register with satisfaction the declarations of the representatives of the United States and the United Kingdom confirming this understanding in their explanations of vote and assuring that the goal of the resolution is the full implementation of the existing Security Council resolutions on disarmament of Iraq's weapons of mass destruction 12 villas apply. Such failure will be reported to the Security Council by the Executive Chairman of UNMOVIC or by the Director General of IAEA. It will be then for the Council to take a position on the basis of that report. Therefore, the resolution fully respects the competences of the Security Council in the maintenance of international peace and security, in conformity with the Charter of the United Nations" – http://www.ambafrance-uk.org/Iraq-UNSCR-1441-Joint-statement-by.html

"Negroponte [US Representative] told the council, 'As we have said on numerous occasions to council members, this resolution contains no <hidden triggers> and no automaticity with respect to the use of force. If there is a further Iraqi breach, reported to the council by UNMOVIC, the IAEA or a member state, the matter will return to the council for discussions as required. (...) The resolution makes clear that any Iraqi failure to comply is unacceptable and that Iraq must be disarmed. And one way or another, Mr. President, Iraq will be disarmed'. He added, 'If the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN resolutions and protect world peace and security'" – http://www.unwire.org/unwire/20021108/ 30232_story.asp

[81] For more information on certain aspects of the operation in Iraq, see *infra* 4.3.2.

[82] Y. Dinstein (fn. 8), pp. 273–277.

[83] See O.F. Kittrie (fn. 24).

require a further resolution (a formula such as *a further decisions will be required, should additional measures be necessary).* In both cases, we are dealing with laborious progress (paid for to some extent by concessions to Russia and China[84]). The main problem of the Council, however, was how to behave in the event of Iran or North Korea failing to implement the legally binding resolutions.

In resolution 1695 (2006), which did not refer to Chapter VII of the UN Charter[85], the Security Council for the first time demanded that North Korea suspend its ballistic missile activities and called on member states to restrict and control trade in sensitive items with North Korea[86]. In resolution 1718 (2006), adopted unanimously after North Korea conducted an underground nuclear test, it declared (as in resolution 1695) that the proliferation of nuclear, biological and chemical weapons constituted a threat to international peace and security. It also showed greater determination, stating that it was acting under Chapter VII of the UN Charter and taking measures under Article 41 of the UN Charter. It committed North Korea to the irreversible, controlled and complete abandonment of all ballistic missile and weapons of mass destruction programmes, while establishing an embargo on the supply of nuclear weapons, equipment and technology to and from that country[87]. It also made it clear

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[84] D. Blumenthal, R. Kagan, *What to Do about North Korea,* "The Washington Post", May 26, 2009: "China could pressure Kim to give up his weapons – it has the power and influence. But the fact is, China doesn't want to. Beijing is content to live with a nuclear and anti-Western North Korea. While China fears a collapsed North that would flood its struggling Northeast with refugees, it also fears a unified, democratic, prosperous Korea allied with the United States. China wants a puppet state in North Korea, which is why, far from joining in sanctions, it steadily increases its economic investment there"; G. Samore, *North Korean Atomic Test 'A Purely Political Act',* October 17, 2006 (Council on Foreign Relations): "Trade with China and South Korea in the form of food, fertilizer, cash, cement, oil, and gas. These are the kinds of things from the North Korean economy depends on to survive and none of that has been jeopardized so far by the Security Council. And that's what the North Koreans are counting on: They are counting on the Chinese and the South Koreans to protect them from the kinds of sanctions that might actually jeopardize the survival of the regime" – www.cfr.org/publication/11746/samore.html.

[85] Instead typical formulas such as "Determining that the situation continues to constitute a threat to international peace and security" and "Acting under Chapter VII of the Charter of the United Nations", resolution 1695 uses following phrases : "Affirming that such launches jeopardize peace, stability and security in the region and beyond, particularly in light of the DPRK's claim that it has developed nuclear weapons" and "Acting under its special responsibility for the maintenance of international peace and security".

[86] SC Res. 1695 (2006): "Demands that the DPRK suspend all activities related to its ballistic missile program, and in this context re-establish its pre-existing commitments to a moratorium on missile launching" (§ 2); Requires all Member States, in accordance with their national legal authorities and legislation and consistent with international law, "to exercise vigilance and prevent missile and missile-related items, materials, goods and technology being transferred to DPRK's missile or WMD programs„ and "to exercise vigilance and prevent the procurement of missiles or missile related-items, materials, goods and technology from the DPRK, and the transfer of any financial resources in relation to DPRK's missile or WMD programs" (§ 3, § 4).

[87] SC Res. 1718 (2006): "Reaffirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security (…), Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41. (…) 2. Demands that the DPRK does not conduct any further nuclear test or launch of a ballistic missile; (…) 5. Decides that the DPRK shall suspend all activities related to its ballistic missile program and in this context re-establish its pre-

that if further measures were to be taken, further decisions would be necessary. The North Korean representative described the Security Council resolution as gangster-like, emphasizing that the Korean actions were an element of self-defence against the threat from the United States.

Resolution 1718 is somewhat innovative, as it demands that North Korea return to the NPT in a legally binding manner, as well as IAEA inspections related to it[88]. The adoption of such a strong resolution (with various previous reservations from China and Russia) should be considered progress. After many promises unfulfilled by North Korea, the issue of implementing the provisions of this resolution, for example regarding the inspection of freight to and from North Korea, remains open. This inspection is to take place in the form of cooperative action and in accordance with the national legislation of the states and international law[89].

Resolution 1874 (2009) – adopted unanimously under Chapter VII of the UN Charter – strengthened the non-military sanctions regime. In order to prevent the trade of certain types of weapons and military equipment to and from North Korea, it provided for the inspection of ships on the high seas, but without the use of armed force (the condition of China and Russia), which, in the absence of the consent of the state under whose flag a ship sails, means only notification of the appropriate UN committee[90]. It also repeated earlier orders to suspend the ballistic missile program

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existing commitments to a moratorium on missile launching; 6. Decides that the DPRK shall abandon all nuclear weapons and existing nuclear programs in a complete, verifiable and irreversible manner (…); 7. Decides also that the DPRK shall abandon all other existing weapons of mass destruction and ballistic missile program in a complete, verifiable and irreversible manner. (…) 8. (b) the DPRK shall cease the export of all items covered in subparagraphs (a) (i) and (a) (ii) above and that all Member States shall prohibit the procurement of such items from the DPRK by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the DPRK."

[88] SC Res. 1718 (2006): "4. Demands further that the DPRK return to the Treaty on the Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency (IAEA) safeguards." See AL Paulus, J. Müller, *Security Council Resolution 1718 on North Korea's Nuclear Test,* "ASIL Insight", 3 November 2006.

[89] SC Res. 1718 (2006): "8(f): in order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary." Design resolution "called on all states to undertake and facilitate inspection of cargo to and from North Korea to ensure compliance with sanctions", but after questioning this one formulas By China and Russia introduced weaker version using the phrases "cooperative action" and "as necessary"; there is also no reference to control on the high seas. On the issue of ship inspection, see also SC Res. 1803 (2008) and 1929 (2010) concerning Iran, SC Res. 665 (1990) concerning Iraq, SC Res. 787 (1992) and 820 (1993) concerning the Federal Republic of Yugoslavia, SC Res. 1132 (1997) concerning Sierra Leone, SC Res. 875 (1993) and 917 (1994) concerning Haiti. For more information, see V. Lowe, A. Tzanakopoulos, *Ships, Visit and Search,* "Encyclopedia of Public International Law" (cited hereinafter as EPIL), 2010.

[90] SC Res. 1874 (2009): "11. Calls upon all States to inspect, in accordance with their national authorities and legislation, and consistent with international law, all cargo to and from the DPRK, *in their territory,* including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution

and to cease all programs related to nuclear weapons[91], restricted arms trade to light weapons (the condition of Russia)[92], and limited international financial assistance to North Korea[93].

North Korea, by ordering IAEA inspectors to leave the country[94], and by conducting further ballistic missile tests (allegedly for non-military purposes) and another underground nuclear explosion in April, May and July 2009[95], violated the

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1718 or by paragraph 9 or 10 of this resolution (…); 12. Calls upon all Member States to inspect vessels, with the consent of the flag State, *on the high seas,* if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution 1718 (2006) or by paragraph 9 or 10 of this resolution (…); 13. Calls upon all States to cooperate with inspections pursuant to paragraphs 11 and 12, and, *if the flag State does not consent to inspection on the high seas,* decides that the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities pursuant to paragraph 11; (…) 16. Requires any Member State, when it does not receive the cooperation of a flag State pursuant to paragraph 12 or 13 to submit promptly to the Committee a report containing relevant details."

[91] SC Res. 1874 (2009): "5. Demands that the DPRK immediately retract its announcement of withdrawal from the NPT; (…) 8. Decides that the DPRK shall abandon all nuclear weapons and existing nuclear programs in a complete, verifiable and irreversible manner and immediately cease all related activities."

[92] SC Res. 1874 (2009): "10. Decides that the measures in paragraph 8(a) of resolution 1718 (2006) shall also apply to all arms and related materiel, as well as to financial transactions, manufacture technical training, advice, services or assistance related to the provision, maintenance, maintenance or use of such arms, except for small arms and light weapons and their related materiel; (…) States shall notify the Committee at least five days prior to selling, supplying or transferring small arms or light weapons to the DPRK."

[93] SC Res. 1874 (2009), §§ 18, 19, 20.

[94] IAEA. Press Releases 2009/04 (16 April 2009): "IAEA inspectors at the Democratic People's Republic of Korea (DPRK) Yongbyon nuclear facilities, on 15 April, removed all IAEA seals and switched off surveillance cameras. This follows the DPRK informing the inspectors, on 14 April, that it had decided to cease all cooperation with the IAEA, requested removal of containment and surveillance equipment and required the inspectors to leave the DPRK at the earliest possible time"; April 25, 2009 (KCNA): "The reprocessing of spent fuel rods from the pilot atomic power plant began as declared in the Foreign Ministry statement dated April 14 [2009]. This will contribute to bolstering the nuclear deterrence for self-defence in every way to cope with the increasing military threats from the hostile forces."

[95] SC presidential statement (13 April 2009): "The Security Council condemns the 5 April 2009 (local time) launch by the Democratic People's Republic of Korea, which is in contravention of Security Council resolution 1718 (2006). (…) The Security Council demands that the Democratic People's Republic of Korea not conduct any further launch" (S/PRST/2009/7).

The Korean Central News Agency released the following report: "The Democratic People's Republic of Korea successfully conducted one more underground nuclear test on May 25 [2009] as part of the measures to bolster up its nuclear deterrent for self-defence in every way as requested by its scientists and technicians. (…) The test will contribute to defending the sovereignty of the country and the nation and socialism and ensuring peace and security on the Korean Peninsula"; "The Washington Post", May 30, 2009: "At an Asian security meeting in Singapore, Defence Secretary Robert M. Gates told regional defence ministers, 'We will not stand idly by as North Korea builds the capability to wreck destruction on any target in the region or on us', the Reuters news agency reported."

A. Moussa, *Situation en République Populaire Démocratique de Corée* : « Un lanceur de fusée utilise une technologie balistique quasiment similaire à celle d'un missile et les deux peuvent être confondus. C'est donc autour de cette confusion qu'achoppe un Conseil de sécurité incapable de prendre une quelconque décision. La Russie et la Chine ont ainsi fait prohibition under Resolution 1718 (2006). Thus North Korea is not subject to IAEA supervision[96]. It should also be added that in 2009 it unilaterally terminated agreements concluded with South Korea[97], including the 1953 Armistice Agreement[98]. Despite the strengthening of sanctions in Resolution 1874 (2009), North Korea continues to work on a military nuclear program, including a nuclear[99] export program.

International action has so far brought limited results, and it is not known whether and to what extent it will affect North Korea's complete abandonment of its nuclear

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valoir que ce tir s'inscrit dans le cadre d'un programme spatial pacifique auquel chaque Etat a droit. Il ne peut donc selon ce point de vue être condamné. (…) La Libye et le Vietnam ont défendu la même position », « Sentinelle », 17 avril 2009.

[96] IAEA. *Application of Safeguards in the Democratic People's Republic of Korea (DPRK). Report by the Director General,* GOV/2010/45-GC(54)/12, 31 August 2010: "9. Since December 2002, the DPRK has not permitted the Agency to implement safeguards in the country and, therefore, the Agency cannot draw any safeguards conclusion regarding the DPRK. Nor has the DPRK implemented the relevant measures called for in United Nations Security Council resolutions 1718 (2006) and 1874 (2009). At the behest of the DPRK, the Agency ceased the implementation of the ad hoc monitoring and verification arrangement in the DPRK on 15 April 2009. As a result, since that date the Agency has not been able to carry out any monitoring and verification activities in the DPRK and thus cannot provide any conclusions regarding the DPRK's nuclear activities.

[97] "The group of traitors has already reduced all the agreements reached between the north and the south in the past to dead documents. Under such situation it is self-evident that there is no need for the DPRK to remain bound to those north-south agreements", January 30. 2009 – http://www.kcna.co.jp/index-e.htm

[98] "The New York Times", May 28, 2009: "North Korea escalated its vitriol against South Korea and the United States, warning of a 'powerful military strike' if any North Korean ships were stopped or searched as part of an American-led operation to intercept vessels suspected of carrying unconventional weapons. (…) The North had earlier warned the South not to participate in the operation, known as the Proliferation Security Initiative. 'We consider this a declaration of war against us', North Korea said in a statement carried by its official news agency, KCNA. (…) The North Koreans also said in the statement that they 'no longer feel bound by the army' that ended the fighting in the 1950-53 Korean War. See also A. D'Amato, *The Two Koreas: The Armistice and the Boundary,* June 01, 2009 – http://jurist.law.pitt.edu/forumy/2009/06/two-koreas-armistice-and-boundary.php

[99] *North Korea makes fast progress on construction of nuclear plant,* "The Washington Post", November 15, 2011; *Scientist who visited North Korea nuke sites says Pyongyang may seek to launch 3rd atomic test,* "The Washington Post", September 9, 2011; *Pakistan's nuclear-bomb maker says North Korea paid bribes for know-how,* "The Washington Post", July 7, 2011; *From whiskey to nuclear secrets, North Korea plays a remarkably entrepreneurial role in international affairs for a Communist regime,* "The Washington Post", July 7, 2011; SS Hecker, *What I found in Yongbyon and Why It Matters,* "American Physical Society [APS] News", March 2011; *US alerts Asian capitals to possible North Korean uranium enrichment program,* "The Washington Post", November 21, 2010; *North Korea Says It Will Start Enriching Uranium,* "The Washington Post", June 14, 2009.

program.[100] This is evidence of the helplessness of the international community[101]. The sinking of a South Korean warship and the shelling of one of the South Korean islands by North Korean troops (2010) did not meet with a decisive reaction from the Security Council due to the lack of unanimity among the powers (China's position). Meanwhile, concentration camps continue to operate, the population of North Korea is dying of hunger (about two million victims in the 1990s), and the outside world looks on with a cold eye.

2.3.4. Iran

2.3.4.1. Iran has been developing a nuclear program for some time now – officially for civilian purposes.[102] However, there are serious grounds for believing that it is also pursuing a secret military program[103]. Iran has repeatedly stressed that some IAEA and Security Council resolutions concerning its nuclear program are illegal. However, if Iran is developing a nuclear program exclusively for peaceful purposes (energy, medicine), one must wonder why this is taking place in underground centers.

In Resolution 1696 (2006) of the Security Council, ordering Iran to suspend nuclear enrichment and submit to full IAEA inspection. In this context Article 40 of the UN Charter was invoked[104], explaining that in the absence of a positive reaction

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[100] *Sponsorship for the executioner* (interview with Andrei Lankov), "Tygodnik Powszechny", November 18, 2007, p. 7: "The current disarmament talks have three stages. The first is to persuade Pyongyang to freeze, or maybe even dismantle, its nuclear power plants. Is that possible? Yes, because the Koreans no longer need them. As long as they have more than two atomic bombs in stock, they can sacrifice their nuclear weapons production equipment in exchange for money and political benefits. The second phase of the negotiations will be more difficult, but its goal seems achievable: these are the issues of transferring enriched plutonium and uranium and inspections by international experts. The third phase is the transfer of already produced nuclear weapons. This will not happen."

[101] IAEA. *Intervention on Non-Proliferation Issues at IAEA Board of Governors by IAEA Director General Dr. Mohamed ElBaradei,* 17 June 2009: "We reported North Korean non-compliance in 1992 - today it's 2009. For seventeen years, we have been dealing with the verification issue in North Korea. This should teach us a lesson on how not to deal with verification issues. If every verification issue took us 20 years to clarify, then we are obviously on the wrong track. I would even dare to say that we are not very useful."

[102] See *supra* 1.3.

[103] U. Weisser, *Don't Ignore Russia,* „Internationale Politik", 2007, Vol. 8/1: "Iran is in possession of ballistic medium range 'Shihab 3' missiles with a range between 780 and 900 miles (1,300 and 1,500 kilometers). These have been displayed in public and tested several times since 2003. Such missiles are, in fact, designed to be equipped with nuclear warheads; it makes neither military nor economic sense to arm a complex weapons system such as ballistic missiles with conventional warheads. (…) a solution to the crisis must offer something to all sides. This means no Iranian nuclear option, but also security for Iran in a threatening environment. This concept embraces both dialogue and political deterrence. However, deterrence can only be based on plausibly effective measures. Washington's military options do not correspond to the plausibility criterion."

[104] "Article 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding on the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall not prejudice the rights, claims or

from Iran, the Security Council would subsequently move to non-military sanctions under Article 41 of the UN Charter[105].

In view of Iran's apparent failure to implement this resolution, the Security Council unanimously adopted in December 2006 Resolution 1737 (2006), in which, acting under Article 41 of the UN Charter, it obliged Iran to immediately suspend all enrichment-related activities and projects to build a heavy-water reactor and stressed the need for rigorous submission to IAEA inspections. At the same time, it obliged Member States to impose an embargo on the sale to and transfer to Iran of all nuclear materials and technologies, as well as to freeze all funds and assets located in their territories, establishing an additional control regime for this purpose[106]. Iran's reaction to this resolution was negative[107].

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position of the parties concerned. The Security Council shall draw appropriate conclusions from any failure to comply with such measures."

[105] SC Res. 1696 (2006): "Acting under Article 40 of Chapter VII of the Charter of the United Nations in order to make mandatory the suspension required by the IAEA" (preamble); "2. Demands, in this context, that Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA ; "by that date complied with this resolution, then to adopt appropriate measures under Article 41of Chapter VII of the Charter of the United Nations to persuade Iran to comply with this resolution and the requirements of the IAEA, and underlines that further decisions will be required should such additional measures be necessary."

[106] SC Res. 1737 (2006): "Reiterating its serious concern (…) on Iran's nuclear program, including topics which could have a military nuclear dimension, and that the IAEA is unable to conclude that there are no undeclared nuclear materials or activities in Iran, (…) Noting (…) that (…) Iran has not established full and sustained suspension of all enrichment-related and reprocessing activities as set out in resolution 1696 (2006), nor resumed its with cooperation with the IAEA under the Additional Protocol, nor taken the other steps required of it by the IAEA Board of Governors, nor complied with the provisions of Security Council resolution 1696 (2006) and which are essential to build confidence, and deploring Iran's refusal to take these steps, (…) mindfulness of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, Acting under Article 41 of Chapter VII of the Charter of the United Nations, (…) 2. Decides, (…) that Iran shall without further delay suspend the following proliferation sensitive nuclear activities: (a) all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA; and (b) work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water, also to be verified by the IAEA; 3. Decides that all States shall take the necessary measures to prevent the supply, sale or transfer (…) of all items, materials, equipment, goods and technology which could contribute to Iran's enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems, (…) 8. Decides that Iran shall provide such access and cooperation as the IAEA requests to be able to verify the suspension outlined in paragraph 2 and to resolve all outstanding issues, as identified in IAEA reports, and calls upon Iran to ratify promptly the Additional Protocol; (…) 12. Decides that all States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated in the Annex."

[107] "Iran's representative told the Council that it was a sad day for the non-proliferation regime. The Council was imposing sanctions on a member of the Nuclear Non-Proliferation Treaty, which, unlike Israel, had never attacked or threatened to use force against any United Nations member. Also, unlike Israel, Iran had categorically rejected development, stockpiling and use of nuclear weapons on ideological and strategic grounds, and it was prepared to provide guarantees that it would never withdraw from the Non-Proliferation Treaty. (…) He was here today because his country had not accepted that illegal demand", SC/8928 Security Council, 23 December 2006 – www.un.org/News/Press/docs//2006/ sc8928.doc.htm.

The then Director General of the IAEA Mohammed ElBaradei stated that Iran undoubtedly has the knowledge to enrich uranium but does not have the actual production capacity. He was critical of the Security Council sanctions against Iran and North Korea[108], claiming that there is no threat that we would have to face immediately and that there is still plenty of time for negotiations[109]. He also negatively assessed the UN's actions in Iraq.[110] Hans Blix, ElBaradei's predecessor, also criticized the sanctions imposed on Iran and North Korea and considered the US policy in this regard to be arrogant[111].

Resolution 1747 (2007) of the Security Council, adopted unanimously in March 2007, does not differ substantially from previous resolutions. The Council reaffirmed its negative assessment of the situation in Iran and the attitude of its authorities and the failure to implement previous resolutions. It only established additional sanctions in the form of an arms embargo, a broader freeze of Iranian assets and a suspension of financial assistance programs for Iran[112]. It stated that in the event of Iran failing

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[108] "Die Welt", 25 October 2006.

[109] Mohamed ElBaradei, interview – "Newsweek Polska", November 5, 2006, p. 51. See also « Le Monde », October 23, 2007 (interview with Mohamed ElBaradei): « Je ne peux pas juger des intentions, mais à supposer que l'Iran ait l'intention de se doter de la bombe nucléaire, il lui faudra encore entre trois et huit années pour y arriver. (…) Je veux détourner les gens de l'idée que l'Iran sera une menace dès demain, et que nous nous trouvons maintenant devant la question de savoir s'il faut bombarder l'Iran ou le laisser avoir la bombe ».

[110] *ElBaradei Warns on Work Plan',* "Financial Times", 2 October 2007: "In Iraq we use diplomacy and verification as an Agency, and we succeeded in disarming the nuclear program in Iraq. UNSCOM, the Committee that was established by the Security Council, used verification and arrogance and it imploded. The Security Council itself decided to disband it and establish another committee, as you remember UNMOVIC, to deal with all the problems of UNSCOM."

[111] Hans Blix: "Uns sollte es jetzt darum gehen, Nordkorea dazu zu bringen, 'zurückzurudern', und die Iraner dazu zu bewegen, die Urananreicherung auszusetzen. In beiden Fällen geht es im Kern darum, dass die USA eine Sicherheitsgarantie anbieten, die beinhaltet, dass sie diese beiden Länder nicht angreifen und keinen Regimewechsel anstreben werden. (...) Die USA sind arrogant aufgetreten", "Die Welt", 17 Oktober 2006.

[112] SC Res. 1747 (2007): "Concerned by the proliferation risks presented by the Iranian nuclear program and, in this context, by Iran's continuing failure to meet the requirements of the IAEA Board of Governors and to comply with the provisions of Security Council resolutions 1696 (2006) and 1737 (2006), mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, Acting under Article 41 of Chapter VII of the Charter of the United Nations, 1. Reaffirms that Iran shall without further delay take the steps required by the IAEA Board of Governors in its resolution GOV/2006/14, (…) and, in this context, affirms its decision that Iran shall without further delay take the steps required in paragraph 2 of resolution 1737 (…) 5. Decides that Iran shall not supply, sell or transfer (…) any arms or related material, and that all; States shall prohibit the procurement of such items from Iran by their nationals; (…) 7. Calls upon all States and international financial institutions not to enter into new commitments for grants, financial assistance, and concessional loans, to the government of the Islamic Republic of Iran, except for humanitarian and developmental purposes; (…) 13. Affirms that it shall review Iran's actions in light of the report referred to in paragraph 12 above, to be submitted within 60 days, and: (…) (c) that it shall, in the event that the report in paragraph 12 above shows that Iran has not complied with resolution 1737 (2006) and this resolution, adopt further appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with these resolutions and the requirements of the IAEA, and

to comply with the provisions of the legally binding resolutions, it would take further steps under Article 41 of the UN Charter (non-military sanctions). The representative of Iran considered this resolution illegal[113].

In resolution 1803 (2008), adopted with one abstention (Indonesia), the Security Council reiterated Iran's failure to implement previous resolutions and its failure to cooperate with the IAEA,[114] and – based on Article 41 of the UN Charter – extended the scope of non-military sanctions (covering the movement of persons, trade in dual-use items, control of air and sea supplies to Iran). In the subsequent resolution 1835 (2008), no new sanctions were adopted (which was the basis for achieving unanimity) and Iran was called upon to comply with previous resolutions[115].

In the face of Tehran's intransigence, the Security Council adopted Resolution 1929 (2010), with Brazil and Turkey voting against and Lebanon abstaining. In this resolution, the Council once again found Iran to be in violation of its previous resolutions and Tehran's insufficient cooperation with the IAEA (including the construction of a new nuclear facility without notifying the IAEA); it also adopted a

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underlines that further decisions will be required should such additional measures be necessary."

[113] "Minister for Foreign Affairs of Iran, said that the Security Council, orchestrated by a few of its permanent members, was 'being abused to take an illegal, unnecessary and unjustifiable action against the peaceful nuclear program of the Islamic Republic of Iran, which presents no threat to international peace and security and falls, therefore, outside the Council's Charter-based mandate'. (…) In order to give that scheme a semblance of international legitimacy, its initiators had first manipulated the IAEA Board of Governors and, as they had themselves acknowledged, coerced some of its members, to vote against Iran in the Board. Then, they had taken advantage of their economic substantial and political power to pressure and manipulate the Security Council to adopt three unwarranted resolutions within eight months. (…) Consideration by the Council of the Iranian peaceful nuclear program had no legal basis, and the referral of the case to the Council and adoption of resolutions failed to meet the minimum standards of legality, he said programme was a gross violation of Article 25 of the Charter and contradicted the Iranian people's right to development and education", Security Council (SC/8980), 24 March 2007 – www.un.org/News/Press/docs/2007/sc8980.doc.htm.

[114] SC Res. 1803 (2008): "Noting with serious concern that (…) Iran has not established full and sustained suspension of all enrichment related and reprocessing activities and heavy-water-related projects (…) nor resumed its cooperation with the IAEA under the Additional Protocol, nor taken the other steps required by the IAEA Board of Governors, nor complied with the provisions of Security Council resolution 1696 (2006), 1737 (2006) and 1747 (2007); (…) Emphasizing that in accordance with Article 39 of Iran's Safeguards Agreement Code 3.1 cannot be modified nor suspended unilaterally and that the Agency's right to verify design information provided to it is a continuing right, which is not dependent on the stage of construction of, or the presence of nuclear material at, a facility (…) Concerned by the proliferation presented by the Iranian nuclear program and (…) mindfulness of its primary responsibility under the Charter of the United Nations for the conservation of international peace and security; Acting under Article 41 of Chapter VII of the Charter of the United Nations" (preamble). See also NJ Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue,* "Vanderbilt Journal of Transnational Law", 2009, Vol. 42/5, pp. 1393–1442.

[115] SC Resolution 1835 (2008): "2. Takes note of the 3 March 2008 statement of the Foreign Ministers of China, France, Germany, the Russian Federation, the United Kingdom, the United States of America, with the support of the High Representative of the European Union, describing the dual-track approach to the Iranian nuclear issue; (…) 4. Calls upon Iran to comply fully and without delay with its obligations under the above-mentioned resolutions of the Security Council, and to meet the requirements of the IAEA Board of Governors".

broad package of further non-military sanctions under Article 41 of the UN Charter, including a ban on any activities related to its ballistic missile program[116]. In this situation, some countries, such as the United States and the European Union, announced additional sanctions[117], while others tried to reduce the pressure on Iran[118].

There is no doubt that Iran is not implementing the Security Council resolutions that are binding on it and is not fully complying with the International Atomic Energy Agency's control regime. Iran, as a party to the NPT, and thus obliged to renounce nuclear weapons and submit to IAEA control, signed the so-called Additional Protocol with the IAEA in 2003 (enabling detailed control), but has not ratified it yet[119]. IAEA inspectors are therefore unable - as a result of obstacles posed by Iran - to accurately assess the nature of Iran's nuclear program (especially its military elements). At the

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[116] SC Res. 1929 (2010): "Concerned by the proliferation risks presented by the Iranian nuclear program and mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security; Stressing that nothing in this resolution compels States to take measures or actions exceeding the scope of this resolution, including the use of force or the threat of force; Acting under Article 41 of Chapter VII of the Charter of the United Nations; 1. Affirms that Iran has so far failed to meet the requirements of the IAEA Board of Governors and to comply with resolutions 1696 (2006), 1737 (2006), 1747 (2007) and 1803 (2008)."

[117] M. Zarif, *US Policy Toward Iran's Nuclear Program,* July 21, 2009 – http://www.irantracker.org/us-policy/us-policy-toward-irans-nuclear-program; US Office of Foreign Assets Control. 31 CFR Part 560 - Iranian Transactions Regulations, 34630 Federal Register (Vol. 75, No. 117), June 18, 2010 (Rules and Regulations); EU. Council Regulation No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 (Official Journal of the European Union L 281/1, 27 October 2010).

[118] V. Churkin (Russian Federation): "Iran had not opened the road sufficiently to allow it fully to master the use of nuclear energy for peaceful purposes, thanks to its lack of cooperation with IAEA, he said. Sanctions, forceful measures that must be used in a balanced and proportional way, were aimed exclusively at bolstering the non-proliferation regime and not at the well-being of the Iranian people, he stressed, welcoming the efforts of Brazil and Turkey" – Security Council (SC/9948), June 9, 2010; *US says Chinese businesses and banks are bypassing UN sanctions against Iran,* "The Washington Post", October 18, 2010.

[119] IAEA. *Intervention on Non-Proliferation Issues at IAEA Board of Governors by IAEA Director General Dr. Mohamed ElBaradei,* 17 June 2009: "I made it very clear ten years ago that without the Additional Protocol, we cannot really do our work in a credible way. Without an Additional Protocol, we can only talk about declared nuclear material. We have learned since 1991 in Iraq, that if any country tries to divert nuclear material, they don't divert from declared material, they divert through a clandestine program. And yet we still have over 100 countries without Additional Protocols, which means we do not have the authority"; IAEA. Board of Governors (GOV/2009/74), 16 November 2009. *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran. Report by the Director General* : "36. Contrary to the request of the Board of Governors and the requirements of the Security Council, Iran has neither implemented the Additional Protocol nor cooperated with the Agency in connection with the remaining issues of concern, which need to be clarified to exclude the possibility of military dimensions to Iran's nuclear program. (…) Unless Iran implements the Additional Protocol and, through substantive dialogue, clarifies the outstanding issues to the satisfaction of the Agency, the Agency will not be in a position to provide credible "assurance about the absence of undeclared nuclear material and activities in Iran."

same time, Iran has not suspended its uranium enrichment program within the deadline set by the Security Council in Resolution 1696[120].

Iran's nuclear facilities are scattered, and some of them are located deep underground, which is by no means typical of a civilian nuclear program. In 2009, it also turned out that Iran was building another uranium enrichment centre without notifying the IAEA, thus openly violating the law[121]. The plan, in which Iran was offered a special procedure for supplying fissile materials from outside, became the subject of tenders from Tehran[122]. In turn, a compromise proposal in this matter, presented by Iran, Brazil and Turkey, was not accepted by other countries[123]. There seems to be no doubt that Iran's hidden goal is to produce nuclear weapons, which

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[120] IAEA. Board of Governors (GOV/2011/54), 2 September 2011, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran. Report by the Director General* : "8. Contrary to the relevant resolutions of the Board of Governors and the Security Council, Iran has not suspended its enrichment related activities. (…) 50. (…) Iran is not implementing a number of its obligations, including: implementation of the provisions of its Additional Protocol; implementation of the modified Code 3.1 of the Subsidiary Arrangements General Part to its Safeguards Agreement; suspension of enrichment related activities; suspension of heavy water related activities; and addressing the Agency's concerns about possible military dimensions to Iran's nuclear program. 51. (…) Iran is not providing the necessary cooperation, including by not implementing its Additional Protocol, the Agency is unable to provide credible assurance about the absence of undeclared nuclear material and activities in Iran, and therefore to conclude that all nuclear material in Iran is in peaceful activities"; see also IAEA. Board of Governors (GOV/2011/29), 24 May 2011 ; IAEA. Board of Governors (GOV/2010/62), 23 November 2010 (para. 33); Board of Governors (GOV/2010/28), 31 May 2010 (para. 37); Board of Governors (GOV/2010/10), 18 February 2010 (para. 46); Board of Governors (GOV/2009/55), 28 August 2009 (paras 26-27); Board of Governors (GOV/2009/35), 5 June 2009 (paragraph 17); Board of Governors (GOV/2009/8), 19 February 2009 (para. 17); Board of Governors (GOV/2008/59), 19 November 2008 (paragraphs 18, 19, 20); Board of Governors (GOV/2008/15), 26 May 2008 (paragraph 27); Board of Governors (GOV/2008/4), 22 February 2008 (para. 57).

[121] IAEA. *Implementation of the NPT safeguards agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran.* Resolution adopted by the Board of Governors on 27 November 2009 (GOV/2009/82): "(g) Also noting with serious concern that Iran has constructed an enrichment facility at Qom in breach of its obligation to suspend all enrichment related activities and that Iran's failure to notify the Agency of the new facility until September 2009 is inconsistent with its obligations under the Subsidiary Arrangements to its Safeguards Agreement [preamble], (…) 1. Urges Iran to comply fully and without delay with its obligations under the above-mentioned resolutions of the Security Council, and to meet the requirements of the Board of Governors, including by suspending immediate construction at Qom."

[122] *Ahmadinejad backs deal to remove bulk of enriched uranium from Iran,* "The Washington Post", February 3, 2010 (A06); *Iran counters UN on uranium plan,* "The Washington Post", October 30, 2009: "Iran on Thursday appeared to reject a key element of a UN-backed proposal aimed at quickly reducing its stockpile of enriched uranium, offering an informal oral counteroffer that diplomats said fell far short of a tentative deal reached earlier this month. (…) A central element of the plan, conceived by the Obama administration, is that Iran must ship the enriched uranium out of the country in one batch by the end of the year. Instead, the presentation by Iranian Ambassador Ali Asghar Soltanieh suggested that Iran would ship out its uranium in batches, swapping it for new material on a continuous basis, diplomats said."

[123] *Joint Declaration by Iran, Turkey and Brazil* (17 May 2010) – http://english.aljazeera.net/news/middleeast/2010/05/201051795513637980.html

is confirmed by subsequent information[124]. A certain signal about the possibility of stopping Iran's nuclear program was the disruption of Iranian nuclear facilities as a result of a computer attack[125]. At the end of 2010, the IAEA spoke in favour of creating an international resource of low-enriched uranium in order to ensure supplies for countries using nuclear energy for peaceful purposes[126].

In November 2011, the IAEA Board of Governors adopted the most damning resolution against Iran, documenting that country's progress in expanding its nuclear program, in clear violation of previous IAEA and Security Council resolutions[127]. The Board of Governors ordered the IAEA Director General to present an assessment of the implementation of the adopted resolution in March 2012. However, the Board of Governors did not decide to refer the Iran case to the UN Security Council.

Despite similarities, the resolutions on Iran and North Korea differ in that the Security Council orders Iran to suspend certain elements of its nuclear program, while the Security Council orders Korea to abandon its program entirely. Furthermore, the Council did not clearly qualify the situation in Iran as a threat to international security, limiting itself to recalling its responsibility for maintaining international peace and security. These differences have both legal and political implications. Iran's attitude

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[124] *Secret documents expose Iran's nuclear trigger,* "The Times", December 14, 2009; Institute for Science and International Security. *New Document Reopens Question on Whether Iran's Nuclear Weaponization Work Continued Past 2003,* December 14, 2009 – http://isis-online.org/isis-reports/detail/new-document-reopens-question-on-whether-irans-nuclear-weaponization-work-c/; Institute for Science and International Security. *Excerpts from Internal IAEA Document on Alleged Iranian Nuclear Weaponization* (October 2, 2009): "The Agency has information, known as the Alleged Studies, that the Ministry of Defence of Iran has conducted and may still be conducting a comprehensive program aimed at the development of a nuclear payload to be delivered using the Shahab 3 missile system" – http://isis-online.org/uploads/isis-reports/documents/IAEA_info_3October2009.pdf;
J. Borger, *Iran tested advanced nuclear warhead design – secret report,* "The Guardian", November 5, 2009 – http://www.guardian.co.uk/world/2009/nov/05/iran-tested-nuclear-warhead-design/print

[125] See fn. 186.

[126] "On 3 December 2010, the IAEA Board of Governors authorized the IAEA Director General to establish a reserve of low enriched uranium (LEU), or an IAEA LEU bank. Owned and managed by the IAEA, the IAEA LEU bank will help to ensure a supply of LEU for power generation" – http://www.iaea.org/Publications/Factsheets/English/iaea_leureserve.html

[127] IAEA. Board of Governors (GOV/2011/65), 8 November 2011. *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran. Report by the Director General* : "39. (…) In resolution 1929 (2010), the Security Council reaffirmed Iran's obligations to take the steps required by the Board of Governors in its resolutions GOV/2006/14 and GOV/2009/82, and to cooperate fully with the Agency on all outstanding issues, particularly those which give rise to concerns about the possible military dimensions to Iran's nuclear program, including by providing access without delay to all sites, equipment, persons and documents requested by the Agency. Since August 2008, Iran has not engaged with the Agency in any substantive way on this matter. (…) 43. The information indicates that Iran has carried out the following activities that are relevant to the development of a nuclear explosive device: • Efforts, some successful, to procure nuclear related and materials; weapons development information and documentation from a clandestine nuclear supply network; and • Work on the development of an indigenous design of a nuclear weapon including the testing of components. 44. While some of the activities identified in the Annex have civilians as well as military applications, others are specific to nuclear weapons. (…) 53. The Agency has serious concerns regarding possible military dimensions to Iran's nuclear program."

and the international community's reactions reveal a variety of views on the issue of nuclear programs, as well as Iran's violations of international law[128].

2.3.4.2. While the pursuit of solutions through negotiations can generally be assessed positively, in specific cases there are problems with the expected effectiveness of this method, as well as with the Security Council resolutions themselves[129].

Iraq ignored the international community and the Security Council for many years until the adoption, not without difficulty, of Resolution 1441 (2002). Timid attempts to discourage North Korea from its nuclear program took place in 1993 (Security Council Resolution 825[130]); in 1998 the country conducted ballistic missile tests (to which the Security Council did not react), in 2003 it withdrew from the Nuclear Non-Proliferation Treaty, and in 2005 from the six-party talks on its nuclear program[131]. The next Security Council resolutions on the Korean issue were not adopted until 2006 in connection with North Korea's missile test and nuclear test explosion. Iran's nuclear program, in turn, has been developed for years[132] in violation of the IAEA

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[128] Panel of Experts Established Pursuant to Resolution 1929 (2010) - Final Report – http://www.innercitypress.com/1929r051711.pdf (May 2011); OF Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law,* Syracuse Law Review, 2007, Vol. 57, pp. 519–549. See also, *US Policy Toward Iran's Nuclear Program,* July 21, 2009 – http://www.irantracker.org/us-policy/us-policy-toward-irans-nuclear-program

[129] SC Res. 1887 (2009): "Reaffirming its resolutions 825 (1993), 1695 (2006), 1718 (2006), and 1874 (2009), [*North Korea, JK*]; Reaffirming its resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), and 1835 (2008), [*Iran, JK*] (…) Reaffirming its resolution 1540 (2004) and the necessity for all States to implement fully the measures contained therein, (…) 1. Emphasizes that a situation of non-compliance with non-proliferation obligations shall be brought to the attention of the Security Council, which will determine if that situation constitutes a threat to international peace and security and emphasizes the Security Council's primary responsibility in addressing such threats; (…) 3. Notes that enjoyment of the benefits of the NPT by a State Party can be assured only by its compliance with the obligations thereunder; (…) 15. Affirms that effective IAEA safeguards are essential to prevent nuclear proliferation and to facilitate cooperation in the field of peaceful uses of nuclear energy, and in that regard."

[130] SC Res. 825 (1993) – The Security Council finds that, in light of the IAEA reports, Korea is in violation of the inspection regime under the Treaty on the Non-Proliferation of Nuclear Weapons; however, the Council limited itself to an appeal to the authorities of North Korea, but did not find a threat to international peace and security and did not adopt this resolution under Chapter VII of the UN Charter.

[131] The compromise agreement reached by this group in February 2007 is yet to be tested. See Ch.J. Le Mon, *Six-Party Talks Produce Action Plan on North Korean Nuclear Disarmament, "ASIL Insight,"* March 6, 2007.

[132] M. Rubin, *Iran's Nuke News Shows Danger of Trusting This Regime,* "New York Daily News", December 5, 2007: "While Iranian leaders said their program was for peaceful uses, in 2003 inspectors found traces of uranium metal, an element important in nuclear weapons development but not in a civilian energy program, in their centrifuges. a year later, the IAEA found Iran experimented with polonium-210, an element used to start the "chain reaction leading to the detonation of a nuclear bomb. IAEA Director Mohamed El-Baradei revealed Iran had a blueprint for a nuclear warhead provided by disgraced Pakistani nuclear scientist AQ Khan during a visit to Tehran in the 1990s." See also IAEA. *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran.* Report by the Director General, IAEA Doc. GOV/2003/40 (June 6, 2003), paragraph 32.

control regime, and the Security Council resolutions date only from 2006. Libya secretly pursued (in violation of the IAEA control regime) a military nuclear program, which it abandoned in 2003.

In the case of Iran or North Korea, the international community faces a similar dilemma to that of Iraq at the turn of 2002/2003[133]. Is it about avoiding the use of armed force until the last moment before acquiring operational capabilities in the field of weapons of mass destruction, or is it about ruling out the use of force altogether, especially in the absence of consent from the permanent members of the Security Council?

In any case, delaying the adoption of non-military sanctions of the Security Council and their ineffectiveness are conducive to the expansion of the nuclear military capabilities of some countries, as well as the covert proliferation of weapons of mass destruction. The question is whether countries such as Iran can be allowed to pursue nuclear programs for civilian purposes without appropriate international control and whether to admit the risk that they will acquire nuclear weapons and means of their delivery (ballistic missiles).

A certain way out of the outlined situation would be for the Security Council to adopt a legally binding resolution, which in the event of its violation would authorize member states to act (including the use of armed force) without the need to adopt a new resolution, i.e. it would prevent political manipulation of the veto of one of the

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[133] The report by the US intelligence services does not dispel many long-known doubts – *National Intelligence Estimate. Iran: Nuclear Intentions and Capabilities,* November 2007: "Key Judgments. A. We judge with high confidence that in fall 2003, Tehran halted its nuclear weapons program; we also assess with moderate-to-high confidence that Tehran at a minimum is keeping open the option to develop nuclear weapons. (…) D. Iranian entities are continuing to develop a range of technical capabilities that could be applied to producing nuclear weapons, if a decision is made to do so. (…) H. We assess with high confidence that Iran has the scientific, technical and industrial capacity eventually to produce nuclear weapons if it decides to do so."

J.R. Bolton, *The Flaws in the Iran Report,* "The Washington Post", December 6, 2007: "The real differences between the NIEs are not in the hard data but in the psychological assessment of the mullahs' motives and objectives. (…) [A]n unnamed International Atomic Energy Agency official, quoted in the New York Times, saying that 'we are more skeptical. We don't buy the American analysis 100 percent'."

Iranian site prompts US to rethink assessment, "The Washington Post", October 24, 2009: "Tehran set to open Qom nuclear facility to inspectors amid concerns over its role. (…) Iranian plans to place only 3,000 centrifuge machines in the plant. That number is too small to furnish fuel for a civilian power plant, but just big enough to supply Iran annually with up to three bombs' worth of weapons-grade fuel, the former officials said. (…) The Qom "site has disputed one of the US intelligence community's key assessments of Iran's nuclear program: the assumption that Tehran had abandoned plans to enrich uranium in secret, according to two former senior US officials involved in high-level discussions about Iran."

permanent members of the Security Council[134]. However, such an option seems difficult politically and militarily[135].

In this context, it is worth recalling the opinion of two US presidents (George W. Bush and Barack Obama.

> "I believe they want to have the capacity, the knowledge, in order to make a nuclear weapon. And I know it's in the world's interest to prevent them from doing so. I believe that the Iranian – if Iran had a nuclear weapon, it would be a dangerous threat to world peace. But this – we got a leader in Iran who has announced that he wants to destroy Israel. So, I've told people that if you're interested in avoiding World War III, it seems like you should be interested in preventing them from having the knowledge necessary to make a nuclear weapon".[136]
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> "A nuclear-armed Iran is completely counter to Israel's security interests. But it is also counter to the national security interests of the United States. (…) I have said that when it comes to preventing Iran from obtaining a nuclear weapon, I will take no options off the table, and I mean what I say. That includes all elements of American power. (…) Iran's leaders should understand that I do not have a policy of containment; I have a policy to prevent Iran from obtaining a nuclear weapon. And as I have made clear time and again during the course of my presidency, I will not hesitate to use force when it is necessary to defend the United States and its interests".[137]

According to the former French president :

« I]l n'y aura pas de paix dans le monde si la communauté internationale fait preuve de faiblesse face à la prolifération des armements nucléaires. (…) La

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[134] P. Goldschmidt, *Nuclear Prevention and Red Lines: The Case of Iran,* IISS – CFR Workshop, "The Iranian Nuclear Challenge: Reassessing the Options", London, March 22-23, 2010, p. 5: "To prevent the Iranian nuclear crisis from escalating, it would be advisable to clearly define the red lines and the consequences of crossing them. The best way would be for the Security Council to adopt a resolution under Chapter VII of the UN Charter deciding that if Iran were to produce HEU, to separate plutonium, or to notify its withdrawal from the NPT – *before* the IAEA is able to draw the necessary conclusion about the exclusively peaceful nature of Iran's nuclear program – a number of strong and well-defined sanctions would automatically be applicable and implemented without requiring a further UNSC resolution."

[135] T. Donnelly, D. Pletka, M. Zarif, *Containing and Deterring a Nuclear Iran. Questions for Strategy, Requirements for Military Forces.* A Report by the American Enterprise Institute, December 2011.

[136] G.W. Bush, Press Conference, October 17, 2007: https://georgewbush-whitehouse.archives.gov/news/releases/2007/10/20071017.html

[137] Barack Obama's speech at the America Israel Public Affairs Committee's annual policy conference, March 4, 2012: see also Hillary Rodham Clinton, Secretary of State, Interview, Washington, DC, July 26, 2009: "[W]e believe as a matter of policy it is unacceptable for Iran to have nuclear weapons, the G-8 came out with a very strong statement to that effect coming from Italy – so we are united in our continuing commitment to prevent Iran from obtaining nuclear weapons. What we want to do is to send a message to whoever is making these decisions that if you're pursuing nuclear weapons for the purpose of intimidating, of projecting your power, we're not going to let that happen" – http://www.state.gov/secretary/rm/2009a/july/126450.htm. See also fn. 313.

faiblesse et la démission ne sont pas des facteurs de paix mais des facteurs de guerre ».[138]

2.3.5. Lebanon, Syria, Gaza Strip

In adopting resolution 1701 (2006) on Lebanon, the Security Council did not refer to Chapter VII of the UN Charter, although it would seem obvious that it was acting within this framework (however, it clearly stated that the situation in that country constituted a threat to international peace and security). Moreover, it did not specify the strengthened mandate of the international forces, although it authorized UNIFIL forces to take "all necessary measures" in order to implement the resolution. This is yet another proof of the Security Council's specific – legal and political – meandering, which is an expression of dangerous illusions on the one hand, and extra-legal interests on the other.

In response to this resolution, the President of Syria described the intention to deploy international forces along the Lebanese Syrian border as a hostile action violating Lebanon's sovereignty, while threatening to close the border crossings[139]. It is no secret that it is through this border that the largest number of weapons flows for the Hezbollah military faction. This situation has not changed for years.

The weakness of this resolution is that it treats Lebanon, especially its army, as a fully functional organism, and the Lebanese-Syrian border (only partially demarcated) as controllable. One may fear that this resolution contains the seeds of failure at its very source. The Security Council has once again encountered the political limits of its effectiveness. It should be noted that Hezbollah – with the help of Iran and Syria – is rebuilding its military power in Lebanon[140].

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[138] *Discours du Président de la République* (N. Sarkozy), 62ème Assemblée Générale des Nations Unies, New York – 25 septembre 2007: « L'Iran a droit à l'énergie nucléaire à des fins civiles. Mais en laissant l'Iran se doter de l'arme nucléaire, nous ferions courir un risque inacceptable à la stabilité de la région et à la stabilité du monde. Je veux dire au nom de la France que cette crise ne sera résolue que si la fermeté et le dialogue vont de pair ».

G.W. Bush, Press Conference, October 17, 2007: "I believe they want to have the capacity, the knowledge, in order to make a nuclear weapon. And I know it's in the world's interest to prevent them from doing so. I believe that the Iranian – if Iran had a nuclear weapon, it would be a dangerous threat to world peace. But this – we got a leader in Iran who has announced that he wants to destroy Israel. So, I've told people that if you're interested in avoiding World War III, it seems like you should be interested in preventing them from having the knowledge necessary to make a nuclear weapon" – www.whitehouse.gov/news/releases/ 2007/10/20071017.html.

« Il faut se préparer au pire, a déclaré Bernard Kouchner, au sujet de l'Iran. Interrogé (…) pour savoir ce que cela signifiait, le chef de la diplomatie a répondu: c'est la guerre. (…) Nous devons négocier jusqu'au bout, a dit le ministre. Mais la possession de l'arme atomique par Téhéran serait 'un vrai danger pour l'ensemble du monde', a dit Bernard Kouchner, même si 'aucun signe ne nous permet de penser en dehors des préparations militaires' qu'un bombardement de l'Iran soit proche. 'Je ne crois pas que nous en soyons là' mais il est 'normal qu'on fasse des plans', a-t-il dit » – « Le Figaro », 16 septembre 2007.

[139] "Frankfurter Allgemeine Zeitung", 24 August 2006, p. 1.

[140] *A resurgent Syria alarms US, Israel,* "The Washington Post", December 4, 2010: "The Obama administration has so far failed through its policy of engagement to persuade the country to abandon its support for Hezbollah and sever its alliance with Iran", "Israeli surveillance tracks the nighttime missile shipments as Syrian personnel escort them from

In turn, Security Council resolution 1860 (2009) on the Israeli-Palestinian conflict in the Gaza Strip[141] did not state (despite the military operations) that there was a threat to international peace and security; it was not adopted under Chapter VII of the UN Charter[142]. Furthermore, it did not oblige Israel to immediately withdraw its troops from the Gaza Strip, nor did it mention sending international forces to the Gaza Strip[143]. The resolution was rejected by both Israel and Hamas[144], and the fighting ceased only on 17 January 2009, after a ceasefire unilaterally announced by Israel.

The Security Council's position on Lebanon and the Gaza Strip is an example of compromises and a weakness, which results from political differences[145] (especially among the permanent members of the Council).

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clandestine bases in Syria to the Lebanese border. At the swap area, the weapons are transferred to Lebanese Lebanon trucks and driven into southern Lebanon and to Beirut", "Lebanon's top security positions - the head of military intelligence and director of general security - are controlled by Syrian-approved appointees"; *Hezbollah's relocation of rocket sites to Lebanon's interior poses wider threat,* "The Washington Post", January 23, 2010 (A06).

[141] See *infra* 4.5.2.2.

[142] SC Resolution 1860 (2009): "Stressing that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state, (…) 1. Stresses the urgency of and calls for an immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza; 2. Calls for the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment; (…) 5. Condemns all violence and hostilities directed against civilians and all acts of terrorism; 6. Calls upon Member States to intensify efforts to provide arrangements and guarantees in Gaza in order to sustain a durable ceasefire and calm, including to prevent illicit trafficking in arms and ammunition and to ensure the sustained re-opening of the crossing points on the basis of the 2005 Agreement on Movement and Access between the Palestinian Authority and Israel; and in this regard, welcomes the Egyptian initiative, and other regional and international efforts that are under way."

[143] *Israel Warns Gazans to Expect Heightened Warfare,* "The Washington Post", January 10, 2009: "Hossam Zaki, a senior Egyptian Foreign Ministry official, said his government is resisting pressure to allow the deployment of foreign forces on its side of the border to prevent the smuggling of weapons to Hamas. (…) The US Army Corps of Engineers and other US agencies last year began providing Egypt with technical help to patrol the border, including sonar equipment designed to locate tunnels. With more such aid, Zaki said, Egypt could patrol the border by itself."

[144] *Hamas rejects UN Gaza resolution,* 09 January 2009: "Even though we are the main actors on the ground in Gaza, we were not consulted about this resolution (…), top Hamas official Ayman Taha told AFP. (…) Hamas spokesman Sami Abu Zuhri said the Security Council 'did not take the interests and the demands of the Palestinian people, especially in Gaza, into consideration when making this resolution'" – http://www.reliefweb.int/rw/rwb.nsf/db900SID/FBUO-7N5EPU?OpenDocument&emid=ACOS-635PFR

"Israel dismissed a UN Security Council resolution calling for an immediate and lasting cease-fire, calling the plan 'unworkable' because it lacked any guarantee that Hamas, the Islamist movement that rules Gaza, would stop firing rockets into southern Israel," The Washington Post, January 10, 2009 (A09).

[145] SC Resolution 1850 (2008), 14 votes in favour as Libya abstains: "Libya's representative (…) said (…) the text contained deliberate ambiguity and did not confront breaches of illegality, which did not serve peace as much as harm it. The aggressor could interpret such texts as acceptance of its practices, and the victim could see them as proof that the international community was biased, thereby promoting further despair and frustration."

2.3.6. Darfur

Another proof of the ineffective compromise of the members of the Security Council is Resolution 1706 (2006) on the conflict in Darfur, concerning the replacement of the ineffective African Union (AU) peacekeeping mission in Sudan (AMIS*)* – financed mainly from European Union funds – by the United Nations Mission in Sudan (UNMIS*).* In this resolution, the Security Council stated that the situation in Darfur constituted a threat to international peace and security. When deciding to take over the AMIS operation by UNMIS, the Council increased the UNMIS contingent to 17,300 military personnel and ordered the UN Secretary-General to deploy additional troops as soon as possible.

The Security Council did not take these decisions expressly on the basis of Chapter VII of the UN Charter, and in para 1 of the resolution it provided for Sudan's consent (*invites the consent of the Government)* to the deployment of additional troops. Only in point 12 of the resolution – this time explicitly stating that it was acting under Chapter VII of the UN Charter – did it authorise UNMIS forces to "use all necessary measures" to protect UN personnel and humanitarian organisations, prevent attacks on the civilian population and disarm irregular forces.

After the resolution was passed with three abstentions (Russia, China, Qatar) and protests from Sudan, the Russian representative (like the Egyptian Foreign Minister) stated that the consent of the Sudanese government was a necessary condition, while the representatives of the USA and United Kingdom United Kingdom had a different opinion. Over time, an outline of a compromise emerged, consisting in the establishment of a joint UN and African Union force in Darfur, with Sudan preferring the African Union command. The situation in Darfur (as well as in South Sudan) is the result of many years of tolerance by the international community of mass murders committed by the dictatorial government and the lack of serious involvement of states and international organizations (including the impotence of the AU, especially Muslim states[146]). Interestingly, for a long time no serious economic sanctions were adopted against Sudan[147].

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[146] For a critical discussion of the inglorious role of Arab states in the context of Darfur, see: *About the Arab Stance vis-à-vis Darfur,* 21 March 2007 –www.crisisgroup.org/home/index.cfm?id=4722&l=1; Nadim Hasbani, *L'insupportable complicité des Arabes avec Khartoum,* « Courrier International » (Al Hayat), March 2007 – www.crisisgroup.org/home/index.cfm?id=4767&l=1; H. Travis, *Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations,* Florida International University Legal Studies Research Paper Series, 2008, no. 08–05, pp. 1–73; see also critical comments UN Secretary General (fn. 238).

[147] C. Thomas-Jensen, *How John Q. Citizen Can Affect Darfur* (9 January 2007): "In the past, strong punishment has forced the Sudanese government to change course. When the Clinton administration pushed to impose UN sanctions and unilateral trade restrictions on Sudan for supporting international terrorism, Khartoum responded by dismantling terrorist networks and cooperating with US intelligence agencies. Last January, when the US put the full court press on Khartoum to sign a peace agreement with rebels in southern Sudan, the Bush administration scored a rare foreign policy victory. (…) Why won't the US government back its talk with real action? The answer is pretty straightforward: It doesn't want to

In unanimously adopted resolution 1769 (2007), the Security Council made another attempt to break the deadlock. Reaffirming that the situation in Darfur constitutes a threat to international peace and security and that Sudan is not fully implementing its previous resolutions, the Security Council decided to strengthen the humanitarian operation with the help of a hybrid force of the UN and the African Union (UNAMID). However, this resolution is a compromise, the effectiveness of which may prove limited[148].

The Security Council in paragraph 15 of this resolution – expressly referring to Chapter VII of the UN Charter – authorised UNAMID to use armed force (*take the necessary action)* in order to protect its personnel and humanitarian personnel and ensure their safety, as well as to protect the civilian population[149]. However, it did

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jeopardize the Sudanese government's cooperation on important US counterterrorism objectives" – www.crisisgroup.org:80/home/index.cfm?id=4605&l=1.

The US, however, changed its policy in this respect and in 2007 sought to have the Security Council adopt economic sanctions despite China's clear resistance (www.chinadaily.com.cn/china/2007-05/30/content_882954.htm). On the US sanctions adopted in 2007, see R. Weissburg, *Sanctioning Talk on Darfur* (May 31, 2007) – www.american.com:80/archive/2007/may-0507/sanctioning-talk-on-darfur.

"Times Online", 19 April 2007: "China has indicated that it will block any attempt by Britain and the United States to push for sanctions against Sudan (…). The Chinese foreign ministry said today that now was not the 'proper time' to discuss sanctions (…). China, a veto-wielding permanent member of the Security Council, buys two-thirds of Sudan's oil exports and sells the African country weapons and military aircraft" – www.timesonline.co. uk/tol/news/world/africa/article1678083.ece.

"China Daily", May 30, 2007: "Imposing new sanctions only makes the problem more difficult to resolve", China's recently-appointed special envoy to Africa Liu Guijin told a news conference after a fact-finding trip to Sudan. (…) why can't the international community give more time for a peaceful settlement of the problem?" he asked. (…) Liu also advocates some countries not to politicize Sino-Sudanese energy collaboration, saying it was normal business activity and has, indeed, helped social and economic development in the poverty-stricken country" – www.chinadaily.com.cn/china /2007–05/30/content_ 882954.htm.

148 M. Malan, *UN Resolution for Darfur: An Important but Insufficient First Step Towards Protecting Civilians*: "Over the past month, the process involved watering down the text of what emerged as Resolution 1769 several times in response to objections from Sudan and China. For example, the sponsors (initially the United Kingdom and Ghana; later the UK and France) had to remove aspects such as the threat of sanctions; authorization for the new force to seize or collect arms; and specific language, such as phrases condemning the Government of Sudan for blocking access by relief workers to displaced people in distress, which Sudan's UN ambassador called ugly and awful" – www.reliefweb.int/rw/rwb. nsf/db900sid/RMOI-75PVFK?OpenDocument.

Peacekeepers in Darfur Hobbled by Need, The Washington Post, July 4, 2008 (A01): "Nearly a year after its creation, a joint UN–African Union peacekeeping mission to Darfur is struggling, with fewer than half the soldiers promised, broken-down equipment, government obstacles, and what commanders say are the unrealistically high expectations of a world that has failed to support them."

149 SC Res. 1769 (2007): "15. Acting under Chapter VII of the Charter of the United Nations: (a) decides that UNAMID is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities in order to: (i) protect its personnel, facilities, installations and equipment, and to ensure the security and freedom of movement of its own personnel and humanitarian workers, (ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan."

not authorise UNAMID to seize and collect weapons or disarm irregular forces, but only to monitor arms build-up in Darfur (without reference to Chapter VII of the UN Charter), which was a step back from the previous Council resolution[150]. Furthermore, resolution 1769 did not establish clear sanctions for violations of its provisions (which was mainly due to the "efforts" of China and which made it possible to adopt the resolution)[151].

The UN has not recognized the situation in Sudan as a case of genocide[152]. Interestingly, while the UN mission lacks appropriate equipment, the perpetrators of crimes in Sudan have both weapons and ammunition and continue to operate[153]. In its resolutions, the Security Council recommends strengthening UNAMID's efforts[154].

Against this background, a restrictive application and interpretation of international law lead at times to a situation in which perpetrators are more protected

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[150] SC Res. 1769 (2007): "9. Decides [omitting reference to Chapter VII of the UN Charter, note JK] that UNAMID shall monitor whether any arms or related material are present in Darfur in violation of the Agreements and the measures imposed by paragraphs 7 and 8 of resolution 1556 (2004)." Meanwhile, in resolution 1706 (2006) of the Security Council: "12. Acting under Chapter VII of the Charter of the United Nations: (a) Decides that UNMIS is authorized to use all necessary means, in the areas of deployment of its forces and as it deems within its capabilities: (...) to seize or collect, as appropriate, arms or related material whose presence in Darfur is in violation of the Agreements and the measures imposed by paragraphs 7 and 8 of resolution 1556, and to dispose of such weapons and related material as appropriate."

[151] M. Malan (fn. 148): "There may be some disappointment with the vagueness of the language of Resolution 1769 when it comes to the protection of civilians and the safeguarding of humanitarian space. Vagueness is the rule, however, rather than the exception with UN mandates. In virtually every peacekeeping 'lessons learned' exercise since the early 1990s, force commanders have called upon their 'political masters' – Council and governments of Troop Contributing Countries (TCCs) – to provide them with a realistic and well-defined mandate, and the necessary means for its implementation bridge too far; the sovereignty of a state that has failed dismally to protect its own population has trumped international morality."

[152] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005), p. 4: "The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. (…) The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offenses such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide." See H. Travis' critical position (fn. 146).

[153] *China seeks to block UN report on its weapons in Darfur,* "The Washington Post", October 15, 2010.

[154] SC Res. 1935 (2010): "1. *Decides* to extend the mandate of UNAMID as set out in resolution 1769 (2007) for a further 12 months to 31 July 2011; 2. Underlines the need for UNAMID to make full use of its mandate and capabilities, giving priority in decisions about the use of available capacity and resources to (a) the protection of civilians across Darfur, and (b) ensuring safe, timely and unhindered humanitarian access, the safety and security of humanitarian personnel and humanitarian activities; (…) 4. Requests UNAMID in consultation with the UN country team to develop a comprehensive strategy for the achievement of the objectives set out in paragraph 2 above and requests UNAMID to maximize the use of its capabilities in Darfur, in the implementation of that strategy"; in similar spirit of SC Res. 1870 (2009).

than their victims, and dictatorial states are safer outside than their citizens inside. Such cases are not exceptional.

2.4. Security Council vulnerability

If the United Nations system is not perfect, then in assessing its activities, one must perceive the scale of the difficulties faced by this organization and also realize that the UN is composed of states (including five members of the Security Council with the right of veto) and dependent on their will[155].

We are dealing with a paradoxical situation: on the one hand, the practice (political interests) of states and their international law violations can lead to the erosion of this system, while on the other hand, states seek acceptance of their actions by the UN and assess the conduct of other states in the light of the Charter's rules. Some countries (e.g. Russia) even specialize in producing their own, most often grotesque, legal justifications.

Regardless of the disputes concerning the concepts and scope of legal norms, the main difficulty lies in establishing and assessing the facts and only then in their legal qualification. The weakness of the international system results from the unilateral nature of these assessments and the lack of a global international jurisdiction. The Security Council, as a political, not judicial body, often avoids legal assessments, focusing on political measures.

Although in the last years international armed operations authorised by the Security Council have become more frequent, in practice the illusion about the guarantee of success of these actions have been dispelled. The effects of the use of force are both positive and negative, regardless of their legal assessment. In many cases the murders and bloodshed have been stopped, which is an undoubted success. However, the examples of East Timor, Afghanistan and Somalia indicate that terror and fundamentalism are coming back. Therefore, some areas are far from stabilizing and rebuilding the state after an armed conflict is one of the most difficult tasks[156].

Regardless of the paralyzing veto the Security Council encounters, especially after 1990, another difficulty. It adopts – more often than before – appropriate resolutions, which, on the one hand, are the result of far-reaching and long-developed compromises, but on the other hand, they enforceability is limited, because dictatorships boycott legally binding resolutions of the Council.

The drafting and adoption of Security Council resolutions is subject to political pressure, especially from the great powers, which often leads to their content being diluted and weakened. Differences in political interests slow down the adoption of resolutions and cause resolutions, at the cost of avoiding a veto, to be full of various types of ambiguities or half-words. This is the (inevitable?) cost of compromise[157].

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155 FL Kirgis, Jr., *The Security Council's First Fifty Years,* AJIL, 1995, Vol. 89, No. 3, pp. 506–539.

156 G. Jones, J. M. Wilson, A. Rathmell, K. J. Riley, *Establishing Law and Order After Conflict,* RAND Corporation, Santa Monica 2005.

157 H. Freudenschuß, *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council,* EJIL, 1994, Vol. 5/4, pp. 492–531; O. Eldar, *Vote-Trading in International Institutions,* EJIL, 2008, Vol. 19/1.

Another political twist is the adoption of resolutions in conflict situations without mentioning that the Council is acting under Chapter VII or without stating that the situation in question constitutes a threat to international peace and security. It is against this background that the criticised concept of implied authorization of the Council for certain military operations emerged.[158]

The long-standing failure of Iran, North Korea or Iraq to respect legally binding Security Council resolutions and the toleration of the uncontrolled development of these countries' nuclear programs threaten to seriously weaken the authority of the UN and encourage other countries to violate similar Council resolutions.

One may ask about the limits of the Council's vulnerability.

[158] See Ch. Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq,* EJIL, 2002, Vol. 13/1, pp. 1–20; N. Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by Coalitions of the Able and Willing,* EJIL, 2000, Vol. 11/3, pp. 541–568; J. Lobel, M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime,* AJIL, 1999, Vol. 93, pp. 124–154.

Chapter 3. Evolution of concepts

Wars begin when you will,
but they do not end when you please.
Niccolò Machiavelli,
Florentine Histories (1521–1525)

The world of 1945 differs quite significantly from the era at the beginning of the 21st century, especially in terms of new weapons and threats. For example, self-defence, threat to international security, armed attack and attacker take on a slightly different form today. The international balance of power has also changed.

The illegality of the use of force or the threat of force is obvious in some cases. However, in recent decades, the problem of responding to new threats (internal conflicts and related mass atrocities; terrorist attacks and armed actions by non-state actors; the proliferation of weapons of mass destruction; so-called hybrid warfare) and new weapons (weapons of mass destruction; ballistic and cruise missiles; cyberattacks; drones) has emerged.

However, these terms are neither clear nor fixed in international law and are often subject to political and legal assessment (either unilaterally or in the Security Council). As a result, the legal and political assessment leads sometimes to real dilemmas.

The UN Charter uses various terms: use of force (Article 2, paragraph 4), aggression (Article 39) and armed attack (Article 51). The most comprehensive of these is use of force, then aggression, and finally armed attack. In the context of Article 51 the fundamental and controversial issue is whether every use of armed force constitutes an armed attack.

UN General Assembly Resolutions 2625 (XXV) of 1975[159] and 3314 (XXIX) of 1974 define an act of aggression as an action of a state against a state[160]. This definition is not exhaustive and is not legally binding, but it can be useful as an auxiliary means of interpretation. A distinction must be made here between an act of aggression *as an action* of a state and the *crime of aggression*, understood as an act of an individual[161]. The definition of aggression adopted by the ICC in June 2010 does not

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[159] GA Resolution 2625 (XXV). *Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations.*

[160] GA Resolution 3314 (XXIX). *Definition of Aggression.* Annex: Definition of Aggression: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition" (Article 1); "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter" (Article 4).

[161] Work on the definition of aggression in the context of criminal responsibility of individuals was completed in 2010 – Review Conference of the Rome Statute. *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression,* Resolution RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus; D. Scheffer, *States Parties Approve New Crimes for International Criminal Court,* "ASIL Insight", June 22, 2010; see also C. Kreß, S. Barriga, *The Crime of Aggression. A Commentary,* New York 2016;

constitute a breakthrough – it is modelled on resolution 3314 and leaves much room for interpretation[162].

3.1. Threat to the peace and security

The armed attack on the United States on September 11, 2001, did not so much change the world as raise awareness of new sources and types of threats and their impact on international security policy. It did not target just one side of the conflict; it constituted a symbolic assault on the fundamental values of democracy and civilization.

The fundamental question concerns defining what a threat to international peace and security is. This legal concept is used by the UN Charter (Article 39), which, however, does not define it, leaving it to the Security Council to decide. Starting from the facts and their assessment, the Security Council determines threats to international peace and security, which constitutes a premise for further actions by Member States or the Council. However this assessment alone is not a sufficient legal basis authorizing the use of armed force.

In this regard, especially since the 1990s, we have witnessed an evolution of the Security Council's practice concerning not only such terms as aggression and armed attack. Over time, the Council, acting under Chapter VII of the Charter, extended the concept of threat to important and new areas: internal situations (civil war, collapse of state authority, humanitarian catastrophe, mass violations of fundamental rights of the population by the state – SC resolutions from the 1990s concerning Bosnia and Herzegovina, Somalia, Rwanda, East Timor and Kosovo) and terrorist acts

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M.J. Glennon, *The Blank-Prose Crime of Aggression,* "The Yale Journal of International Law", 2010, Vol. 35, pp. 71-114; I. Hurd, *How Not to Argue against the Crime of Aggression: A Response to Michael Glennon,* 2010 - http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601357; EJIL, 2009, Vol. 20/4; R.S. Clark, *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*; A. Paulus, *Second Thoughts on the Crime of Aggression*; C. Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*); S.D. Murphy, *Aggression, Legitimacy and the International Criminal Court*); *The International Criminal Court and the Crime of Aggression,* Case Western Reserve Journal of International Law, 2009, Vol. 41, Nos. 2 & 3; *Report of 13 December 2007 of the Special Working Group on the Crime of Aggression,* ICC-ASP/6/SWGCA/1; L. May, *Aggression and Crimes against Peace,* Cambridge University Press, Cambridge 2008; K.A. Petty, *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court* (May 20, 2007) – http://ssrn.com/abstract=1013408

[162] Review Conference of the Rome Statute. *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression,* Resolution RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus: "Article 8 *bis.* Crime of aggression. 1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (XXIX) of 14 December 1974, qualify as an act of aggression" (http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf)

(resolutions 1368 and 1373 of 2001), which constitute a violation of international law (irrespective of the reasons and objectives)[163] and authorise self-defence[164].

The practice of the Security Council shows that maintaining a regime of racial segregation (resolutions 217, 232, 418), failing to respect the results of free elections (resolutions 841, 875), failing to extradite or punish terrorists (resolutions 748, 883, 1214, 1070, 1267, 1333), providing government support for rebels in another country (resolution 1408), as well as failing to implement Council resolutions (1277, 1441) adopted under Chapter VII of the United Nations Charter also constitute such a threat to international peace and security.

New is the recognition by the Security Council that the proliferation of weapons of mass destruction and their means of delivery is also part of the mentioned threats (for example resolutions 1172, 1540, 1695, 1718). In Resolution 1540 (2004), adopted under Chapter VII, the Security Council affirm that "the proliferation of nuclear, chemical and biological weapons and their means of delivery constitutes a threat to international peace and security" (preamble) and obliges member states (but without implementing provisions and possible sanctions) to tighten the system of controls on the proliferation of weapons of mass destruction with regard to non-state actors and to adopt appropriate national laws in this regard[165].

In 2011, the Security Council first noted that climate change may impact and pose a threat to international security[166].

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[163] SC Res. 1377 (2001): "Reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed"; SC Res. 1566 (2004): "3. Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism, are "under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."

[164] See fn. 191

[165] SC Res. 1540 (2004): "Acting under Chapter VII of the Charter of the United Nations, 1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery; 2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them." See also SC Res. 1673 (2006).

[166] SC 20 July 2011 (SC/10332). Presidential statement S/PRST/2011/15: "The Security Council expresses its concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security. (…) The Security Council notes that in matters relating to the maintenance of international peace and security under its consideration, conflict analysis and contextual information on, inter alia, possible security implications of climate change are important, when such issues are drivers of conflict, represent a challenge to the implementation of Council mandates or endanger the process of consolidation of peace."

Against this background, the problem of Security Council resolutions containing orders for behaviours going beyond the strict framework of a conflict arose. Such orders, legally binding on states (adopted by the Security Council under Chapter VII of the Charter), concern recognition of a border, partial disarmament, specifying special regime of responsibility for violating international law (for example, Iraq – Security Council resolutions 687 and 692), extradition of one's own citizens, establishment, pursuant to a decision of the Security Council, of special criminal tribunals for the former Yugoslavia and for Rwanda. In resolution 1718, the Council ordered North Korea to return to the NPT and the IAEA control mechanisms.

Such activity of the Council – which can be described as quasi-legislative or quasi-judicial – is sometimes the subject of criticism for alleged overstepping of its competences[167]. This criticism – not always convincing – makes it difficult for the Council to perform its function as a guarantor of international peace and security. The scope of the Security Council's discretion is evolving, and each case requires separate analysis and assessment[168]. Controversy also arises in the context of the application by the Security Council of targeted sanctions against individuals[169].

Secretary-General's remarks to the Security Council on the Impact of Climate Change on International Peace and Security (20 July 2011): "We must make no mistake. The facts are clear: climate change is real; it is accelerating in a dangerous manner; and it not only exacerbates threats to international peace and security, but it is also a threat to international peace and security". See also *Concept note: Maintenance of international peace and security - the impact of climate change,* July 19, 2011 (Concept Note for the Open Debate of the Security Council on July 19, 2011).

[167] See J. Farrall, K. Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalized World,* Cambridge 2009; I. Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit,* AJIL, 2008, Vol. 102, No. 2, pp. 275–308; LM Hinojosa Martinez, *The Legislative Role of the Security Council In Its Fight Against Terrorism: Legal, Political And Practical Limits,* International and Comparative Law Quarterly, Vol. 57, April 2008, pp. 333–359; S. Chesterman, *The Role of the Security Council in Strengthening A Rules-based International System. Final Report and Recommendations from the Austrian Initiative, 2004–2008,* Federal Ministry for European and International Affairs (Austria); V. Kanwar, *Two Crises of Confidence: Securing Non-Proliferation and the Rule of Law Through Security Council Resolutions,* Ohio Northern University Law Review, 2008, Vol. 34; A. Boyle, Ch. Chinkin, *The Making of International Law,* Oxford 2007, pp. 229–233; S. Talmon, *The Security Council as World Legislature,* AJIL, 2005, Vol. 99, No. 1, pp. 175–193; M. Akram, SH Shah, *The Legislative Powers of the United Nations Security Council,* and A. Marschik, Legislative Powers *of the Security Council,* (in:) R.St.J. Macdonald, D.M. Johnston (ed.), *Towards World Constitutionalism,* Leiden/Boston 2005, pp. 431–456; A. Zimmermann, B. Elberling, *Grenzen der Legislativbefugnisse des Sicherheitsrats,* „Vereinte Nationen", 2004, No. 3, pp. 71–77; M. Wagner, *Die wirtschaftlichen Maßnahmen des Sicherheitsrates nach dem 11. September 2001 im völkerrechtlichen Kontext – Von Wirtschaftssanktionen zur Wirtschaftsgesetzgebung?,* ZaöRV, 2003, Vol. 63, pp. 879–920; F.L. Kirgis, Jr. (fn. 155), pp. 520–532.

[168] E. de Wet writes about a possible control of the legality of the resolutions of the Security Council (fn. 40).

[169] C. Michaelsen, *The Security Council's Al Qaeda and Taliban Sanctions Regime: "Essential Tool" or Increasing Liability for the UN's Counterterrorism Efforts?,* "Studies in Conflict & Terrorism", 2010, pp. 448–463; G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi,* Harvard International Law Journal, 2010, Vol. 51/1, pp. 1-49; D. Halberstam, E. Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order,* Jean Monnet Working Paper 02/09; see also UK. The Supreme Court. *Her Majesty's Treasury (Respondent)*

We are therefore dealing with a constant definition and expansion of the concept of a "threat to international peace and security". A similar tendency can also be seen in the security doctrines of NATO (1999, 2010), the EU (2003) and the OSCE (2003)[170].

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v Mohammed Jabar Ahmed and Others (FC) (Appellants), Her Majesty's Treasury (Respondent) v Mohammed al- Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant) – Judgment of 27 January 2010.

[170] See also *Strategic Concept for the Defence and Security of The Members of the North Atlantic Treaty Organization,* Adopted by Heads of State and Government in Lisbon, 19 November 2010; *The Alliance's Strategic Concept Approved by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington DC,* 23rd and 24th April 1999: "24. Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organized crime, and by the disruption of the flow of vital resources"; *A Secure Europe in a Better World. European Security Strategy,* Brussels, 12 December 2003: "Our traditional concept of self- defence – up to and including the Cold War – was based on the threat of invasion. With the new threats, the first line of defence will often be abroad. The new threats are dynamic. The risks of proliferation grow over time; left alone, terrorist networks will become ever more dangerous. State failure and organized crime spread if they are neglected – as we have seen in West Africa. This implies that we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early"; *OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century,* 2 December 2003.

3.2. Self-defence and armed attack[171]

3.2.1. According to article 51 of the UN Charter:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

This Article is one of the most controversial and provoking various interpretations[172], especially concerning the new weapons and new types of threats.

In this context, several problems arise from the evolution of international realities since the adoption of the UN Charter in 1945. First, what does "armed attack" and "occur" mean. Second, who is the perpetrator of the attack (the victim is clearly a UN Member). Third, what form does the attack take and what does "armed" mean? Finally, fourth, what form does self-defence take? More than half a century after the adoption of the UN Charter, the answers will not always be identical.

Self-defence, by definition, requires an armed attack, but not every use of force qualifies as such. The definition of an armed attack is far from precise. It will undoubtedly be a full-scale military operation by one country against another. However, in some circumstances armed incidents, series of attacks by irregular groups (including terrorists) or cyberattacks can be treated as equivalents of an armed attack[173]. The assessment may depend on the scale, effects, and duration of an attack, which influences the form of the response.

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[171] See also *infra* 5.2.

[172] T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice,* Cambridge 2010.

[173] See NATO. *Strategic Concept (*fn*.* 170), points 9, 10, 12, 14 (proliferation of nuclear weapons and other weapons of mass destruction, terrorism, cyber-attacks, development of laser weapons, electronic warfare and technologies that impede access to space); *NATO 2020: Assured security; dynamic engagement. Analysis and recommendations of the group of experts on a new strategic concept for NATO,* 17 May 2010: "[L]ess conventional threats to the Alliance could arise from afar and still affect security at home. These dangers include attacks involving weapons of mass destruction, terrorist strikes, and efforts to harm society through cyber assaults or the disruption of critical supply lines. To guard against these threats, which may or may not reach the level of an Article 5 attack, NATO must update its approach to the defence of Alliance territory while also enhancing its ability to prevail in military operations and broader security missions beyond its borders" (pp. 8/9). "There is, of course, nothing ambiguous about a cross-border military assault by the combined armed forces of a hostile country. However, there may well be doubts about whether an unconventional danger – such as a cyber-attack or evidence that terrorists are planning a strike – triggers the collective defence mechanisms of Article 5. In the event, this will have to be determined by the NAC based on the nature, source, scope, and other aspects of the particular security challenge" (p. 20). "Any substantial or sudden interruption of supplies to an Ally would be of concern, especially if the interruption were caused by the sabotage of energy infrastructure

3.2.2. The institution of self-defence is known in national legal systems. However, if the state is a structure of monopolized power and allows self-defence as an auxiliary measure in exceptional situations when the state authority is not (would not be) able to prevent the commission of a crime, the international community is far from being so organized.

The prohibition of the use of force contained in the UN Charter is an important element, but the functioning of the UN system and the legal nature of its subjects (states) mean that self-defence plays and will continue to play a significant role. Even if the Security Council bears the main responsibility for maintaining international peace and security, its decision-making power is seriously weakened by the veto of five great powers, and as a consequence, the use of force by states is most often justified by self-defence. That being, basic legal concepts (e.g. self-defence, armed attack, armed conflict or imminence) require adaptation and interpretation.

The norm of self-defence is older, and Article 51 of the UN Charter does not so much recognize the right to self-defence for the first time but rather specifies and supplements existing customary law[174]. The right to self-defence is by definition granted to the attacked state, but there is no right to self-defence against acts in self-defence (an aggressor has no right to self-defence against the victim of his aggression).

Article 51 of the Charter clearly states that the decision to defend oneself is made by the attacked state, so the Security Council's approval is not necessary. Although this article requires that the Security Council be notified of actions taken in self-defence, such notification is procedural in nature.

The premise of self-defence is an armed attack on a Member State i.e. its territory, including its armed forces or nationals abroad, ships or aircraft, as well as diplomatic and consular missions. Classic self-defence takes place on the territory of the attacked State (repelling an attack), sometimes passing into the territory of the attacker. The latter is generally a foreign state, but irregular non-state actors (including terrorists) are not excluded.

According to the literal and restrictive interpretation of Article 51, an armed response in self-defence is permissible only when an armed attack has actually taken place (occurs). However, in the context of modern weapons, this is not as obvious, especially when the threat is potential.

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or by unlawful interference with maritime commerce. Such an occurrence, if prolonged, could lead to consultations under Article 4 of the North Atlantic Treaty and to a determination by the Allies of an appropriate response" (p. 46).

[174] ICJ. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "[T]he Charter, having itself recognized the existence of this right [self-defence, JK], does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law" (§ 176).

Armed attacks concern various actions ranging from armed incidents to large military operations, which have been recently supplemented with new forms such as cyberattacks, so-called hybrid warfare, or a series of terrorist attacks. In the latter cases, however, it is not easy to determine the threshold of an armed attack or the moment of its start.

When an armed attack occurs, the choice of reaction – whether armed or otherwise – rests solely with the attacked state[175]. These may include: an armed response, immediate but limited and short-lived; a defensive-offensive operation, sometimes initiated with some delay and on a larger scale, leading to the expulsion of the enemy's armed forces beyond the borders of the attacked state, as well as entering the territory of the state that carried out the armed attack or supports irregular forces in various ways. The matter becomes even more complicated in the case of cyberattacks.

Self-defence should be characterised by necessity, proportionality and temporal proximity of the reaction,[176] as confirmed in the judgments of the International Court of Justice[177].

In the case of armed attacks of lesser importance, especially armed incidents of various kinds, the criteria of necessity, proximity and proportionality have greater weight. As a rule, an attack of a relatively small scale does not justify a mass armed response. However, in the case of cross-border terrorist attacks, this perspective changes significantly.

In the case of large-scale attack, these criteria lose their significance in practice because the purpose of self-defence becomes not only to repel the attack but also to prevent further attacks and ensure the security of the state and its citizens. For example, the self-defence of many states during World War II did not stop at the borders of Germany or Japan. Self-defence in Afghanistan in 2001 took the form of a large-scale and long-term military operation.

The criterion of necessity will be of great importance in the case of pre-emptive self-defence (or possibly preventive operations)[178], while the criterion of proportionality will be limited to the extent that the scope and effect of a potential attack, as well as the scope and objectives of the armed response, are not known in advance. In the era of missile weapons and serial terrorist attacks, it is difficult, and sometimes even impossible, to predict an approaching attack.

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[175] G. Evans (fn. 167): "The misunderstanding arises out of a confusion (…) between necessary and sufficient conditions. In short, it is certainly necessary for a case to be really extreme for coercive military force to be an option, but the fact that it is extreme is not in itself sufficient to conclude that such force should be applied" – www.crisisgroup.org/home/index.cfm?id=5407&l=2.

[176] See *infra* chapter 6.

[177] ICJ. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "176. (…) [S]elf- defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law"; CIJ. *Licéité de la menace ou de l'emploi d'armes nucléaires.* Avis consultatif du 8 juillet 1996 : « 41. La soumission de l'exercice du droit de légitime défense aux conditions de nécessité et de proportionnalité est une règle du droit international coutumier. (…) Cette double condition s'applique également dans le cas de l'article 51 de la Charte, quels que soient les moyens mis en œuvre ».

[178] See *infra* 4.3. (anticipatory self-defence) and 4.4. (preventive armed operation).

3.2.3. As technology develops, new problems arise related to the definition of armed attack and self-defence. This concerns cyberattacks[179] directed at civilian and military facilities in times of peace or armed conflict. They consist of stealing data, paralyzing the civilian and military infrastructure of the state, including, for example, disrupting the management of armed forces (hacker attacks on military satellites) or a nuclear program. The perpetrators are civilian hackers, sometimes acting on behalf of the state, or special units of the armed forces.

These actions can create a threat to international security and may, in some circumstances, be considered an armed attack, which is the premise of armed self-defence. However, its threshold is not precisely defined (for example, within NATO).

Can a cyberattack be treated as the equivalent of an armed attack and an element of an armed conflict[180]. This depends on whether it starts an armed conflict or has

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[179] See *Tallinn Manual on the International Law Applicable to Cyber Warfare*. Prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence. General Editor: M.N. Schmitt, Cambridge 2013; M.C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4),* "Yale Journal of International Law", 2011; DB Hollis, *An e-SOS for Cyberspace,* 2011 – http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670330; ET Jensen, *Cyber Warfare and Precautions Against the Effects of Attacks,* Texas Law Review, 2010, Vol. 88, pp. 1555-1563; M. Hoisington, *Cyberwarfare and the Use of Force Giving Rise to the Right of Self- Defence,* Boston College International & Comparative Law Review, 2009, Vol. 32, pp. 439–454; AJ Schaap, *Cyber Warfare Operations: Development and Use under International Law,* Air Force Law Review, 2009, Vol. 64/1, pp. 121–174; W. A. Owens, K. W. Dam, H. S. Lin (eds), *Technology, Policy, Law, and Ethics Regarding US Acquisition and Use of Cyberattack Capabilities,* Committee on Offensive Information Warfare, National Research Council, 2009; D. Delibasis, *Cyberspace Warfare Attacks Within Current Norms of Self- Defence,* University of Westminster School of Law, Research Paper No. 10-05, pp. 1–92; ET Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self- Defence,* Stanford Journal of International Law, 2002, Vol. 38, pp. 207–240; MN Schmitt, BT O'Donnell (eds), *Computer Network Attack and International Law,* Newport RI 2002; Ch.C. Joyner, C. Lotrionte, *Information Warfare as International Coercion: Elements of A Legal Framework,* EJIL, 2001, Vol. 12/5, pp. 825–865; J. Barkham, *Information Warfare and International Law on the Use of Force,* New York University Journal of International Law and Policy, 2001-2001, Vol. 34; W.G. Sharp, Sn., *Cyberspace and the Use of Force,* Aegis Research Corporation 1999.

[180] *Strategic Concept (*fn. 170): "12. Cyber-attacks are becoming more frequent, more organized and more costly in the damage that they conflict on government administrations, businesses, economies and potentially also transportation and supply networks and other critical infrastructure; they can reach a threshold that threatens national and Euro-Atlantic prosperity, security and stability"; *NATO 2020 (*fn*.* 173): "Already, cyber-attacks against NATO systems occur frequently, but most often below the threshold of political concern. However, the risk of a large-scale attack on NATO's command and control systems or energy grids could readily warrant consultations under Article 4 and could possibly lead to collective defence measures under Article 5. Effective cyber defence requires the means to prevent, detect, respond to, and recover from attacks" (p. 45).

International Committee of the Red Cross. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* 2009 – V. Constitutive elements of direct participation in hostilities: "Military harm should be interpreted as encompassing not only the conflict of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict" (p. 47). "Electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitation (CNE), as well as wiretapping the adversary's high command already occurred during it. The use of cyberattacks during an international armed conflict seems to be legal in principle[181], but taking into account the consequences (for example on the civilian population) in the context of the humanitarian law[182]. It should be assumed that in some circumstances a cyberattack is the equivalent of an armed attack and authorizes self-defence in a similar or different form[183].

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or transmitting tactical targeting information for an attack" (p. 48). "Acts that neither cause harm of a military nature nor inflict death, injury, or destruction on protected persons or objects cannot be equated with the use of means or methods of 'warfare' or, respectively, of 'injuring the enemy', as would be required for a qualification as hostilities. For example, (…) the manipulation of computer networks (…) may have a serious impact on public security, health, and commerce, and may even be prohibited under IHL. However, [it] would not, in the absence of adverse military effects, cause the kind and degree of harm required to qualify as direct participation in hostilities" (p. 50).

S. Watts, *Combatant Status and Computer Network Attack,* August 3, 2009 : "Current military strategy regards cyberspace as a domain of war on par with land, air, and sea" (p. 3); "[A] broad range of commentators accepts that CNA between states could constitute armed conflict of sufficient scale and intensity to trigger the law of war generally and, specifically, the 1949 Geneva Conventions and their 1977 Protocols" (p. 23) – http://ssrn.com/abstract=1460680; *No options 'off the table' for US response to cyber-attacks,* May 8, 2009: "The US military's response to a cyber-attack would not necessarily be limited to cyberspace, the head of US Strategic Command said. The Law of Armed Conflict will apply to this domain', said Air Force Gen. Kevin P. Chilton" – http://www.stripes.com/article.asp?section=104&article=62555

181 "The Washington Post", September 19, 2012: "Spelling out the US government's position on the rules governing cyberwarfare, Harold Koh, the department's legal adviser, said a cyber-operation that results in death, injury or significant destruction would probably be seen as a use of force in violation of international law. In the United States' view, any illegal use of force potentially triggers the right of national self-defence, Koh said. Cyberattacks that cause a nuclear plant meltdown, open a dam above a populated area or disable an air-traffic control system resulting in plane crashes are examples of activity that would probably constitute an illegal use of force, he said"; similarly Department of Defence Cyberspace Policy Report. *A Report to Congress Pursuant to the National Defence Authorization Act for Fiscal Year 2011,* Section 934, November 2011, p. 2 – http://www.defence.gov/home/features/2011/0411_cyberstrategy/docs/NDAA%20Section%20934%20Report_For%20webpage.pdf

182 Protocole additionnel (I) aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), 8 juin 1977. « Article 49.1. L'expression 'attaques' s'entend des actes de violence contre l'adversaire, que ces actes soient offensifs ou défensifs. 2. Les dispositions du présent Protocole concernant les attaques s'appliquent à toutes les attaques, quel que soit le territoire où elles ont lieu, y compris le territoire national appartenant à une Partie au conflit mais se trouvant sous le contrôle d'une Partie adverse ». Commentaire: « 1880. La définition donnée par le Protocole (…) couvre (…) les actes défensifs (notamment les 'contre-attaques') aussi bien que les actes offensifs, car les uns comme les autres peuvent affecter la population. Telle est la raison d'être de l'acception extensive à laquelle on s'est arrêté. (…) 1881. La question s'est posée (…) de savoir si la pose de mines constituait une attaque. Le sentiment général a été qu'il y a attaque dès qu'une personne est mise directement en danger par une mine posée »- http://www.icrc.org/dih.nsf/COM/470-750062?OpenDocument

183 *NATO 2020 (*fn*.* 173): "Already, cyber-attacks against NATO systems occur frequently, but most often below the threshold of political concern. However, the risk of a large-scale attack on NATO's command and control systems or energy grids could readily warrant consultations under Article 4 and could possibly lead to collective defence measures under Article 5. Effective cyber defence requires the means to prevent, detect, respond to, and recover from attacks" (p. 45).

A cyberattack may also be considered as an instrument of self-defence or deterrence (reaction to an attack, prevention of an attack).

It is necessary to take into account not only the scale of the cyberattack, but also the type and scope of the damage caused - whether it is temporary disruption (e.g. blocking of access) or permanent damage or destruction of the computer system leading to paralysis of important state functions. There is also a significant problem of not always unintended and predictable side effects for other users or other computer networks[184].

Cases of cyber espionage or offensive actions blocking access to a banking network or government information system (for example Estonia in 2007[185] and Georgia in 2008) do not seem sufficient to be considered as equivalent to an armed attack authorizing (armed) self-defence. This assessment may be different in the case of paralyzing the energy sector of a country or immobilizing all or part of its military forces. Another option is to consider the legality of a preventive cyber-attack on the nuclear facilities of a country that avoids full IAEA control and violates clearly legally binding prohibitions adopted by the UN Security Council (in 2010, the disruption of Iran's nuclear program, which was developed in defiance of Council resolutions)[186].

Regardless of the interpretation of legal concepts, it is problematic to determine the author of a cyberattack – in other words, who should be subject to potential sanctions (attribution of responsibility)[187]. It is also difficult to expect in advance the

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[184] *US cyberweapons had been considered to disrupt Gaddafi's air defences,* "The Washington Post", October 18, 2011: "Top Pentagon officials considered using their secret arsenal of cyberweapons to disrupt Libya's air defences before deciding that bombs would be the better option for preparing the way for US-led coalition airstrikes. (…) [T]here was not enough time for a cyberattack to work. Libyan government forces, led by Moammar Gaddafi, were at the time close to overrunning Benghazi, a rebel stronghold where US officials feared massacre might occur without fast intervention. (…) Damaging air defence systems might have, for example, required interrupting power sources, raising the prospect of the cyberweapon accidently infecting other systems reliant on electricity, such as those in hospitals."

[185] "What followed was what some here describe as the first war in cyberspace, a monthlong campaign that has forced Estonian authorities to defend (…) from a data flood that they say was set off by orders from Russia or ethnic Russian sources (…). 'It turned out to be a national security situation', Estonia's defence minister, Jaak Aaviksoo, said (…). The attackers used a giant network of bots – perhaps as many as one million computers in places as far away as the United States and Vietnam – to amplify the impact of their assault. In a sign of their financial resources, there is evidence that they rented time on other so-called botnets. (…) On Russian-language forums and chat groups, the investigators found detailed instructions on how to send disruptive messages, and which Estonian Web sites to use as targets" – "The New York Times" from May 29, 2007.

[186] *Iran struggling to contain 'foreign-made' 'Stuxnet' computer virus,* Washington Post, September 27, 2010; N. Fallière, L.O. Murchu, E. Chien, *W32.Stuxnet Dossier. Version 1.1* – https://archive.org/details/w32_stuxnet_dossier

[187] DB Hollis (fn. 179): "The US Defence Department, for example, has indicated that international law does not require – that we know who is responsible before we take defensive action. Thus, if a cyberattack disabled critical infrastructure or killed enough people, the United States *could* treat it as an act of war – and respond with force by invoking the right of self-defence – without knowing for sure who launched the attack" (p. 30); "Assume another state attacks the United States in self-defence for a cyberattack it believes originated here.

imminence of an attack, because it takes the form of millions of data flows. Another problem is related to determining the threshold of the attack and the moment of its implementation, especially in the case of a cyberattack or of a terrorist act.[188]

The current legal framework seems imperfect, and solutions should be sought in the interpretation of the state practice, and customary law. Referring solely to violations of sovereignty is risky, as this concept is often used as a catch-all, potentially leading to arbitrariness and abuse. Such violations should rather be classified as failures to comply with specific norms of international law protecting sovereignty.

3.2.4. In this context, the problem of defining terrorism arises.[189] Another difficulty lies in the attempt to attribute terrorist activities to the state. Last but not least we need to assess whether we are dealing with an armed attack (that authorizes self-defence).[190]

Would the United States accept responsibility for such an attack if its forces did not persist it?" (p. 31).

[188] B. Krekel, P. Adams, G. Bakos, *Occupying the Information High Ground* : *Chinese Capabilities for Computer Network Operations and Cyber Espionage.* Report prepared for the US-China Economic and Security Review Commission by Northrop Grumman Corp, March 7, 2012; The White House. *International Strategy for Cyberspace. Prosperity, Security, and Openness in a Networked World,* May 2011; D.E. Sanger, E. Bumiller, *US to view cyberattacks as acts of war,* "The New York Times", May 31, 2011.

[189] Special Tribunal for Lebanon. Before the Appeals Chamber (Case No.: STL-11-01/I). *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging,* 16 February 2011: the Appeals Chamber declared that the customary international law definition of terrorism consists of "the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element."

UN International Convention for the Suppression of the Financing of Terrorism (1999): "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act" – Article 2 (1)(b). See also *Draft Comprehensive Convention Against International Terrorism,* UN Doc. A/59/894 (12 August 2005), Annexe II.

[190] See *supra* 1.2. See also L. Van Den Herik, N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge 2013; K.L.H. Samuel, N.D. White, A.M. Salinas de Friás, *World Justice Project Counter-Terrorism Expert Network: Report of Key Findings and Recommendations on the Rule of Law and Counter-Terrorism,* 2012; Ch.J. Tams, *The Use of Force against Terrorists,* EJIL, 2009, Vol. 20/2, pp. 359–397; B. Saul, *Defining Terrorism in International Law,* Oxford 2006; C. Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht,* Kiel 2006; H. Duffy, *The 'War on Terror' and the Framework of International Law,* Cambridge 2005; M. Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention,* Journal of International Criminal Justice, 2006, No. 4, pp. 1031–1043; Th. Weigend, *The Universal Terrorist: The International Community Grappling with a Definition,* Journal of International Criminal Justice, 2006, No. 4, pp. 912–932; C. Walter, *Defining Terrorism in National and International Law,* (in:) C. Walter *et al.* (eds), *Terrorism as a Challenge for National and International Law: Security versus Freedom?,* Berlin 2004; SP Subedi, *The UN Response to International Terrorism in the Aftermath of the Terrorist*

In resolutions 1368 and 1373, the Security Council recognized terrorist acts as a threat to international peace and security. Although these resolutions did not proclaim that every terrorist act constitutes an armed attack, they did expressly recall the right of every state to self-defence. They also called for combating such acts by all means and emphasized the responsibility of those who aid, support or shelter the perpetrators, organizers or sponsors of terrorist acts[191]. The Security Council, acting under Chapter VII of the UN Charter, also obliged member states to refrain from providing any support – active or passive – to terrorists[192].

Both resolutions are of a general nature and, although they were adopted in connection with the attack on the USA, they do not explicitly concern Afghanistan and do not contain a direct authorization to use armed force. If, according to these resolutions, every act of terrorism constitutes a threat to international peace and security and authorizes self-defence, it should be concluded that a terrorist attack is treated as an armed attack – otherwise, invoking self-defence would make little sense.

Russia invoked abusively these resolutions, threatening Georgia with armed action in self-defence in connection with the actions of irregular units from Georgian territory in Chechnya[193].

Attacks in America and the Problem of the Definition of Terrorism in International Law, "Forum du droit international", 2002, Vol. 4, No. 3, pp. 159–169; K. Bannelier, Th. Christakis, O. Corten, B. Delcourt (dir. publ.), *Le droit international face au terrorisme,* Paris 2002; *Terrorism and International Law: Challenges and Responses,* International Institute of Humanitarian Law, San Remo 2002; R. Higgins, M. Flory (eds), *Terrorism and International Law,* London 1997.

[191] SC Res. 1368 RB: "Determined to combat by all means [in accordance with the Charter of the United Nations - added in SC Res. 1373] threats to international peace and security caused by terrorist acts; Recognizing the inherent right of individual or collective self-defence in accordance with the Charter" (preamble), "1. Unequivocally condemnations in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, DC and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security (...) 3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harboring the allegations, organizers and sponsors of these acts will be held accountable"; in resolution 1373, adopted under Chapter VII of the UN Charter, repeated quoted fragments; similarly in resolution 1438 (2002) concerning assassination attempt in Bali, in resolution 1450 (2002) concerning the attack in Kenya, in resolution 1465 (2003) concerning attack in Bogota and in resolution 1530 (2004) concerning Madrid attack. Interestingly, General Assembly resolution 56/1 (2001) makes no reference to the right of self-defence. See also SC Res. 731 (1992): "deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved", "acts of international terrorism that constitute threats to international peace and security".

[192] SC Res. 1373 (2001): "Acting under Chapter VII of the Charter of the United Nations (…) 2. Decides also that all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; (…) (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."

[193] United Nations (S/2002/1012), 12 September 2002 – *Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations*

3.2.5. The Security Council can sometimes consent to the use of force, but in other cases this assent will be denied as a result of a veto by one of the permanent members. Security Council approval is determined by a precise framework and objectives, and specific resolutions include additionally time limits[194] and are subject to its political control.[195]

The Security Council is not a judicial body and therefore does not focus only on determining the legality of an action. In this context, independent verification of the relevant grounds is important, but difficult in practice, because the self-defence is in fact based on a unilateral assessment.

It sometimes happens that the Security Council or the ICJ do not recognize a self-defence and condemn the actions taken, as was the case with the armed action of the United Kingdom in Yemen in 1964 (resolution 188), Portugal in Senegal in 1969 (resolution 273), Israel in Tunisia in 1985 (resolution 573) and in 1998 (resolution 611), the USA in Nicaragua (ICJ ruling of 1986), the USA towards Iranian oil platforms (ICJ ruling of 2003), Israel in neighbouring countries (ICJ advisory opinion of 2004 on the construction of the wall), Uganda in Congo (ICJ ruling of 2005).

What does the phrase from Article 51 of the Charter mean: "before the Security Council takes measures necessary to maintain international peace and security"? Does the adoption of any resolution automatically mean that the matter is taken over by the Security Council and the right to self-defence is suspended? Practice shows that this is not the case[196].

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addressed to the Secretary-General Statement by Russian Federation President VV Putin : "If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border, continues to ignore United Nations Security Council resolution 1373 (2001) of 28 September 2001, and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation, we reserve the right to act in accordance with Article 51 of the Charter of the United Nations, which lays down every Member State's inalienable right of individual or collective self-defence."

[194] Examples of indefinite authorisation to use force include: SC Res. 678 (1990), 687 (1991), 1483 (2003) concerning Iraq; 770 (1992), 781 (1992), 787 (1992), 836 (1993) concerning Bosnia and Herzegovina; 1244 (1999) concerning Kosovo. In the case of indefinite authorisation by the Security Council, difficulties may arise in terminating a given military operation, because then a new decision of the Council is necessary (which may lead to the so-called *reverse veto,* i.e. the impossibility of terminating the adopted sanctions in the absence of the consent of one permanent member of the Security Council). The impasse in this context became visible in 2008 (Kosovo's proclamation of independence, Serbia's and Russia's resistance to the Marti Plan). Ahtisaari, Special Envoy of the UN Secretary General).

[195] More on this subject in E. de Wet (fn. 40), pp. 260–290.

[196] For example, the case of the British-Argentine conflict over the Malvinas/Falklands – SC Res. 502 (1982), the Iraqi-Iranian conflict – SC Res. 598 (1987), the Iraqi aggression against Kuwait – SC Res. 661 (1990). It should be noted that under Resolution 1386 (2001) the Security Council established a multilateral armed force (*International Security Assistance Force,* ISAF), operating under its supervision, which provides security in the Kabul area and possibly in other selected regions (in order to fulfill the ISAF mission, the Security Council authorized member states to use all necessary means). In turn, American troops continue to conduct, as part of Operation Enduring Freedom *(Enduring Freedom*), separate military operations (self-defence), and in some regions of Afghanistan there is cooperation between units participating in both operations. See also JJ Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond,* "Cornell International Law Journal", 2002, Vol. 35, No. 3, pp. 533–557.

The question also arose whether a legally binding Security Council resolution on an arms embargo could limit a state's right to self-defence. In the case of Bosnia and Herzegovina, the Security Council responded in the affirmative[197], which seems controversial in the context of hindering that state's self-defence and facilitating Serbian crimes, especially since in the case of Angola, Sierra Leone, and Somalia, it limited the embargo to only one party to the conflict[198]. In the case of Rwanda, the Security Council initially imposed an embargo on arms deliveries to all parties to the conflict and then lifted this ban with respect to the Rwandan government[199].

Sometimes self-defence is impossible due to military weakness (e.g. Czechoslovakia 1938/39, 1968); similarly, in the case of Ukraine (2014/2022).

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[197] In connection with SC Res. 713 (1992) concerning Bosnia and Herzegovina.
[198] SC Res. 864 (1993), 1171 (1998), 1725 (2006).
[199] SC Res. 918 (1994), 1011 (1995).

3.3. The perpetrator (attacker)

While Article 2(4) of the UN Charter establishes a general prohibition on the use of force, it is not limited solely to relations between Member States. Firstly, this article reflects a customary law norm and also applies to relations with states that were not or are not members of the UN (for example, some former enemy states in the first years after the war, the Federal Republic of Germany and the German Democratic Republic, or the People's Republic of China until the early 1970s). Secondly, it refers generally to the prohibition of the use of force in any way inconsistent with the purposes of the United Nations. The formulation "in its international relations" indicates, *a contrario,* that it is not about the prohibition of the use of force in an internal conflict.

If an armed attack entitles to self-defence, the question arises: who committed the attack and against whom is self-defence applicable? According to Article 51 of the UN Charter, the object of this attack is a UN member state, and the attacker is not specified, although in 1945 people probably thought primarily of a state. In light of Resolutions 1368 and 1373, the Security Council's answer is clear: The perpetrator does not have to be a state,[200] as is also stated in Article V of the Washington Treaty (NATO).

The NATO Strategic Concept of 2010 leaves no doubt that an attack leading to self-defence may be of a less conventional nature and that the prohibition does not always have to be a state.[201]

UNGA Resolution 2625 stated:

> "Every State has the duty to refrain from organizing, inciting, aiding or participating in internal fighting or terrorist acts in another State, or from allowing activities organized within its territory to commit such acts, when the acts referred to in this paragraph involve the threat or use of force. (...) No State shall organize, aid, incite, finance, provoke or tolerate subversive, terrorist or armed activities with the aim of overthrowing by force the regime of another State, or interfere in internal fighting in another State."

Article 3 (g) of UNGA Resolution 3314 considers "significant participation" by a State in the activities of armed bands in the territory of another State to be aggression[202].

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[200] Previous practice shows that the Security Council has adopted non-military or military sanctions targeting not only states but also non-state actors, for example the Khmer Rouge (Party of Democratic Republic of Congo). Kampuchea, PDK) – resolution 792 (1992), UNITA groups in Angola – resolutions: 864 (1993), 1127 (1997), 1173 (1998), 1176 (1998), 1295 (2000), Bosnian Serbs – resolution 942 (1994), Somali groups – resolutions 733 (1992) and 794 (1992), Albanian structures in Kosovo – resolutions 1199 (1998) and 1203 (1998), Afghan Taliban – resolutions: 1267 (1999), 1333 (2000), 1390 (2002), Hezbollah – resolution 1701 (2006), all parties to the conflict in Darfur – resolution 1935 (2010).

[201] *Strategic Concept (*fn. 170).

[202] GA Res. 3314 (XXIX). Annex – *Definition of Aggression* – "3. Any of the following acts, regardless of a declaration of war, shall (…) qualify as an act of aggression: (…) (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which

For example, in the preamble of the UN Security Council resolution 1267 (1999) adopted under Chapter VII, certain activities of the Taliban were classified as a threat to international peace and security, stating that they were providing shelter to Usama bin Laden in Afghanistan, creating conditions for the operation of a network of training camps in that country and allowing the territory they controlled to be used as a base of support for international terrorist actions. In point 1 of this resolution, the Council called on the Taliban authorities to stop supporting terrorists and providing them with shelter, and in point 2 it demanded the extradition of Usama bin Laden (in the same spirit, UN Security Council resolution 1333). Until the American (and British) military operation of 7 October 2001 Afghanistan had not complied with the Council's demands[203].

If the perpetrators of the September 11, 2001 attacks had taken part in secret training in France or the Netherlands, they would not have had official support or been tolerated by these countries, and even if responsibility were to result from a failure to take protective and preventive measures, it is hard to imagine that these countries would have become the object of British-American self-defence. In the case of Afghanistan, the far-reaching links between the Taliban and Al-Qaeda were significant as the failure to implement legally binding Chapter VII resolutions of the Security Council.

It should be noted, however, that Afghanistan did not attack the United States, did not send terrorists acting on its behalf, did not direct or control them, and the Al-Qaeda network extended beyond that country. In Resolution 1368, the Security Council called on all states to cooperate in bringing to justice the perpetrators, organizers and sponsors of terrorist acts and emphasized that those who support or even tolerate them (give them shelter) should also be held accountable (this theme was repeated and expanded in Resolutions 1373[204] and 1624).

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carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

See also GA Res. (A/49/743) *Measures to Eliminate International Terrorism. Annex: Declaration on Measures to Eliminate International Terrorism* (9/12/1994): "4. States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiring in or encouraging activities within their territories directed towards the commission of such acts."

SC Res. 748 (1992): "Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force; Determining in this context that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992), constitute a threat to international peace and security" (preamble).

[203] See preamble SC Res. 1378 (2001): "Condemning the Taliban for allowing Afghanistan to be used as a basis for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden."

[204] SC Res. 1368: "Calls on all States to work together urgently to bring to justice the persuasions, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harboring the persecutions, organizers and sponsors of these acts will be held accountable" (§ 3). SC Res. 1373: "[E]very State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State

International practice shows that a reaction in self-defence may be directed against a state that, especially on its own territory, at least supports the perpetrators of an armed attack, or a state that only provides them with shelter but does not exercise control over these forces[205]. We are therefore dealing with a tendency to treat the training of irregular and terrorist groups or providing them with shelter (and not just sending them on behalf of a state or under its control) as a threat to international peace and security. In order to take action in self-defence, an attack must occur or there must be a high probability of one. A state supporting the attackers or providing them with shelter may then become the object of armed self-defence by another state, especially if other measures previously taken have proven ineffective.

In conclusion, the principles of a state's responsibility for acts committed from its territory are also changing[206]. Responsibility lies not only with states that knowingly support terrorists, but also with those that prove unable or unwilling to prevent attacks from their territories. A state cannot lend its territory to foreign actors for the purpose of violating international law.

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or acquiescing in organized activities within its territory directed towards the commission of such acts" (preamble) and "Decides also that all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; (b) "Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; (c) Deny safe havens to those who finance, plan, support, or commit terrorist acts, or provide safe havens" (§ 2).

[205] See *infra* 4.4.

[206] See chapter 5.

3.4. Countermeasures and self-help

In the context of the prohibition of the use of armed force, the question arises whether it is permissible for a state to use armed force in order to assert its rights and to cease violations and enforce compliance with international law.

In the light of the work of the International Law Commission (ILC), countermeasures[207] are currently understood as a unilateral violation by a state in times of peace, but without the use of armed force, of the norms of international law that bind it, in response to a previous violation of international law by another state; the illegality of the reaction is repealed by the fact that it constitutes a response to the said violation.[208]

Countermeasures are permitted, but their application cannot violate the prohibition of the use of force or the threat of its use[209]. The International Law Commission refers to the UN Charter with all its ambiguities. Armed reprisals and armed self-help[210] were considered prohibited after 1945, while self-defence is

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[207] See L.A. Sicilianos, *La codification des contre-mesures par la Commission du droit international,* « Revue belge de droit international », 2005, no. 1–2, pp. 447–500; D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public,* Paris 1994; L.A. Sicilianos, *Les réactions décentralisées à l'illicite,* Paris 1990; E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures,* New York 1984; O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law,* Oxford 1988; P. Malanczuk, *Countermeasures and Self- Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility,* ZaöRV, 1983, No. 4, pp. 705–802; Ch. Leben, *Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale,* « Annuaire français de droit international », 1982, pp. 9–77.

[208] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* (2001): "Article 22: The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three. (…) Article 49. 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two. 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."

[209] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* (2001): "Article 50. Obligations not affected by countermeasures. 1. Countermeasures shall not affect: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) Obligations for the protection of fundamental human rights; (c) Obligations of a humanitarian character prohibiting reprisals; (d) Other obligations under peremptory norms of general international law."; "Article 51: Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."

[210] CIJ. *Affaire du détroit de Corfou (fond),* arrêt du 9 avril 1949: « l'agent du Royaume-Uni (…) a rangé l'Opération Retail parmi les procédés d' auto-protection ou self-help. La Cour ne peut pas davantage accueillir cette défense. Entre Etats indépendants, le respect de la souveraineté territoriale est l'une des bases essentielles des rapports internationaux. La Cour reconnaît que la carence complète du Gouvernement albanais dans l'exercice de ses fonctions au lendemain des explosions, ainsi que le caractère dilatoire de ses notes diplomatiques constituent pour le Gouvernement du Royaume-Uni des circonstances atténuantes. Elle doit,

permitted. In turn, the concept of sanctions, according to the ILC, applies only to measures taken by international organizations against their members.

Countermeasures – which should be consistent with the principles of reasonableness and proportionality – are an expression of the decentralization of international law and, to some extent, the weakness of its institutionalized control mechanisms. The purpose *of* countermeasures is primarily to enforce compliance with international law especially to end the violation of law and obtain possible compensation[211]. These actions may be differentiated depending on the nature of the previous violation of international law.

If armed countermeasures were to be considered legal, they would differ from self-defence in that their goals and scale of operation are more limited, and thus they would fall below the threshold of war (short of war), whereas self-defence – although by definition primarily defensive in nature – may take an offensive form[212]. The distinction between self-defence, armed countermeasures (repression), and armed self-help is not easy, especially when we are dealing with the use of force that cannot be repelled once the attack is over (e.g. a bombing).

The contemporary concept of belligerent reprisals[213] corresponds, in principle, to the construction of countermeasures and refers to actions during an armed conflict in response to some violation of the law by the other side. However, this type of reprisals is limited by humanitarian law (in particular civilians, the wounded or cultural monuments are protected).

Armed self-help is sometimes tolerated, which results from justifying some actions with good faith[214] and extenuating circumstances. Furthermore, states do not usually invoke the concept of armed countermeasures, but most often on a broadly interpreted self-defence.

Examples of armed self-help tolerated or ignored by the UN include the operation of Israeli agents in Argentina, who kidnapped Adolf Eichmann (1960), the armed

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néanmoins, pour assurer l'intégrité du droit international dont elle est l'organe, constater la violation par l'action de la marine de guerre britannique de la souveraineté de l'Albanie » (p. 35).

211 Institut de Droit international, Session de Paris (1934): « Article premier: Les représailles sont des mesures de contrainte, dérogatoires aux règles ordinaires du Droit des Gens, prises par un Etat à la suite d'actes illicites commis à son préjudice par un autre Etat et ayant pour but d'imposer à celui-ci, au moyen d'un dommage, le respect du droit ».

212 See e.g. Y. Dinstein (fn. 8), pp. 3–29; S.C. Neff (fn. 8), pp. 285–313; S. Darcy, *The Evolution of the Law of Belligerent Reprisals,* "Military Law Review", 2003, Vol. 175, pp. 184-251; F. Mégret, *'War'? Legal Semantics and the Move to Violence,* EJIL, 2002, Vol. 13, No. 2, pp. 361–400.

213 See extensively C. Greenwood (fn. 8)), pp. 295–351.

214 T.M. Franck (fn. 8): "State recourse to force may be tolerated, perhaps even specifically approved, in circumstances not anticipated by the drafters of Charter. Among such circumstances is the failure of the UN system to redress an egregious wrong recognized as such in international law. Protracted failure may give rise to a limited right of self-help on the part of a bona fide injured party, even when the injury does not rise to the threshold of an armed attack" (p. 112). "[A] limited right to self-help (...) has not been specifically repealed by the Charter. (…) [T]he use of force in self-help, while prohibited by the Charter text, may be justified by the evident credibility of the cause in which self-help is deployed; and a widespread perception of that legitimacy is likely to mitigate, if not actually to exculpate, the resort to force" (pp. 131/132).

occupation of the enclave of Goa by India (1960), the armed action of Turkey in Cyprus (1974) after the overthrow of President Makarios and the intention of the new authorities to realize the union with Greece (contrary to the tripartite agreement on Cyprus of 1961). In turn, the armed self-help actions of Morocco and Mauritania, dividing the territory of Western Sahara between themselves (1975–1976), Indonesia towards East Timor, which declared independence (1975), or Argentina towards the Falkland Islands (1982) – justified in the most general terms by the rights of these countries to the areas they occupied by force – were condemned by the Security Council or the UN General Assembly[215].

In conclusion, there is no solid legal basis for establishing that armed self-help or armed countermeasures have the status of a rule of customary law. However, the topic is subject to debate due to new threats and methods of combat.[216]

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[215] On UN practice, see T.M. Franck (fn. 8), pp. 109–134.

[216] M.A. Newton, *Reconsidering Reprisals,* "Duke Journal of Comparative & International Law", 2010, Vol. 20, p. 380: "Reasonable reprisals may represent the best long-term way to erode support for those non-state actors who would willingly ignore the humanitarian rules protecting innocent civilians, thereby violating the most basic human rights of their victims."

Chapter 4. New trends and concepts of international practice

Is peace more precious than justice? (…) Extreme peace – in the sense of absolute priority – creates the conditions of war, while extreme justice similarly generates the conditions of injustice.
Thomas M. Franck

4.1. Introduction

4.1.1. Is the view satisfactory that the use of force outside the framework of the UN Charter remains unlawful? Even if at first glance there appears to be no formal legal basis, the justification does not lie in a legal vacuum. This assessment is made in the context of the dynamics of the international environment and of the interpretation of legal rules and values, including political or moral principles and objectives.

Article 2(4) of the UN Charter proclaims a universal prohibition on the use of force or the threat of force, and the Charter exceptionally allows for the use of force in the form of self-defence against an armed attack (Article 51) or on the basis of Security Council authorisation (Chapter VII). Thus, the legality of the use of force is assessed in the light of these two criteria.

Confronted with changing circumstances (new threats, new weapons, new warfare methods) the current legal regime for the use of force seems imperfect. The greatest controversy concerns the category of formally illegal actions (lack of a Security Council authorization or of grounds for self-defence), because acting outside the UN Charter regime amounts to a violation of international law.[217]

As a result, some military operations fall within a grey area. In such a situation, even in specific circumstances of existential threat to the state or a threat to international peace, we are deprived of legal means of armed response or obliged to tolerate extreme forms of lawlessness. Such dilemmas arise, over time, from new kinds of threats, new types of weapons, new methods of warfare, and the international balance of power.

Solutions to some difficult cases should be sought through a broader interpretation of the UN Charter and through decisions based on moral and/or political considerations, although a revision of the applicable rules should not be excluded.

4.1.2. In practice, decisions on whether to use force take legal considerations into account but are equally based on political considerations and objectives. International assessment of the legality of a specific case is most often carried out by political institutions (e.g. the UN Security Council) or expert bodies. There are no

[217] Only in some cases, the Security Council accepts the use of force *post factum* – it does not directly assess its legality but its effects, for example resolutions 1244 (Yugoslavia), 1483 and 1511 (Iraq), to some extent 788 (Liberia); see I. Österdahl, *Preach What You Practice*: *The Security Council and the Legalisation ex post facto of the Unilateral Use of Force,* "Nordic Journal of International Law", 2005, Vol. 74, pp. 231–260.

global (universal) legislator, government, prosecutor or police, and states are subject to the jurisdiction of international courts only upon prior consent (either through treaty or ad hoc).

The question may be asked to what extent and to what extent international courts constitute the optimal and effective forum for resolving politically sensitive issues related to the use of force. It is not without reason that the American political question doctrine arose and operates. Its essence is the difficulty or impossibility of legal decisions without an initial policy determination of a kind clearly for nonjudicial discretion (also in the context of observing the limits of the competences of the legislative and executive branches).

In Dean Acheson's opinion (case of the Cuban Missile Crisis) the survival of states is not a matter of law.[218] The International Court of Justice stated that it cannot definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.[219] Thomas M. Franck recalled that the implementation of law cannot be reduced to absurdity when it grossly offends most persons' common moral sense of what is right.[220] Kofi Annan questioned whether justice should sometimes be sacrificed in the interests of peace.[221]

These opinions should be treated not only as evidence of missing legal rules, but also as a reflection on whether all situations (conflicts) can be assessed and resolved by law. At the same time, they do not mean a negation of law but rather concern imperfections of the international legal regime.

The current international situation calls for deeper reflection on this matter, rather than merely limiting oneself to a formal disapproval (by political or expert circles) of the illegality of the use of force. In reality, the issue concerns the purposes and consequences of the use or non-use of force. In this context, one must simultaneously take into account the state's capabilities (military, political and economic), as well as the anticipated effects, which in turn are linked to the state's actual possibilities for action (feasibility).

Thus, the distinction should also be made between the legal criteria and the political decision concerning the use of force: the former are elements of legal analysis, while the latter concern political aspects of decision-making. And so, it is crucial to bear in mind that each of the two formally identical decisions to use force

[218] See fn. 561.

[219] ICJ. *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion of 8 July 1996: "96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. (...) 97. Accordingly, (...) the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake. (...) 105(2B). There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. (...) (2E) The Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."

[220] See fn. 291, 593.

[221] See fn. 275.

(whether lawful or unlawful) is based on different premises and objectives, which, as elements of legitimacy, are of vital importance. These elements are an expression of states' interests and of the tactical or strategic goals. An assessment of legality that fails to take these elements into account is incomplete and seems not always satisfactory.

For example there is a fundamental difference between the premises and objectives in the case of the use of force in Korea (1950), Hungary (1956), Czechoslovakia (1968), Ukraine (2014, 2022), the Middle East (1948, 1956, 1967, 1973, 2024, 2025), Cambodia (1978), Kosovo (1998), Iraq (1981, 1991), Afghanistan (2001), Georgia (2008) or Syria (2007, 2013-2015, 2017).

It is from this perspective that we perceive the use of force or the decision not to use it (or the inability to use it), with legal arguments being an important, but not the only factor. The legality (e.g. in response to a threat) does not prejudge the actual possibility of the reaction, and the latter does not presume its legality. Consequently, it is difficult to separate the legal aspect from the political element in the decision to use force.

4.1.3. Effectiveness is another significant factor in the overall evaluation of the use of force, including its purposes and premises. An operation qualified as unlawful may sometimes yield positive results, whereas, conversely, the lawful use of force in accordance with the UN Charter may fail to achieve the intended objectives and prove to be ineffective and unreliable. In other words, legality does not determine effectiveness and *vice versa*. In any case, it must be required that the use of force be preceded by precise objectives and an analysis of the possible consequences.

However, not every state, and not in every circumstance, can or will reasonably use force (offensively or defensively), because each decision should be evaluated in terms of military capabilities and objectives (for example, lack of analysis on day after). Even assuming the most legitimate use of force in self-defence, it may prove impractical due to insufficient military capabilities and resources, or because it is simply politically unwise.

Furthermore, there is no legal obligation (except in the case of a military alliance) to provide assistance to an attacked state (Hungary 1956 or Czechoslovakia 1968). Ukraine was not politically and militarily capable of anticipating impending Russian aggression (2014). Russia's prolonged aggression against Ukraine demonstrates that providing external military support is lawful. However, the decisive factor in this case turns out to be the extra-legal argument based on the lack of political will to legally provide Ukraine with adequate weapons. This approach is often dictated by internal political considerations and/or fears of military escalation.

4.1.4. In recent decades there has been a growing tendency to avoid detailed legal justification for the use of force. This is the result of the confrontation of the general regime of the UN Charter with new weapons and threats. In fact, it is impossible to ignore the difficulties in applying and interpreting concepts such as self-defence, armed attack, imminence, or threats to international security. For example, how to define the threshold of armed attack and self-defence in the context of serial cross-border terrorist attacks, cyberattacks, or so-called hybrid warfare.

This situation is compounded by a recent and significant shift in the international balance of power, namely the closing of the so-called Cold War at the turn of 1980-1990. Both hegemons, the US and China (as well as Russia, which is losing its position), are avoiding legal constraints or violating them, depending on their arbitrarily defined interests.

That being, international law does not replace or, by itself, change the international balance of power. It's difficult to blame the largest and most powerful powers for existing. Great powers will not disappear, but the scope of their international obligations and their compliance with them remain important.

International law protects sovereignty, or the qualitative nature of the power of states – equal in terms of their ruling capacity (but not in terms of their possibilities) and equal in terms of their obligation to obey the laws binding them. On the other hand, state sovereignty does not manifest itself as a justification for violations of international law.

The view that international law is powerful against the powerless but powerless against the powerful is only half true, because in some cases and areas this law turns out to be an effective weapon.

After 1945, the United States was one of the architects of the international legal architecture and multilateral cooperation. This structure assumed that the international community operates on the basis of principles and rules of law - a set of norms created by states (for themselves), which gave rise to specific rights and obligations. Within this order, states justify their actions with legal arguments and certain values and are evaluated in light of their compliance with these. Even when states violate the rules, the system compels them to seek legal justifications for their actions.

The use of force and violations of international law under Donald Trump's presidency are nothing particularly new since 1945. Interestingly, however, alarmist voices and debate about the breakdown of the international legal order did not gain momentum as a result of Russia's aggression against Ukraine, but rather after the US military operations in Venezuela and Iran.

It is also unreasonable to accept the view that violations of international law by the United States provide a good pretext and incentive for Russia or China to engage in similar actions. The practices of these two countries demonstrate that they are independent in this regard, sometimes even ahead of the United States.

Violations of international law (as well as the Ten Commandments and the Penal Code) are a feature of every legal practice, which do not render its norms redundant – they remain important points of reference. This view does not mean, however, that the use of force can be justified in every case, if not legally, then at least politically and axiologically.

What is new in Donald Trump's presidency is the frontal and formal questioning of the referential function of the principles and rules of the international order (which have not ceased to apply), as well as the liberation from multilateral cooperation and the obligations resulting from it, which results from a fundamental shift in the international balance of power.

The evolution of the international practice of the use of force is inevitable, essentially political in nature. However, it raises concerns because it could lead to abuses that undermine the international legal regime. In fact, in the long run, the violations can lead to their tolerance and, consequently, to a modification of existing rules. Countering this trend offer an opportunity for Europe.

However, caution must be exercised in classifying this trend as a crisis or decline of international law. There is no doubt that in other areas, this law (despite inevitable violations) operates and effectively ensures international cooperation (economic or military) or the protection of individual rights.

To quote Marc Twain: "The report of my death was an exaggeration."

4.1.5. When assessing the use of force and security dilemmas, it's impossible to ignore some hard cases. For example, concerning the ethnic cleansing in Yugoslavia and the use of armed force under NATO auspices (1998), two competing principles existed at the time: the prohibition of the use of force (UN Charter) and the prohibition of crimes against humanity (committed by Yugoslavia).

In practice, ideas have emerged that offer a way out of legal impasses. These include, for example, concepts such as humanitarian intervention (Responsibility to Protect), pre-emptive self-defence (unable, unwilling), and preventive armed operations (self-preservation). They are the result of reflection on the needs and new types of weapons and threats, and not simply an expression of disregard for the law.

Such concepts gain acceptance (even if mixed) – either in the form of support or tacit tolerance, but we are not always on firm ground (the case law of the International Court of Justice on the use of force is not impressive). The practice of states is of significant importance here, even if it is not (immediately) accompanied by *opinio iuris*. It is not easy and obvious for these concepts to achieve customary law status, as a part of international scholarship, as well as some major powers and many countries of the Global South are opposed to it.

Opinions that these concepts constitute a violation of the international legal order are not uncommon. However, international law is not always explicit on the use of force and it does not provide a clear answer to the question of who is ultimately responsible for assessing legality.

Situating the new concepts on the timeline, in the case of humanitarian intervention we are dealing with a response to a previously obvious, massive and serious violation of fundamental norms of international law. In the case of a pre-emptive self-defence, the aim is to counteract a future, but imminent armed attack (including a terrorist one). In turn, a preventive armed operation is not so much about an expected attack as about the annihilation of the enemy's military capabilities. In the latter case, the threat of an attack is distant in time, but is characterized by a very serious scale and effects (especially in the context of weapons of mass destruction). While in the case of humanitarian intervention we are dealing with facts and violations of international law that have already occurred, in a pre-emptive or preventive operations, the aim is future event.

PAST			*FUTURE*
Use of armed force by a state against a time-defined threat and for a specific purpose			
Humanitarian intervention	Classic self-defence	Pre-emptive self-defence	Preventive Armed Operation
Use of force by a third state to stop massive and obvious violations of fundamental human rights (crimes) already committed by another state against the population on its territory.	A state repels with force an armed attack by another state or non-state actor	A state uses force to anticipate an imminent armed attack on it by another state or non-state actor (no other options available)	A state destroys by force the ability of another state or non-state actor to attack itself or other states (having previously exhausted other options)
Legitimate	Legal	Legal	Illegal
The problem of legality disappears (in principle) when a military action is carried out with the consent of the Security Council under Chapter VII of the UN Charter			

4.2. Humanitarian intervention

4.2.1. In the context of evident and mass crimes committed by a State against the population within its territory, the use of armed force may take place before it is too late. A prolonged wait for a legitimizing resolution of the Security Council is risky.

The crimes of various dictators raise the question of how – in the absence of a decision by the Security Council – to respond to massive and serious violations of internationally protected human rights? Practice shows that we sometimes deal with the following situations: an armed humanitarian action is carried out without the consent of the Security Council due to the opposition of one of its permanent members.

An attempt to get out of this situation is the concept of humanitarian intervention[222], which is to some extent a reference to the nineteenth-century *intervention d'humanité*.[223] It is connected with the question of whether and for how long accept the massive violations of human rights in a state, applying the principle: kill everyone, God will recognize his own (« *Tuez-les tous, Dieu reconnaîtra les siens* »).[224] Another question is: whether the collateral damage damages caused during humanitarian intervention may be balanced by the collateral benefits, i.e. the number of human lives saved? Finally, we must ask whether a humanitarian intervention is more acceptable as inhumane non-intervention?

Some armed humanitarian actions are of a short-term nature, for example, in order to save a small group of citizens of the state taking action (rescuing hostages, evacuation from the place of conflict). This concerns a situation in which citizens of state A are attacked on the territory of state B, and the second is unable or unwilling to stop the crimes already committed.

In such cases, the concept of the self-defence (there is no need to obtain the consent of the Security Council) is usually invoked, since in specific circumstances an

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[222] See D. Bethlehem, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, September 12, 2013 – https://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/ ; SD Murphy, *Criminalizing Humanitarian Intervention,* Case Western Reserve Journal of International Law, 2009, Vol. 41, pp. 341–377; H. Münkler, K. Malovitz (Hrsg.), *Humanitäre Intervention. Ein Instrument außenpolitischer Konfliktbearbeitung. Grundlagen und Diskussion,* Wiesbaden 2008; W. Hinsch, D. Janssen, *Menschenrechte militärisch schützen. Ein Plädoyer für humanitäre Interventionen,* Bundeszentrale für politische Bildung, München 2006; J.L. Holzgrefe, R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas,* Cambridge 2003; N. Krisch, *Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo,* EJIL, 2002, Vol. 13/1; C. Greenwood, *Humanitarian Intervention: Law and Policy,* Oxford 2001; S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law,* Oxford 2001; J.B. Elshtain, *Just War and Humanitarian Intervention,* "Ideas", 2001, Vol. 8, No. 2; idem (ed.), *Just War Theory,* Oxford 1992; M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations,* New York 2000; NJ Wheeler, *Saving Strangers: Humanitarian Intervention in International Society,* Oxford 2000.

[223] See the extensive analysis of the international practice – *The Responsibility* (fn. 8).

[224] https://www.lhistoire.fr/la-croisade-contre-les-albigeois-%C2%AB-tuez-les-tous-dieu-reconnaitra-les-siens-%C2%BB; J. Berlioz, *Tuez-les tous. Dieu reconnaîtra les siens. Le massacre de Béziers et la croisade des Albigeois vus par Césaire de Heisterbach,* Portet-sur-Garonne, Loubatières 1994.

attack on citizens of a state abroad (similarly to military units of a state abroad, its ships and aircraft or diplomatic and consular missions) can be considered an armed attack on the state. This type of armed response has been known for a long time and is usually accepted[225]. However, this variant has a limited goal (saving one's own citizens) and requires compliance with the criteria of necessity and proportionality.

Rescuing one’s own citizens abroad has been the aim of numerous armed operations. Some of them had the consent of the state on whose territory the operation took place, for example the operations of the USA in Lebanon (1958), Belgium in the Congo (1964), the Federal Republic of Germany in Somalia (Mogadishu, 1977), France and Belgium in Zaire (1978). Others took place without the consent of the state, for example Belgium in the Congo (1960); Israel in Uganda (Entebbe, 1976); the USA in Iran (1980), Liberia (1990) and Sierra Leone (1997); the Federal Republic of Germany in Albania (1997); France in Zaire (1978), Gabon (1990), Rwanda (1990, 1994), Chad (1992), and the Central African Republic (1996). In the 1990s, in some armed episodes of this type (especially in Africa) the Security Council was not informed either by the state conducting such an operation or by the state on whose territory it took place (Article 51 of the UN Charter).

Rescue operations of one's own citizens in danger abroad usually do not generate any serious controversy; however, some of them have been met with criticism, for example the US military operations in the Dominican Republic (1965), Grenada (1983) and Panama (1989), Belgium in the Congo (1960) and Russia in Georgia (2008). They have been accused of having other intentions than just rescuing their own citizens.

International military operations to stop massive and serious violations of human rights by a third country, especially massacres of population on its own territory, are of a different nature. Such a situation can be the result of a weakness of the state (for example, civil war) or of an abuse of power (dictatorship).

Against this background, it seems advisable to clarify the concepts and to distinguish between a legal humanitarian **operation** (with the consent of the Security Council) and **an intervention** that does not have a clear legal status humanitarian (without the consent of the SC). For example, armed actions with the consent of the UN in Somalia (1992) or Rwanda (1994) did not constitute humanitarian intervention, but they were armed humanitarian operations.

If intervention constitutes an act in international law that is by its nature illegal (as there is no legal aggression, there is also no legal intervention), the adjective humanitarian is intended to deprive such actions of their illegal character.[226]

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[225] SC Res. 731 (1992): “affirming the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security” (preamble).

[226] For diplomatic protection see J. Dugard, *Diplomatic Protection*, Encyclopedia of Public International Law, May 2009: “(68) There is no duty on a State to provide diplomatic protection to an injured national (see para. 13 above). This means that a State will make a political decision whether to exercise its discretionary power in favor of diplomatic protection (68). (...) (70) Although Art. 51 UN Charter does not recognize the lawfulness of the use of force to protect nationals abroad, it is considered by some scholars that the right of self-defence contained in Art. 51 embraces the customary law right to self-defence which includes

4.2.2. Given the scale of the crimes committed and the impunity of the perpetrators, we are confronted with some questions: how and who should rescue victims from the hands of terrorists or dictators; who wants to die for Sarajevo, Darfur, Aleppo, Kiev... and who, for how long and on what financial terms can ensure stability after the conflict has been calmed down with the help of armed force?

The UN's record on this issue is modest, and victims cannot wait for a unanimous opinion from lawyers and their states. The situation in Darfur is an example (massacre of the population by government forces and militias close to the government), because China considers it necessary to increase diplomatic efforts, and the Security Council sanctions - premature or unnecessary. Similar reasoning (Russia, China) can be found on the margins of the Kosovo case.

Since serious violations of human rights threaten international peace and security, humanitarian interventions can be considered a natural reaction. Well-known examples in this regard include the military operations of Indian troops in East Pakistan, later known as Bangladesh (1971), Vietnamese troops in Cambodia (1978–1979), Tanzanian troops in Uganda (1978–1979) and NATO in Yugoslavia (1999). The use of armed force and the establishment of safe zones in northern Iraq by the US and several other countries in 1991 in order to stop the mass flight of the Kurdish population, and the subsequent establishment of the so-called no- fly zone, can also be considered as falling within the framework of humanitarian intervention. SC Resolution 688 recognized the persecution of the Kurdish population in Iraq as a threat to international peace and security but did not contain an explicit reference to Chapter VII of the UN Charter[227].

The Indian authorities invoked self-defence and humanitarian grounds and goals, emphasizing that Pakistani repression had caused about 8 million people to flee to their country, which they considered a specific act of "civilian aggression" (Pakistan and China claimed that it was an internal matter of Pakistan).

Tanzania invoked (not without reason) self-defence in response to earlier attacks by Ugandan troops. Vietnam argued similarly, claiming that it was the object of aggression from the so-called Pol Pot clique (it only used the persecution of the Cambodian population as a subsidiary measure).

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protection of nationals exposed to imminent threat to personal safety abroad .There is State practice to support such a view. In recent times the US has justified military action in Grenada (1983) and Panama (1990) on this ground, and in 1976 Israel sent commandos to Entebbe in Uganda in order to forcibly rescue Israeli nationals held hostage by Palestinians (1976)."

[227] SC Res. 688 (1991): "Recalling of Article 2, paragraph 7, of the Charter of the United Nations; Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region, (…) 1. Condemns the repression of the Iraqi civilian population in "many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; (…) 3. Insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations."

In the case of Kosovo, Belgrade violated basic norms of international law and did not fulfil the Security Council resolutions binding it. The Yugoslav authorities' goal was not so much defence against an external threat, but the deportation of the Albanian population from Kosovo and its partial extermination, as well as the destruction of homes in order to prevent their return.

In view of Russia's clear announcement that it would veto any draft resolution authorizing the use of armed force against Yugoslavia, NATO countries did not submit such a motion to the Security Council. In 1999, NATO did not refer *expressis verbis* to the concept of humanitarian intervention - it limited itself to political and moral arguments (humanitarian catastrophe), omitting legal arguments.

In the India-Pakistan case, the Security Council did not take a position due to the USSR's veto, and the General Assembly recognized the situation as a threat to international peace and security but did not describe the Indian operation as aggression[228]. In the Tanzania -Uganda case, the UN remained neutral, disregarding the appeals of Uganda and Libya, thus tacitly accepting the Tanzanian action against the Ugandan dictator. In the Vietnam-Cambodia case, the draft resolution of the Security Council, aimed at condemning Vietnam, was blocked by the USSR, and in the General Assembly, the Khmer Rouge regime was still recognized as the representative of Cambodia; most developing countries and Western countries assessed the Vietnamese action as illegal[229], which resulted from ideological and political divisions. In the Kosovo case, the Security Council rejected the Russian draft resolution condemning the NATO military operation.

Some powers (especially Russia and China) do not treat serious violations of human rights as a threat to international peace and security – for example, the blocking of draft Security Council resolutions on Zimbabwe and Myanmar[230]. In 2011-

[228] GA Res. 2793 (XXVI) (7/12/1971).

[229] GA Res. 34/22 (14/11/1979); *The Responsibility* (fn. 8), pp. 57–60.

[230] Security Council, 5933rd Meeting, 11 July 2008 (SC/9396): "A Security Council measure intended to impose sanctions against Zimbabwe's President Robert Mugabe failed today when two of the 15-member body's permanent members – China and the Russian Federation – voted against a draft resolution that would also have imposed an arms embargo on the country, as well as a travel financial ban and freeze against the President and 13 senior Government and security officials considered most responsible for the violent crisis there. The result of the Council's vote was 9 in favor (Belgium, Burkina Faso, Costa Rica, Croatia, France, Italy, Panama, United Kingdom, United States), to 5 against (China, Libya, Russian Federation, South Africa, Viet Nam), with Indonesia abstaining." Zimbabwe's representative said, 'This resolution is a clear abuse of Chapter VII'. (…) The representative of the Russian Federation said ' there have been some obvious attempts to take the Council beyond its Charter prerogatives of maintaining international peace and security. Such illegitimate and dangerous attempts could unbalance the whole United Nations system, and the Russian Federation intended to counter such trends. (…) The draft was an attempt to interfere in the internal affairs of a country and ignored the dialogue launched between the parties. The representative of China: 'A threat of sanctions was not conducive to that goal (…). The situation in Zimbabwe had not exceeded the context of domestic affairs and did not constitute a threat to international peace and security'."

The Principle of Non-Intervention in Contemporary International Law: Non-interference in a State's Internal Affairs Used to be a Rule of International Law: Is It Still? Chatham House, February 2007: "On 12 January 2007, the Security Council failed to adopt a draft resolution dealing with Myanmar, because it was vetoed by two permanent members of the Council, China and Russia. (…) China in particular explained its position at some length, 2012, in the context of the massacre of civilians by the Syrian troops, China and Russia repeatedly blocked draft Security Council resolutions (supported, importantly and new, by Arab states) calling for an end to crimes and caution in arms supplies to Syria (a softening of the previous embargo formula). The argument for these peace-loving states was the fear of further confrontation and regime change[231]. Russia and China also abstained in the vote on the General Assembly resolution condemning

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asserting that '[a]ccording to the United Nations Charter, it is only those questions that constitute threats to international peace and security that warrant discussion by the Security Council'. The Chinese line was echoed by the Russian representative, who said that 'we believe that the situation in that country does not pose any threat to international or regional peace. That view is shared by a large number of States, including, most importantly, those neighboring Myanmar'. Where does this leave the Council's role, so recently proclaimed by the General Assembly – and formally accepted, in the abstract, by the Council – in regard to 'responsibility to protect'?"; see also fn. 265.

[231] See *Russia asserting itself against West, this time over Syria regime change,* "The Washington Post", January 29, 2012; Projet russe de résolution du 12 décembre 2011 – http://responsibilitytoprotectblog.files.wordpress. com/2011/12/application.pdf; *Russia, China veto Syria resolution at the United Nations,* "The Washington Post", October 5, 2011: "The draft garnered nine votes on the 15-member council, the minimum needed for adoption, as Brazil, India, Lebanon and South Africa expressed unease with the West's push for sanctions by abstaining. Speaking after the vote, Russia's UN envoy, (...)and China's UN ambassador, (...)expressed concern that the resolution would have served to exacerbate tensions in Syria and could have served as a pretext for possible regime change there. (…) The Council's European members had initially pressed for a much tougher resolution, including an arms embargo."

The latest draft resolution on Syria (04 October 2011) signed by France, Germany, Portugal and United Kingdom of United Kingdom and Northern Ireland: "The Security Council, (…) Recalling the Syrian Government's primary responsibility to protect its population (…) 1. Strongly condemns the continued grave and systematic human rights violations by the Syrian authorities. (…) 2. Demands an immediate end to all violence and urges all sides to reject violence and extremism. 3. Recalls that those responsible for all violence and human rights violations should be held accountable. (…) 9. Calls upon all States to exercise vigilance and restraint over the direct or indirect supply, sale or transfer to Syria of arms and related material of all types, as well as technical training, financial resources or services, advice, or other services or assistance related to such arms and related materiel (…) 11. Expresses its determination, to review Syria's implementation of this resolution within 30 days, and, in the event that Syria has not complied with this resolution, to consider the adoption of targeted measures under Article 41 of Chapter VII of the Charter of the United Nations."

Syria's massive human rights violations[232]. These resolutions referred to the concept of *Responsibility to Protect*[233]. Russia also did not stop arms supplies to Syria[234].

In opposing the draft resolution of the Security Council supported by the Arab states, Russia raised the objection that it should not call for the resignation of the head of state[235]. This view cannot be taken seriously, because if it comes to a resolution of the Security Council that authorizes the use of armed force, then it is obvious that the members of the Security Council, including the great powers, agree to the fall of the regime, because otherwise they would vote against it. It is also obvious that the resolution of the Security Council cannot be too casuistic and list all the detailed goals. The overthrow of a regime as a result of the use of force with the consent of the Security Council (and also in self-defence) is legal and often seems to be a premise for ceasing the crimes.

4.2.3 Humanitarian armed response is a reaction to a violation of fundamental norms of international law, but – unlike, for example, the violation of norms relating to trade or air traffic – it involves an ethical norm built into the norms of international law (prohibition of genocide, prohibition of war crimes, prohibition of crimes against

[232] General Assembly (GA/SHC/4033). Third Committee, 22 November 2011. *Third Committee Approves Resolution Condemning Human Rights Violations in Syria, by vote of 122 in favor to 13 against, with 41 abstentions* : "The representative of the Russian Federation said his country had consistently opposed unilateral country-specific resolutions. History showed such texts were ineffective. States themselves were responsible for the protection and promotion of human rights and it fell to the international community to provide technical assistance. While national dialogue was needed, the efforts of the Syrian authorities should not be overlooked. Further, the opposition groups should not boycott those efforts. The Russian Federation believed it was inadmissible to use force or intervention in Syria. The human rights situation in any country could be a source of concern for the international community. However, those issues should in no instance be used as an excuse for interference".

[233] See *Safe Area for Syria. An Assessment of Legality, Logistics and Hazards* (Prepared by Michael Weiss), Strategic Research & Communication Center 2011: "The failure to secure a United Nations Security Council resolution that would impose comprehensive international sanctions, the lack of international consensus on enacting more robust measures to protect a vulnerable population, the regime 's incitement of sectarian violence and its decision to launch multiple full-scale offensive military campaigns against civilians all suggest that prolonging decisive action to topple the Assad regime could very well plunge the Syrian state into a devastating and protracted conflict. A humanitarian catastrophe on par with the 1994 Rwandan genocide is another very real likelihood. In the interest of assessing all suggested options for hastening the end of a totalitarian dictatorship and/or averting a mass humanitarian catastrophe, this paper examines the way in which foreign military intervention could work for Syria political preconditions, legal rationales, logistics and possible hazards."

[234] *Russia asserting itself against West, this time over Syria regime change,* "The Washington Post", January 29, 2012: "Russia has pursued a complicated diplomatic strategy to shore up the regime, joining China in vetoing the Western-backed resolution threatening sanctions against Damascus, and introducing its own resolution. (…) Under the resolution, Assad's army could still be armed. Asked if Russia's ongoing arms sales to Assad's government were perhaps undercutting his government's effort to pursue a political settlement, Churkin said: 'We are not doing anything which is contrary to international law. Other than that, we don't have to give any explanation to anyone'."

[235] *Violence surges in Syria as UN Security Council meets,* "The Washington Post", January 27, 2012: "Russia, a close ally of Syria and permanent member of the Security Council, has warned that it will block any UN measure that requires Assad to step aside."

humanity). There is a visible conflict here between law and political realism and evaluative concepts of morality and justice.

Such controversies are difficult to resolve in national systems, let alone in the less complete and rather decentralized system of international law. Law, morality and justice are different fields, but it is difficult to ignore their connections (this does not mean, however, that moral norms must always dominate legal ones). In the application of law and its creation, one must strive for a specific integration of rules and values. With the passage of time, the basic values recognized by international law, including the UN Charter, have become not only the protection of the state against the illegal use of armed force, but also the protection of human rights against the state. In the long term, international law (and international politics), deprived of an evaluative compass, are doomed to failure. It should be noted in this context that the conflict between state sovereignty and human rights or between peace and justice is often created artificially.

The purpose of using force in the discussed case is humanitarian, but it is sometimes difficult to separate it from more far-reaching intentions, consisting in eliminating the causes and further mass violations of law, for example by a dictatorial government. Humanitarian interventions (and operations) are not devoid of political overtones. It must be taken into account, for example, that weakening Pakistan was in India's interest, just as Vietnam (supported by the USSR) was interested in gaining greater influence in Cambodia (supported by China). The same assessment should be made of the behind-the-scenes action of France, leading to the coup d'état and the fall of dictator (Emperor) Bokassa in the Central African Republic (1979).

Sometimes it is impossible to stop the crime without eliminating the government or the system, even if this is not the main goal of the humanitarian intervention (operation). If extreme legalism were maintained, Slobodan Milosevic, Khmer Rouge, Salah Eddine Ahmed Bokassa and Idi Amin would continue to murder before the eyes of the world.

There is a well-known unofficial Serbian statement: "A village a day keeps NATO away" (NATO will not react to crimes committed slowly and gradually)[236]. Nevertheless, from a political and humanitarian perspective, it seems better to use armed force for humanitarian purposes than to refrain from doing so, which would lead to the continuation of mass crimes and costly assistance to refugees and victims of crime.

The lack of use of force does not always mean neutrality and is often a case of taking the side of the perpetrator (your misery is the price of peace), while – from a different perspective – protecting victims should take precedence over protecting perpetrators. We expect consequences from morally motivated behaviour, not just political calculation.

However, the lack of reaction of world opinion in one case cannot be mechanically transferred to another. The alternative of intervening in every case of mass violations of law, or in none at all, is therefore wrong. However, these are not easy matters in practice, considering the Weberian concept of the ethics of responsibility

[236] R.C. DiPrizio, *Armed Humanitarians: US Interventions from Northern Iraq to Kosovo,* Baltimore 2002, p. 137.

(*Verantwortungsethik)* and the ethics of conviction (*Gesinnungsethik).* In how many places can one simultaneously protect the population from violations of their basic rights by dictatorial regimes?

Contemporary international politics is characterized by a selective response to flagrant violations of human rights, i.e. a discrepancy between what is morally desirable and what is politically expedient and legally permissible[237]. This results from a political and strategic lack of interest in a situation or region, the lack of a good prognosis of effectiveness, or limited military and/or financial capabilities. A blind eye is also turned to crimes committed by great powers or their strategic allies, indifference is shown to crimes in regions of less political importance, and dictatorships are tolerated in the name of pursuing economic interests. Abuses by democratic states are stigmatized, and there is limited or no reaction to less democratic or dictatorial regimes[238].

For example, the US military operation in Iraq in 2003 and the abuse of Iraqi prisoners caused much greater outrage and protests than the murder of almost a million people in Rwanda (1994), or of several million Chinese during the so-called cultural revolution or the "loud silence" in the face of the war and massacres that have been going on for years in Sudan, Congo and Ethiopia (Ogaden). When the Yugoslav army was carrying out ethnic cleansing in Kosovo in 1997 and 1998, there were no mass street demonstrations in Europe. Russian crimes in Chechnya are minimized or passed over in silence, and Moscow does not execute the judgments of the European Court of Human Rights[239]. The same applies to the highly selective condemnation of Israel in the UN Human Rights Council.

In conclusion, in many cases the opposite of humanitarian intervention may be inhumane non-intervention. It is also worth recalling Talleyrand's saying that "non-intervention is a diplomatic and enigmatic term that means more or less the same

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[237] W.M. Reisman, *Why Regime Change Is (Almost Always) A Bad Idea?* AJIL, 2004, Vol. 98, No. 3, pp. 516–525.

[238] *UN Secretary-General Kofi Annan's Address to Mark International Human Rights Day in New York City,* 8 December 2006: "World leaders (…) agreed to double the budget of the Office of the High Commissioner for Human Rights over the next five years. (…) But the Office's capacity is still far short of the needs it has to meet. I hope the quality of its work will persuade Member States to authorize further increases in the years ahead. Meanwhile, we must realize the promise of the Human Rights Council, which so far has clearly not justified all the hopes that so many of us placed in it. Of course, it's encouraging that the Council has now decided to hold a special session on Darfur next week. I hope that it will find an effective way to deal with this burning issue by the efforts of some Council members to weaken or abolish the system of Special Procedures – the independent mechanisms for reporting on violations of particular kinds, or in specific countries" – https://www.un.org/sg/en/content/sg/statement/2006-12-08/secretary-generals-address-mark-international-human-rights-day-%28followed-qa%29

[239] Human Rights Watch, June 4, 2009: "The number of European Court of Human Rights judgments holding Russia responsible for serious violations of human rights in Chechnya has surpassed 100, but the government has failed to take appropriate steps to remedy them" – http://www.hrw.org/en/news/2009/06/04/russia-prosecute-rights-violations-north-caucasus ; Human Rights Committee, Ninety-seventh session, 12-30 October 2009. *Concluding observations of the UN Human Rights Committee on Russia's report on the International covenant on civil and political rights.*

thing as intervention".[240] One may wonder, therefore, what is more important: the value of the community or the community of values[241]. Silence and passivity – however they are justified – favour the perpetrator of the crime, not his victims.

In this context, it is also necessary to note the problem of humanitarian aid when a state, as a result of an armed conflict, is unwilling to provide assistance to civilian victims of that conflict. The issue of access to victims by international humanitarian organizations also arises, which is sometimes required by Security Council resolutions[242].

4.2.4. Fundamental norms of international law (for example, the prohibition of genocide or of war crimes) have an *erga omnes effect*, meaning that every state has a legal interest in observing them. The main problem is whether and under what conditions armed force can be used in this context.

The doctrine of international law is divided on the issue of the legality of humanitarian intervention. It is characteristic that states - when taking an official legal position[243] - rarely refer to the concept of humanitarian intervention (the most common argument is self-defence)[244].

The lack of acceptance of armed humanitarian intervention is sometimes justified by the fear of abuse and manipulation but this extra-legal argument does not seem to be decisive. Another reason may be the belief of various dictatorships that the current state of affairs provides them with impunity for committing crimes. However, humanitarian interventions should not be condemned out of hand, because it would mean tolerating mass crimes and prevent the emergence of a new norm. In other words, it is problematic to accept an attitude that emphasizes the illegality of using force for a humanitarian purpose, while omitting the illegality of crimes committed. "To accept a permanent dichotomy between law and morality on something as important as the right to prevent genocide or other humanitarian catastrophes is to undermine law and morality and, indeed, international society itself."[245]

In UN practice, there is a tendency to treat mass violations of fundamental human rights by a state as a threat to international peace and security. However, the

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[240] « La non-intervention est un mot diplomatique et énigmatique qui signifie à peu près la même chose que l'intervention », *Réalité du droit international contemporain: le discours juridique sur la non-intervention et la pratique internationale. Actes de la septième rencontre de Reims,* Reims 1988, Vol. 5, p. 52.

[241] R. Kwiecień, *Between the Value of Community and the Community of Values. Studies and Sketches on the Philosophy of Law of German Idealism,* Lublin 2007.

[242] For example, resolution 688 concerning Iraq, resolution 770 concerning Bosnia and Herzegovina, resolutions 1101 and 1114 concerning Albania, resolution 1264 concerning East Timor, resolutions 1590, 1706 and 1769 concerning the conflict in Sudan.

[243] One of the countries that has officially developed criteria for humanitarian intervention is United Kingdom, see *Guiding Humanitarian Intervention.* Speech by the Foreign Secretary, Robin Cook, American Bar Association Lunch, QEII Conference Centre, London, 19 July 2000 – https://www.ukpol.co.uk/robin-cook-2000-speech-to-the-american-bar-association-lunch/

[244] There are also political concepts of the so-called pro-democratic intervention and the right to democratic government. More: GH Fox, BR Roth (eds.), *Democratic Governance and International Law,* Cambridge 2000; Th.M. Franck, *The Emerging Right to Democratic Governance,* AJIL, 1992, Vol. 86, no. 1, pp. 46–91.

[245] C. Greenwood (fn. 8), p. 597.

identification of such a threat does not automatically constitute a legal basis for unilateral armed operations by other states. In the case of the consent of the Security Council (Chapter VII of the UN Charter), an armed humanitarian operation does not constitute an intervention in internal affairs (Article 2, para. 7 of the UN Charter); the problem arises when such consent is lacking.

The international community tolerates some humanitarian interventions (without the consent of the UN Security Council), but it is difficult to authoritatively state the existence of an *opinio iuris* confirming the creation of a customary norm. However, the international acceptance of some humanitarian interventions should be assessed as significant. The rejection by the UN Security Council (by 12 votes to 3 – China, Russia and Namibia) of the draft resolution condemning NATO's military action in Yugoslavia (1999) seems to be an important argument for the admissibility of humanitarian intervention[246], although the lack of condemnation of the use of force by the UN Security Council does not automatically mean the legality of such actions.

Taking into account the slow legislative process in international relations, one can assume that we are at the stage of the creation of a customary norm permitting humanitarian intervention. The evolution of the law of international organizations in Africa, which permit the use of armed force without prior consent of the UN Security Council in cases of serious violations of human rights[247].

If we assume that such a norm does not yet exist, the tolerance for humanitarian intervention can be seen as an extraordinary exception to the prohibition of the use of force, arising from a serious violation of law. It can therefore be treated as morally and politically justified (legitimate), but not entirely legal[248], although this is not a satisfactory solution.

It is sometimes believed that humanitarian intervention constitutes a form of armed self-help that enforces compliance with fundamental norms of international law, which have an *erga omnes* effect. States conducting armed humanitarian intervention are directly harmed as a result of the violation of these norms and therefore have a direct legal interest[249].

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[246] More broadly, B. Simma, *NATO, the UN and the Use of Force: Legal Aspects,* EJIL, 1999, Vol. 10/1, pp. 1–22; A. Cassese, *Ex iniuria jus oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?,* EJIL, 1999, Vol. 10/1, pp. 23–30.

[247] See ECOWAS. *Protocol Relating to Mutual Assistance of Defence,* Freetown, 29th May 1981 – Article 4; ECOWAS. *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security,* Lomé, 10th December 1999: article 10; African Union. *The Constitutive Act* (2000): Article 4; *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (2002), article 4; *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (2009): Article 8.1.

[248] *The Independent International Commission on Kosovo* stated that "the NATO military intervention was illegal but legitimate", *Kosovo Report: Conflict, International Response, Lessons Learned, Oxford 2000,* p. 4.

[249] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts*: "Article 48. 1. Any State other than an adjudicated State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (…) (b) The obligation breached is owed to the international community as a whole."

If we assume that we are not yet dealing with a new norm of customary law in the matter in question, it seems reasonable to include the state of necessity[250] as a criterion for exemption from legal liability for violating the prohibition of the use of armed force.

4.2.5. Non-democratic states sometimes try to invoke their sovereignty to justify violations of international law, including against their own populations. By mixing concepts, a fictitious conflict is created between the sovereignty of the state and the international law that is binding on it. Violating fundamental norms of international law can hardly be considered an element of state sovereignty. However if sovereignty is a legal concept (principle), not a rule, its violation is only possible as a result of violating specific norms of international law.

Silence or inaction in the face of mass and most serious crimes essentially means compromising international law. It is necessary to strengthen legal argumentation, because referring to moral and political arguments is important, but insufficient. At the same time, invoking the lack of a legal norm seems to be a legalistic attitude. The violation of law as a result of the crime is beyond doubt, the only problematic thing is the reaction to it in the face of political disagreement in the Security Council.

In recent years, new trends have emerged in UN practice and legal doctrine. They are expressed in particular in the report (2001) of a special commission appointed by the UN, which introduced the concept of "responsibility to protect*"* and shifted the emphasis from the term "intervention" (humanitarian) to the problem of responsibility. Against the background of the responsibility to protect[251]*,* the earlier construction of the legal obligation to intervene (*devoir d'ingérence*, right to intervene)[252] seems to be of little relevance and out of date (whose obligation, what is the sanction for its violation?).

The responsibility to protect refers to the state's obligation towards the population on its own territory (in the case of its own citizens threatened abroad, self-defence applies). For other states the principle of equal sovereignty or the prohibition of intervention in internal affairs[253] cannot be a legal obstacle to their action.

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[250] See *infra* 6.1. O. Spiermann, *Humanitarian Intervention as a Necessity and the Threat or Use of* Jus Cogens, "Nordic Journal of International Law", 2002, Vol. 71, pp. 523–543.

[251] *The Responsibility to Protect.* Report of the International Commission on Intervention and State Sovereignty (December 2001); *Implementing the responsibility to protect.* Report of the Secretary-General, 12 January 2009 - A/63/677; A. Orford, *International Authority and the Responsibility to Protect,* Cambridge 2011; G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Once and for All,* New York 2008; V.K. Holt, T.C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations,* September 2006 (The Henry L. Stimson Center).

[252] M. Bettati, B. Kouchner, *Le devoir d'ingérence,* Paris 1987; O. Corten, P. Klein, *Droit d'ingérence ou obligation de réaction?,* Brussels 1992; M. Bettati, *Le droit d'ingérence: mutation de l'ordre international,* Paris, 1996.

[253] *The Responsibility (*fn*.* 251) : "1A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. 1B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect" (Synopsis, Core Principles).

"2.15 Thinking of sovereignty as responsibility, in a way that is being increasingly

The responsibility of third states includes preventive actions of a non-military nature, a response (including armed) to mass and serious violations of human rights, and support for social reconstruction and reconciliation after the end of the conflict. The essential elements of the discussed concept include the emphasis on the state's responsibility to protect the population, a new interpretation of the concept of sovereignty, and a broader perception of the aforementioned responsibility than just in terms of the use of armed force.[254]

Among the criteria for the admissibility of armed humanitarian actions, the report lists: the justness of the cause and the just goal (mass violations of human rights and their halting), the final nature of the measure used (exhaustion of other, non-military possibilities, including in particular the previous attempt at the procedure in the Security Council), the proportionality of the means, reasonable expectations regarding the success of the action and the competence of the body authorizing its implementation (the Security Council)[255]. If the Security Council is unable to reach an agreement (a veto by the great powers is permissible in the case of their "vital interests"), it is proposed that armed humanitarian actions could be carried out by regional international organizations (emphasis on the multilateral nature of the actions), which should strive to obtain the subsequent approval of the Security Council[256].

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recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promoting their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are responsible for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security."

[254] H. Nasu, *The Responsibility to Prevent: Could the UN Have Prevented the Atrocities in East Timor or Kosovo?,* Australian National University College of Law, Research Paper No. 10-51 (2009) – http://ssrn.com/abstract=1652493: "An early engagement by the international community is easier said than done. There are many questions that have been left unaddressed in relation to what the responsibility to protect concept" (p. 2); "There are three important questions to be addressed for the purpose of clarifying the international responsibility to prevent as part of the Responsibility to Protect doctrine: (1) how international political will be generated at an early stage; (2) how the issue of self-determination and secession can be addressed; and (3) what is the nature of the international responsibility to provide assistance or to take collective action, as opposed to a sovereign state's responsibility towards its own people" (p. 9); "If the responsibility to protect is nothing more than a political concept based on the existing rules of international law, it appears to suggest that the failure by the international community to provide assistance or intervene to protect a population from mass atrocities does not entail any legal consequences. However, any action or inaction, success or failure, by the international community will have an impact on the normative force and interpretation of basic principles of international law, such as non-use of armed force and the right of self-determination, which could otherwise pull in potentially conflicting directions" (pp. 15/16).

[255] *The Responsibility (*fn. 251), point 5.15 and ff. (right authority, just cause, right intention, last resort, proportional means and reasonable prospects).

[256] *The Responsibility (*fn. 251): "1. Military intervention for human protection purposes is an exceptional and extraordinary measure. (...) 3E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are: I. consideration of the matter by the General Assembly in Emergency Special Session under the 'Uniting for

It is rightly emphasized that the obligation to protect is not easy to fulfil. Firstly, it seems reasonable for the Security Council to attempt to define specific, although (due to the resistance of some states) not necessarily legally formalized guidelines for the use of armed force in this context. Secondly, the obligation to protect requires strong incentives to create the political will of states (on the domestic and international plane) not only for the ultimate use of force, but also for decisive non-military actions preceding it, including building appropriate coalitions of states. Thirdly, the responsibility to protect cannot be limited to verbalism, but must be backed by operational capability and readiness (appropriate military units to put an end to crimes, civilian assistance in reconstruction, financial capabilities)[257]. Without meeting these premises, the concept of the responsibility to protect will remain a dead letter[258].

The GA resolution, adopted during the UN World and Anniversary Summit in 2005, does indeed contain an affirmation of the responsibility to protect on the part of each state and the international community, but at the price of limiting such actions to those consistent with the UN Charter[259]. We can thus see progress, but at the same time a departure from the important proposals contained in the *Responsibility to Protect* document. The question therefore remains open: what to do if it is not possible to agree on a common position in the Security Council?[260]

Developing countries are not enthusiastic about the concept of the responsibility to protect[261], which is also reflected in the work of the Institute of International

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Peace' procedure; and II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking authorization subsequent from the Security Council" (Synopsis, Principles for Military Intervention).

[257] A new accent is SC Res. 1645 (2005) which established *Peacebuilding Commission.*

[258] G. Evans, *The Responsibility to Protect: Unfinished Business, G8 Summit 2006: Issues and Instruments (The Official Summit Publication),* 15–17 July 2006 – https://www.gevans.org/opeds/oped73.html

[259] *2005 World Summit Outcome,* A/RES/60/1: "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (para. 138). "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be "adequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (para. 139). This content is expressly adopted in section 4 of SC Res. 1674 (2006).

[260] The 2009 report of the UN Secretary-General does not introduce any new elements on this issue: "56. (…) When a State refuses to accept international prevention and protection assistance, commits egregious crimes and violations relating to the responsibility to protect and fails to respond to less coercive measures, (…) collective measures could be authorized by the Security Council under Articles 41 or 42 of the Charter, by the General Assembly under the 'Uniting for peace' procedure (see para. 63 below) or by regional or subregional arrangements under Article 53, with the prior authorization of the Security Council" – *Implementing the responsibility to protect.* Report of the Secretary-General – A/63/677 (12 January 2009).

[261] *Outcome of July Debate: Adoption of the First UN Resolution on the Responsibility to Protect.* GA Sixty-third session – Agenda items 44 and 107. Resolution adopted by the General

Law[262]. The evidence of the UN's impotence is, among others, the situation in Darfur, in the context of which the UN Secretary General openly criticized the attitude of governments, including some developing countries, considering the concept of the responsibility to protect as a manifestation of Western imperialism[263]. He did not spare the new UN Human Rights Council either[264]. The cases of Burma (2008)[265] or

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Assembly [without reference to a Main Committee (A/63/L.80/Rev.1 and Add.1)] 63/308. *The responsibility to protect* – http://www.responsibilitytoprotect.org/index.php /component/ content/article/35-r2pcs-topics/2626-un-resolution-on-the-responsibility-to-protect;

G. Evans, *Operationalizing R2P in Coercive Peace Operations* (Working Group on Peace Operations and the Protection of Civilians, ICRC and IIHL Conference on International Humanitarian Law, Human Rights and Peace Operations), San Remo, 5 September 2008; G. Evans, *The Responsibility to Protect: An Idea Whose Time Has Come... and Gone?* Lecture to David Davies Memorial Institute, University of Aberystwyth, 23 April 2008; G. Evans, *The Limits of State Sovereignty: The Responsibility to Protect in the 21st Century* (Eighth Neelam Tiruchelvam Memorial Lecture, International Center for Ethnic Studies), Colombo, July 29, 2007.

For the echoes of this concept see *ECOWAS Conflict Prevention Framework* (Regulation MSC/REG.1/01/2008): "41. Beyond legal instruments and guidelines, however, the unacceptable levels of deprivation in West Africa, as well as the destructive nature and spillover effects of contemporary regionalized internal upheavals, place specific moral obligations on ECOWAS Member States to act. Thus, ECOWAS is imbued with the necessary supranational powers (acting on-behalf of and in conjunction with Member States, AU and UN), as well as the authority to intervene to protect human security in three distinct ways, namely: a. The Responsibility to prevent – actions taken to address the direct and root causes of intra and inter-state conflicts that put populations at risk. b. The Responsibility to react – actions taken in response to grave and compelling humanitarian disasters."

[262] Institut de Droit International, Session de Santiago (27 octobre 2007). *Problèmes actuels du recours à la force en droit international – Actions humanitaires* – La Déclaration du Président: « L'Institut a débattu de manière approfondie la question de la licéité des actions militaires qui n'ont pas été autorisées par les Nations Unies mais dont l'objectif déclaré est de mettre fin à un génocide, à des crimes contre l'humanité de grande ampleur ou à des crimes de guerre de grande ampleur. Tandis que certains Membres furent d'avis que ces actions pourraient être licites dans certaines circonstances et moyennant certaines conditions, certains autres Membres furent d'avis que tel n'est pas le cas en droit international contemporain, et en particulier selon la Charte des Nations Unies ».

[263] *UN Secretary-General Kofi Annan's Address (*fn*.* 238): "As you know, last year's World Summit formally endorsed that momentous doctrine – which means, in essence, that respect for national sovereignty can no longer be used as an excuse for inaction in the face of genocide, war crimes, ethnic cleansing and crimes against humanity. Yet, one year later, to judge by what is happening in Darfur, our performance has not improved much since the disasters of Bosnia and Rwanda. Sixty years after the liberation of the Nazi death camps, and 30 years after the Cambodian killing fields, the promise of 'never again' is ringing hollow. (…) Some governments have tried to win support in the global South by caricaturing responsibility to protect, as a conspiracy by imperialist powers to take back the hard-won national sovereignty of formerly colonized peoples." See also G. Evans, *Making Idealism Realistic: The Responsibility to Protect as a New Global Security Norm* – https://www.gevans.org/ speeches/speech219.html

[264] *UN Secretary-General Kofi Annan's Address (*fn*.* 238): "Yet, if we are serious about human deprivation, we must also demonstrate that we are serious about human dignity, and vice versa. Are you any more confident today than you were 10 years ago that an intergovernmental organization can really do this job? I fear the answer may be no, and that the first steps of the Human Rights Council, which we all fought so hard to establish, may not have given you much encouragement."

[265] G. Evans, *Facing Up to Our Responsibilities,* "The Guardian", 12 May 2008: "French Foreign Minister Bernard Kouchner (…) believes (…) that this is a proper case for coercive

Sri Lanka (2009)[266] prove the constant fluctuations in the practical application of the responsibility to protect. In turn, Russia's invocation of the responsibility to protect at the time of the conflict with Georgia in August 2008 was a gross abuse of this concept, as it does not apply to its own citizens abroad[267].

4.2.6. The UN Charter must be read and interpreted as a whole. The Charter does not at all give priority to protecting a state over protecting its citizens[268].

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intervention under the 'responsibility to protect' principle unanimously endorsed by 150 heads of state and government at the 2005 UN World Summit. His proposal that the Security Council pass a resolution which 'authorizes the delivery and imposes this on the Burmese government' met with immediate rejection not only from China and Russia, who are always sensitive about external intervention into internal affairs, but from many other quarters as well. It generated concern from the UK and others, including senior UN officials, that such an 'incendiary' approach would be wholly counterproductive in winning any still-possible cooperation from the generals It also provoked the argument from humanitarian relief agencies – who know what they are about – that simply as a practical matter any effort to drop supplies without an effective supporting relief on the ground. ground would be hopelessly inefficient, and perhaps even dangerous with the prospect of misuse of medical supplies".

[266] G. Evans, *Falling Down on the Job* (1 May 2009): "France, the United States, Britain (…) have pushed – although cautiously – for the council to review Sri Lanka as an official agenda item. (…) But because of consistent obstruction by a handful of member states, the issue continues to be relegated to informal statements and unofficial meetings – not in the Security Council chamber. (…) Those signaling varying degrees of opposition to council engagement have been China, Russia, Libya, Vietnam and (…) Japan. While the tacit approval of a military endgame against a terrorist group is understandable enough, looking the other way as tens of thousands of innocent civilians are imperiled in the process is indefensible" – https://www.gevans.org/opeds/oped101.html

[267] See the critique of the Russian position: *The Georgia-Russia Crisis and the Responsibility to Protect: Background Note,* August 2008 – https://www.globalr2p.org/wp-content/uploads/2021/07/the-georgia-russia-crisis-and-the-r2p-background-note.pdf

[268] Kofi Annan, *Réflexions sur l'intervention,* [Ditchley Park (Royaume Uni), 26 juin 1998]: « La Charte, après tout, a été proclamée au nom des peuples, et non pas des gouvernements des Nations Unies. Elle l'a été pas seulement dans le souci de maintenir la paix internationale, encore que cela soit d'une importance vitale, mais aussi comme la manifestation de 'notre foi dans les droits fondamentaux de l'homme, dans la dignité et la valeur de la personne humaine'. La charte reconnaît la souveraineté des peuples. Son intention n'a jamais été, ce faisant, de donner licence aux gouvernements de fouler aux pieds les droits fondamentaux et la dignité de l'homme. La souveraineté implique la responsabilité, pas seulement le pouvoir »– https://press.un.org/en/1998/19980626. sgsm6613.html

Kofi Annan. Rapport du Millénaire du Secrétaire général des Nations Unies « Nous le peuples: le rôle des Nations Unies au XXIe siècle» (Doc. A/54/2000, 27 mars 2000): « 217. (…) J'admets aussi que les principes de la souveraineté et de la non-ingérence offrent une protection absolument indispensable aux petits États faibles. Je voudrais néanmoins poser la question suivante aux critiques: si l'intervention humanitaire constitue effectivement une atteinte inadmissible à la souveraineté, comment devons-nous réagir face à des situations comme celles dont nous avons été témoins au Rwanda ou à Srebrenica et devant des violations flagrantes, massives et systématiques des droits de l'homme, qui vont à l'encontre de tous les principes sur lesquels est fondée notre condition d'êtres humains? (…) 219. L'intervention humanitaire est une question délicate et très complexe sur le plan politique et ne se prête pas à des réponses faciles. Toutefois, ce qui est certain, c'est qu'aucun principe juridique - même pas celui de la souveraineté - ne saurait excuser des crimes contre l'humanité. Lorsque de tels crimes sont commis et que les moyens pacifiques pour y mettre fin ont été épuisés, le Conseil de sécurité a le devoir moral d'agir au nom de la communauté internationale. Ce n'est pas parce que nous ne pouvons pas protéger les populations partout dans le monde que nous ne devons pas agir chaque fois que nous le pouvons. L'intervention

It is especially worth remembering the UN's goals, such as: "to save succeeding generations from the scourge of war (...), to restore faith in fundamental human rights and the dignity and worth of the individual (...), to create conditions under which justice can be maintained and the obligations arising from international agreements and other sources of international law respected (...), to ensure by the adoption of principles and the institution of methods that armed force shall not be used except in the common interest" (preamble to the UN Charter).

According to Article 1, paragraph 1, the UN's task is to maintain international peace and security by "effective collective measures to prevent and eliminate threats to the peace and to suppress acts of aggression or other breaches of the peace". There is no reason to ignore these arguments in the interpretation of the legal norms of the UN Charter, especially in relation to Article 2, paragraph 4, which prohibits the use of force in "a manner inconsistent with the purposes of the United Nations".

The UN Secretary-General stated in the context of the situation in Kosovo that when diplomacy fails, the use of force is sometimes justified in the name of peace[269].

French President François Mitterrand expressed the view that "the ban on intervention ends precisely at the moment when there is a risk that aid will not be provided"[270].

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armée doit toujours demeurer le dernier recours mais, face à des massacres, c'est une possibilité qu'il ne faut pas écarter ».

A More Secure World (fn. 24): "29. In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. (…) 30. What we seek to protect reflects what we value. The Charter of the United Nations seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens. These are the values that should be at the heart of any collective security system for the twenty-first century, but too often States have failed to respect and promote them.

[269] Kofi Annan's Speech in The Hague, May 18, 1999, UN Press Release SG/SM/6997: "[M]y reaction to the decision of the NATO to take enforcement action without seeking explicit Security Council authorization was twofold: I identified the Security Council as having the primary responsibility for maintaining international peace and security. With equal emphasis, I also stated that it was the rejection of a political settlement by the Yugoslav authorities which made this action necessary, and that, indeed, there 'are times when the use of force may be legitimate in the pursuit of peace'.

By another occasion Secretary-General added: "It is clear that sovereignty alone is not the only obstacle to effective action in human rights or humanitarian crises. No less significant are the ways in which the Member States of the United Nations define their national interest in any given crisis. Of course, the traditional pursuit of national interest is a permanent feature of international relations and of the life and work of the Security Council. But as the world has changed in profound ways since the end of the cold war, I believe our conceptions of national interest have failed to follow suit" – Secretary-General. *Annual Report to General Assembly,* UN Press Release SG/SM/7136, GA/9596, 20 September 1999.

[270] « [L]'obligation de non-ingérence s'arrête à l'endroit précis où naît le risque de non-assistance » – Allocution de M. François Mitterrand, Président de la République, sur l'importance des travaux de la CSCE en matière de droits de l'homme et sur la construction d'une Europe de droit, Paris, La Sorbonne, le 30 May 1989.

In his message for the XXXIII World Day of Peace (2000), Pope John Paul II recalled (certainly not without connection with the NATO military operation in Yugoslavia in 1999):

> "[W]hen there is a danger that the civilian population will fall victim to an unjust aggressor, and when attempts at political action and non-violent defence have failed, it is legitimate and even necessary to take concrete steps to disarm the aggressor. Such actions, however, must be limited in time and have precisely defined objectives, they must be carried out in full respect of international law and under the supervision of a recognised supranational authority, and in no case be guided exclusively by military logic".[271]

Father Józef Tischner once said:

> "A decision is at the same time an establishment of values. It is not about acting in accordance with a rule, because there are so many of them that whatever I would do, I would always have some rule behind me. So with my decision I am not illustrating a rule, but – I repeat – I establish a value. I establish it not on by virtue of conformity with some general rule, but on the basis of simple experience: <if you have to, you have to [if it is necessary, it must be done]. That is what I am for>. (...) Fundamentalists invoke not so much conscience as rules. This is the disease of Pharisaism. It is the rules that count, while the human being dies alongside. This is why conscience is at odds with fundamentalism"[272].

In the opinion of Władysław Bartoszewski:

"Where is the limit of decency? Where is the limit of helpfulness? Is it giving alms or taking someone into your home? Or maybe sharing your garments with them, as some saints did? No one can say about themselves that they have done enough, except for those who died helping others. Only they have done enough".[273]

Quoting Alain Pellet: « *Mieux vaut appliquer le 'principe Zorro', que celui de Munich, dont on sait à quel drame plus grave il ouvre la voie* ».[274]

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[271] *On Earth, peace to those whom God loves.* Message for the World Day of Peace, 1 January 2000 (in:) John Paul II, *The world is not in turmoil...,* Warsaw 2003 (Diplomatic Academy of the Ministry of Foreign Affairs), pp. 284–285 (item 11). See also *Address of His Holiness Benedict XVI,* United Nations, New York, 18 April 2008: "Recognition of the unity of the human family, and attention to the innate dignity of every man and woman, today find renewed emphasis in the principle of the responsibility to protect. (…) If States are unable to guarantee such protection, the international community must intervene with the juridical means provided in the United Nations Charter and in other international instruments. The action of the international community and its institutions, provided that it respects the principles undergirding the international order, should never be interpreted as an unwarranted imposition or a limitation of sovereignty. On the contrary, it is indifference or failure to intervene that do the real damage."

[272] „Słowo ludu", 29.06.2000, p. 5;"Przekonać Pana Boga" z ks. Józefem Tischnerem rozmawiali Dorota Zańko i Jarosław Gowin, Kraków 1999.

[273] *My Jerusalem, my Israel. Władysław Bartoszewski in conversation with Joanna Szwedowska,* Warsaw 2004.

[274] A. Pellet, *L'imputabilité d'éventuels actes illicites. Responsabilité de l'OTAN ou des Etats membres,* (in :) Ch. Tomuschat (ed.), *Kosovo and the International Community. A Legal Assessment,* The Hague-London-New York 2002, p. 194.

Shortly before the end of his mandate, Kofi Annan stated: "Some believe that justice should sometimes be sacrificed in the interests of peace. I question that view”[275]. However, this position was not universally shared[276].

4.2.7. Contrary to some allegations, armed humanitarian intervention is not an example of the use of force against a weaker state, but rather an action in defence of its population. Nor is it an expression of arbitrariness or a continuation of the old gunboat policy. In the absence of a decision by the Security Council, a state committing an international crime should not remain unpunished, and the perpetrator cannot be protected more effectively than its victims.

The above dilemmas require us to focus on individual cases of humanitarian interventions and draw conclusions from them for international law, which also develops as a result of the practice of states. In such an assessment, it is worth taking into account legal and extra-legal arguments, especially whether we are dealing with mass violations of human rights; whether an armed operation (without the consent of the UN Security Council) was preceded by a broader diplomatic action; whether other than military means were exhausted; whether there was a real chance for an imminent resolution of the Security Council; whether the Security Council had previously determined a threat to international peace or security; whether the state violating human rights complied with the Security Council's calls; whether the operation took place in the context of the lack or inability of local authorities to act; whether the operation has international support; whether it is not an expression of hegemonic policy (the problem of protected values and interests of intervening states); whether there is a real chance of successfully carrying out a an action, and finally, and whether its (negative) effects are not disproportionate to the (positive) results. The application of the criterion of necessity also remains to be considered[277].

In conclusion, it cannot be ruled out that we are witnessing the slow formation of a customary norm of humanitarian intervention, which seems to be partly confirmed by the practice of states, the international law doctrine, and the concept of the responsibility to protect. At the same time, however, there is noticeable resistance to this concept from some international law scholars and many countries in the so-called Global South.

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[275] “Some say that justice must sometimes be sacrificed in the interests of peace. I question that” – *UN Secretary-General Kofi Annan's Address (*fn*.* 238).

[276] *In Tapes, Nixon Rails About Jews and Blacks,* “The New York Times”, December 10, 2010: <“The emigration of Jews from the Soviet Union is not an objective of American foreign policy,” Mr. Kissinger said. “And if they put Jews into gas chambers in the Soviet Union, it is not an American concern. Maybe a humanitarian concern”. “I know,” Nixon responded. “We can't blow up the world because of it”>; see also H.A. Winkler, „Der Spiegel“, Nr. 51 (13 December 2004) p. 30: „Es gibt Traditionen im deutschen politischen Denken, wonach ein gutes Verhältnis zu Russland von so überragender Bedeutung ist. (…) 1982 erschien ein Interviewband von Egon Bahr, und eine der Fragen darin lautete: Hätte die Sowjetunion ein Recht, in Polen zu intervenieren, wenn Polen seine Mitgliedschaft im Warschauer Pakt in Frage stellen sollte? Die Antwort lautete: Aber selbstverständlich”; D. Pick, *Brücken nach Osten. Helmut Schmidt und Polen*, Bremen 2011, p. 104: „Die Haltung Schmidts [1980] ergab sich aus seiner Überzeugung, dass die Lage in Polen für die Entspannung in der Welt gefährlich sei“.

[277] See *infra* 6.1.

4.3. Pre-emptive self-defence

Another variant of the use of armed force by a state without the consent of the Security Council are the concepts of a pre-emptive armed self-defence and of a preventive armed operation – by no means identical[278]. These operations are often incorrectly referred to as self-defence, and the adjectives pre-emptive and preventive are sometimes incorrectly used interchangeably. The adjectives *anticipatory* or *interceptive* refer to pre-emptive actions .

Politicians sometimes face difficult challenges: whether and how long to wait for credible evidence of a threat of an armed attack? Assessing the intentions of the enemy is extremely difficult, while a reaction after the fact may be late or impossible[279].

4.3.1. According to Article 51 of the UN Charter, self-defence is lawful when an armed attack has been committed against a Member State (if an armed attack occurs; *est l'objet d'une agression armée*)[280]. The UN Charter does not specify who is the author of an armed attack, i.e. it does not limit the perpetrator to the state.

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[278] D. Bethlehem, *Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL (2012); A.N. Guiora, *Self- Defence – From the Wild West to 9/11: Who, What, When,* Cornell International Law Journal, 2009, Vol. 41, pp. 631–674; idem, *Anticipatory Self-Defence and International Law – A Re-Evaluation,* " Journal of Conflict & Security Law", 2008, Vol. 13, No. 1, pp. 3–24; J. Schwehm, *Präventive Selbstverteidigung. Eine vergleichende Analyse der völkerrechtlichen Debatte,* "Archiv des Völkerrechts", 2008, 46. Band, 3. Heft, pp. 368–406; WM Reisman, A. Armstrong, *The Past and Future of the Claim of Preemptive Self-Defence,* AJIL, 2006, Vol. 100, No. 3, pp. 525–550; S.D. Murphy, *The Doctrine of Pre-emptive Self- Defence,* Villanova Law Review, 2005, Vol. 50, pp. 699–748; AD Sofaer, *On the Necessity of Pre-emption,* EJIL, 2003, Vol. 14/2, pp. 209–227; M.N. Schmitt, *Preemptive Strategies in International Law,* "Michigan Journal of International Law", 2003, Vol. 24, No. 2, pp. 513–548; E. Bunn, *Preemptive Action: When, How, and to What Effect?,* "Strategic Forum" (National Defence University), 2003, no. 200; M. Bothe, *Terrorism and the Legality of Pre-Emptive Force,* EJIL, 2003, Vol. 14, pp. 227–240.

[279] United States of America. Department of Defense. *Annual Report to Congress. Military Power of the People's Republic of China* – 2007: "PLA [People's Liberation Army] authors describe preemption as necessary and logical when confronting a more powerful enemy. Chinese doctrinal materials stress that static defenses are insufficient to defend territory based on the speed and destructive power of modern forces. As a result, PLA operational concepts seek to prevent enemy forces from massing and to keep the enemy off balance by seizing the initiative with offensive strikes. According to PLA theorists, an effective <defense includes destroying enemy capabilities on enemy territory before they can be employed>" (p. 12).

[280] Institut de Droit International (Session de Santiago), Résolution du 27 octobre 2007 sur les *Problèmes actuels du recours à la force en droit international – Légitime défense*: « 1. L'article 51 de la Charte des Nations Unies, tel que complété par le droit international coutumier, régit adéquatement l'exercice du droit de légitime défense individuelle et collective. 2. La nécessité et la proportionnalité sont des éléments essentiels des règles applicables à la légitime défense. 3. Le droit de légitime défense de l'Etat visé prend naissance en cas d'attaque armée (agression armée) en cours de réalisation ou manifestement imminente. (…) 5. Une attaque armée déclenchant le droit de légitime défense doit avoir un certain degré de gravité. Les actions impliquant un emploi de la force de moindre intensité peuvent donner lieu à des contre-mesures conformes au droit international. (…) 6. Les doctrines de légitime défense « préventive », en l'absence d'une attaque armée en cours de

The fundamental question is when does an armed attack begin? It is unwise and unjustified under applicable legal norms to assume that a self-defence reaction can only occur when an armed attack has already taken shape against a target. In extreme cases, waiting for an armed attack may mean completely depriving oneself of the possibility of self-defence[281]. While the victim of a potential armed attack does not have to wait for it to take place, he must demonstrate a high probability of the impending attack (usually a matter of hours or days – imminence) based on relevant data (usually intelligence) and the lack of other possibilities to prevent it (necessity*).*

Classic self-defence can take place on the territory of the attacked country (fighting off an ongoing attack) and then move to the territory of the attacker, while pre-emptive self-defence takes place on the territory of another country from which an armed attack is expected. The perpetrators of the attack are forces of a foreign country or irregular groups (non-state actors), including terrorist groups.

The pre-emptive self-defence is a response to threats to the territory of the state (but also its armed forces or citizens abroad, ships, aircraft, as well as diplomatic and consular missions), when "there is a need for immediate and overwhelming self-defence leaving no choice of means of action or time for reflection", provided, however, that such action cannot be unreasonable or excessive[282]. In this construction: "The crux of the issue (…) is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon."[283].

These are the criteria recognized in the 19th century *Caroline case,* which concerned the armed action of British troops on US territory in order to forestall further, illegal and unofficial deliveries of weapons by the ship *Caroline* (destroying it on US territory) to the rebels in then British Canada. This case concerned the tolerance by the United States on its territory of the activities of irregular groups supporting the rebels in Canada, even though the US could have prevented these activities. The US authorities did not exercise control over these groups, and United Kingdom did not attempt to attribute their actions to the United States.

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réalisation ou manifestement imminente, n'ont pas de fondement en droit international. (…) 10. En cas d'attaque armée d'un Etat par un acteur non étatique, l'article 51 de la Charte, tel que complété par le droit international coutumier, s'applique en principe ».

[281] W.B. Slocombe, *Force, Pre-Emption and Legitimacy,* "Survival", 2003, Vol. 45, p. 125: "[T]he right of anticipatory self-defence by definition presupposes a right to act while action is still possible. If waiting for 'imminence' means waiting until it is no longer possible to act effectively, the victim is left no alternative to suffering the first blow. So interpreted, the 'right' would be illusory."

[282] "[T]he necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment for deliberation" – The *Caroline* (exchange of diplomatic notes between United Kingdom, Ashburton, and the United States, Webster, 1841–1842) – more on topic matters *Caroline* see AD Sofaer (fn. 278); A. Guiora, *Pre-empting Terror Bombings—A Comparative Approach to Anticipatory Self- Defence,* "Toledo Law Review", Vol. 41, 2010, p. 18: "Customary international law permits a state to respond to a threat and infringement on the territorial sovereignty of another nation when four criteria are met: (1) it is acting in self-defence ; (2) the attack is substantial and military (ie, not an 'isolated armed incident'); (3) the offending nation is complicit, unwilling, or unable to prevent further attacks; (4) the attack is widespread *and* imminent."

[283] Y. Dinstein (fn. 8), p. 191.

These criteria concern the use of armed force in the face of an imminent and highly probable threat, assuming that passivity (especially in the perspective of an imminent attack) would be unreasonable. This is usually a matter of a short time, when there is no possibility of using other measures (for example, after an attack, the threat of further attacks). In other words, I respond with an armed attack to an almost concrete intention of the adversary, who wants to surprise me with his attack or tolerates on his territory armed preparations for a sudden and imminent attack by irregular forces[284].

The well-known example of pre-emptive self-defence is Israel's attack in 1967 (the so-called Six-Day War) in response to clear political and military preparations for an attack by Arab states[285]. The Israeli action was preceded in 1967 by the withdrawal of the UN peacekeeping forces (UNEF) at Egypt's request, Egypt's blockade of the Gulf of Aqaba and the Straits of Tiran, and a massive concentration of troops from several Arab states on the border with Israel. President Jamal Abdel Nasser also made public his intention to destroy the State of Israel. The Israeli army waited until the first armed incidents in the form of artillery fire on several locations and then attacked[286]. This reaction, however, was not limited to stopping the artillery fire.

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[284] US Department of Defence. Annual Report to Congress. *Military Power of the People's Republic of China - 2009* : "Beijing's definition of an attack against its sovereignty or territory is vague. The history of modern Chinese warfare provides numerous case studies in which China's leaders have claimed military pre-emption as a strategically defensive act. For example, China refers to its intervention in the Korean War (1950–1953) as the 'War to Resist the United States and Aid Korea.' similarly, authoritative texts refer to border conflicts against India (1962), the Soviet Union (1969), and Vietnam (1979) as 'Self- Defence Counter Attacks.' This logic suggests the potential for China to engage in military pre-emption, prevention, or coercion if the use of force protects or advances core interests, including territorial claims (e.g., Taiwan and unresolved border or maritime claims). Chinese strategic-level military theory establishes seemingly contradictory guidance: 'strike only after the enemy has struck,' and 'seize the initiative.' Of note, China's 2008 Defence White Paper features a slightly different construction: 'Strategically, [the PLA] adheres to the principle of…striking and getting the better of the enemy *only after the enemy has started an attack* [emphasis added].' Yet, the authoritative work, *Science of Military Strategy,* makes it clear that the definition of an enemy strike is not limited to conventional, kinetic military operations. Rather, an enemy 'strike' may also be defined in political terms. Thus: ' Striking only after the enemy has struck does not mean waiting for the enemy's strike passively… It doesn't mean to give up the "advantageous chances" in campaign or tactical operations, *for the 'first shot' on the plane of politics must be differentiated from the 'first shot' on that of tactics...* If any country or organization violates the other country's sovereignty and territorial integrity, *the other side will have the right to 'fire the first shot' on the plane of tactics* [emphasis added].' These passages illustrate the ambiguity of PRC strategic thinking as well as the justification for offensive – or pre-emptive – military action at the operational and tactical level under the guise of a defensive posture at the strategic level" (p. 12).

[285] I. Ginor, G. Remez, *Foxbats over Dimona: The Soviets' Nuclear Gamble in the Six-Day War,* Yale 2007.

[286] Security Council, Official Records (S/PV.1348, 6 June 1967) – Mr. Eban (Israel): "150. Now there could be no doubt about what was intended for us. With my very ears I heard President Nasser's speech on May 26. He said: 'We intend to open a general assault against Israel. This will be total war. Our basic aim will be to destroy Israel'. 151. On 2 June, the Egyptian Commander in Sinai, General Mortagi, published his order of the day, calling on his troops to wage a war of destruction against Israel. (…) 155. But as time went on, there was

The attempt to legally condemn the attack failed both in the Security Council and in the General Assembly. The Security Council only demanded a ceasefire between the parties to the conflict (resolutions: 233, 234, 235, 236, 240). It was a few months later, in resolution 242, that the demand for the withdrawal of Israeli armed forces "from territories occupied in the recent conflict", situated, however, in the context of respecting the borders and recognizing the sovereignty of each state in the region (including the State of Israel).

If the United States had attacked Japanese aircraft carriers navigating towards Pearl Harbor (1941), this would have been an example of a legitimate and legal pre-emptive operation (self-defence). Of a specific nature, close to pre-emptive self-defence, are some of the Security Council resolutions on combating piracy, authorizing member states to use force in territorial seas and in the territory of Somalia[287].

4.3.2. The importance of pre-emptive self-defence has changed over time and has clearly increased with the emergence of new weapons and irregular groups, including terrorists. While in times of classic war, one could observe massive preparations for an attack (for example, concentration of troops and military equipment), today, for example in the event of a missile attack, this is not possible. Cross-border terrorist attacks are carried out unexpectedly and from hiding. Moreover, today the threat often takes the form of a series of armed attacks carried out over many years by another state (or its proxies).

In recent practice, we note that after one terrorist attack, more should be expected and then pre-emptive self-defence against terrorist groups on the territory of other states that support these groups or provide them with shelter are considered legitimate. For a legal launch of a pre-emptive operation, neither the possession of a large army by the potential adversary nor verbal threats are sufficient, because it is required to prove a high probability of an imminent armed attack.

The subject of the dispute in the case of pre-emptive self-defence is not so much its legality, but its practical application, that is, above all, the assessment of the need for an armed response. An important element is the conviction of the need to react, while the criterion of a threat in the near future is relegated to the background, because in the context of new weapons and new warfare methods it cannot be seriously verified in every case.[288]

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no doubt that our margin of general security was becoming smaller and smaller responded defensively in full strength."

[287] E. Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia,* "ASIL Insight", February 6, 2009: "Authorizing armed action against pirates in sovereign territory is an unprecedented measure by the Security Council. Because the resolutions [SC resolutions 1816, 1846, 1851, JK] permit responses beyond those permitted under customary international law they caused some apprehension on the part of states with a history of piracy problems, fearing the resolutions may set a precedent eroding national territorial sovereignty. The text accompanying the resolutions and statements made by Council members stressed that the resolutions applied solely to the Somali situation and would not establish any precedent of customary international law."

[288] Chatham House. *The Principle (*fn. 230): "Whether the attack is 'imminent' depends upon the nature of the threat and the possibility of dealing effectively with it at any given

For example, if a country is the object of repeated attacks by irregular groups (acting as proxies of another state, e.g. Hamas, Hezbollah) it can attack these groups located on the territory of a foreign country, even if it does not expect an attack from them within a few hours but is certain that further attacks will occur. By detecting the hideout of such a group or one of its units, the country uses the windows of opportunity and attacks, because only then will it be possible to destroy the group. In practice, in such cases we often deal with a combination of pre-emptive self-defence and classic self-defence. The armed response can possibly be classified as classic self-defence if it is assumed that a long-term series of armed attacks means the existence of an international armed conflict.

Neither missile nor nuclear weapons were known at the time of the adoption of the UN Charter, and therefore the type and scale of the threats associated with them. A difficulty in the case in question concerns primarily the establishment of facts and intentions and their assessment, especially in the light of intelligence information, because not all threats or armed preparations authorize pre-emptive self-defence.

In essence, the problem of pre-emptive operation comes down to answering the seemingly simple question of when an attack begins. In this context, it is most important to define the necessity criteria and imminence;[289] the criterion of proportionality is not of fundamental importance in the case at hand, since the scale and scope of the envisaged attack are not precisely known[290].

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stage. Factors that may be taken into account include: the gravity of the threatened attack – whether what is threatened is a catastrophic use of WMD; capability – for example, whether the relevant state or terrorist organization is in possession of WMD, or merely of material or component parts to be used in its manufacture; and the nature of the attack – including the possible risks of making a wrong assessment of the danger. Other factors may also be relevant, such as the geographical situation of the victim state, and the past record of attacks by the state concerned" (section 4).

J. Yoo, *Using Force,* "The University of Chicago Law Review", 2004, Vol. 71, No.3, p. 757: "Whether a threat is sufficiently imminent to render the use of force in self-defence necessary is not solely a question of time. Rather, imminence should take into account several factors: (1) the probability of an attack; (2) the likelihood that the probability of an attack will increase, given the practicality or impracticality of diplomatic alternatives, and therefore the need to take advantage of a window of opportunity."

[289] *A More Secure World* (fn. 24) – "188. (…) A threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate"; *Larger Freedom: Towards Security, Development and Human Rights for All*. Report of the Secretary General of the United Nations (2005) – "124. 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 recognized that this covers an imminent attack as well as one that has already happened".

[290] See *infra* 3.2. and chapter 6.

That being, the Charter's prohibition rules should not be reduced to absurdity – after all, it is not a suicide pact [291]. In any case the concept of pre-emptive armed operation does not seem to be in conflict with Article 51 of the UN Charter[292].

However, we should not forget about cases in which pre-emptive self-defence becomes unrealistic due to the military and/or political weakness of the victim state. The last example of such a situation was Ukraine at the turn of 2021/2022.

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[291] *Vienna Convention on the Law of Treaties.* Article 32: "Recourse may be had to supplementary means of interpretation, (…) in order (…) to determine the meaning when the interpretation according to article 31: (…) (b) leads to a result which is manifestly absurd or unreasonable"; TM Franck (fn. 8), p. 98: "[N]o law – and certainly not Article 51 – should be interpreted to compel the *reductio ad absurdum* that states invariably must await a first, perhaps decisive, military strike before using force to protect themselves. On the other hand, a general relaxation of Article 51's prohibitions on unilateral war-making (…) could lead to another *reductio ad absurdum*"; H. Waldock, *The Regulation of the Use of Force by Individual States in International Law,* „Recueil des cours de l' Académie de droit international", 1952, Vol. 81, p. 498: "If the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow. If an armed attack is imminent within the strict doctrine of the *Caroline,* then it would seem to bring the case within Article 51. To read Article 51 otherwise is to protect the aggressor's right to the first stroke."

[292] *Larger Freedom* (fn. 289): "125. 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. 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?"

4.4. Preventive armed operation

The evolution of new weapons and threats has put the issue of preventive armed operations on the agenda.[293] In this context, a doctrine known as "duty to prevent" emerged.[294] If an armed response would not meet the premises for the use of force under the UN Charter, the question arises whether and how long to wait for an attack with weapons of mass destruction or ballistic missiles?

The question that must also be answered is whether every state has the right to possess weapons of mass destruction? Is a nuclear arms race inevitable, and if so, to what extent? How and when should we respond to a potential nuclear threat?

Last but not least an inevitable reflection arises: whether and to what extent law is an appropriate tool for resolving such dilemmas?

4.4.1. While in the case of pre-emptive self-defence it is about an armed reaction to an imminent attack (or series of attacks), a preventive operation is aimed at making such attack impossible in the longer term, i.e. depriving the ability to attack by destroying armed potential. It concerns a serious threat, which is perceived earlier, but the attack is not imminent. The use of nuclear weapons or of sophisticated missiles is of such a nature that its fulfilment would have irreversible consequences, including for effective self-defence.[295]

The term "self-defence" is justified in the context of a pre-emptive operation, but in the case of a preventive operation, referring to self-defence blurs the essence of the action, as it requires a very broad interpretation of the concept of imminence. A preventive operation does not therefore meet the criteria for pre-emptive self-defence.

One of the justifications for a preventive operation is that the consequences of the lack of military action would be much more serious than the consequences of this operation, especially since the use of weapons of mass destruction makes classical

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[293] See also fn. 278.

[294] L. Feinstein, A.-M. Slaughter, *A Duty to Prevent,* "Foreign Affairs", 2004, Vol. 83 (January-February) ("The duty to prevent has three critical features. First, it seeks to control not only the proliferation of WMD but also people who possess them. Second, it emphasizes prevention, calling on the international community to act early in order to be effective and develop a menu of potential measures aimed at particular governments – especially measures that can be taken well short of any use of force. Third, the duty to prevent should be exercised collectively, through a global or regional organization"). See comment on this article by G. Evans, *Uneasy Bedfellows: "The Responsibility to Protect" and Feinstein-Slaughter's "Duty to Prevent",* The American Society of International Law Conference, Washington DC, April 1, 2004 – https://www.gevans.org/speeches/speech104.html

[295] M.C. Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction,* Michigan Journal of International Law, 2009, Vol. 31, No. 1, pp. 1–77: "The technological nature of WMD and their delivery can make it impossible to discern this 'last chance' period, limiting the extent to which the imminence requirement can be used to reduce uncertainty about a WMD-armed adversary's true intentions" (p. 11); "The broader dangers of WMD possession become 'imminent' not immediately prior to a WMD attack, but before a state's WMD program reaches a sufficient stage of development. (…) Additionally, mere possession can create serious collateral dangers, by acting as a shield for other forms of aggression and unfavorably altering the regional security dynamic" (p. 12).

self-defence difficult or impossible[296]. The concept of preventive operation is therefore not based on the inevitability and temporal proximity of an attack (imminence), but on an analysis of the enemy's military capabilities in close connection with the potential damage[297].

The basis of a preventive operation is also the belief that it concerns not only and not always the security of one country, but also a broader spectrum of international security[298] (for example, the range of North Korean or Iranian missiles does not cover the territory of the USA). Such an operation therefore assumes a new definition of international security and of its threats[299].

The preventive operation should be preceded by a diplomatic action and relatively objective evidence of a real threat. The mere possession by a state of a large army are not sufficient grounds for launching a preventive strike against it.

The premises of a preventive operation are relatively difficult from an evidentiary perspective.[300] Obtaining certainty of a threat and proving its existence seem complicated, which is not without influence on the political decision-making process[301]. Obtaining relatively reliable information is difficult in this case, sometimes

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[296] "The Washington Times", July 6, 2010: "The United Arab Emirates ambassador to the United States said Tuesday that the benefits of bombing Iran's nuclear program outweigh the short-term costs such an attack would impose. (…) Ambassador Yousef al- Otaiba publicly endorsed the use of the military option for countering Iran's nuclear program, if sanctions fail to stop the country's quest for nuclear weapons."

[297] "Assume that North Korea has nuclear warheads, but that it does not have and is unlikely to acquire ballistic missiles capable of reaching the United States. Even if US intelligence discovers evidence that North Korea desired to attack the United States, pre-emptive force would not be justified because there is no practical ability to deploy missiles that reach the United States. However, if US intelligence services have gathered strong evidence that the nuclear warheads will be used against the US Pacific Fleet, the option of pre-emption must be considered, although only after exhausting other less extreme possibilities such as multilateral diplomacy or sanctions involving China", Tai-Heng Cheng, E. Valaitis, *Shaping an Obama Doctrine of Preemptive Force,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349884 ("Temple Law Review", Fall 2009).

[298] "President Clinton's decision to strike Iraq has clear military goals. We want to degrade Saddam Hussein's ability to make and to use weapons of mass destruction. We want to diminish his ability to wage war against his neighbors. And we want to demonstrate the consequences of flouting international obligations," Secretary of Defence William S. Cohen Briefing on Military Operations in the Gulf (December 16, 1998).

[299] Tai-Heng Cheng, E. Valaitis (fn. 297): "To reduce the necessity for preemptive force, the Obama administration could pursue five broad strategies: (1) strong, targeted military responses to neutralize attacks or incipient attacks against the United States; (2) effective diplomacy to obtain Security Council Chapter VII authorization to use force; (3) measures addressing the root causes of terrorism; (4) promoting global controls over nuclear and other materials that could be used militaristically, and (5) strengthening international and national judicial control over states, entities and individuals that commit or plan to commit acts of militaristic violence" (p. 9).

[300] See MC Waxman (fn. 295278); WM Reisman, A. Armstrong (fn. 278): "In an international system marked by radically different cultures, values, and, as a consequence, factual perceptions and their strategic assessments, an act of preemptive self-defence, based upon one actor's self-perceived good faith conviction, will often look like serious or hysterical misjudgment to some actors and like either cynical or self-deluded, naked aggression to others" (p. 526).

[301] This is evidenced, for example, by the US hesitation to destroy Chinese nuclear facilities after Beijing conducted its first nuclear test in 1964 – see C. Rak, *The Role of*

not without deliberate disinformation from the other side. Abuses and mistakes are indeed real in every variant of self-defence, but in the case of preventive operations they seem more important. Even if we were to accept the legality of preventive operations, the most difficult task is to formulate its criteria.[302]

Preventive Strikes in Counterproliferation Strategy: Two Case Studies, "Strategic Insights", 2003, no. 10. Similar plans concerned North Korea in 1994 – see B. Clinton, *My Life,* New York 2004, pp. 602–603; AB Carter, *Three Crises with North Korea* (Prepared Testimony before the Senate Foreign Relations Committee, February 4, 2003): "In 1994, when North Korea threatened to remove fuel rods from the Yongbyon nuclear reactor, US officials considered a preemptive strike on the reactor with precision conventional weapons. Former officials have recently tested that they were confident that such a strike would have eliminated the facilities at Yongbyon without causing any radioactive plume to be emitted downwind, but they also recognized that the result might well have been a very destructive North Korean conventional attack on South Korea"; AB Carter, *Alternatives to Letting North Korea Go Nuclear* (Testimony before the Committee on Foreign Relations United States Senate, March 6, 2003): "[T]he attack plan on Yongbyon we devised in 1994, the last time North Korea was moving towards reprocessing at Yongbyon. a strike with conventionally armed precision weapons at Yongbyon's fuel rods and reprocessing facility would not eliminate North Korea's nuclear program, but it would set it back for years. If we were to strike Yongbyon, North Korea would have a choice. It could respond by lashing out at South Korea through an invasion over the DMZ, but that would precipitate a war that would surely mean the end of the North Korean regime – http://belfercenter.ksg.harvard.edu /publication/3267/alternatives_ to_letting_north_korea_go_nuclear.html; M. Fuhrmann, SE Kreps, *Targeting Nuclear Programs in War and Peace: A Quantitative Empirical Analysis, 1941–2000* – http://ssrn.com/abstract=1587015 (2010).

[302] See M.C. (fn. 278): "How international legal rules on the use of force should handle emergent and inescapable intelligence gaps and uncertainties about adversary states' WMD capabilities. (...) A reasonable necessity approach to use of force against WMD threats – and with it an objective standard of assessing WMD capability – operating as a narrow exception to formal U.N. Security Council authorization best balances competing risks" (p. 77); A.N. Guiora, *Anticipatory (*fn. 278), pp. 3–24; MW Doyle, *Striking First: Preemption and Prevention in International Conflict,* Princeton 2008, p. 46 (standards for prevention: the lethality of the threat, the likelihood of its materialization, the legitimacy of the proposed action (determined by reference to traditional just war principles), and the legality of the target state's domestic and international behavior and the threatened state's response).

G.J. Ikenberry, A.-M. Slaughter (Co-Directors), *Forging A World of Liberty Under Law. US National Security in the 21st Century.* Final Paper of the Princeton Project on National Security, September 27, 2006: "Thus, the preventive use of force should not be used indiscriminately or as a first resort. The United States should put in place strong internal controls to ensure that policymakers have their facts right and that any particular action is proportionate. We should also work actively with other liberal democracies to establish a set of agreed guidelines on uses of force against terrorists. These steps will help ensure that the preventive use of force against terrorists remains a viable and effective tool" (pp. 31/32). "The preventive use of force against states should not be ruled out, but the following conditions should be met before it is seriously considered: 1) it should be a last resort; 2) we must have overwhelming confidence in the intelligence and in the prospects for success; 3) we must be prepared to deal adequately with the aftermath; and 4) we must gain approval from the UN Security Council or at least from another broadly representative multilateral body, such as NATO" (p. 32). "The preventive and preemptive use of force against terrorists is a necessary tool in the global counterinsurgency, but it should be used discriminately, and considerable effort should be dedicated towards developing strong internal controls to ensure we get our facts right. The costs of being wrong, as the Iraq War demonstrates, are very high. The use of force against rogue states is a very different matter. Preventive action may have unintended consequences that could result in that which the United States is trying to prevent (e.g. proliferation of weapons of mass destruction). While the United States should

However, if we have such a list of criteria/premises, another problem arises: who is to examine them?

In the light of the current legal regulations, a preventive operation (without the consent of the Security Council) is considered to be contrary to international law. This does not, however, change the fact that in the face of new threats, the problem of preventive operations remains relevant.[303]

If the preventive use of force were to have the approval of the Security Council, it would become, in principle, legal[304]. The UN Charter does not prohibit the Security Council from deciding on the preventive use of armed force as a (final) response to a threat to international peace and security identified by it. In such a case, however, it is better to speak of the use of force in accordance with the Charter (just as an

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not eschew this option entirely, it only should be an option in the most extreme cases, where there is no other option and the prospects of achieving American objectives are overwhelming" (p. 63).

AD Sofaer, *On the Necessity of Pre-emption,* EJIL, 2003, Vol. 14, p. 220: "[N]ecessity must be established on the basis of factors and circumstances related to establishing the legitimacy of using force under international law principles and UN Charter values, including: (1) the nature and magnitude of the threat involved; (2) the likelihood that the threat will be realized unless pre-emptive action is taken; (3) the availability and exhaustion of alternatives to using force; and (4) whether using pre-emptive force is consistent with the terms and purposes of the UN Charter and other applicable international agreements."

[303] *A More Secure World (*fn*.* 24): "190. (…) if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option."

[304] Ibid: "193. [T]he language of Chapter VII is inherently broad enough (…) to allow the Security Council to approve any coercive action at all, including military action, against a State when it deems this 'necessary to maintain or restore international peace and security'. That is the case whether the threat is occurring now, in the imminent future or more distant future; whether it involves the State's own actions or those of non-State actors it harbors or supports; or whether it takes the form of an act or omission, an actual or potential act of violence or simply a challenge to the Council's authority. and much more besides, which may conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent. The question is not whether such action can be taken: it can, by the Security Council as the international community's collective security voice, at any time it deems that there is a threat to international peace and security. (…) 195. Questions of legality apart, there will be issues of prudence, or legitimacy, about whether such preventive action should be taken: crucial among them is whether there is credible evidence of the reality of the threat in question (taking into account both capability and specific intent) and whether the military response is the only reasonable one in the circumstances. We address these issues further below. 196. It may be that some States will always feel that they have the obligation to their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of the collective Security Council process. But however understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed and expectations about legal compliance are very much higher. 197. One of the reasons why States may want to bypass the Security Council is a lack of confidence in the quality and objectivity of its decision-making. The Council's decisions have often been less than consistent, less than persuasive and less than fully responsive to very real State and human security needs. But the solution is not to reduce the Council to impotence and irrelevance: it is to work from within to reform it, including in the ways we propose in the present report."

armed humanitarian operation with the consent of the Security Council is not a humanitarian intervention).

4.4.2. One of the historical examples of a preventive armed operation was the occupation of Iraq (May 1941) and Lebanon and Syria (July 1941) by British troops, as well as of Iran by Soviet and British troops (August 1941), which was justified by the need to efficiently wage war against the Axis countries. Attempts to justify the German attack on Denmark and Norway in 1940 with the preventive concept were not accepted by the International Military Tribunal in Nuremberg (1946). It is worth noting that after Hitler's remilitarization of the Rhineland in 1936, Polish diplomacy conducted a secret inquiry with the French authorities about a possible preventive strike against Germany.[305]

During the Cuban Missile Crisis in 1962, the United States did not invoke self-defence but used the Organization of American States to adopt a recommendation to member states to prevent, by all means, the Soviet Union from arming Cuba with missile weapons, which posed a threat to the security of the entire region[306]. On this

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305 A. Viatteau, *La « guerre préventive » selon Varsovie et Washington* (2003) – www.diploweb.com/science-politique/guerrepreventive.htm.

306 *Resolution on the Adoption of Necessary Measures to Prevent Cuba from Threatening the Peace and Security of the Continent,* OAS Council, Annex A, OEA/ Ser.G /V/Cd-1024 Rev. 2 (23 October 1962): "Whereas, the Inter-American Treaty of Reciprocal Assistance of 1947 (Rio Treaty) recognizes the obligation of the American Republics to 'provide for effective reciprocal assistance to meet armed attacks against any American state and in order to deal with threats of aggression against any of them' (…), The Council of the Organization of American States, Meeting as the Provisional Body of Consultation, Resolves: 1. To call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability; the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent." See also Rio Treaty, 1947: "Article 6. If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defence and for the maintenance of the peace and security of the Continent. (…) Article 8. For the purposes of this Treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force".

The Soviet Threat to the Americas. Address by President John F. Kennedy, "US Department of State Bulletin", 1962, Vol. 47, No. 715: "Acting, therefore, in the defence of our own security and of the entire Western Hemisphere, (…) I have directed that the following initial steps be taken immediately: First: To halt this offensive buildup, a strict quarantine on all offensive military equipment under shipment to Cuba is being initiated. All ships of any kind bound for Cuba from whatever nation or port will, if found to contain cargoes of offensive weapons, be turned back. This quarantine will be extended, if needed, to other types of cargo and carriers (…). Fifth: We are calling tonight for an immediate meeting of the Organ of Consultation, under the Organization of American States, to consider this threat to hemisphere security and to invoke articles 6 and 8 of the Rio Treaty in support of all necessary action. (…) Sixth: Under the Charter of the United Nations, we are asking tonight that an basis, the United States (invoking Chapter VIII of the UN Charter) imposed a naval quarantine of Cuba. In fact, the American action resembled a preventive armed operation, since non-compliance with the so-called quarantine was threatened by the use of armed force by the United States. However, from Cuba, despite Fidel Castro's arrogant rhetoric, there was no threat of an imminent attack[307].

The most prominent modern case of preventive operation is the Israeli bombing of Iraqi nuclear facilities (under construction) in 1981.[308] This attack was condemned by the Security Council in Resolution 487 as a violation of the UN Charter (also by the US due to the lack of prior use of peaceful means)[309], while the Council recognized the right of every state to develop nuclear technology "for peaceful purposes" (this last phrase is the subject of constant disputes, most recently in the context of Iran's position). Characteristically, the Security Council[310] did not apply sanctions against Israel.

According to Israel, the concept of self-defence has expanded as a result of increased destructive capabilities[311]. Iraq's statement in 1980 that the nuclear weapons it intends to produce will be used against Israel should also be taken into account. In turn, the president of Iran spoke in 2006 about wiping Israel off the world map. There is no doubt that Iraq has been developing a military-style nuclear

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emergency meeting of the Security Council be convoked without delay to take action against this latest Soviet threat to world peace".

[307] J.F. Kennedy, *Radio and Television Report to the American People on the Soviet Buildup in Cuba,* (in): *Public Papers of the Presidents of the United-States: John F. Kennedy, 1962,* p. 807: "We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive, and ballistic missiles are so swift, that any substantially increased possibility of their use (…) may well be regarded as a definite threat to peace."

[308] T.L.H. McCormack, *Self-Defence in International Law. The Israeli Raid on the Iraqi Nuclear Reactor,* New York, Jerusalem 1996.

[309] SC Res. 487 (1981): "[S]trongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."

[310] The General Assembly condemned the Israeli action and recommended that a group of experts be appointed to assess the Israeli attack – see resolution 37/18 of 16 November 1982.

[311] Security Council. Official Records (S/PV.2280, 12 June 1981) – Mr. Blum (Israel): "58. In destroying Osirak, Israel performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in Article 51 of the Charter of the United Nations", Security Council. Official Records (S/PV.2288, 19 June 1981) – Mr. Blum (Israel): "85. Indeed, the concept of a State's right to self-defence has not changed throughout recorded history. Its scope has, however, broadened with the advance of man's ability to wreak havoc on his enemies. The concept took on new and far wider application with the advent of the nuclear era."

Correspondence between the Chairman of the Committee and the Secretary of State, Foreign and Commonwealth Office, 2 December 2002 – *Letter from the Foreign Secretary to the Chairman:* "Our view of the raid [1981] was spelled out at the time in the Security Council by Sir Anthony Parsons, the then British Ambassador, in the following terms: 'It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq. There was no instant or overwhelming necessity for self-defence. Nor can it be justified as a forceful measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter'. I see no reason to change that judgement now" – www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmfaff/196/196ap10.htm.

program, concealing some aspects of it from the imperfect control of the IAEA[312]. The Israeli action is a good illustration of the threats and different assessments: the nuclear weapons of France or United Kingdom do not threaten neighbouring countries, but the possession of nuclear weapons by Cuba, Iran, and Iraq is perceived (not without reason) in a completely different perspective[313].

Let us also note Israel's preventive armed operation in Syrian territory in September 2007. This operation consisted of bombing nuclear facilities under construction[314]. Syria is a party to the NPT, but (like Iran) has not signed the additional protocol on enhanced controls. After initial denials, Israel admitted to carrying out the operation, and Syria stated that it destroyed old and unused facilities in a remote area. Syria intended to respond with an armed response using chemical weapons but abandoned this plan[315].

This operation differed, for example, from Israel’s bombing of an irregular camp in Syrian territory in 2003 (in response to the terrorist attack in Haifa)[316], because it targeted Syrian state facilities. In both cases, the Security Council failed to pass a resolution[317].

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[312] Security Council. Official Records (S/PV.2288, 19 June 1981) - S. Eklund (Director General of the International Atomic Energy Agency): “16. Iraq has been a party to the Non-Proliferation Treaty since it came into force in 1970. In accordance with that Treaty, Iraq accepts Agency safeguards on all its nuclear activities. These safeguards have been unsatisfactorily applied to date, including during the period of armed conflict with Iran.”

[313] Opinions have been raised about the possibility of a military operation in Iran, which demonstrably disregards the legally binding resolutions of the Security Council, see for example A.H. Cordesman, *The Iran Attack Plan,* The Wall Street Journal, September 25, 2009; A. Toukan, AH Cordesman, *Study on a Possible Israeli Strike on Iran's Nuclear Development Facilities,* March 14, 2009 – http://csis.org/files/media/csis/pubs/090316_ israelistrike iran.pdf

[314] *The Story of 'Operation Orchard'. How Israel Destroyed Syria's Al Kibar Nuclear Reactor,* “Spiegel Online”, November 2, 2009 – http://www.spiegel.de/international/ world/0,1518,658663,00.html; D. Albright, P. Brannan, *The Al Kibar Reactor: Extraordinary Camouflage, Troubling Implications* (Institute for Science and International Security, May 12, 2008); D. Joyner, *North Korean Links to Building of a Nuclear Reactor in Syria: Implications for International Law,* “ASIL Insight”, April 28, 2008. See also *Experience with Syria Exemplifies the Challenge That Detection Presents,* The Washington Post, May 12, 2008 (A16); *US Details Reactor in Syria,* The Washington Post, April 25, 2008 (A12); *Israel Struck Syrian Nuclear Project, Analysts Say,* New York Times, October 14, 2007.

[315] *WikiLeaks: Syria aimed chemical weapons at Israel,* 14. April 2011 – http://www.ynetnews.com/articles/0,7340,L-4056748,00.html

[316] “The Secretary-General strongly deplores the Israeli air strike on Syrian territory earlier today. He is especially concerned that this further escalation of an already tense and difficult situation has the potential to broaden the scope of current conflicts in the Middle East, further threatening regional peace and security. The Secretary-General urges all concerned to respect the rules of international law and to exercise restraint” – Press Release (SG/SM/8918), 6. October 2003; *Security Council Meets in Emergency Session Following Israeli Air Strike Against Syria,* Press Release SC/7887, 5 October 2003 – http://www.un.org/News/Press/docs/2003/sc7887.doc.htm

[317] '*It Was Others Who Failed*'. SPIEGEL Interview with Mohamed ElBaradei, 18 May 2009: “ElBaradei: What the Israelis did was a violation of international law. If the Israelis and the Americans had information about an illegal nuclear facility, they should have notified us immediately” – http://www.spiegel.de/international/world/0,1518, 625600,00.html; *IAEA chief criticizes Israel over Syria raid,* October 28, 2007 (Reuters): Mohamed ElBaradei, the chief of the International Atomic Energy Agency, “criticized Israel on Sunday for attacking

While political criticism of Israel was evident in 2003, in 2007 it was surprisingly weak: Syria, having accused Israel of violating airspace, did not demand a meeting of the Security Council, did not demand international control, and quickly destroyed the remains of the bombed facility (which indicates a cover-up). There was also no criticism from other states, especially Muslim ones. The case was investigated by the IAEA, which, despite clear obstruction by Syria, concluded that the bombed facility was a nuclear reactor under construction[318]. In July 2011, the IAEA submitted its report to the UN Security Council – so far without visible results (due to the attitude of Russia and China)[319].

The bombing by Israeli aircraft in January 2009 of a convoy of vehicles in Sudan carrying weapons supplied by Iran to Hamas units in the Gaza Strip may be

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a suspicious Syrian site last month, saying the 'bomb first and then ask questions later' undermined global atomic monitoring work. (…) The IAEA chief said was he told by the Syrians the site hit by Israel was a military facility with 'nothing to do with nuclear'. (…) Israeli Prime Minister Ehud Olmert said on Sunday that he apologized to Turkish Prime Minister Tayyip Erdogan during a meeting in London last week because Israel's air force may have flown over neighboring Turkey during the sortie" – http://www.reuters.com/article/idUSN28442767

[318] IAEA. Board of Governors (GOV/2011/41, 9 June 2011), *Implementation of the NPT safeguards agreement in the Syrian Arab Republic* : "(g) Noting with serious concern (…) that (…) the building destroyed at the Dair Alzour site in September 2007 was very likely a nuclear reactor and should have been declared by Syria pursuant to Articles 41 and 42 of its Safeguards Agreement and Code 3.1 of the General Part of the Subsidiary Arrangements thereto" (Preamble), 1. Finds, (…) that Syria's undeclared construction of a nuclear reactor at Dair Alzour and failure to provide design information for the facility in accordance with Code 3.1 of Syria's Subsidiary Arrangements are a breach of Articles 41 and 42 of Syria's NPT Safeguards Agreement, and constitute non-compliance with its obligations under its Safeguards Agreement with the Agency in the context of Article XII.C of the Agency's Statute"; IAEA. Director General Addresses Board of Governors, 7 March 2011: "Concerning the *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic,* Syria has not cooperated with the Agency since June 2008 in connection with the unresolved issues related to the Dair Alzour site and some other locations"; P. Crail, *IAEA Disputes Syrian Uranium Claims,* "Arms Control Today", December 2009, Vol. 39 – http://www.armscontrol.org/print/3989; IAEA. Board of Governors (GOV/2009/75, 16 November 2009), *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic.* Report by the Director General: "10. Syria has not yet provided the cooperation necessary to permit the Agency to determine the origin of the anthropogenic natural uranium particles found in samples taken at the Dair Alzour site. Syria has also not provided information or access that would allow the Agency to confirm Syria's statements regarding the non-nuclear nature of the destroyed building on the Dair Alzour site, or to determine if, as alleged, any functional relationship existed between that site and three other locations"; IAEA. Board of Governors (GOV/2009/9, 19 February 2009). *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic.* Report by the Director General (pt. 6); IAEA. Board of Governors (GOV/2008/60), 19 November 2008. *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic.* Report by the Director General (point 12).

[319] *After UN's Nuclear Meeting on Syria, Russia Calls It History, Damascus a Campaign,* July 14, 2011: "Even before the UN Security Council began meeting about the Dair Alzour in Syria, China's Deputy Permanent Representative Wang told the Press that 'the issue shouldn't be here, it no longer exists'. (…) A Russian representative called Inner City Press aside and said, 'We are only here because we are Council members. The Council is for threats to international peace and security, not for history'" – http://www.innercitypress.com/unuke1syr071411.html

considered a preventive operation[320]. This matter was not brought to the Security Council's attention, and diplomatic methods proved unreliable[321].

In the operation against Iraq in 2003,[322] the USA and the United Kingdom did not invoke the concept of preventive operation (the concept of pre-emptive operation did not apply here) and legally justified their actions by referring to previous Security Council resolutions (including the validity of Resolution 678, authorising the use of force against Iraq) and their constant violations by Iraq[323]. The United States additionally emphasised the need to defend the international community from the threat posed by Iraq. Opinions on this argument were overwhelmingly critical[324], although it is difficult to consider it completely groundless[325].

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[320] "The New York Times", March 27, 2009: "The Israeli prime minister, Ehud Olmert, did not comment specifically on the reported bombing. But he said in a speech on Thursday in Israel that when it came to security, 'we operate wherever it is possible to harm terror infrastructure, near and far'."; "Time", March 30, 2009.

[321] The US has warned Sudan that weapons are being shipped to Hamas through its territory, but Khartoum has failed to act, see *How Israel Foiled an Arms Convoy Bound for Hamas,* "Time", 30 March 2009 and *US warned Sudan before attack on Gaza convoy,* "Haaretz", March 30, 2009.

[322] See also *supra* 2.2.2.

[323] Justifications British and American – *Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council,* United Nations S/2003/351, 21 March 2003: "Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002). (…) The Government of Iraq decided not to avail itself of its final opportunity under resolution 1441 (2002) and has clearly committed additional violations, the basis for the ceasefire has been removed and use of force is authorized under resolution 678 (…) The actions that the coalition forces are undertaking are an appropriate response.

Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of United Kingdom and Northern Ireland to the United Nations addressed to the President of the Security Council, United Nations S/2003/350, 21 March 2003: "Iraq has failed to comply with the disarmament obligations imposed on it by the Council, including in resolutions 678 (1990), 687 (1991) and 1441 (2002). (…) Military action was undertaken only when it became apparent that there was no other way of achieving compliance by Iraq."

[324] For legal disputes in the UK and the US over the operation in Iraq (2003), see The Iraq Inquiry. *Declassified documents* – http://www.iraqinquiry.org.uk/transcripts/declassified-documents.aspx; J.S. Bybee (Assistant Attorney General), *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq* (October 23, 2002) – http://www.usdoj.gov/olc/2002/iraq-opinion-final.pdf ; JC Yoo (Deputy Assistant Attorney General), *Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law to Use Military Force Against Iraq* (November 8, 2002) – http://www.usdoj.gov/olc/2002/iraq-unscr-final.pdf ; JC Yoo (Deputy Assistant Attorney General), *Whether False Statements or Omissions in Iraq's Weapons of Mass Destruction Declaration Would Constitute A "Further Material Breach" Under UN Security Council Resolution 1441* (December 7, 2002) – www.usdoj.gov/olc/2002/material breach.pdf

[325] C. Greenwood (fn. 8), pp. 687–700; *British Attorney General's Advice to Blair (General Analysis on Iraq),* March 7, 2003 (declassified): "22. (…) The French and Russians both made proposals to amend OP12 to include an express requirement for a further decision, but these proposals were not accepted. The US Administration insists that they made clear throughout that they would not accept a text which subjected the use of force to a further Council decision. The French (and others) therefore knew what they were voting for. (…) 26. To sum up, the language of resolution 1441 leaves the position unclear and the statements made on adoption of the resolution suggest that there were differences of view

The main dispute concerned whether the military operation in 2003 required further consent from the Security Council in the form of a separate resolution for its legality. Resolution 1441 (2002) was adopted only because the members of the Security Council deliberately and consciously passed an ambiguous text[326]. In this light, the legal controversies over the legality of the Iraqi operation in 2003 seem unproductive – the parties had good arguments in the light of Resolution 1441, but from a political perspective the United States found itself in a worse position.

The operation in Iraq had a deeper political background, as it aimed to provoke political changes in the Middle East region, and Iraq's desire to possess weapons of mass destruction was a convenient pretext for achieving this goal. Legal problems of the use of force did not play a primary role, some powers rather wanted to ensure an appropriate political role for themselves and that their interests in Iraq would be taken into account after the use of military force (for example, France[327] and Russia were not guided primarily by legal considerations).

Regardless of the controversies surrounding the legal arguments of the US and the United Kingdom, this operation had other weaknesses: there was no high degree of probability of a threat from Iraq and its military capabilities (Iraq's nuclear program was still far from finalized) and no nuclear weapons were found on Iraqi territory. The finding of weapons of mass destruction in Iraq would not have had decisive significance for the legal assessment of the use of force without the consent of the Security Council, but the political and moral aura of this operation would have been different. In light of the latest documents, there is no doubt that at the turn of the

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within the Council as to the legal effect of the resolution Arguments can be made on both sides" – http://www.globalpolicy.org/component/content/article/168/36072.html

[326] United Kingdom. Iraq Inquiry. *Statement by Sir Michael Wood,* 15 January 2010: "12. In the UK view, the authorization to use force in SCR 678 had been revived in this way on earlier occasions. For example, when Iraq refused to co-operate with the United Nations Special Commission (UNSCOM) in 1998, a series of SCRs condemned this as unacceptable. SCR 1154 stressed that any violation of Iraq's obligations to accord immediate, unconditional and unrestricted access to UNSCOM and the IAEA would have severest consequences for Iraq. In SCR 1205 the Council recalled that the effective operation of UNSCOM and the IAEA was essential for the implementation of SCR 687, and condemned Iraq's decision to cease cooperation with UNSCOM as a flagrant violation of SCR 687 and other relevant resolutions In the UK view, SCR 1205 had the effect of reviving the authorization to use force in SCR 678; this provided the legal basis for Operation Desert Fox in December 1998. 13. Military action in 1998 (and on previous occasions) followed from specific decisions of the Security Council. By 2002 there has not been any significant decisions of the Council since 1998. The UK interpretation of SCR 1205 was in any event controversial. Many others did not think the legal basis was sufficient, as the authority to use force was not explicit. Reliance on SCR 1205 in 2002 would have been unlikely to have received any support. (…) 15. I considered that the use of force against Iraq in March 2003 was contrary to international law. In my opinion, that use of force had not been authorized by the Security Council, and had no other legal basis in international law"; Y. Dinstein (fn. 8), pp. 296–300: "Quite frequently between 1991 and 2003 (in particular, in 1998/9) Coalition warplanes raided Iraqi targets striving unsuccessfully to compel Iraq to abide by the cease-fire condition and especially to cooperate with UN disarmament inspectors. The sundry strikes by the Coalition must be construed as a resumption of combat operations in the face of Iraqi violations of the cease-fire terms" (p. 296).

[327] KR Timmerman, *The French Betrayal of America* , New York 2004; MA Ledeen, *How France Blocked US in Ankara,* New York Sun, March 26, 2003.

1990s Iraq - with the help of Pakistan, or at least a Pakistani scientist - was clearly aiming to obtain nuclear weapons and did not abandon this intention[328]. Iraq's attitude after the adoption of resolution 1441 was assessed very critically by the head of UNMOVIC and the head of the IAEA[329]. The case of Iraq is not isolated or exceptional, as we also face similar threats from Iran and North Korea[330].

If an armed preventive operation does not, so far, have a solid basis in international law, its justification seems not trivial[331]. Declaring it unlawful does not solve the problem.

4.4.3. The central problem of preventive operations is not only its legality, but the effective prevention of terrorism and the aspirations of some states to possess nuclear weapons and means of their delivery. The prior use of non-military measures is important for the assessment of a preventive military operation.

This problem concerns primarily states that refuse international control or even boycott legally binding Security Council resolutions obliging them to suspend or abandon their nuclear programs that go beyond civilian limits (e.g. North Korea, Iran).

The development of a nuclear program for civilian purposes does not automatically mean that every state has the right to possess (and possibly use) nuclear weapons. In this context, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT, 1968) establishes differential treatment between a small number of states already possessing nuclear weapons and the majority of states renouncing them (several states possessing nuclear weapons are not parties to the NPT – India,

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[328] D. Albright, *Peddling Peril: How the Secret Nuclear Trade Arms America's Enemies,* New York 2010; *Khan's Bomb Offer to Saddam's Iraq: Document Showing Iraq's Interest in Nuclear Weapon Design,* April 1, 2010 – http://isis-online.org/peddlingperil/ch4/khanoffer

[329] UN Security Council (S/PV.4692), *The situation between Iraq and Kuwait,* 27 January 2003 (Hans Blix, Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission; Mohamed ElBaradei, Director General of the International Atomic Energy Agency).

[330] In the official statement North Korean we read: "The chairman of the Joint Chiefs of Staff of the south Korean Forces at a 'confirmation hearing at the National Assembly' on March 26 pulled up the north over what he called 'nuclear threat' and went the lengths of threat that they would make a 'preemptive strike' at its nuclear bases with precision guided weapons when necessary. (…) As we have clarified more than once, a preemptive strike is by no means a monopoly of the one party on the Korean Peninsula (…). Our revolutionary armed forces (…) will counter any slightest move for 'preemptive strikes' at their nuclear bases with more rapid and more powerful preemptive strikes of their own mode. (…) They should bear in mind that once the more powerful preemptive strike of our own mode be launched, it will not merely plunge everything into flames but reduce it to ashes", March 30, 2008 (KCNA) – www.kcna.co.jp/index-e.htm.

[331] M.C. Waxman (fn. 295): "How international legal rules on the use of force should handle emergent and inescapable intelligence gaps and uncertainties about adversary states' WMD capabilities. (...) A reasonable necessity approach to use of force against WMD threats – and with it an objective standard of assessing WMD capability – operating as a narrow exception to formal U.N. Security Council authorization best balances competing risks" (p. 77); K. Chainoglou (fn. 8), p. 323: "Although I would not support the legality of pre-emptive [*preventive,* JK] self-defence in general, I would suggest that it is a lawful exercise of the right of self-defence against threats related to WMD proliferation, which may combine defensive purposes with collective security purposes."

Pakistan, Israel, North Korea). This distinction is accepted and is associated with subjecting the civilian nuclear program to international control.

4.5. Activities of irregular groups (Israel, Lebanon, Gaza, Syria, Somalia, Ethiopia)

The evolution of the concepts of self-defence, armed attack and countermeasure creates a new perspective on the legal perception of armed activities of irregular groups[332]. This is not an unambiguous perspective due to the asymmetric nature of armed conflicts between a state and irregular groups.

How to respond to attacks by irregular groups, especially those aimed at civilian objects? Should we limit ourselves to condemnation and political appeals? Should we use only non-military means? Should we use military means as a last resort? But against whom and on the territory of which country? Is armed self-defence ruled out due to the relatively small scale of some attacks? Who should be held responsible for the attacks?

As in the case of humanitarian intervention, anticipatory (pre-emptive) self-defence or preventive military operations, the activities of irregular groups also give rise to legal dilemmas and illustrate the partial inadequacy of international regulations on the use of force to new challenges.

4.5.1. In 1964, the United Kingdom bombed Fort Harib in Yemen, which had been used as a base by rebels attacking multiple targets in the British protectorate of the South Arabian Federation, justifying the attack on the basis of pre-emptive self-defence. The Security Council condemned the operation as unlawful reprisals, although it implicitly acknowledged responsibility not limited to the British side[333].

In 1968, Israel bombed the Beirut airport, arguing that Lebanon tolerated and supported terrorist organizations on its territory that carried out attacks on Israeli entities, which was met with a negative reaction from the Security Council[334].

In 1985, Israel bombed the headquarters of the Palestine Liberation Organization (PLO) on the outskirts of Tunis in response to the murder of Israeli citizens by Palestinian terrorists, invoking the right to self-defence, especially the fact that Tunisia, by providing shelter to the PLO authorities, supports international terrorism. This air operation was recognized by the Security Council as aggression[335] (with one abstention - the USA[336]).

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[332] R.H. Shultz, D. Farah, I.V. Lochard, *Armed Groups: A Tier-One Security Priority,* INSS Occasional Paper (USAF Institute for National Security Studies), 2004, no. 57 – www.usafa.af.mil/df/inss/OCP/ocp57.pdf.

[333] SC Res. 188 (1964): "1. Condemns reprisals as incompatible with the purposes and principles of the United Nations. 2. Deplores the British military action at Harib on 28 March 1964. 3. Deplores all attacks and incidents which have occurred in the area. 4. Calls upon Yemen Arab Republic and the United Kingdom (...) to exercise the maximum restraint in order to avoid further incidents."

[334] SC Res. 262 (1968): "1. Condemns Israel fir its premeditated military action in violation of its obligations under the Charter and the cease-fire resolutions."

[335] SC Res. 573 (1985): "1. Condemns vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct."

[336] Ambassador Vernon Walters: "We, however, recognize and strongly support the principle that a State subjected to continuing terrorist attacks may respond with appropriate

In 1986, after a series of attacks (perpetrated by Libyan-backed organizations or by Libyan secret agents) on civilians and American soldiers abroad (for example, in a disco in West Berlin), the United States carried out airstrikes on selected targets in Tripoli and Benghazi. In its official position, it emphasized that it was acting in self-defence under Article 51 of the UN Charter in response to armed attacks, and also to prevent further such attacks (an element of pre-emptive self-defence)[337].

After the terrorist attacks on the American embassies in Kenya and Tanzania, the United States raided chemical installations in Sudan (which it considered to be the property of Usama bin Laden, the instigator of the attacks) and a terrorist base in Afghanistan in 1998. In both cases, it cited Sudan's sheltering of terrorists and Article 51 of the UN Charter on self-defence. The Security Council[338] did not condemn the American action, and the General Assembly failed to pass a resolution.

The armed self-defence operation in Afghanistan, conducted by American and British forces, began on October 7, 2001, in response to the terrorist attacks of September 11, 2001. The United States determined that the attacking group was part of al-Qaeda, and that the organization had one of its main bases in Afghanistan. Both countries notified the Security Council of the armed action under Article 51 of the UN Charter, describing it as self-defence[339]. This argument gained broad support

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use of force to defend against further attacks. This is an aspect of the inherent right of self-defence recognized in the United Nations Charter. We support this principle regardless of attacker and regardless of victims", US Mission to the UN, Press Release 1985, no. 106.

[337] "US military forces this evening have executed a series of carefully planned air strikes against terrorist-related targets in Libya. (…) Libya bears direct responsibility for the bombing in West Berlin on April 5 that resulted in the death of Army Sergeant Kenneth Ford and injury to a number of American servicemen and others. In light of this reprehensible act of violence and clear evidence that Libya is planning future attacks, the United States has chosen to exercise its right of self-defence. It is our hope this action will preempt and discourage Libyan attacks against innocent civilians in the future. US forces struck targets that were part of Qadhafi's terrorist infrastructure: the command-and-control systems, intelligence, communications, logistics, and training facilities" – *Statement by Principal Deputy Press Secretary Speaks on the United States Air Strike Against Libya April 14, 1986.*

[338] SC Res. 1189 (1998): "Stressing that every Member State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts; Commending the responses of the Governments of Kenya, Tanzania and the United States of America to the terrorist bomb attacks in Kenya and Tanzania" (preamble), "1. Strongly condemns the terrorist bomb attacks in Nairobi, Kenya and Dar-es-Salaam, Tanzania on 7 August 1998 which claimed hundreds of innocent lives, injured thousands of people and caused massive destruction to property."

[339] *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council,* S/2001/946: "The attacks (…) have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. (…) From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent "people throughout the world and target United States nationals and interests in the United States and abroad. In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to *prevent* and *deter* further attacks on the United States."

Letter Dated 7 October 2001 from the Chargé d'affaires ai of the Permanent Mission of the United Kingdom of United Kingdom and Northern Ireland to the United Nations Addressed to the President of the Security Council : "These forces have now been employed in the UN debate and in the positions of the EU and NATO[340], with NATO invoking for the first time Article 5 of the Washington Treaty (acting in self-defence, the premise of which is an armed attack). There is no doubt in this case that an armed attack within the meaning of the UN Charter may be committed by a non-state actor.

In July 2010, Mauritanian army units carried out an armed operation against terrorist groups in Mali, invoking the right to pursue terrorists agreed between the two countries. These units were supported by French special forces, who hoped to rescue a French hostage from the terrorists. This action was met with criticism from political circles in Mali but was not discussed by the Security Council[341].

At times, the international community (including the UN) has shown tolerance towards military operations by one country on the territory of another, involving pursuit and/or elimination of attacking irregular groups, for example the actions of Senegal in Guinea-Bissau (1992, 1995), Thailand in Burma (1995), Tajikistan in Afghanistan (1993) or Turkey in Iraq (against the Kurds).

Similar actions by South Africa, Portugal and Israel were, however, condemned by the UN. The Organization of American States (OAS) has deemed Colombia's military operation against irregular groups' bases in Ecuador illegal[342].

4.5.2. The situation in the Middle East is specific[343], with constant armed attacks by irregular forces on Israel (e.g. missile fire, terrorist attacks – including suicide

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in the exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source."

[340] *Statement by NATO Secretary General, Lord Robertson, 2 October 2001:* "We know that the individuals who carried out these attacks were part of the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taleban. On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty" – www.nato.int/docu/speech/2001/s011002a.htm.

Declaration by the Heads of State or Government of the European Union, Brussels, 19 October 2001: "The European Council confirms its staunchest support for the military operations which began on 7 October, and which are legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security Council" – http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/ACF7BE.pdf.

Similar position took Organization Countries American (OAS) - see Press statement (E-194/01) of September 21, 2001 (E-194/01) (Terrorist Attacks on United States Are an Attack on All Countries of the Americas,) https://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm

[341] *La France impliquée dans un raid antiterroriste au Mali,* « Le Monde », 24 juillet 2010; *Mali: plus d'une vingtaine de militaires français ont participé à l'opération antiterroriste* (24/07/2010) – https://cridem.org/C_Info.php?article=45744; *Opération militaire franco-mauritanienne au Nord du Mali: Les partis politiques exigent des comptes* (03/08/2010) – https://www.maliweb.net/la-situation-politique-et-securitaire-au-nord/operation-militaire-franco-mauritanienne-au-nord-du-mali-les-partis-politiques-exigent-des-comptes-3902.html

[342] CP/RES. 930 (1632/08), 5 March 2008: "That act constitutes a violation of the sovereignty and territorial integrity of Ecuador and of principles of international law". This resolution, however, does not mention the violation of article 2 (4) of the UN Charter.

[343] See also *infra* 5.2.

attacks – on civilians)[344]. For years, Israel has been justifying with self-defence the military operations it conducts in the territories of some neighbouring countries in response to armed attacks carried out from their territory .

The argument of self-defence against attacks by irregular groups from Egyptian territory was put forward by Israel as early as 1956 as a justification for military operation against Egypt (in the background the issue of nationalization of the Suez Canal Company and the military action of France and United Kingdom following the Israeli attack). At that time the Security Council was paralyzed by the attitude of France and United Kingdom, as a result of which Yugoslavia submitted a motion (supported by the USA and the USSR) to convene a special session of the UNGA within the framework of the *Uniting for Peace* procedure. In resolution 997 (ES-l) of 1956 the General Assembly limited itself to an appeal for a ceasefire and withdrawal of troops (no reference was made to such concepts as aggression, armed attack or self-defence), however in resolution 1125 (ES-I) of 1957 it indirectly confirmed the need to prevent attacks from Egyptian territory[345].

4.5.2.1 Some governments are deliberately destabilizing the Middle East by actively supporting irregular groups, such as the Sunni Hamas (since 2007, a political faction at the head of the Gaza Strip authorities) or Shiite Hezbollah (a political faction represented in the official Lebanese authorities and a military faction). Hezbollah and Hamas are largely dependent politically and financially on Syria and Iran, but neither these countries nor Lebanon fully control these organizations. The armed wing of Hezbollah exercises de facto military authority in the southern part of Lebanon and conducts military operations against Israel from this territory.

In fact, Iran and Syria have been conducting and are conducting military operations against Israel through proxy entities (irregular forces)[346]. In Lebanon, which has become a hostage to the policy of these countries[347], UN soldiers have been stationed in the south since 1978 (*United Nations Interim* Force in Lebanon, UNIFIL)[348]. However, these forces have proven too weak to prevent Hezbollah from

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[344] M.N. Schmitt, *"Change Direction" 2006: Israeli Operations in Lebanon and the International Law of Self- Defence,* " Michigan Journal of International Law", 2008, Vol. 29, pp. 127–164 ; A. Zimmermann, *The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality,* "Max Planck Yearbook of United Nations Law", Vol. 11 (2007), pp. 99–141; E. Cannizzaro, *Entités non-étatiques et régime international de l'emploi de la force. Une étude sur le cas de la réaction israélienne au Liban,* « Revue générale de droit international public », 2007, no. 2, pp. 333–353; H. Münkler, *Asymmetries and Kriegsvölkerrecht. Die Lehren des Sommerkrieges 2006,* "Die Friedens-Warte", 2006, no. 81/2, pp. 59–65; The State of Israel. *The Operation in Gaza. 27 December 2008 – 18 January 2009, July 2009 (*report government).

[345] "Noting the disregard on many occasions by parties to the Israel-Arab military agreements of 1949 of the terms of such agreements" (preamble).

[346] K.A. Petty, *Veiled Impunity: Iran's Use of Non-State Armed Groups,* May 20, 2007 – http://ssrn.com/abstract=1013415.

[347] See H. Saghieh, *Warum die Wut more wachsen wird,* "Die Zeit", August 17, 2006, p. 35; F. Ajami, *The Hostage Hezbollah,* „Weekly Universal „from August 20, 2006.

[348] "On 11 March 1978, a commando attack in Israel resulted in many dead and wounded among the Israeli population; the Palestine Liberation Organization (PLO) claimed responsibility for that raid. In response, Israeli forces invaded Lebanon on the night of 14/15 March, and in a few days occupied the entire southern part of the country except for the city

expanding its powerful bunker system and accumulating weapons stocks on the Israeli-Lebanese border. Contrary to Security Council resolution 1559 (2004),[349] Lebanon has not led to the withdrawal of Hezbollah forces, which continue armed attacks on Israel[350]. However, this weakness would hardly justify the lack of responsibility for military acts committed from its territory, because as early as 1948, traces of commitments to control irregular armed forces can be found in Security Council resolutions[351]. According to some statements by the Lebanese authorities, part of its territory is occupied by Israel and Hezbollah is acting in self-defence[352].

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of Tire and its surrounding area. On 15 March 1978, the Lebanese Government submitted a strong protest to the Security Council against the Israeli invasion, stating that it had no connection with the Palestinian commando operation „– information official from the website UNIFIL website – www.un.org/Depts/dpko/missions/unifil/background.html. Likewise – *Letter Dated 17 May 1982 from the Permanent Representative of Lebanon to the United Nations Addressed to the President of the Security Council* – S/15087, 17 May 1982.

[349] It is clear from Security Council resolutions 1559 (2004) and 1680 (2006) that: Lebanon is unable to fully control the entirety of its territory; there are foreign armed forces operating on its territory (an allusion to Syrian troops, unnamed and withdrawn under international pressure after the adoption of resolution 1559) as well as irregular – Lebanese and non-Lebanese – armed forces (an allusion to Hezbollah groups); significant parts of resolution 1559 (especially the withdrawal of irregular forces) have not been implemented; weapons are being supplied to Lebanon from abroad without the consent and control of its authorities, which the governments of Lebanon and Syria, called upon by the Security Council, are unable or unwilling to prevent; Syria has not taken up the Lebanese proposal for talks on the establishment of the border between the two countries and the establishment of diplomatic relations between them.

SC Res. 1614 (2005): "6. Calls upon "the Government of Lebanon to fully extend and exercise its sole and effective authority throughout the south, including through the deployment of sufficient numbers of Lebanese armed and security forces, to ensure a calm environment throughout the area, including along the Blue Line, and to exert control and monopoly over the use of force on its entire territory and to prevent attacks from Lebanon across the Blue Line." See also SC Res. 1583 (2005) and 1655 (2006).

[350] See on for example SC Res. 1655 (2006), in which the Council states "the hostilities initiated by Hizbullah on 21 November 2005 and those triggered by the firing of rockets from Lebanon into Israel on 27 December 2005."

[351] See SC Res. 56 (1948): "2 (a) Each party is responsible for the actions of both regular and irregular forces operating under its authority or in territory under its control; (b) Each party has the obligation to use all means at its disposal to prevent action violating the Truce by individuals or groups who are subject to its authority or who are in territory under its control." See Too *Israel-Egypt Armistice Agreement* (February 24, 1949): "Article II. 2. No element of the land, sea or air military or para-military forces of either Party, including non-regular forces, shall commit any warlike or hostile act against the military or para-military forces of the other Party, or against civilians in territory under the control of that Party; or shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Line set forth in Article VI of this Agreement except as provided in Article III of this Agreement; and elsewhere shall not violate the international frontier; or enter into or pass through the air space of the other Party or through the waters within three miles of the coastline of the other Party."

[352] *Letter dated 17 September 2002 from the Chargé d'affaires ai of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General* – A/57/415 – S/2002/1038 (18 September 2002): "1. Israel is occupying the Shab'a farms area of Lebanon, and therefore the acts of legitimate resistance against the Israeli occupation are not being carried out 'on the Israeli side of the Blue Line' or across the border in northern Israel, as alleged, but in occupied territory and against Israeli military positions in that territory. Accordingly, the acts of resistance to the Israeli occupation do not fall under Security Council

The cause of the armed conflict in Lebanon in July 2006 was the attack on Israel, including the kidnapping of its soldiers and the shelling of its territory by Hezbollah – an action bearing the features of a political provocation by Iran to weaken international pressure on Iran's nuclear program[353]. The Israeli operation was self-defence in nature, which did not raise any major doubts either in the UN Security Council[354] or during the G-8 meeting[355]. This confirms that acting in self-defence does not require an armed attack by a state (terrorist groups are not states). The aim of the Israeli operation was not only to stop the missile fire from mobile launchers, but also to deprive the enemy of a military logistical base that had been created after 2000 (i.e. after the withdrawal of Israeli troops from southern Lebanon). For this reason, the military operation was not limited to the difficult-to-detect Hezbollah units but had to necessarily also concern the infrastructure in Lebanon used by Hezbollah[356]. The military operations were conducted not so much against Lebanon, but against Hezbollah on the territory of that country[357].

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resolution 1373 (2001) on counter-terrorism, which Lebanon is implementing. (…) 3. (…) If Hizbollah fired at the Israeli aircraft in self-defence as part of the legitimate struggle to liberate the territory, it was only firing at Israeli military aircraft that were violating Lebanese. "airspace".

[353] See R. Dergham, *Various Scenarios that Would Prompt an Israeli Strike on Lebanon and Syria,* January 6, 2006 – www.raghidadergham.com/archive/4rdpast1_06_06.html.

[354] Debate on Security Council meeting – 14 July 2006 (S/PV.5489), 14 July 2006 (SC/8776), 21 July 2006 (S/PV.5493) ; see also statement secretary UN General: "Hizbollah's provocative attack on 12 July had been the trigger for the crisis. (…) He again condemned Hizbollah's attacks on Israel and acknowledged Israel's right to defend itself under Article 51 of the United Nations Charter", SC/8780, 20 July 2006.

[355] G-8 statement: "In Gaza, elements of Hamas launched rocket attacks against Israeli territory and abducted an Israeli soldier. In Lebanon, Hizbollah, in violation of the Blue Line, attacked Israel from Lebanese territory and killed and captured Israeli soldiers, reversing the positive trends that began with the Syrian withdrawal in 2005, and undermining the democratically elected government of Prime Minister Fuad Siniora. (…) The extremists must immediately halt their attacks. It is also critical that Israel, while exercising the right to defend itself, be mindful of the strategic and humanitarian consequences of its actions" – St. Petersburg, July 16, 2006; European Union. 2744th External Relations Council meeting – Brussels, 17 July 2006: "The EU recognizes Israel's legitimate right to self-defence, but it urges Israel to exercise strict restraint and not to resort to disproportionate action. All parties must do everything possible to protect civilian populations and to refrain from actions in violation of international humanitarian law."

[356] In this sense A. Zimmermann (fn. 344), p. 123.

[357] What is characteristic in this respect is the correction of official Israeli statements. "Prime Minister Olmert (12 July 2006): This morning, actions were carried out against IDF soldiers in the north. At this time, the security forces are operating in Lebanese territory. (…) This morning's events were not a terrorist attack, but the action of a sovereign state that attacked Israel for no reason and without provocation. The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. is responsible and Lebanon will bear the consequences of its actions" – http://www.mfa.gov.il/MFA/Government/Communiques/2006/PM+Olmert+-+Lebanon+is+responsible+and+will+bear+the+consequences +12-Jul-2006.htm; Cabinet Communiqué (16 July 2006): "Prime Minister Olmert emphasizes that Israel is not fighting Lebanon but the terrorist element there, led by Nasrallah and his cohorts, who have made Lebanon a hostage and created Syrian- and Iranian-sponsored terrorist enclaves of murder" – http://www.mfa.gov.il/MFA/Government/Communiques/2006/Cabinet+Communique+16-Jul-2006.htm

The rocket fire of Hezbollah units from the area of southern Lebanon was directed blindly at civilian targets in Israel. Although Israel used precision weapons, casualties among the Lebanese civilian population were not avoided, because the political and military centers and mobile rocket launchers of Hezbollah were located in centers inhabited by the civilian population, which Hezbollah uses as a so-called human shield (which violates humanitarian law).

The conflict ended provisionally with the adoption by the Security Council of Resolution 1701 (2006), which – although it stated that the situation in Lebanon constituted a threat to international peace and security – was not adopted under Chapter VII of the UN Charter[358]. This resolution attributed responsibility to Lebanon for Hezbollah's military actions[359]. Despite its adoption, Syrian arms deliveries (of Russian production) to Lebanon have not ceased, and the political situation in Lebanon remains unstable[360].

4.5.2.2. The situation in the Gaza Strip is basically similar and is made more difficult by the internal conflict of the Palestinian side. The armed operation of Israeli

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[358] Resolution 1701 states that: the Israeli operation launched in July 2006 was an armed operation (the term self-defence is not used) in response to armed attacks by Hezbollah units from Lebanese territory; Hezbollah (i.e. a non-state entity) was obliged to cease all attacks and Israel to cease all military offensive operations; it is necessary to restore full control of the Lebanese authorities in its territory, including the elimination of foreign paramilitary units; the stationing of foreign armed forces and the sale or supply of military equipment, as well as training in the use of such equipment, without the consent of the Lebanese government are prohibited; for this purpose, a buffer zone is established, fully controlled by Lebanese army units supported by a large international force (UNIFIL), authorizing them to take all necessary actions (*all necessary action) in the area where they* are stationed, to prevent any hostile action. See also *Behind the Headlines: UN Security Council Resolution 1701,* 12 August 2006 – https://www.gov.il/en/pages/behind-the-headlines-un-security-council-resolution-1701-12-aug-2006

[359] G. Ziccardi Capaldo, *Providing a Right of Self-Defence against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict,* "Harvard International Law Journal Online", 2007, Vol. 48, p. 109: "The resolution [1701] aims to re-establish effective control by the Lebanese government over its territory, (…) and (…) to make it responsible for its political actions. To this effect, it '[c]alls upon the Government of Lebanon to secure its borders and other entry points (…) and requests UNIFIL (…) to assist the Government of Lebanon' to prevent the entry into Lebanon of arms or related material 'without its consent'. (…) The resolution's aims can be identified through the wording chosen: that of 'assist' and 'consent'. On the basis of these provisions, the Lebanese government (…) alone has the power to decide whether to disarm the Hezbollah fighters or to allow weapons in to equip them (…) and UNIFIL cannot interfere with it. "In this way, the entire scenario can be seen as providing a sort of mechanism for attribution, a context within which any further armed activity on the part of terrorist groups based in Lebanon would be deemed the 'deliberate official policy' of the government of Lebanon."

[360] *Opposition Seizes Most of Beirut,* "The Washington Post" of May 10, 2008 (A01): "Supporters of Lebanon's opposition Hezbollah movement seized control of most of Beirut Friday, roaming shuttered streets with guns and grenade launchers and provoking broad domestic condemnation for deploying their weapons against fellow Lebanese. (…) The crisis erupted Wednesday when a demonstration called by labor unions turned violent and led to the closure of main roads, including the highway to Beirut's international airport, by opposition supporters. They were incensed by government decisions to dismantle a Hezbollah telecommunications network that the movement considers part of its military infrastructure and by the reassignment of a Shiite security official at the airport."

forces in the Gaza Strip began in December 2008 after the expiration of the truce[361] and was aimed at ending the constant rocket fire from Gaza into the territory of Israel and the delivery of weapons (mainly from Iran) through the network of underground tunnels on the Gaza-Egypt border (with Cairo's tolerance for this procedure).

Both during the conflict in Lebanon in 2006 and in the Gaza Strip (2008/2009) the attackers were irregular groups, which shelled the territory of Israel, aiming at the civilian population. Israel's military operation took place on the territory of the Lebanese state (although not directly against it), while the status of the Gaza Strip is not clear. In the case of the Gaza, rocket attacks on Israel occurred from outside its state territory, or in any case from the territory it did not fully control, having withdrawn its armed forces from Gaza in 2005. The cross-border military operations of the USA in Pakistan (a response to the actions of the Pakistani Taliban on the territory of Afghanistan) should be assessed in a similar way.[362] The claim that Israel

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361 R. Malley, *Gaza: Où s'arrêtera l'offensive israélienne?* « Le Monde », 7 Janvier 2009: « Le cessez-le-feu préexistant n'était pas parfait, loin s'en faut. (…) Un compromis logique était à portée de main: fin des attaques provenant de Gaza contre ouverture des points de passage entre Gaza, Israël et l'Egypte. (...) Pour le Hamas, prolonger la trêve semblait avantageux, mais uniquement à condition de l'aménager. (…) Alors qu'approchait la date d'expiration de la trêve, les tirs de roquettes allèrent en s'accroissant, message on ne peut moins subtil que le Hamas emploierait la violence pour forcer Israël à ouvrir les points de passage. La riposte israélienne aura étonné les militants du Hamas par sa synchronisation et son intensité. Mais le fait lui-même n'était guère surprenant. Il était attendu. Car le Hamas compte engranger les bénéfices politiques de ses lourdes pertes matérielles ».

A. Applebaum, *It's a War Process,* "The Washington Post", January 6, 2009: "Peace negotiators come and go (…). When all else has failed, you can be absolutely certain that someone, somewhere, will issue a statement calling for peace. (…) For the trouble with all of these peace efforts, peace conferences, peace initiatives and peace proposals is that none of them recognizes the most obvious fact about the Israeli-Palestinian conflict: It's not a peace process; it's a war. At the moment, at least, both parties are still convinced that their central aims will be better obtained through weapons and military tactics than through negotiations of any kind."

362 See J.J. Paust (fn. 403).

did not have the right to self-defence is absurd,[363] although implemented in an unusual context[364].

There have also been accusations against Israel of failing to comply with humanitarian law in the Gaza Strip[365]. However, recognizing the right to act in self-

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[363] Security Council (SC/9266), 1 March 2008: "The Secretary-General placed blame on both sides (…). While rejecting Israel's right to defend itself, I condemn the disproportionate and excessive use of force that has killed and injured so many civilians, including children"; Security Council (SC/9567), 8 January 2009: "Condoleezza Rice, Secretary of State of the United States, said that (…) the United States recognized the right of Israel, like other States, to exercise its right of self-defence, and it had stressed to Israel that it was obliged to take feasible steps to minimize the impact of any actions on civilians"; *Letter to UN Secretary General and President of the UN Security Council* (24 December 2008): "Israel has (…) the right to protect itself in accordance with article 51 of the United Nations Charter. Israel has the right and duty to safeguard the lives, the security and the well-being of its citizens" - Gabriela Shalev, Ambassador, Permanent Representative of Israel to the United Nations; *Letter to UN Secretary General and President of the UN Security Council* (22 December 2008): "[U]nder article 51 of the Charter of the United Nations, Israel has the full right to defend itself and the security of its citizens from such attacks. Israel will not tolerate a situation where Israeli citizens become hostages of a terrorist organization" – https://www.gov.il/en/pages/israel-submits-protest-to-un-following-escalation-in-hamas-missile-attacks

[364] A. Guiora, *Legal Aspects of 'Operation Cast Lead' in Gaza,* January 11, 2009: "The IDF launched Cast Lead after two significant developments: Hamas had fired 6,000 missiles from the Gaza Strip into southern Israel during the past three years after Israel had unilaterally disengaged from the Gaza Strip and Hamas had unilaterally violated an Egyptian negotiated cease-fire. This is classic self-defence; to that extent, Operation Cast Lead is not different. From a legal perspective, however, there are three critical differences between Cast Lead and previous IDF operations, each of which may pose significant challenges to existing interpretations of international law: re-articulating proportionality; and redefining what is a legitimate target in the context of collateral damage can be declared against a non-state entity. While President Bush declared war on 'terrorism' after 9/11, a declaration of war specific to a particular organization represents a fundamental change. (…) In declaring war on Hamas, Israel has deliberately left undefined the degree to which an individual must be affiliated with Hamas in order to be categorized as a legitimate target. (…) In contrast to the traditional model associated with the suicide bombing infrastructure predicated on the individual bomber, the planner, the driver and the financier, the Hamas rocket firing infrastructure is inherently broader. By expanding the definition of 'legitimate target', the IDF has narrowed the definition of 'collateral damage'. (…) While self-defence (in the classic model) is the legal basis for Cast Lead, the IDF's re-articulation of proportionality and collateral damage is a new development in international law. How this new paradigm is implemented in the Gaza Strip is the essence of the issue. It means that the IDF is conducting an aggressive policy directed at Hamas. It suggests expanding the number of legitimate targets and broadening the definition of 'military necessity'. It does not — and must not — mean that all Gazans are legitimate targets. Israel's Defence Minister declared war on Hamas, not on Gaza. The IDF must minimize collateral damage; to do otherwise is a violation of international law" – https://ict.org.il/legal-aspects-of-operation-cast-lead-in-gaza-2/

[365] General Assembly (A/HRC/15/21). Human Rights Council (27 September 2010). *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance* ; General Assembly (A/HRC/15/50); Human Rights Council (21 September 2010). *Human rights situation in Palestine and other occupied Arab territories. Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the*

defence is one thing, and violating international humanitarian law is another. In other words, even if Israel violated humanitarian law, it had the right to self-defence in the situation that arose[366]. However, the scale of these violations should be taken into account and it should be assessed whether they are rather an expression of chance or deliberate policy. The interpretation of the principle of proportionality in the context of the use of force (*jus ad bellum)* and humanitarian law (*jus in bello)* is often complicated and is the subject of controversies[367].

Since June 2007, after Hamas took power, Israel has tightened restrictions on trade in goods with the Gaza Strip; at that time foreign financial aid was also limited, with the aim of isolating Hamas and alienating the population from it. This political goal was not achieved. The Hamas elite, taking advantage of the land blockade, enriched itself at the expense of the majority of the population: "People in Gaza divide their history into three periods. The first - disastrous, although definitely the best on the scale of misfortunes, is the one when Israel was present in the Strip day and night. The second - light years behind the first, is the rule of Fatah. The third, beyond imagination, is the time of Hamas"[368]. Hamas is a terrorist organisation, and the population of the Gaza Strip is essentially its hostage.

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light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards.

[366] According to the UN Secretary-General: "Both the deliberate targeting by Hizbollah of Israeli population centers with hundreds of indiscriminate weapons and Israel's disproportionate use of force and collective punishment of the Lebanese people must stop", SC/8780, 20 July 2006; "The Secretary-General placed blame on both sides, calling on them to cease the violence and restore order. 'I condemn Palestinian rocket attacks and call for the immediate cessation of such acts of terrorism, which serve no purpose, endanger Israeli civilians and bring misery to the Palestinian people,' he said. 'While recognizing Israel's right to defend itself, I condemn the disproportionate and excessive use of force that has killed and adjudged so many civilians, including children. Israel must fully comply with international humanitarian law and exercise the strictness constraint'" – SC/9266 Security Council, 1 March 2008.

[367] See also UN Human Rights Council. Human *Rights in Palestine and other Occupied Arab Territories. Report of the United Nations Fact Finding Mission on the Gaza Conflict (A/HRC* / 12/48, 15 September 2009) [Goldstone Report]; D. Kaye, *The Goldstone Report,* "ASIL Insight", October 1, 2009. Goldstone admitted in 2011 that his report was biased and based on insufficient data; see R. Goldstone, *Reconsidering the Goldstone Report on Israel and war crimes,* The Washington Post, April 1, 2011: "We know a lot more today about what happened in the Gaza war of 2008-09 than we did when I chaired the fact-finding mission appointed by the UN Human Rights Council that produced what has come to be known as the Goldstone Report. If I had known then what I know now, the Goldstone Report would have been a different document."

For a critical review of the Goldstone report, see LR Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare,* Case Western Reserve Journal of International Law, Vol. 43, 2011 (March); L. Blank, G. Gordon, *Goldstone, Gaza and (Dis)Proportionality: Three Strikes* (November 04, 2009): "The Report fails the law. It does so by striking out in applying the law in three key areas. Strike One: the Report incorrectly claims Israel disproportionately attacked civilians. Strike Two: the Report unjustly accuses Israel of a disproportionate response to Hamas's attacks. Strike Three: The Report treats Israel and Hamas disproportionately by them holding to different standards" – http://jurist.law.pitt.edu/forumy/2009/11/goldstone-gaza-and-disproportionality.php

[368] P. Smoleński, *The Devil in the House,* "Gazeta Wyborcza" October 27, 2011, pp. 12-13; M. Zawadzki, *The Blockade Radicalizes Gaza,* "Gazeta Wyborcza" June 7, 2010: "Hamas

Restrictions on the movement of goods by land were modified in 2010: the list of goods permitted for import was replaced by a list of prohibited goods[369]. The previous material scope of the restrictions extended far beyond military equipment and materials. For this reason, the land blockade was criticized as a form of collective punishment and a disproportionate measure contrary to humanitarian law.

In the 1990s, the Gaza Strip was surrounded by a special barrier by Israel[370], and similar protection also exists between the Gaza Strip and Egypt, which expanded the wall to prevent terrorists from crossing from the Gaza Strip. In January 2010, Israel announced its intention to build special protection along the entire Israeli-Egyptian border in Sinai.[371] Egypt, on its side, began (but did not finish) placing steel plates in the ground to prevent the digging of underground tunnels.[372] During the armed conflict between Hamas and Israel (at the turn of 2008/2009), Egypt did not allow the opening of border crossings from the Gaza Strip. In May 2011, after radical political changes in Egypt, the Rafah border crossing was opened, which can facilitate and increase the supply (smuggling) of weapons to the Gaza Strip.

The reason for the naval blockade of the Gaza Strip, which was established in January 2009 and is still in force, is the armed conflict, and the aim of the blockade is primarily to prevent illegal deliveries of weapons and military equipment to the ruling Hamas, which fires rockets into Israeli territory. Israel's control of the maritime borders of the Gaza Strip was indeed earlier, but the establishment of the naval blockade in 2009 led to its operational strengthening. The critical supply situation in the Gaza Strip resulted not so much from the naval blockade justified by security reasons, but from restrictions on land trade. Therefore, it is difficult to claim that the naval blockade contributed to the humanitarian crisis in the Gaza Strip[373].

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is pleased, because it can repeat phrases about the Zionist siege, and at the same time stuff its pockets with dollars and remain in power."

[369] *Prime Minister's Office statement following the Israeli Security Cabinet meeting* – http://www.mfa.gov.il/MFA/Government/Communiques/2010/Prime_Minister_Office_statement_20-Jun-2010.htm; *Israel: annonce de la fin du blocage de Gaza,* "Sentinelle", n°231, 27 juin 2010.

[370] *Agreement on the Gaza Strip and the Jericho Area,* May 4, 1994: "Article XXIII (4): The Parties agree that, as long as this Agreement is in force, the security fence erected by Israel around the Gaza Strip shall remain in place."

[371] *PM Netanyahu Decides to Close Israel's Southern Border to Infiltrators and Terrorists,* 10 January 2010 – http://www.pmo.gov.il/PMOEng/Communication /Spokesman/2010 /01/spokegvul100110.htm

[372] *Gaza, Hundreds Protest Against Egyptian Wall,* December 21, 2009 – http://www.ansamed.info/en/news/ME03.XAM20095.html; *Mubarak Resists Calls at Home, in Region to Admit Palestinians Fleeing Violence,* "The Washington Post", January 10, 2009 (A01) ; *Egypt Builds a Wall,* The Weekly Standard, April 28, 2008; *Egypt builds new wall along Gaza,* CNN, March 6, 2008 – http://us.cnn.com/2008/WORLD/meast/03/ 06/egypt.gaza. ap/index.html.

Egypt tolerated illegal smuggling of weapons and goods into Gaza through a network of underground tunnels; see also *Memorandum of Understanding between Israel and the United States Regarding Prevention of the Supply of Arms and Related Materiel to Terrorist Groups* (16 January 2009) - https://www.gov.il/en/pages/israel-us-memorandum-of-understanding-16-jan-2009

[373] These unfounded thesis contains *Report of the international fact-finding mission (*fn. 365), § 59-60.

A naval blockade is a legal measure in times of armed conflict[374]. Ships that intend to break the blockade and, in addition, openly announce this, may be detained both in the blockade zone and in other international waters for inspection[375]. Incidentally, on the basis of the relevant treaties, Israel has the competence to control the movement of ships heading to the Gaza Strip even without declaring a naval blockade[376]. However, if the control is to be effective, it must be total and cannot be limited only to the statements of the captain of a ship. Gaza Strip does not have a seaport that could accept deliveries of goods.

The legality of a blockade is assessed in the context of the existence or non-existence of an armed conflict. The concepts of international and non -international armed conflict are derived from the Geneva Conventions (1949) and the two Additional Protocols to these Conventions (1977). The specificity of some new conflicts, including the Middle East, proves that the aforementioned classification of conflicts does not correspond to the complex and changing international realities[377].

The starting point is the definition of armed conflict *tout court.* It is assumed that it is a prolonged armed clash between states or between state authorities and organized, armed groups, or between such groups on the territory of a state[378]. And

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[374] W. Heintschel von Heinegg, *Blockade,* EPIL (2009); *Report (*fn*.* 373), §§ 50–52.

[375] V. Lowe, A. Tzanakopoulos, *Ships, Visit and Search,* EPIL (2010); *Interception of Gaza flotilla is legal under international law,* 03 June 2010 – http://dover.idf.il/IDF/English/News/today/10/06/0301.htm; *The Gaza flotilla and the maritime blockade of Gaza - Legal background,* 31 May 2010 – https://www.gov.il/en/pages/gaza_flotilla_maritime_blockade_gaza-legal_background_31-may-2010; see too Y. Shany, *Know Your Rights! The Flotilla Report and International Law Governing Naval Blockades* – http://www.ejiltalk.org/know-your-rights-the-flotilla-report-and-international-law-governing-naval-blockades/#more-2708

[376] *The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,* Washington, DC, September 28, 1995: "Article *Agreement on the Gaza Strip and the Jericho Area,* May 4, 1994: "Article VIII. (…) Israel shall continue to carry the responsibility for defence against external threats, including the responsibility for protecting the Egyptian border and the Jordanian line, and for defence against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility"; *Declaration of Principles on Interim Self-Government Arrangements* ('Oslo Accords') – September 13, 1993.

*Report of the international fact-finding mission (*fn*.* 365) : "55. It might be suggested that a belligerent in an armed conflict has a right to visit, inspect and control the destinations of neutral vessels on the high seas, irrespective of any declared blockade. While there is some controversy on this issue, the San Remo Manual and a number of military manuals take the view that the right may only be exercised upon reasonable suspicion that a vessel is engaged in activities which support the enemy. The Mission takes the view that a right of interference with third States' freedom of navigation should not lightly be presumed."

[377] M. Milanović, V. Hadzi-Vidanović, *A Taxonomy of Armed Conflict,* in: N. White, Ch. Henderson (eds), *Research Handbook on International Conflict and Security Law,* 2012; AL Paulus, M. Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization,* "International Review of the Red Cross", 2009, Vol. 91, No. 873, pp. 95–125; S. Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations,* "International Review of the Red Cross", 2009, Vol. 91, No. 873, pp. 83–85.

[378] International Criminal Tribunal for the former Yugoslavia (ICTY). *Prosecutor v. Tadić* (IT-94-1), Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995: "70. [A]n armed conflict exists whenever there is a department

the emphasis is on a certain degree of intensity of fighting and the organization of rebel forces.

Non-international armed conflicts are clashes between government forces and armed groups only on the territory of one state (Article 3 of the Geneva Conventions of 1949). Additional Protocol II (1977) narrows this concept, requiring that these groups have a unified command, exercise effective control over part of the territory of the state and comply with the provisions of this Protocol. This definition does not therefore apply to short-term rebellions, riots or attacks, or armed clashes between two rebel groups on the territory of one state. Terrorist structures of various types – secret by their nature – are not covered by the Geneva Conventions or the Additional Protocols (apart from Common Article 3 and Article 75 of Additional Protocol I). The concepts of combatant, prisoner of war and occupation do not apply to non-international armed conflicts .

If, without sending its own troops, a state supports a foreign government in fighting the aforementioned armed groups on the latter's territory, the conflict is non-international in nature. On the other hand, a conflict becomes international when the action of one state on the territory of another state (especially without its consent) takes the form of direct participation of its troops or when irregular armed groups act on behalf of that state[379].

The parties to an armed conflict of an international character are States (Article 2 of the Geneva Conventions, 1949). Article 1 (4) of Additional Protocol I specifies that an armed conflict between nations fighting against colonial domination, foreign occupation and racist regimes in the exercise of the right to self-determination is of an international character.

In the Gaza Strip, we are therefore dealing – in light of the above definitions – with an armed conflict that has been ongoing for years. It is not non-international in nature, because it is not a prolonged armed clash on the territory of one state (nor is there any control of organized armed groups on part of the territory of that state). However, this conflict is not *strictly* international in nature, because its parties are not states – the Gaza Strip (like the Palestinian Authority) is not a state, and Hamas is essentially a terrorist organization. We are therefore confronted with not the only example of an unusual situation, the classification of which under the applicable norms of humanitarian law seems difficult, especially since Hamas, Hezbollah or al-Qaeda do not comply with humanitarian law.

The division of conflicts into international and non-international seems increasingly difficult to justify today. It is possible that in such a context we are

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to armed force between States or *protracted* armed violence between governmental authorities and *organized* armed groups or between such groups within a State." See similarly, although not identically, art. 1 of Additional Protocol II (1977) and Art. 8 2(f) of the ICC Statute (1998).

[379] ICTY. *Prosecutor v. Tadić* (IT-94-1-A), Appeals Chamber, Judgment of 15 July 1999: "84. It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."

dealing with a new, transnational category of asymmetric conflict, which is closer to an international armed conflict. According to a widespread view, the Gaza Strip is an occupied territory and an example of a nation's struggle for the right to self-determination under foreign occupation (the concept of occupation applies only to international conflicts). Moreover, it is an armed conflict in which Hamas is clearly supported – militarily and financially – by third countries (no attempts have been recorded to date to attribute Hamas's actions to Iran or Syria). We are also dealing with a situation of cross-border actions, as the Gaza Strip is a territory external to Israel. The cross-border element does not appear directly in the definitions discussed, but it follows from the nature of a non-international conflict that a group fights a state on its territory and attributing cross-border support for the rebels to another state leads to the classification of the conflict as an international conflict.

Israel recognizes the current situation as an armed conflict, but with some restraint in defining its character (international – non-international)[380]. This position expresses the lack of willingness to treat terrorists as combatants and/or prisoners of war, while maintaining certain minimum standards (for example, Article 3 of the Geneva Conventions of 1949)[381]. In one of the cases (*Targeted Killings*[382]), the Israeli Supreme Court cautiously agreed with the opinion that the Gaza Strip is an international conflict, especially in the context of the military occupation of Gaza. In a later case (*Gaber Al- Bassiouni v. Prime Minister*[383]), heard after the withdrawal of troops from the Gaza Strip in 2005, the Supreme Court found that Israel had ceased to be an occupying power, but due to certain competences over the Gaza Strip – resulting from the ongoing armed conflict, from Israel's control of the borders of that Strip and from the state of de facto dependence caused by the long-term military occupation – it must observe, to a limited extent, certain norms of humanitarian law and may not violate certain internationally protected human rights. This new situation no longer fits the definition of occupation contained in Article 42 of the Regulations to the IV Hague Convention of 1907[384]. The concept of occupation is therefore not

[380] The Public Commission to Examine the Maritime Incident of 31 May 2010. The Turkel Commission. *Report. Part one.* January 2011, §§ 37-44.

[381] The case law of American courts is essentially similar, which (especially in the context of the complications related to combating international terrorism) emphasizes that basic minimum standards apply in every armed conflict (e.g. Article 3 of the Geneva Conventions of 1949).

[382] The Supreme Court Sitting as the High Court of Justice (769/02). *The Public Committee against Torture in Israel v. The Government of Israel,* Judgment of 13 December 2006: "21. (…) Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character."

[383] The Supreme Court Sitting as the High Court of Justice (9132/07). *Gaber Al- Bassiouni v. Prime Minister,* Judgment of 30 January 2008, § 12.

[384] Convention (IV) respecting the Laws and Customs of War on Land (The Hague 1907). Regulations concerning the Laws and Customs of War on Land: "Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".

always easy to define, and the thesis that the situation in the Gaza Strip can currently be described as a state of siege (*état de siège)* seems accurate.

Israel's competences/obligations result not only from the occupation, but also from international agreements, on the basis of which Israel has exclusive competence in the field of external security of the Gaza Strip and its borders[385]. Moreover, an international armed conflict is not always reduced to occupation. The naval blockade resulted from the fact that Israel is not an occupying power in the classical sense of the term, because its troops (or other bodies) do not exercise effective control over the territory of Gaza. Moreover, if it were an occupier and exercised the necessary control, there would be no need to declare a naval blockade. This example proves that the concept of occupation is currently being adapted to unusual circumstances.[386]

In conclusion, the detention of the Turkish ship (May 2010) that intended to break the blockade proves that the preparation of the Israeli action and the manner of its execution left much to be desired. The possible violation of humanitarian law by Israeli soldiers does not affect the legality of the naval blockade and the inspection of the ship and its detention[387].

4.5.3. Regarding military operations initiated in 2104 in Iraq and Syria against ISIS (Islamic State of Iraq and Syria), among the arguments supporting the legality of US-led air operations of a multi-state coalition (e.g. United Kingdom, Canada, Turkey, Australia, and France) against ISIS positions in Syria and Iraq are the right of self-defence and, in certain circumstances, the invitation of the Iraqi or Syrian authorities. In this context, it is also worth considering whether and to what extent a state is unwilling or unable to prevent the use of its territory for armed attacks by non-state actors (this is where the issue of attribution arises).

In the opinion of Claus Kreß:[388]

> "The legal claim to a right of individual and collective self-defence in a case of a non-State armed attack has gained further traction through the use of

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[385] See fn. 376 .

[386] Let us also recall the example of an unusual (peaceful) occupation of Germany after 1945.

[387] *Palmer Report to Say Gaza Blockade is Legal,* July 7, 2011 – http://www.israelnationalnews.com/News/News.aspx/145498#.TicBH2E1OnA; TurkelReport (fn. 380).

[388] C. Kreß, *The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against 'IS' in Syria* (February 17, 2015) – http://justsecurity.org/20118/claus-kreb-force-isil-syria/ ; see also D. Akande, Z. Vermeer, *The Air-strikes Against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, (February 2, 2015) – http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/; K. Bannelier, *Military Interventions Against ISIL in Iraq, Syria and Libya and the Legal Basis of Consent*, Leiden Journal of International Law, Issue 3, Vol.29 (2016); D. Akande, M. Milanović, *The Constructive Ambiguity of the Security Council's ISIS Resolution* (2249 of 21 November 2015) – http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/#comments [SC Res. 2249 (2015) calls upon "Member States […] to take all necessary measures, in compliance with international law, (…) on the territory under the control of ISIL (…), in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts" (para. 5), however this resolution was not adopted under Chapter VII UN Charter.]

force against the Islamic State in Syria and that a precedent has been established to the effect of a refinement of the line between the right of self-defence in a case of a non-State armed attack and the legal title to intervention by invitation of the territorial State".

Another problematic case is a series of military strikes launched (April 14, 2018) by the United States, France and the United Kingdom in order to destroy and deter the use of chemical weapons by Syria against its own population. The assessment of these strikes encapsulates a spectrum of responses: from explicit political support and/or assertion of the legality of the strikes, on one end, to the more circumspect avoidance of an explicit statement on either political support or legality, to condemnation of the strikes and/or assertions of illegality, on the other end, and various permutations of these factors.[389] Legalność użycia siły uzasadniano między innymi interwencją humanitarną.[390]

In the opinion of A. Kleczkowska:[391]

> "The only three States that adopted clear positions on the airstrikes were Russia, Bolivia, and Iran, which called them a violation of international law and an act of aggression. The approach taken by the rest of the States was very vague, and one can speak only about more favourable or less favourable assessments of the airstrikes. [p. 371] (...) Neither the intervening States claimed the legality of the airstrikes, nor did the majority of the States condemn the breach. [377] (...) If similar situations [as 2017 and 2018 airstrikes] occur in future – i.e. if despite a flagrant violation of international law the majority of States do not react to the violation, while those States which react do not condemn the intervention – it could ultimately lead to the modification of a customary norm" [p. 389]

In the opinion of M.P. Scharf:[392]

> "Some commentators have argued that even if there were a newly emergent customary international law right to humanitarian intervention, customary international law simply cannot prevail over the U.N. Charter. But as former State Department Legal Adviser Harold Koh points out, <it is not nearly so black and white as the absolutists claim, because textual ambiguity in Article 2(4), the broader structural purposes of the U.N. Charter, and some recent significant state practice give far more legal play in the joints than textual absolutists would concede>." [p. 26] "Since the Security Council declined to condemn the airstrikes, the question that this article addresses --

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[389] Mapping States' Reactions to the Syria Strikes of April 2018 (April 22, 2018) – https://www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/

[390] *Syria action [4-2018] – UK government legal position* (Policy paper 14 April 2018) – https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position

[391] A. Kleczkowska, *Changing Customary Law. The Shape of the Prohibition of the Use of Force after the 2017 and 2018 Airstrikes in Syria*, International Community Law Review 21 (2019) 369–389.

[392] M.P. Scharf, *Striking A Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention*, Chicago Journal of International Law 19.2 (2019), pp. 1-42.

whether a limited customary international law right of humanitarian intervention has crystalized from the 2018 Syrian airstrikes -- may not require a definitive answer at this time as there is no pending International Court of Justice or International Criminal Court case arguing that the strikes were an unlawful act of aggression." [p. 28]

These examples illustrate the dilemmas posed by new threats and, against this backdrop, the partial inadequacy of the international legal framework (UN Charter criteria) related to the use of force. The further practice of states will be of significant importance in this respect.

4.5.4. Since 1992, after the unsuccessful humanitarian operation with the consent of the Security Council, Somalia has been in chaos and can be described as a failing state. In 2004, a government was established there, which controlled only a small part of the state territory and was dependent solely on external support. The confusion and fighting of the warring clans contributed to the gaining of significant influence by the Taliban forces, who to some extent put an end to the chaos. On the one hand, the robber clans make it impossible for a stable central authority to exist, on the other, the fundamentalists pose a political threat to the country and the region. In both cases, the civilian population suffers, some of whom have fled and are fleeing to neighbouring countries. What should the international community do in such a situation?

In early December 2006, the Security Council adopted (with the US taking an active role) Resolution 1725 (2006), authorizing the creation of regional support forces by the African Union (*African Union Mission to Somalia*, AMISOM) to combat the threat from fundamentalists and partially lifting the arms embargo on Somalia. This resolution was met with some criticism[393], understandable in that there is no ideal solution in this situation. In addition, African countries were reluctant to declare the appropriate number of soldiers for the planned international forces. As a result, in late December 2006, Ethiopian troops entered Somalia, supporting the weak Somali government and leading to the withdrawal of Taliban forces.

How to assess this action by Ethiopia? Ethiopian troops entered a country engulfed in chaos, so it is difficult to claim that they did so in order to overthrow the legitimate government. In official statements, Ethiopian representatives cited self-defence against attacks by extremists from Somalia and a threat to the Ethiopian sovereignty[394]. The African Union, the Arab League and the UN Secretary General appealed for an end to the fighting[395], although some politicians supported Ethiopia's

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[393] For example, the International Crisis Group – www.crisisgroup.org/home/index.cfm?id=4520.

[394] "After too much patience, the Ethiopian government has taken a self-defensive measure and has begun counterattacking the aggressive extremist forces of the (Islamic council) and foreign terrorist groups," said Ethiopia's foreign affairs spokesman, Solomon Abebe – http://worldpressnetwork.net/index.php/Somalia; "We are not trying to set up a government for Somalia, nor do we have an intention to meddle in Somalia internal affairs. We have only been forced by the circumstances" Mr Meles said – http://news.bbc.co.uk/2/hi/africa/6209325.stm

[395] *Communiqué de presse du Président de la Commission de l'Union Africaine sur la situation en Somalie,* Addis Abéba, 25 décembre 2006.

military action[396]. The Security Council failed to reach an agreement on the draft resolution, so no international peacekeeping force was established.

The legal assessment of the Ethiopian armed action depends to a large extent on the analysis and assessment of the facts. Assuming that there were armed actions by irregular groups originating from Somalia on the territory of Ethiopia and that the stabilization of the Taliban government threatens the security of the region, we are dealing with a classic self-defence or pre-emptive self-defence. Elements of a humanitarian operation can also be taken into account.

Ethiopia withdrew its troops at the end of 2008, and its military operation proved ineffective. As a result, the struggle for power is between the moderate and the radical (Somali) Taliban and the African Union mission (AMISOM) is still present in Somalia.[397] The UN Security Council considered that the conditions for the establishment of a UN *peacekeeping operation* in Somalia do not yet exist[398]. It is no wonder that Somalia, gripped by chaos, has become a base for maritime pirates. This shows how difficult the situation in this country is, as well as the hesitation of the UN.

4.5.5. In the context of responding to foreign military operations, the problem of the so-called targeted killing of specific individuals arises[399], i.e. eliminating – on the

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[396] "Patrick Mazimhaka, the deputy chairman of the AU Commission, told the BBC that the African Union would not criticize Ethiopia as it had 'given us ample warning that it feels threatened by the UIC (fundamentalists)'. BBC quoted Mazimhaka also as saying: 'It is up to every country to judge the measure of the threat to its own sovereignty.' terror coming from any direction".

[397] See SC Res. 2036 (2012), which extends the AMISOM mission.

[398] SC Res. 1910 (2010): "1. Decides to authorize the Member States of the African Union to maintain AMISOM until 31 January 2011, which shall be authorized to take all necessary measures to carry out its existing mandate as set out in paragraph 9 of resolution 1772 (2007); (…) 9. Recalls its statement of intent regarding the establishment of a United Nations peacekeeping operation as expressed in resolution 1863 (2009), and notes "that any decision to deploy such an operation would take into account inter alia the conditions set out in the Secretary-General's report dated 16 April 2009 (S/2009/210)"; SC Res. 1872 (2009) "15. Requests the African Union to maintain and enhance AMISOM's deployment in Somalia in order to carry out its mandate as set out in paragraph 9 of resolution 1772 (2007), welcomes its efforts to protect the airport, seaport and other strategic areas in Mogadishu; and encourages it to continue to assist the Transitional Federal Government in the establishment of the National Security Force and the Somali Force"; SC Res. 1863 (2009): "4. Expresses "its intent to establish a United Nations Peacekeeping Operation in Somalia as a follow-on force to AMISOM, subject to a further decision of the Security Council by 1 June 2009".

[399] *Targeted Killings Law and Morality In An Asymmetrical World* (C. Finkelstein, JD Ohlin, A. Altman, eds), Oxford 2012; K. Anderson, *"Efficiency" Jus in Bello and "Efficiency" Jus Ad Bellum In the Practice of Targeted Killing Through Drone Warfare?,* Penn Conference on Targeted Killing, Draft of April 18, 2011 (Working Paper SSRN Version); G. Blum, P.B. Heymann, *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism,* 2010; JJ Paust, *Self- Defence Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan,* "Journal of Transnational Law & Policy", 2010, Vol. 19/2; L. Blank, B. Farley, *Characterizing United States Operations in Pakistan: Is the US Engaged in an Armed Conflict?,* "Fordham International Law Journal", 2010, Vol. 34; J.M. Beard, *Law and War in the Virtual Era,* AJIL, 2009, Vol. 103, pp. 409–445; C. Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict,* North Dakota Law Review, 2009,

government's orders and with the help of its bodies – direct perpetrators of illegal use of armed force (especially terrorist acts) against that state or its entities, and to some extent also persons preparing and directing such actions, if they cannot be caught (they usually operate in hiding). Targeted killing takes place outside the territory of the injured or threatened state, i.e. on the territory of another state, but not against it. An example would be the operations against armed irregular groups by the US in Pakistan[400] (for example, the killing of Bin Laden in 2011[401]), in Syria or in Yemen[402]. Operations of this type are also carried out by Israel and Russia.

Recognizing targeted killing as a form of defence, it should be emphasized that the type of conflict (international/ non-international) is not of decisive importance here, as is obtaining the consent of a third country, or assigning it direct responsibility for terrorist activities from its territory[403]. In such cases, the criteria of necessity and

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Vol. 85, pp. 650–671; N. Melzer, *Targeted Killing in International Law,* Oxford 2008; A.N. Guiora, *"Not 'By All Means Necessary': A Comparative Framework for Post-9/11 Approaches to Counterterrorism,"* Case Western Reserve Journal of International Law, 2009, Vol. 42, pp. 273–287; K. Anderson, *Targeted Killing in US Counterterrorism Strategy and Law,* May 11, 2009 – http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070; M. Milanović, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case,* "International Review of the Red Cross", 2007, Vol. 89, no. 866, pp. 373–393; RS Schondorf, *The Targeted Killings Judgment: A Preliminary Assessment,* Journal of International Criminal Justice, 2007, Vol. 5, No. 2, pp. 301–309; A. Cohen, Y. Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case,* "Journal of International Criminal Justice", 2007, Vol. 5, No. 2, pp. 310–321; D. Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?,* EJIL, 2005, Vol. 16/2, pp. 171–212; A.N. Guiora, *Targeted Killing As Active Self- Defence,* Case Western Reserve Journal of International Law, 2004, Vol. 36, pp. 319–334; M. Patel, *Israel's Targeted Killings of Hamas Leaders,* ASIL Insight, May 6, 2004; N. G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the US Predator Strike in Yemen,* The UCLA Journal of International Law and Foreign Affairs, 2003, Vol. 8, pp. 331–383.

400 *US wants to widen area in Pakistan where it can operate drones,* "The Washington Post", November 20, 2010: "Pakistan places strict boundaries on where CIA drones can fly. The unmanned aircraft may patrol designated flight 'boxes' over the country's tribal belt but not other provinces."

401 See A.S. Deeks, *Pakistan's Sovereignty and the Killing of Osama Bin Laden,* "ASIL Insight", May 5, 2011; N. Schmidle, *Getting Bin Laden. What happened that night in Abbottabad,* "The New Yorker", August 8, 2011.

402 *US military teams, intelligence deeply involved in aiding Yemen on strikes,* "The Washington Post", January 27, 2010 (A01): "US military teams and intelligence agencies are deeply involved in secret joint operations with Yemeni troops who in the past six weeks have killed scores of people, among them six of 15 top leaders of a regional al-Qaeda affiliate. (…) The American advisers do not take part in raids in Yemen, but help plan missions, develop tactics and provide weapons and munitions. (…) Obama has ordered a dramatic increase in the pace of CIA drone-launched missile strikes into Pakistan in an effort to kill al-Qaeda and Taliban members in the ungoverned tribal areas along the Afghan border. There have been more such strikes in the first year of Obama's administration than in the last three years under President George W. Bush, according to a military officer who tracks the attacks. authority to kill US citizens abroad if strong evidence existed that an American was involved in organizing or carrying out terrorist actions against the United States or US interests. (…) The Obama administration has adopted the same stance"; *US Airstrike Allegedly Kills 8 Inside Syria,* "The Washington Post", October 27, 2008 (A09).

403 In this sense JJ Paust, *Permissible Self- Defence Targeting and the Death of Bin Laden,* "Denver Journal of International Law and Policy", Vol. 4/2011, pp. 569-583.

proportionality must be taken into account, as well as the construction of direct participation (*direct participation)*[404]. These are complicated issues in the context of humanitarian law[405], especially in the context of justified doubts about granting combatant status to terrorists. The legal assessment is influenced by the accuracy of intelligence information and other possibilities of neutralizing (arresting) the perpetrators[406].

Targeted killing is, in certain circumstances, a method[407] that must be placed in the context of armed conflict and self-defence, including pre-emptive defence. Here

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[404] Israel. The Supreme Court Sitting as the High Court of Justice. *The Public Committee against Torture in Israel v. The Government of Israel,* Judgment of December 11, 2005 (*Targeted Killings Case)*: "39. [A] civilian who has joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility."

[405] For example J. Addicott, *Anwar al- Awlaqi and the Law of War,* "Jurist – Forum", October 10, 2011; *Secret US Memo Made Legal Case to Kill a Citizen,* The New York Times, October 09, 2011.

[406] Israel. The Supreme Court Sitting as the High Court of Justice (769/02). *The Public Committee against Torture in Israel v. The Government of Israel,* Judgment of 13 December 2006: "40. [T]he following four things should be said: first, well-based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed (…). Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. (…) Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed (…). Arrest, investigation, and trial are not means which can always be used (…) However, it is a possibility which should always be considered (…) Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision. of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent. (…) Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test."

[407] H.H. Koh [Legal Adviser, US Department of State], *The Obama Administration and International Law,* Annual Meeting of the American Society of International Law, March 25, 2010: "US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war. (…) [I]ndividuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. (…) [T]he rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict – such as pilotless aircraft or so-called smart bombs – so long as they are employed in conformity with applicable laws of war (…) [A] state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force" – http://www.state.gov/s/l/releases/remarks/139119.htm ;

J.B. Bellinger, III, [US State Legal Adviser], *Legal Issues in the War on Terrorism* (London School of Economics, October 31, 2006): "I am not suggesting that because they remain in a state of armed conflict with al Qaida, the United States is free to use military force against al Qaida in any state where an al Qaida terrorist may seek shelter. The US military does not plan to shoot terrorists on the streets of London. As a practical matter, though, a state must "be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defence to address that threat" –

we are dealing with an example of another new challenge that international law is not prepared for today.

The criticism of this type of operation seems exaggerated, especially in the context of other – serious and massive – violations of humanitarian law, and especially the millions dying of hunger or as a result of internal conflicts. It turns out that it is not only in this case that the international community focuses primarily on condemning the actions of the US and Israel.

4.5.6. In conclusion, we are dealing with a gradual evolution in the interpretation of the concepts of the UN Charter, as well as with an acceptance or tolerance in international practice of the pre-emptive use of armed force in response to attacks by irregular groups, and especially a series of such attacks.

International law imposes on a state the obligation not to use its territory by other entities for activities violating this law[408]. Thus, "where a state is unable or unwilling

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http://www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf

S.D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan,* The George Washington University Law School, Public Law and Legal Theory Working Paper, 2008, no. 451: "US cross-border operations into Pakistan to date have taken three forms: missile strikes from Predator drones; defensive actions in immediate response to a cross-border raid from Afghanistan; and covert missions by special operations forces against militant targets located deeper in Pakistan" (p. 13); "There are, however, four potential bases for justifying these cross-border operations under international law: (A) consent by the Pakistani government; (B) authorization by the UN Security Council; (C) inherent self-defence against non-state actors operating from Pakistan; or (D) inherent self-defence against Pakistan itself" (p. 18).

J. Paust, *Are US Attacks in Pakistan an Armed Attack on Pakistan*?, September 30, 2009: "First, we can't impute al Qaeda or Taliban attacks on our soldiers (…) to Pakistan merely because Pakistan is incapable of policing its territory. Pakistan would have 'state responsibility' (but not 'imputation' or 'attribution') – so Pakistan could be subject to sanctions not involving the use of armed force if Pakistan financed or even tolerated such attacks unless Pakistan had effective control over al Qaeda or Taliban operations or later adopted them as its own. (…) Whether by merely using selective armed force in foreign state territory that is in response to ongoing armed attacks emanating from such territory engaged in or directed by non-state actors (triggering necessity as well as Article 51 self-defence) the US has engaged in an armed attack on the state as such (…) Such selective responsive targeting are not an attack of the state as such and that such targeting do not trigger application of the laws of war applicable to an international armed conflict unless the non-state actor being targeted is a 'belligerent'. (…) I believe that once necessity for a response involving Article 51 self-defence occurs that such changes the facts and legal policies at stake sufficiently for one to conclude that a selective targeting is not an attack on Pakistan as such. Otherwise, we would be concluding (1) that the state being attacked, i.e., the United States, has no right of self-defence against the non-state actors engaged in continuing armed attacks on US military in Afghanistan (which is not the case and would be unrealistic, clearly outside of general patterns of legal expectation as far as I can tell at this time), or (2) that a permissible response under Article 51 must necessarily trigger a war between the United States and Pakistan when the Pakistani government has not consented to the US use of necessary armed force" – http://www.ejiltalk.org/author/jpaust/

[408] CIJ. *Affaire du détroit de Corfou (fond),* arrêt du 9 avril 1949: « Les obligations qui incombaient aux autorités albanaises (…) sont fondées (…) sur certains principes généraux et bien reconnus, tels que (…) l'obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres Etats » (CIJ, Recueil 1949, p. 22); GA Res. 3314 (1974): "Any of the following acts (…) shall (…) qualify as an act of aggression : (…) (f) The action of a State in allowing its territory, which it has placed at the disposal of another

to assert control over a terrorist organization located in its territory, the state, which is a victim of the terrorist attacks would, as a last resort, be permitted to act in self-defence against the terrorist organization in the state in which it is located."[409]

The armed reaction in self-defence may be directed against the irregular groups or against the state supporting or tolerating them on its territory. The attacked state can react regardless of whether their actions are only tolerated (supported) by another state financially and logistically, or whether the state directs them (in the latter case, these groups are treated as *de facto* state organs).

In this context, the evidentiary issues concerning facts and their qualification in the light of international law norms are important. It is one thing to establish a fact, i.e. armed actions by an irregular group, to attribute it to this group and another thing to attribute responsibility for this fact to a concrete state.

The use of force in self-defence is not only a response to a previous attack (series of attacks) but also aims to prevent further attacks. A state that tolerates or supports the actions of irregular groups can be held responsible for their actions. However, if this is not the case, in some cases it can be held responsible for the lack of due diligence in preventing the actions.

It is important to ensure that the state violating the law is not left without responsibility, for example due to lack of sufficient evidence or to the concealment of evidence by a strong and efficient state. It is also essential that the injured state is not deprived of the possibility of a legal armed response.

If, for example, one were to accept as a sufficient argument the lack of control Lebanon has over the military faction of Hezbollah and the statement that Lebanese troops will not be stationed on the border with Israel as long as a peace treaty is not concluded[410], this would mean granting *carte blanche* to irregular groups and terrorists and at the same time preventing Israel from effectively defending itself against actions that undoubtedly constitute an armed attack .

State, to be used by that other State for perpetrating an act of aggression against a third State"; ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), Art. 16 – Commentary: "(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State."

Similar wording in context of the protection of the environment see ICJ. *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (§ 29); *Trail smelter case (United States, Canada),* 16 April 1938 and 11 March 1941, "Recueil des sentences arbitrales", Vol. III, p. 1965; United Nations Convention on the Law of the Sea (1982): Art. 194 (2): "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment."

[409] *Principles (*fn*.* 288); *infra* chapter 6.

[410] "[T]he Government of Lebanon continued to maintain the position that, as long as there is no comprehensive peace with Israel, the Lebanese armed forces would not be deployed along the Blue Line. Areas along the Blue Line were monitored by Hizbollah through a network of mobile and fixed positions" – www.un.org/Depts/dpko/missions/unifil/background.html.

It is also important to examine whether a state has responded positively to previous appeals or demands of the Security Council to put an end to the activities of irregular groups from its territory. However, making such resolutions a premise for the legality of another state's armed response is an unrealistic postulate[411], given the differences in the interests of the great powers.

The scope and form of self-defence response and state responsibility should be realistically and reasonably adapted to the changing situation[412].

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[411] A. Zimmermann (fn. 344), pp. 119–122.

[412] See *infra* 5.4.

Chapter 5. Attribution of international responsibility for the use of force

Il est plus facile de légaliser certaines choses que de les légitimer
Nicolas de Chamfort
(Maximes et pensées, caractères et anecdotes)

5.1. Introduction

5.1.1. State responsibility for the use of armed force is linked to the assessing the legality of its use and jurisdiction. These issues were the subject of the work of the International Law Commission (ILC) and are reflected in the Articles on Responsibility of States for Internationally Wrongful Acts (2001) and in the Articles on the Responsibility of International Organizations (2011)[413].

States (and international organisations) are responsible for their own actions within or outside their own territory. However, the issue of international legal responsibility of a state for the actions of irregular groups/structures (non-state actors) on foreign territory is becoming increasingly relevant.

As for the violated norms, we are primarily concerned with the prohibition of the use of force and the prohibition of intervention in internal affairs (reflected primarily in the UN Charter), the norms of international humanitarian law and internationally protected human rights (in the latter case, especially their extraterritorial application).

It is necessary to attribute an act to a specific state, international organization or non-state actor (the issue of jurisdiction), establish (prove) a violation of the norm (the issue of legality) and then establish the international responsibility. The reasons excluding the responsibility or the illegality of an act should also be taken into account[414].

The criteria for responsibility are provided for in specific legal norms or in general norms formulated by the ILC. They are developed by the case law of international and national courts. In practice, there are often difficulties in attributing an act (establishing and proving the facts, especially in connection with covert actions), which makes legal assessment difficult. The jurisdiction of international bodies deciding on violations of the law is limited by the will of the parties (for example, the ICJ) or the findings of these bodies are not legally binding (for example, the Human Rights Committee). Violations by states of the prohibition of the use of force or the

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[413] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* – 2001; ILC. *Responsibility of International Organizations* – 2011.

[414] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* (2001): consent of another state to the act (Article 20), self-defence in accordance with the UN Charter (Article 21), countermeasures (Article 22 – *countermeasures)*, force majeure (Article 23 – *force majeure) majeure)*, a situation of necessity (article 24 – *distress)* or a state of necessity (article 25 – *necessity).*

norms of humanitarian law are rarely the subject of rulings by independent bodies[415]. An exception in this area are human rights treaties, which provide for the mandatory jurisdiction of regional courts.

5.1.2 According to the Articles of the International Law Commission (ILC) of 2001, any act or omission by a State that is contrary to its international law obligations entails international law responsibility[416].

The rules on responsibility are formulated in detailed substantive norms of international law[417], which regulate specific obligations of states and the principles of their responsibility, i.e. in the so-called primary rules*.* These norms often contain references to damage, guilt, objective liability or lack of due diligence[418]. The ILC Articles establish simultaneously general norms of responsibility for violations of law and the consequences of such violations, i.e. the so-called secondary rules*.*

The ILC Articles generally approach the model of responsibility referred to as objective (strict liability), based on the finding of a violation of the law without examining the intention of the perpetrator or his guilt[419]. This construction refers, for example, to the effects of legal actions associated with an increased degree of risk, such as the operation of nuclear power plants or the launching of space objects into space, but also to the producer of goods supplied to the market (concern for effective consumer protection). However, the ILC Articles system is not so much objective as rather neutral[420].

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[415] For example, the ICJ has never had the opportunity to rule on cases involving two permanent members of the Security Council, China and Russia. The first case it accepted concerning Russia was a lawsuit filed against it by Georgia in 2008. This can be seen as an accident in the work of Soviet diplomacy, which did not file a timely reservation excluding the jurisdiction of the ICJ.

[416] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) – "Article 1. Every internationally wrongful act of a State entails the international responsibility of that State"; "Article 2. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State"; "Article 12. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

[417] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* (2001): "Article 55 – *Lex specialis.* These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

[418] See J. Crawford, *Revising the Draft Articles on State Responsibility,* EJIL, 1999, Vol. 10/2, p. 438: "The essential point is that different primary rules of international law impose different standards, ranging from 'due diligence' to strict liability, and that all of those standards are capable of giving rise to responsibility in the event of a breach. (…) [I]t depends on the interpretation of that rule in the light of its object or purpose. (…) [I]t is a serious error to think that it is possible to eliminate the significance of fault from the Draft Articles."

[419] PM Gerhart, *The Death of Strict Liability,* "Case Research Paper Series in Legal Studies", Working Paper 07–12, March 2007.

[420] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) – Commentary to Art. 2: "3. Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be 'subjective'. (…) In other cases, the standard for the breach of an obligation may be 'objective', in the sense that the advertence or otherwise of relevant State organs or

The perpetrator's behaviour may consist in conscious action with the intention of violating the law, knowledge of the possibility of such a violation and tacit consent to it, recklessness, i.e. awareness of the risk (possibility) of violating the law, but an unfounded (erroneous) assumption that it will not happen, and finally negligence, i.e. lack of reasonable diligence in anticipation*.* Here we can see the intertwining of basic aspects: anticipation (cognitive aspect) and consent to committing an act and its consequences (volitional aspect). In the first two variants, the perpetrator consents to an act (intentionality), in the last two there is no such consent (unintentionality). In all of them, however, there is an element of anticipation, although to a varying degree (up to the lack of reasonable anticipation).

These behavioural variants allow for determining guilt, i.e. determining to what extent a behaviour deviates from the legally required. As a normative concept, guilt is gradable and constitutes a legal measure for determining responsibility. The court may – based on the facts and its own qualification of the perpetrator's actions – assign him various forms of responsibility or exclude responsibility based on concrete norms.

Another model of normative assessment of a violation of law is based on the lack of due diligence[421]. The duty of due diligence should have a basis in legal norms (express or implied). The content of this standard is specified *ad casum,* because there is no uniform measure of due diligence (similarly to the criteria of reasonableness*,* necessity or proportionality).

Due diligence is an obligation to act and foresee in order to prevent violations of the law[422]. This obligation may concern, on the one hand, diligence in action (e.g. conducting or preparing a commercial or stock exchange transaction, notarial act), and on the other hand, diligence in achieving a specific result. The law may provide that ordinary diligence is not sufficient, but the utmost diligence is necessary (*beyond*

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agents may be irrelevant. Whether responsibility is 'objective' or 'subjective' in this sense depends on the circumstances, including the content of the primary obligation in question. (…) The same is true of other standards, whether they involve some degree of fault, culpability, or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provisions or other rule giving rise to the primary obligation (…) Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

[421] J. Raz, *Responsibility and the Negligence Standard,* "Oxford Journal of Legal Studies", 2010, Vol. 30/1, pp. 1–18; R.P. Barnidge, Jr., *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle,* The Hague 2008; J.A. Hessbruegge, *The historical development of the doctrines of attribution and due diligence in international law,* New York University Journal of International Law and Policy, 2004, Vol. 36/2–3, pp. 265–306; R. Pisillo-Mazzeschi, *Due Diligence and the International Responsibility of States,* "German Yearbook of International Law", 1992, Vol. 35, pp. 9–51. A well-known precedent on this issue is the arbitral award in the Alabama case (*USA v. United Kingdom,* 1872).

[422] CIJ. *Affaire relative à des usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay),* arrêt du 20 avril 2010: « 197. (…) L'obligation de la diligence requise ('*due diligence*') vis-à-vis de toutes les activités qui se déroulent sous la juridiction et le contrôle de chacune des parties (…) implique la nécessité non seulement d'adopter les normes et mesures appropriées, mais encore d'exercer un certain degré de vigilance dans leur mise en œuvre. (…) 204. (…) [O]n ne pourrait considérer qu'une partie s'est acquittée de son obligation de diligence (…) dès lors qu'(…) elle n'aurait pas procédé à une évaluation de l'impact (…) permettant d'apprécier les effets éventuels de son projet ».

reasonable doubt), which only releases from responsibility. The obligation of due diligence does not begin at the moment of violating the law, and the assumption of ineffectiveness of counteraction cannot be an excuse for lack of action.

5.2. Armed attack and self-defence[423]

In the practice important questions arise concerning the legality of the use of force, as well as the manner of responding to its use[424]. The problems concern primarily the concept of armed attack and the response to it in the form of self-defence (especially Articles 2 and 51 of the UN Charter).

To put it schematically: if the troops of State A enter the territory of State B illegally, they are – in principle – carrying out an armed attack (possibly violating international humanitarian law / human rights law). However, State A often invokes self-defence, claiming that its action is a response to an armed attack by State B or irregular troops from the territory of B and supported by that state. State B usually claims that these are not its official troops or that they are not acting on its behalf, or that it is only providing them with ideological support. State A will in turn attempt to attribute these actions to State B and hold it responsible. In response, State B will accuse State A of violating humanitarian law.

Such puzzles are becoming more frequent, which does not mean that they are easier to solve. One may get the impression that international law does not always keep up with the evolution of international environment.

A. In the judgment in the case of the *US diplomatic and consular personnel in Tehran* (1980), the ICJ found that the seizure of the US embassy and the taking of its staff as hostages by the so-called Iranian students constituted a violation of the law in the form of an armed attack.[425] It took place on Iranian territory, but its subject was an official US institution.

B. In the judgment in the case of *Nicaragua v. United States* (1986), the ICJ introduced a distinction between the use of armed force, intervention and armed attack. The ICJ found that by its actions the United States had violated the prohibition on the use of force against Nicaragua and had intervened in its internal affairs[426]. In turn, while self-defence is permitted only in the case of armed attack, according to the Court, not all cases of the use of armed force are equivalent to armed attack. Thus, according to the ICJ, self-defence is not possible in response to every use of armed force. Consequently if in the conflict between Nicaragua and some of its neighbours there was no armed attack on El Salvador, then there is no right to collective self-defence (the USA as an ally of El Salvador) against Nicaragua[427].

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[423] See also *supra* 3.2.

[424] M. Pinto, *L'emploi de la force dans la jurisprudence des tribunaux internationaux,* « Recueil des cours de l'Académie de droit international », 2007, Vol. 331, pp. 9–474.

[425] International Court of Justice (ICJ). *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* Judgment of 24 May 1980, § § 57,64, 91.

[426] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986, § 292; see also §§ 239–249.

[427] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. (…) The Court

Having explained the grounds for self-defence, the ICJ declined to answer the question of whether a state against which the prohibition of intervention in internal affairs below the threshold of armed attack had been violated would be entitled to respond with the use of armed force[428]. The Court's view seems problematic and unconvincing[429].

C. The Court took a similar position on the definition of armed attack and self-defence in the *Oil Platforms* judgment (*Iran v. USA*, 2003)[430]. In that case, the ICJ

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sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes (…) also assistance to rebels in the form of the provision of weapons or logistical or other support." (§ 195).

"For one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus, the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'." (§ 211)

"While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot (...) produce any entitlement to take collective countermeasures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force" (§ 249).

[428] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "[I]f one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of countermeasures against the first State as would otherwise constitute an intervention in its internal affairs? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was legally entitled to take any particular countermeasure" (§ 210).

[429] See J.Abr. Frowein, *Collective Enforcement of International Obligations,* "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", Vol. 47 (1987), No. 1, pp. 71-73.

[430] ICJ. *Oil Platforms (Iran v. United States),* Judgment of 6 November 2003: "The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence '; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS *Samuel B. Roberts,* the Court is unable to hold that the attacks on the Salman and Nasr platforms have been "shown to have been justifiably made in response to an 'armed attack' on the United States by Iran, in the form of the mining of the USS *Samuel B. Roberts"* (§ 72);

was unable to attribute to Iran the acts that the United States considered to constitute an armed attack and thus the issue of Iran's responsibility remained unresolved.

D. In the judgment in the case of *Congo v. Uganda* (2005), the ICJ found that Uganda's armed operation in the territory of the Congo (in response to attacks carried out from that territory) violated the prohibition of the use of force and the prohibition of intervention[431]. While stating that it was impossible to attribute the actions of irregular groups to Congo, the ICJ did not answer the question of whether attacks carried out by irregular forces from the territory of one state to the territory of another state could be treated as an armed attack, authorizing self-defence[432].

According to the Court, the lack of an appropriate response by the Congo to the actions of irregular groups in its territory (due to limited capabilities and difficult terrain configuration) did not mean consent to or tolerance of such activities[433]. The Court rightly condemned the crimes of the Ugandan military, but the armed action of its troops could be considered, at least up to a certain point, as self-defence in

"Iran recognizes the presence of limited military personnel and equipment on the Reshadat platforms, but insists that their purpose was exclusively defensive" (§ 75); "The Court is not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms. (…) However, even accepting those contentions (…) the Court is unable to hold that the attacks made on the platforms could have been justified as acts of self-defence. (…). In the case both of the attack on the Sea Isle City and the mining of the *USS Samuel B. Roberts,* the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. (…) The Court would also observe that (…) the United States forces attacked the R-4 platform as a 'target of opportunity', not one previously identified as an appropriate military target" (§ 76).

431 ICJ. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005: "The Court would comment, however, that, even if the evidence does not suggest that the MLC's conduct is attributable to Uganda, the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law" (§ 161). "Uganda's actions equally constitute an interference in the internal affairs of the DRC and in the civil war there rage. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter" (§ 165); " The Court finds that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention" (§ 345 (1)).

432 ICJ. *Congo v. Uganda,* Judgment of 19 December 2005: "[T]he Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contents of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to inquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate" (§ 147).

433 ICJ. *Congo v. Uganda,* Judgment of 19 December 2005: "The Court (…) cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities" (§ 301).

response to an armed attack by irregular groups at least tolerated by the Congo/Zaire.

E. In its advisory opinion (2004) on the construction of a wall in the occupied Palestinian territory, the ICJ found that the construction did not meet the criteria of self-defence because Israel was not the subject of attacks by a foreign state (Hezbollah or Hamas are not states), and moreover, the attacks were carried out from areas occupied and controlled by Israel[434]. It thus ruled out the possibility of Israel invoking Article 51 of the UN Charter[435].

This advisory opinion is controversial[436], because the application of self-defence should not be ruled out in that case, and the UN Charter and Security Council resolutions 1368 and 1373 certainly do not require that the armed attack be the work of a state. It does not seem that the criterion of the externality of the attack (NATO's opinion in September 2001 was in this direction) is decisive. The terrorist attack of 11 September 2001 was – in its decisive, final phase – carried out from the territory of the USA (similarly in Madrid in 2004), but the perpetrators had arrived earlier from outside and were directed and supported by external forces. The situation was slightly different in the case of the terrorist attacks in London in 2005, carried out by British citizens who had been residents of United Kingdom for a long time or even from birth; however, it is not entirely clear whether and to what extent they were supported from outside.

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[434] ICJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of July 9, 2004: "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to exercise a right of self -defence, the Court concludes that Article 51 of the Charter has no relevance in this case" (138).

[435] Y. Blank, *Legalizing the Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier,* Texas International Law Journal, 2011, Vol. 46/2, pp. 309-343; Ch.F. Martel, *Give Peace a Chance: How Considering Peace Process Obligations Would Have Improved the Rulings of the International Court of Justice and the Israeli Supreme Court on the Israeli Security Barrier,* Duke Journal of Comparative & International Law, 2007, Vol. 17, pp. 305–359; Ch. J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case,* EJIL, 2005, Vol. 16/5, pp. 963–978; D. Murphy, *Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?,* AJIL, 2005, Vol. 99, pp. 62–75.

[436] ICJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004 – Separate opinion of Judge Higgins: "This is formalism of an uneven handed sort" (§ 34). In that sense also Separate Opinion of Judge Kooijmans (§ 35), Declaration of Judge Buergenthal (§ 6).

5.3. Attributing responsibility for the actions of irregular groups

In typical situations, the State is held responsible under international law for the actions of its *de jure* organs, and it is not responsible for the acts of irregular groups/structures. However, according to the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), the acts of subjects that are not its *de jure organs* (Article 8), acts on its territory when official authority does not exist or is not exercised (Article 9) and acts of insurgent movements (Article 10) may sometimes be considered as acts of the state.[437]

Other provisions of the Articles refer to attributing responsibility to the state for its own unlawful acts in the case of support and assistance to another state

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[437] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001). Art. 8: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." Commentary: "(2) (…) Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as 'volunteers' to neighboring countries, or who are instructed to carry out particular missions abroad. (…) (7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised, and the specific conduct complained of. At the same time, it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act."

Article 9: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority." Commentary: "(4) (…) The cases envisaged by article 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. (…) (5) The phrase 'in the absence or default of' is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. (6) (…) The term 'called for' conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State."

Art. 10: "1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9".

(Article 16) and for the acts of one state controlled or directed by a second State (Article 17)[438].

5.3.1. Effective control

5.3.1.1. In order to attribute to a state an act or omission of another entity, we must establish that this act actually constituted a violation of the international law and then determine international legal responsibility. In this context, the facts for the assessment of which specific standards are applied in practice (e.g. total dependence, effective control, overall control, due diligence) are important. The case law of international courts plays an important role here, and the standards applied by the ICJ and those contained in the Articles of the ILC (2001) are convergent.

A. In the case of the *US diplomatic and consular personnel in Tehran* (1980) the ICJ found in its judgement that the responsibility of the Iranian state for the violation of international law in the form of an armed attack on the US embassy by the so-

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[438] G. Nolte, H.Ph. Aust, *Equivocal Helpers – Complicit States, Mixed Messages and International Law,* "International and Comparative Law Quarterly", 2009, Vol. 58, pp. 1–30; ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001): Art. 16: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act, (b) The act would be internationally wrongful if committed by that State." Commentary: "(1) (…) Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. (…) (3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself. (…) (10) In accordance with article 16, the assisting The State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State."

Article 17: "A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act and (b) The act would be internationally wrongful if committed by that State." Commentary: "(1) (…) Under article 16 a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety. (…) (7) In the formulation of article 17, the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility, ' direction and control ', raised some problems in other languages, owing in particular to the ambiguity of the term ' direction' which may. imply, as is the case in French, complete power, whereas it does not have this implication in English."

called students was of a twofold nature. First, in the initial phase, the seizure of the embassy and the taking of hostages was not an act on behalf of the Iranian state. Iran was therefore not liable for this act, but only for the violation of its own duty of due diligence, as provided for in the Vienna Convention. on Diplomatic Relations (1961)[439]. Second, as a result of the subsequent, official and explicit approval of the Iranian authorities for the aforementioned attack, the ICJ attributed responsibility for the actions of the perpetrators to Iran, finding that from a certain point on they acted as a *de facto* state organ.[440]

B. In the case of *Nicaragua v. USA* (1986), the ICJ found that by the actions of its organs *de jure* the United States had violated the prohibition of the use of force and had intervened in Nicaragua's internal affairs[441], but the responsibility for the armed acts of *the contras* (especially violations of humanitarian law) could not be attributed to the United States because those troops were not in a situation of complete dependence on the United States,[442] nor did the United States exercise effective control over their specific operations[443]. According to the ICJ, while the

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[439] Vienna Convention on Diplomatic Relations (1961): "Art. 22.2. The receiving State has a special obligation to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or any prejudice to its dignity." ICJ. *United States of America v. Iran,* Judgment of 24 May 1980: "[T]he Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. (...) [T]he failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means" (§ 63). See also judgment in the case *Kenneth P. Yeager v. Islamic Republic of Iran,* "Iran-US Claims Tribunal Reports", 1987, Vol. IV, p. 92: "Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' or 'Guards' and at the same time deny responsibility for wrongful acts committed by them."

[440] ICJ. *United States of America v. Iran,* Judgment of 24 May 1980: "The approval given to these facts by the Ayatollah Khomeini and other authorities of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostage into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible" (§ 74).

[441] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986, §§ 75–92.

[442] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras,* for legal purposes, with an authority of the United States Government, or as acting on behalf of that Government. (…) Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on their behalf" (§ 109).

[443] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "United States participation, even if preponderant or decisive in the financing, organizing, training, supplying and equipping of the *contras,* the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself (…) for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in

training and arming *of the contras* can be treated as a form of use of force, their financing constitutes intervention in the internal affairs of another state but is not tantamount to the use of force[444].

C. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) went beyond the standard formulated by the ICJ.

In the *Tadić case* (1999), the ICTY found that in order to attribute responsibility to a state for acts of organised irregular groups committed on foreign territory, it is not enough for that state to train or finance those groups or supply them with weapons[445]. It is also necessary for the state to play an organising, coordinating or planning role in the activities of those groups. However, in the Chamber's opinion, it is not necessary (as the ICJ requires in its judgment in the Nicaragua case) for the state to direct those units or give them instructions (orders) to conduct specific operations, i.e. the so-called effective (full) control[446].

Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependence on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the *applicant* State rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed" (§ 115).

[444] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "228. (…) In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force."

[445] AJJ De Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the* Tadić *Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia,* "British Yearbook of International Law", 2002, Vol. 72 (1), pp. 255-292.

[446] ICTY. *Prosecutor v. Tadić* (No. IT-94-1-A), Appeals Chamber, Judgment of 15 July 1999: "117. States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the actual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. (…) 137. Where the question at issue is whether *a single private individual or a group that is not militarily organized* has acted as a *de facto* State authority when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question alternatively, it must be established whether the illegal act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, *control by a State over subordinate armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. (…) The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. "Acts performed by the group or members thereof may be regarded as acts of de *facto* State organs regardless of

The ICTY view was shared by the International Criminal Court in the *Lubanga case* (2007)[447]. The ECtHR ruled similarly in *the Loizidou* or *Ilaşcu cases*[448].

The ICTY therefore distinguished between overall (general) control and effective (full) control. However, the ICTY did not adjudicate on the international law responsibility of a state and developed the construction of overall control for the purposes of determining the international character of the armed conflict in Bosnia and Herzegovina, thanks to which it was possible to apply a broader spectrum of humanitarian law norms in relation to individual criminal responsibility[449].

D. In the *Congo v. Uganda* judgment (2005), the ICJ held that Congo could not be held responsible for the repeated attacks from its territory on Uganda by irregular forces, since it had neither sent them on its own behalf nor controlled their actions; the ICJ held similarly regarding Uganda's control of irregular forces operating from its territory[450].

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any specific instruction by the controlling State concerning the commission of each of those acts." See also ICTY. *Prosecutor v. Zlatko Aleksovski* (No. IT-95-14/1-A), Appeals Chamber, Judgment of 24 March 2000, §§ 145–146; ICTY. *Prosecutor v. Zejnil Delalić, Zdravko Mucić (Aka "Pavo"), Hazim Delic and Esad Landžo (Aka "Zenga")* (No. IT-96-21-A), Appeals Chamber, Judgment of 20 February 2001 ("*Čelebići* Case"), §§ 14–26; ICTY. *Prosecutor v. Naletilić and Martinović (*No. IT-98-34-T), Trial Chamber, Judgment of 31 March 2003, §§ 198–202; ICTY. *Prosecutor v. Dario Kordić and Mario Čerkez* (No. IT-95-14/2-A), Appeals Chamber, Judgment of 17 December 2004, §§ 307–313, 369.

447 Cour pénale internationale. *Le Procureur c. Thomas Lubanga Dyilo* (ICC-01/04-01/06), La Chambre préliminaire I, Décision sur la confirmation des charges, 29 Janvier 2007: « 211. La Chambre est d'avis que lorsqu'un État n'est pas *directement intervenu* sur le territoire d'un autre État en utilisant ses propres troupes, le critère du *contrôle global [overall control*] s'applique afin de déterminer si des forces armées agissent au nom du premier État. C'est le cas lorsque cet État joue un rôle dans l'organisation, la coordination et la planification des actions militaires du groupe militaire, en plus du financement, de l'entraînement, de l'équipement ou du soutien opérationnel qu'il lui apporte ».

448 See *infra* 5.3.2.1.

449 ICTY. *Prosecutor v. Tadić* (No. IT-94-1-A), Appeals Chamber, Judgment of 15 July 1999, § 104; M. Sassòli, *State Responsibility for Violations of International Humanitarian Law,* "International Review of the Red Cross", 2002, Vol. 84, No. 846, p. 408; see also V. Azarov, *Internationalization and Attribution: The* Tadić *Analysis in the* Genocide in Bosnia *Case,* "The Westminster International Law & Theory Center Online Working Papers", 2009/2.

450 ICJ. *Congo v. Uganda,* Judgment of 19 December 2005: "The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX). (…) The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC" (§ 146). "The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of 'an organ' of Uganda (Article 4, ILC Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Article 5) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries" (§ 160).

However, the Court did not address the legal consequences of Congo/Zaire's tolerance or support for irregular forces (i.e. Congo's own liability for its own acts or omissions), nor did it find that Uganda had been subjected to armed attack by irregular groups.

E. In the context of these considerations, the 2007 ICJ judgment on the application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro)* deserves special attention.

Although the Court found the Srebrenica massacre to be an act of genocide (within the meaning of the 1948 Convention)[451], it found that this crime was not attributable to Serbia and Montenegro (the former Federal Republic of Yugoslavia, FRY), and – due to lack of sufficient evidence – it did not find the FRY responsible for various forms of violation of the law, such as conspiracy, incitement or aiding and abetting. The Court concluded, however, that the FRY was responsible under international law for violating the duty of due diligence in preventing the crime of genocide.

The ICJ took the position that the Bosnian Serb units that committed the genocide in Srebrenica were not *de jure organs* of the Federal Republic of Yugoslavia. However, the question arises whether this crime could not be considered an action of *de facto organs* of the FRY? Who financed, armed and politically supported these units? The content of the judgment indicates that it was predominantly the Federal Republic of Yugoslavia that did so[452]. However, the Court was unable to gather convincing evidence to establish the complete dependence of the Bosnian Serb units on the FRY[453].

Referring to the ILC Articles (Article 8) and its previous case law, the ICJ took the position that the responsibility of the state concerns primarily the actions of its organs, and for the actions of non-state actors (irregular groups/structures) it is responsible only in the situation of their complete dependence on it or of the so-called effective control over their specific actions, i.e. recognition of these actors as *de facto organs* of the state. In the first case, the FRY would be responsible for all acts of the Bosnian Serbs, in the second case only for their specific acts violating the law and only when the FRY's effective control over these specific acts is proven, i.e. the crime would have to have taken place on the order (instruction[454]*)* of the FRY or

[451] About the crime of genocide see W. A. Schabas, *Genocide in International Law: The Crimes of Crimes,* Cambridge 2009; JB Quigley, *The Genocide Convention: An International Law Analysis,* Hampshire 2006; *To Prevent and Punish: Commemorating the Sixtieth Anniversary of the Negotiations of the Genocide Convention,* Case Western Reserve Journal of International Law, 2008, Vol. 40, Nos. 1 & 2.

[452] ICJ. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 26 February 2007, § 388.

[453] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007, §§ 392–395.

[454] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "The Court must now determine whether the massacres at Srebrenica were committed by persons who, though not having the status of organs of the Respondent, nevertheless

under its direction. The ICJ clearly denied the concept of the so-called overall control, formulated by the International Criminal Tribunal for the former Yugoslavia[455].

The ICJ rejected the FRY's responsibility for aiding and abetting genocide. It found that there was no convincing evidence that the FRY's unquestionable support for Bosnian Serb troops was accompanied by knowledge that the country was providing assistance in committing genocide, sharing the special intention (*dolus specialis)* characteristic of this crime to destroy, in whole or in part, a national, ethnic, racial or religious group as such. According to the ICJ, there was, in particular, no convincing

acted on its instructions or under its direction or control" (§ 396); "An affirmative answer to this question would in no way imply that the allegations should be sanctioned as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. (…) What must be determined is whether FRY organs – incontestably having that status under the FRY's internal law – originated the genocide by issuing instructions to the allegations or exercising direction or control, and whether, as a result, the conduct of the organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations" (§ 397); "[I]t has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations"(§ 400); "[T]he Court finds, (…) that it has not been established that those massacres were committed on the instructions, or under the direction of authorities of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated" (§ 413); "The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis" (§ 415).

[455] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "The Court (…) finds itself unable to subscribe to the Chamber's view" (§ 403) [ICTY. *Tadić* case - see fn. 446, JK]. "It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be recognized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict" (§ 405). "It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law, but which nevertheless must be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be assumed for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility" (§ 406).

evidence that the FRY had continuously supported the Bosnian Serbs in the context of the planned crime[456].

This argument seems doubtful, because the provision of weapons to Serbian troops was permanent and had been ongoing for a long time (this was condemned, among others, by the Security Council resolutions establishing an arms embargo and the so-called *no- fly zones* in Bosnia and Herzegovina)[457]. This reasoning of the ICJ assumes that the equipment and ammunition used in the Srebrenica massacre would have to be specially marked.

The ICJ found the FRY liable under international law for the lack of due diligence in preventing genocide in Srebrenica, i.e. responsibility for one's own attitude, and not for the actions of another entity (the obligation to prevent results from Article 1 of the 1948 Convention[458]). Already in 1991–1992 the Security Council established an embargo on arms deliveries to Yugoslavia and demanded that the FRY cease its intervention in Bosnia and Herzegovina and withdraw its military units from there[459]. When applying interim measures in 1993, the ICJ expressly demanded that the FRY prevent genocide, incitement thereto or aiding and abetting genocide in relation to units directed or supported by it and organisations or individuals under its control, direction or influence[460].

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[456] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "[T]he question arises whether complicity presupposes that the accomplice shares the specific intent *(dolus specialis)* of the principal perpetrated. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to an allegation of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis)* of the principal allegations. "The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the theories of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, (…) it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied – and continued to supply – the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way in other words that not only were massacres about to be carried out or already under way, but that theirs had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such" (§ 422); "The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph *(e),* of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole" (§ 424).

[457] SC Res. 713, 757, 781, 816, 819, 836.

[458] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948): "Article 1. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

[459] SC Res. 713 (1991), 757 (1992), 819 (1993).

[460] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "In particular, in its Order of 8 April 1993, the Court stated, *inter alia,* that (…) the FRY was required to ensure: 'that any military, paramilitary or irregular armed units which may

According to the ICJ, in order to establish a breach of the state's duty of due diligence, it is sufficient that the entity able to prevent the crime is aware of its risk, has the appropriate means at its disposal and does not use them. The ICJ rightly denied the thesis that the duty of prevention begins at the moment of committing the crime or that the justification for the lack of preventive action may be the assumption that such countermeasures will be ineffective.[461] The ICJ therefore assumes that awareness of the risk of the crime is sufficient for liability for lack of due diligence but is not sufficient for liability for aiding and abetting in a crime – a view that is not very convincing[462].

In contrast to some of its other judgments, the ICJ did not order the FRY to pay reparations[463]. It found that even if it had exercised the necessary diligence, the FRY

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be directed or supported by it, as well as any organizations and persons which may be subject to their control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide' (…).

[461] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of "harbouring specific intent *(dolus specialis),* it is under a duty to make such use of these means as the circumstances permit „(§ 431); "[A]n accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the danger serious that acts of genocide would be committed" (§ 432). "[F]or a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them" (§ 438).

[462] A. Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide,* "Journal of International Criminal Justice", 2007, Vol. 5 (4), pp. 875–887.

[463] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "[T]he Court cannot (…) regard as proven a causal nexus between the Respondent's violation of its obligation to prevent and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide" (§ 462); "[T]he Court (…) (9) Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate" (§ 471).

For comparisons see ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: The Court "(13) Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injuries caused to Nicaragua by the breaches of obligations under customary international law enumerated above; (…) (15) Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case" (§ 292); ICJ. *Congo v. Uganda,* Judgment of 19 December 2005: "Finds that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused" (§ 345(5)); ICJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004 : "(3)C. Israel is under an obligation to make reparations for would not have been able to prevent the genocide in Srebrenica, indirectly contradicting its own thesis of a lack of due diligence[464]. The ICJ's position is not convincing[465], and its reasons do not seem clear[466].

5.3.1.2 The main difficulty with regard to responsibility for violations of law by non-state actors is that the standard of effective control formulated by the ICJ is difficult to prove and is set very high. As a result, the ICJ case law limits international responsibility for the use of force and, on the other hand, it questions some forms of reaction to its use[467].

In the case of Bosnia and Herzegovina, the perpetrators of the Srebrenica genocide were Bosnian Serb troops, whose crime was a deliberate and intentional act. In the case of effective control, the FRY could be held responsible only for the specific crime in Srebrenica. If we accept, following the ICJ's point of view, that this was not the case, then the question arises as to what extent the FRY's international legal responsibility could come into play and on what basis?

In finding the FRY responsible for the lack of due diligence, the ICJ recognized a certain degree of influence of that state on the Bosnian Serb power structure. Assuming the absence of such control, it is difficult to imagine that the FRY could be held responsible for the lack of due diligence in preventive action. Interestingly, the ICJ did not address the lack of due diligence on the part of the UN, which was aware of the threat, had its troops on the ground and had some possibilities of influence

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all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem" (§ 163).

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law - Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005: "15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law." See also Ch. Tomuschat, Reparation *in Cases of Genocide,* "Journal of International Criminal Justice", 2007, Vol. 5/4, pp. 905-912.

[464] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "The Respondent did have significant means of influencing the Bosnian Serb military and political authorities (…) but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought" (§ 462).

[465] M. Milanović, *State Responsibility for Genocide: A Follow-Up,* EJIL, 2007, Vol. 18/4, pp. 688–692.

[466] See D. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals,* Princeton 2012; F. Hartmann, *Paix et châtiment. Les guerres secrètes de la politique et de la justice internationale,* Paris 2007; C. Del Ponte, *La Caccia: Io e i criminali di guerra,* Milan 2008 (The Hunt: Me and War Criminals); MA Newton, MP *Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein,* New York 2008.

[467] C. Kreß, *The International Court of Justice and the 'Principle of Non-Use of Force',* in: *The Oxford Handbook of the Use of Force in International Law* (ed. M. Weller), Oxford 2015, pp. 561-604.

(Srebrenica was declared a protected zone by the UN, and after its capture by the Bosnian Serbs, the civilian population was handed over to their troops).

In the light of Article 1 of the 1948 Convention and the decisions of the ICJ and the Security Council, the FRY had a legal obligation to exercise due diligence in the prevention of the crimes committed by the Bosnian Serbs. The special envoy of the Commission on Human Rights warned of the crimes committed by the Bosnian Serbs.[468] There were also other, dangerous elements, such as the national hatred intensified by the conflict, the criminal past of some members of the units, and the many known war crimes committed since the beginning of the conflict. According to the ICJ, the FRY must therefore have been aware of the serious risk that the Serb units in Bosnia could commit genocide in Srebrenica[469]. Information about the situation in Srebrenica also reached Belgrade through UN and NATO officials, and the genocide in Srebrenica was a large-scale action and by no means spontaneous – it lasted several days and was reported in the press during that time.

The Federal Republic of Yugoslavia could have taken preventive action without exposing itself, for example, to an armed response. Having knowledge of previous crimes, it did not officially condemn them, so it had to anticipate and accept the next ones. There is no known evidence that the FRY took significant countermeasures, despite having influence over the Bosnian Serbs and the appropriate means.

In this case, however, there is another aspect that must be taken into account. Namely, the FRY not only did not take preventive measures that would have been directed against the actions of the Bosnian Serbs, but it also supported them comprehensively (politically, organizationally, militarily, financially and in terms of personnel). The Bosnian Serbs did not hide in the forest, occasionally making guerrilla raids. It was a well-armed and openly operating army that would not have existed without the FRY's help, especially the organization, coordination and planning of its activities (including weapons deliveries) with the FRY. Thanks to this support, it was able to wage a real war for several years and, last but not least, commit numerous crimes. The ICTY's view that the differences between the Bosnian Serb units and the FRY army were only apparent and served to mask Belgrade's policy seems accurate[470].

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[468] T. Mazowiecki went down in history because as only tall UN official filed your office in protest against inaction this one organization. See *Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Periodic Reports of Tadeusz Mazowiecki)* – http://www.unhchr.ch/huridocda/huridoca.nsf/FramePage/formerYugoslavia%20En?OpenDocument&Start=2.17&ExpandView

[469] ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007: "[T]he Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave" (§ 436).

[470] ICTY. *Prosecutor v. Tadić* (No. IT-94-1-A), Appeals Chamber, Judgment of 15 July 1999: "151. (…) The creation of the VRS by the FRY/VJ, therefore, did not indicate an intention by Belgrade to relinquish the control held by the FRY/VJ over the Bosnian Serb army. To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY's own and military political objectives, and the evidence demonstrates that these

Thus, the FRY's responsibility for the acts of the Bosnian Serbs resulted not only from the lack of diligence in its own preventive actions, but also from the unquestionable active facilitation and enabling of the crime. This raised the issue of its responsibility for participation in genocide (taking into account the various possible variants of this concept in the 1948 Convention)[471]. The possibility of complicity (conspiracy), consisting of an agreement between the FRY and the Bosnian Serb command regarding planning, organizing and directing the crime, cannot be ruled out, but it is difficult to prove. Similar evidentiary problems apply to incitement.

Thus the FRY can be held liable for complicity, which – importantly – does not require the control of the complicity over the perpetrator (the FRY over the Bosnian Serb units). Complicity can be of a material nature (for example, providing the means of the crime) or non-material (for example, political support, general advice, providing information). It is an intentional act with direct or eventual intent. In complicity, direct participation in the commission of the crime or issuing orders or directing the crime is not necessary[472].

objectives were implemented by military and political operations that were controlled by Belgrade and the JNA/VJ. There is no evidence to suggest that these objectives changed on 19 May 1992. (…) 162. The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the *Republika Srpska* were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an *international* armed conflict"; M. Milanović, *State Responsibility for Genocide,* EJIL, 2006, Vol. 17/3, p. 599; "My view is that complete control probably existed initially, almost certainly in 1992, but that it lessened over time, and that by 1995 Serbia did not have the kind of influence over the RS as it had before. This is, however, completely open to debate" (p. 600).

[471] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948): "Article 2. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Article 3. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide".

Statute of the International Criminal Tribunal for the Former Yugoslavia (1993): "Article 4 (3). The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide. (...) Article 7 (1). A person who planned, instigated, ordered, committed or otherwise aided and abetted [*aidé et encouragé*] in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

[472] International Criminal Tribunal for Rwanda (ICTR). *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (No. ICTR-96-3-T), Trial Chamber I, Judgment of 6 December 1999: "43. [I]t is not necessary that the person aiding and abetting another to commit an offense be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the offense. The Chamber holds that aiding and abetting include all acts of assistance in either physical form or in the form of moral support; nevertheless, it emphasizes that any act of participation must contribute substantially to the commission of the crime. The aider and abettor assist or facilitate another in the execution of a substantive offense."

The organizers and perpetrators of the Srebrenica genocide acted deliberately and consciously, fulfilling the premise of special intent (*dolus specialis*), characteristic of the definition of this crime. It is known that perpetrators usually eliminate evidence of planning and orders to commit such crimes, but the existence of a plan is not a fundamental element of the definition of genocide, although this element is included as part of the perpetrator's intent[473].

[473] W.A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes,* "Genocide Studies and Prevention", Vol. 2, No. 2, August 2007, p. 110: "But can a state have a 'mental element'? (…) In practice, what we look for is not a 'mental element' but, rather, a 'plan or policy'. (…) [I]n reality, the court was looking for evidence of a plan or policy. (...) [T]he Appeals Chamber of the ICTY has said that practice 'overwhelmingly supports the contention that no such requirement exists under customary international law'. One justification for its position is the earlier conclusion that a plan or policy is not required to establish the crime of genocide"; C. Kreß, *The Crime of Genocide and Contextual Elements. A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case,* "Journal of International Criminal Justice", 2009, Vol. 7 (2), pp. 297–306 ("The contextual elements should not, however, be seen as an addition to the crime's *actus reus* but as an objective point of reference for the determination of a realistic genocidal intent");

ICTY. *Prosecutor v. Dragoljub Kunarač, Radomir Kovač, and Zoran Vuković* (No. IT-96-23&IT-96-23/1-A), Appeals Chamber, Judgment of 12 June 2002: "98. [N]either the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. (…) Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime"; ICTY. *Prosecutor v. Goran Jelisić* (No. IT-95-10-A), Appeals Chamber, Judgment of July 5, 2001: "48. [T]he existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence "of a plan or policy may facilitate proof of the crime."

ICTR. *Siméon Nchamihigo v. the Prosecutor* (No. ICTR-2001-63-A), Appeals Chamber, Judgment of 18 March 2010: "363. The Appeals Chamber recalls that proof of the existence of a 'high level genocidal plan' is not required in order to convict an accused of genocide or for the mode of liability of instigation to commit genocide"; ICTR. *Prosecutor v. Clément Kayishema and Obed Ruzindana (*No. ICTR-95-1-T), Trial Chamber, Decision of 21 May 1999 : " 94. It is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organization."

Did the FRY – as an accomplice – have knowledge of the intention to commit genocide by the Bosnian Serbs?[474] In light of the facts presented before the ICJ, this intention was not a secret to the FRY authorities. However, when assessing the evidence, the Court did not decide to interpret this intention indirectly, i.e. from the circumstances of the violation of the law, although there are examples in this respect from its case law[475] and judgments of international criminal courts.

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[474] *ICC Statute* (1998): "Article 30.2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and ' knowingly ' shall be constructed accordingly."

[475] CIJ. *Affaire du détroit de Corfou (fond),* arrêt du 9 avril 1949, CIJ, Recueil 1949: « Il est vrai (…) qu'un Etat, sur le territoire duquel s'est produit un acte contraire au droit international, peut être invité à s'en expliquer. (…) [I]l ne peut se dérober à cette invitation en se bornant à répondre qu'il ignore les circonstances de cet acte ou ses auteurs. (…) Mais on ne saurait conclure du seul contrôle exercé par un Etat sur son territoire terrestre ou sur ses eaux territoriales que cet Etat a nécessairement connu ou dû connaître tout fait illicite international qui y a été perpétré non plus qu'il a nécessairement connu ou dû connaître ses auteurs. En soi, (…) ce fait ne justifie ni responsabilité *prima facie* ni déplacement dans le fardeau de la preuve. En revanche, le contrôle territorial exclusif exercé par l'Etat dans les limites de ses frontières n'est pas sans influence sur le choix des modes de preuve propres à démontrer cette connaissance. Du fait de ce contrôle exclusif, l'Etat victime d'une violation du droit international se trouve souvent dans l'impossibilité de faire la preuve directe des faits d'où découlerait la responsabilité. Il doit lui être permis de recourir plus largement aux présomptions de fait, aux indices ou preuves circonstancielles (*circumstantial evidence).* Ces moyens de preuve indirecte sont admis dans tous les systèmes de droit et leur usage est sanctionné par la jurisprudence internationale. Il y a donc lieu de rechercher s'il est établi par des moyens de preuve indirecte que l'Albanie a eu connaissance d'un mouillage de mines dans ses eaux territoriales indépendamment de tout connivence de sa part dans cette opération. La preuve pourra résulter de présomptions de fait à condition que celles-ci ne laissent place à aucun doute raisonnable » (p. 18). « De l'ensemble des faits et constatations relevés ci-dessus, la Cour tire la conclusion que le mouillage du champ de mines (…) n'a pas pu échapper à la connaissance du Gouvernement albanais » (p. 22).

The ICJ took a very[476] rigorous position on the issue of evidence, in contrast, for example, to the case oil platforms[477] or Congo v. Uganda[478]. The ICJ therefore applies different standards of proof, not always convincing and justified[479].

In light of the definition of genocide, it was important to determine whether an accessory, who must be aware of the criminal intent of the principal perpetrator and

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[476] H. Vest, *A Structure-Based Concept of Genocidal Intent,* "Journal of International Criminal Justice", 2007, Vol. 5 (4), pp. 781–797 ("[I]n the absence of a confession, genocidal intent must be proven by external and, therefore, indirect or circumstantial evidence. The thesis introduced here is that with regard to circumstantial evidence, there is *no difference* as a matter of principle between a purpose-based and a knowledge-based reading of the intent clause").

ICC. *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir") (*No. ICC-02/05-01/09 OA). Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 6 July 2009: "26. (…) At the arrest warrant/summons stage, the Pre-Trial Chamber need only be 'satisfied that there are reasonable grounds to believe'; at the confirmation of charges, the standard is 'substantial grounds to believe'; and to convict an accused, the standard is 'beyond a reasonable doubt'. (…) 40. (…) An inference is simply a factual finding which is based on circumstantial or indirect evidence, which has the same intrinsic value as direct evidence, is assessed in the proceedings alone and to the same standard as any other manner evidence. Courts simply assess the circumstantial evidence and determine whether it is sufficient to infer the fact to the standard of proof required" [omitted widely quoted footnotes to case law, JK].

ICTY. *Prosecutor v. Radislav Krstić* (No. IT-98-33-A), Appeals Chamber, Judgment of April 19, 2004: "34. (…) Where direct evidence of genocidal intent is absent, the intent may still be inferred from the actual circumstances of the crime. The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified. If the crime committed satisfies the other requirements of genocide, and if the evidence supports the inference that the crime was motivated by the intent to destroy, in whole or in part, a protected group, a finding that genocide has occurred may be entered." See also ICTY. *Prosecutor v. Goran Jelisić* (No. IT-95-10-A), Appeals Chamber, Judgment of July 5, 2001, § 47.

ICTR. *Simon Bikindi v. the Prosecutor* (No. ICTR-01-72-A), Appeals Chamber, Judgment of 18 March 2010: "136. (…) With regard to the *mens rea,* the Trial Chamber first noted that in the absence of direct evidence, genocidal intent may be inferred from the relevant facts and circumstances of the case"; ICTR. *Prosecutor v. Jean-Paul Akayesu (*No. ICTR-96-4-T), Trial Chamber, Decision of 2 September 1998: "523. (…) [I]n the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. see also ICTR. *Siméon Nchamihigo v. the Prosecutor* (No. ICTR-2001-63-A), Appeals Chamber, Judgment of 18 March 2010, § 136.

[477] See fn. 430.

[478] ICJ. *Congo v. Uganda,* Judgment of 19 December 2005: "205. The Court will take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources. In order to rule on the DRC's claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged. (…) 207. The Court therefore finds the coincidence of reports from credible sources sufficient to convince it that massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of the DRC."

[479] AC Asuncion, *Pulling the Stops on Genocide: The State or the Individual?,* EJIL, 2010, Vol. 20/4.

additionally, share his special intent? This is not necessary, as confirmed by the opinions of some judges of the Tribunal[480], the doctrine[481] and some judgments in cases of criminal responsibility of individuals[482].

In the criminal trial of one of the participants in the Srebrenica crime, the ICTY found him responsible for genocide, finding aiding and abetting in the form of consciously agreeing to the crime, without accepting the intention of the main perpetrator. The Tribunal considered that in order to bear responsibility for aiding and abetting, it is sufficient to be aware of the possibility of committing

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480 ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007 – Declaration of Judge Keith: "5. In many national legal systems aiders and abettors need only be aware that they are aiding the principal in the commission of its offense by their contribution. (…) (…) 7. In any event, (…) the actions had to be 'deliberate' in the sense of knowing of the perpetrator's intent; the intent did not have to be shared. (…) 16. Accordingly, I conclude that the Respondent mustache complicity in the genocide committed at Srebrenica in July 1995 in breach of Article III *(e)* of the Genocide Convention"; Déclaration de M. le juge Bennoun: « Je considère que tous les éléments étaient réunis pour que la Cour puisse conclure à la responsabilité de la RFY pour complicité avec la Republika Srpska et son armée dans le génocide commis à Srebrenica. (…) A mon avis, le *mens rea* exigé du complice n'est pas le même que celui qui incombe à l'auteur principal, soit l'intention spécifique *(dolus specialis)* de commettre le génocide. (…) Il est difficile de comprendre que la Cour ait évité de se prononcer sur la définition de la complicité, laissant ainsi en suspens la question de savoir si le complice doit partager lui-même l'intention spécifique *(dolus specialis)* avec l'auteur principal du génocide (arrêt, paragraphe 421). Pourtant, la Cour se devait d'écarter une telle condition, avancée par le défendeur, parce qu'elle va à l'encontre de la définition généralement admise de la complicité. (…) Il est rare en effet qu'un Etat annonce sans détour son intention de détruire partiellement ou totalement un groupe ethnique, culturel ou religieux. (…) C'est donc au travers du comportement de ceux qui engagent l'Etat et de leur mise en jugement qu'on peut revotationner à la responsabilité de l'Etat lui-même; à moins, bien entendu, que l'on se trouve dans l'hypothèse d'un pays vaincu, livré à ses occupants, dont les structures, anéanties, dévoilent ainsi tous les secrets de leurs archives à la justice internationale ».

481 H. Vest, *Business Leaders and the Modes of Individual Criminal Responsibility under International Law,* "Journal of International Criminal Justice", 2010, Vol. 8 (3), pp. 851–872; D. Scheffer, *The World Court's Fractured Ruling on Genocide,* "Genocide Studies and Prevention", Vol. 2, No. 2, August 2007, p. 130: "A more faithful reading and understanding of complicity in genocide distinguishes between specific *intent* and specific *motive.* There is no question that the allegation of genocide must possess both the specific intent to destroy in whole or in part a protected group (sharing national, ethnic, racial, or religious character) *and* the specific motive to do so because of the group's identity *as such.* The '*as such*' requirement in Art. 2 of the UNCG [*Convention on the Prevention and Punishment of the Crime of Genocide*] has always been its most distinguishing characteristic. In other words, it is because the group is of a single identity (national, ethnic, racial, or religious) that exercises the intent to destroy *it.* (…). individual or a government being complicit in genocide. Indeed, it is the absence of motive that is the *raison d'être* for the stand-alone crime of complicity in genocide and distinguishes it from aiding and abetting genocide. This is particularly true of governmental, as distinguished from individual, conduct. (…) The Serbian government needs not to be shown to share *both the* intent and the motive of the Bosnian Serb forces. Therefore, it would have been sufficient to show (1) that the Serbian government intended to destroy the Bosnian Muslims, in whole or in part, for strategic purposes (such as the ultimate creation of a larger Serbian state) and (2) that actions supporting such intent facilitated the crimes of genocide on the ground in Bosnia, who were exercising their own intention to destroy the Bosnian Muslims, in whole or in part, *because of* their religious or ethnic identity *as such* (and that the Serbian government was aware of that particular Bosnian Serb motive).

482 See fn. 483.

a crime[483]. Without mechanically translating the issues of individual criminal responsibility into the international law responsibility of a state, the question arises:

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[483] ICTY. *Prosecutor v. Radislav Krstić* (No. IT-98-33-A), Appeals Chamber, Judgment of April 19, 2004: "134. [A]ll that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. (…) Krstić, therefore, is not guilty of genocide as a principal liability. (…) 139. The terms 'complicity' and 'accomplice' may encompass conduct broader than that of the Statute's express statement in Article 7(1) that liability for genocide under Article 4 may attach through the mode of aiding and abetting, Radislav. Krstić's responsibility is properly recognized as that of aiding and abetting genocide. 140. This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal's specific genocidal intent, or whether he must share that intent. (…) 144. (…) As the preceding factual examination has established, there was no evidence that Krstić ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances the criminal responsibility of Radislav Krstić is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator."

Sud Bosne and Hercegovine. *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar, Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan and Milovan Matić,* Appellate Verdict of 9 September 2009 (Number:

ICTY. *Prosecutor v. Anto Furundžija* (IT-95-17/1-T), Trial Chamber, Judgment of 10 December 1998: "245. [I]t is not necessary for the accomplice to share the *mens rea* of the crime, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the commission in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and crimes to the site of an execution. Moreover, the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver responsible as an aider and abettor (…) 246. committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor. (…) 247. (…) it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor." See also ICTY. Prosecutor *v. Mile Mrkšić, Veselin Šljivančanin* (IT-95-13/1-A), Appeals Chamber, Judgment of 5 May 2009, § 159; ICTY. *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (IT-02-60-A), Appeals Chamber, Judgment of 9 May 2007, § 189; ICTY. *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (No. IT-02-60-T), Trial Chamber, Judgment of 17 January 2005, § 770.

ICTR. *Prosecutor v. Michel Bagaragaza* (No. ICTR-05-86-S), Trial Chamber, Sentencing Judgment – Summary, 5 November 2009: "9. (…) Bagaragaza knew that the planners and the principal had the special genocidal intent to destroy, in whole or in part, the Tutsi ethnic group, but he did not himself share that special intent. (…) 12. (…) The Chamber notes that Bagaragaza is not charged with participating in the planning or execution of the killings or with aiding and abetting the planners and principals while sharing their genocidal intent.

ICTR. *Prosecutor v. Jean-Paul Akayesu* (No. ICTR-96-4-T), Trial Chamber, Judgment of September 2, 1998: "540. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a why is it sufficient in a criminal case to establish that the accomplice knew about the intended violation of law (risk of violation), and for a state that finances and organizes an irregular army, this requirement is increased and required to share the special intention?

In the context of the extraordinary evidentiary caution (even negligence[484]), the deficiencies of the judgment in the case of Bosnia and Herzegovina are that the ICJ did not want to use evidence of the FRY's aiding and abetting in committing genocide (including the special forces – *the Scorpions* – of the FRY Ministry of Internal Affairs)[485]. It is also interesting that in 2005, before the ICJ judgment in question was

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national, ethnic, racial or religious group, as such. (…) 544. The *mens rea,* or special intent, required for complicity in genocide is required *for* complicity in genocide, coupled with the *actus reus* of participation in the execution of such plan Crucially, then, it does not appear that the specific intent to commit the crime of genocide (…) is required for complicity. or accomplice liability. (…) 548. [C]omplicity requires a positive act, i.e., an act of commission, whereas aiding and abetting may consist in failure to act or refraining from action"; see also ICTR. *The Prosecutor v. Georges* Anderson *Nderubumwe Rutaganda* (No. ICTR-96-3-T). Trial Chamber I, Judgment of 6 December 1999, §§ 60, 397; ICTR. *Prosecutor v. Laurent Semanza (*No. ICTR-97-20-T), Trial Chamber, Judgment of 15 May 2003, § 395.

In this in the sense also Special Court for Sierra Leone. *Brima and Others* (SCSL-04-16-T), Trial Chamber II, Judgment of 20 June 2007, §§ 775–776.

484 ICJ. *Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment of 26 February 2007 – Dissenting Opinion of Vice-President Al- Khasawneh: "35. The Court was alerted by the Applicant to the existence of 'redacted' sections of documents of the Supreme Defence Council of the Respondent. Regrettably, the Court failed to act although. (…) The reasoning given by the Court in paragraph 206 of the Judgment, '[o]n this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records…', is worse than its failure to act. (…) 53. Thus, paragraph 389 of the Judgment considers two documents presented by the Applicant, in which there is reference to the 'Scorpions' as 'MUP of Serbia' and a 'unit of Ministry of Interiors of Serbia' (…) The paragraph notes that the authenticity of the documents was disputed by the Respondent presumably because 'they were copies of intercepts, but not originals'. (…) Be this as it may, the other reason advanced to undermine the importance of these documents is that they are not addressed to Belgrade, the senders being 'officials of the police forces of the Republika Srpska'. But this in itself does not deny their probative value. When an official of the Republika Srpska sends a telegram to his superior in which the Scorpions are described as 'MUP of Serbia' or 'a unit of Ministry of Interiors of Serbia', there is no reason to doubt the veracity of this statement."

M. Milanović (fn. 465): "The basic problem here is not so much Serbia's conduct, but rather the ICJ's long-entrenched general passivity in fact-finding. Upon Serbia's willingness to provide unredacted versions of the documents, Bosnia asked the Court to order Serbia to do so, pursuant to Article 49 of the Statute and Article 61 of the Rules of Court, a request that the Court denied without much explanation" (p. 677). "It is not so much that the Court refused to ask for these documents, as it is unlikely that their inclusion would have changed the result of the case. The problem is that the Court's understandable desire to avoid any confrontation which might weaken its authority actually served to undermine that authority in the long run" (p. 678).

485 ICTY. *Prosecutor of the Tribunal Against Radovan Karadžić* (No. IT-95-5/18-PT), Third Amended Indictment, 19 October 2009: "20. Radovan Karadžić participated in a joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica. (…). 23. (…) Members of this criminal enterprise (…) used to carry out these crimes were members of the VRS [*the army of the Republika Srpska*] and MUP [*Bosnian Serb Ministry of Internal Affairs*] operating in or with responsibility over territory within the Drina Corps area of responsibility and/or Trnovo municipality and a Serbian MUP [*Serbian Ministry of Internal Affairs*] unit called the Scorpions ('Srebrenica Forces')."

announced, the government of Serbia and Montenegro stated that a crime had taken place in Srebrenica, committed by an "undemocratic regime of terror and fear"[486]. The Court did not assess the legal consequences of this statement. For the ordinary person, and especially for the victims, such an attitude of the ICJ towards the FRY, which armed the Bosnian Serb army and the criminal special forces of the FRY and coordinated their open actions, undermines the prestige of the Court[487].

By finding only the lack of due diligence, the ICJ significantly reduced the FRY's international legal responsibility. This creates a kind of gap between the (difficult) attribution of responsibility to the state for the actions of non-state actors on the basis of complete dependence or full control and the not always satisfactory construction of lack of due diligence. These shortcomings result in a weakening of the state's responsibility and favour an interpretation in favour of the perpetrator. As

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M. Milanović (fn. 465), p. 675: "It is one thing to say that there is insufficient evidence to find Serbia directly involved in Srebrenica only on the basis of two inconclusive documents, though it must be noted that there was absolutely nothing preventing the Court from asking for further evidence on the matter *proprio motu.* (…) It is something else, however, when the Court actually says that even if the documents could conclusively establish that the Scorpions were *de jure* organs of Serbia, the Scorpions were in any event put at the disposal of the Republika Srpska and were acting on its behalf, thereby rendering their acts unattributable to Serbia. Indeed, the documents themselves show that the Scorpions were under the command of the Republika Srpska Ministry of Interior, but it is still questionable whether the legal rule that the Court announced was the appropriate one."

F. Hartmann, *Paix et châtiment. Les guerres secrètes de la politique et de la justice internationale*, Paris 2007; F. Hartmann, *Vital genocide documents concealed,* 21 January, 2008: The minutes of meetings of Serbia's Supreme Defence Council (SDC) "were submitted as evidence in the Milošević case before the ICTY. Judges in the Milošević case had those minutes at their disposal when they ruled on 16 June 2004 that they 'could be satisfied beyond reasonable doubt that the accused was a participant in the joint criminal enterprise (which had) the aim and intention to destroy a part of the Bosnian Muslims as a group', not only in Srebrenica but also 'in Brcko, Prijedor, Sanski Most, Bijeljina, Kljuc and Bosanski Novi'. Before submitting the SDC documents as evidence in the Milošević case, Serbia applied for protective measures pursuant to article 54 *bis* of the ICTY Rules and Procedures This rule authorized a state to seek confidentiality on documents the disclosure of which could affect the 'national security interest' of the country. After hearing the arguments presented by Serbia-Montenegro's state representatives, the Trial Chamber for the Milošević case agreed in October 2003 that part of these documents be blacked out. (…) The Appeal Chamber considered that the earlier decisions had created 'a legitimate expectation' for Serbia that later decisions involving 'similar material' would be resolved in the same manner, so that it would be 'unfair' to deny the protective measures sought by the state. (…) The most sensitive part could not be disclosed to the ICJ or to the public. Bosnia was therefore not able to produce before the ICJ the unedited version of the SDC minutes obtained by the ICTY. However, the ICJ could have sought access to the SDC documents. Curiously, the Court refused to ask Serbia to hand them over. Bosnia-Herzegovina had requested the Court to order the release of the unedited version of these documents, but this request was turned down" – http://www.bosnia.org.uk/news/news_body. cfm?newsid=2341

[486] *The Legal Significance of the Council of Ministers of Serbia and Montenegro Accepting Responsibility for the Srebrenica Massacre,* by Professor Francis A. Boyle – Attorney for the Mothers of Srebrenica and Podrinja – http://olm.blythe-systems.com/pipermail/nytr/Week-of-Mon-20050620/018969.html

[487] A.C. Asuncion, *Pulling the Stops on Genocide: The State or the Individual?*, EJIL, 2010, Vol. 20/4: "I believe the ICJ gallantly proclaims that a state can be held responsible for committing genocide, it conservatively defines the requisite elements for responsibility and confusingly imposes multi-level standards of proof."

a result, the ICJ case law, including the judgment in the case of Bosnia and Herzegovina[488], may give rise to justified criticism.

5.3.1.3. Violation of the prohibition of the use of force leads to specific consequences for both the perpetrator and the victim. Of particular importance in this respect is the legality of the response of the state harmed by foreign armed actions as an aspect of the issue of responsibility.

The definition of armed attack adopted by the ICJ limits the scope of legal reaction (self-defence), which indirectly facilitates the destabilization of other states with the help of irregular forces[489]. This is important because acting in self-defence excludes or limits the international law responsibility of the reacting state.

In considering an armed attack to be an act authorizing self-defence, it is difficult to agree with the ICJ's view that the use of force below the threshold of an attack excludes an armed response[490]. Such reasoning ignores the complex nature of many situations and leads, in fact, to impunity.

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[488] D. Scheffer (fn. 466), pp. 123–136. See also A. Cassese, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,* EJIL, 2007, Vol. 18/4, pp. 649–668; A. Cassese, *A Judicial Massacre* (February 27, 2007): "The judgment of the ICJ concerning Serbia's involvement in the massacre of Bosnian Muslims at Srebrenica in 1995 should be greeted with considerable ambivalence. (…) The court's decision is one of those judicial pronouncements that attempts to give something to everybody and leave everything as it was" – http://commentisfree.guardian.co.uk/antonio_cassese /2007/02/the_judicial_ massacre_of_srebr.html

[489] ET Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare,* Denver Journal of International Law & Policy, 2007, No. 2, Vol. 35, p. 367.

[490] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986 – Separate opinion of Judge Jennings: "[I]t seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent" (ICJ, Recueil 1986, p. 544).

ICJ. *Iran v. United States,* Judgment of 6 November 2003 – Separate opinion of Judge Simma: "12. (…) I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an 'armed attack' within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter. (…) 13. To sum up my view on the use of force/ self-defence aspects of the present case, there are two levels to be distinguished: there is, first, the level of 'armed attacks' in the substantial, massive sense of amounting to '*une agression armée*', to quote the French authentic text of Article 51. Against such armed attacks, self-defence in its not infinite, but still considerable, variety would be justified. But we may encounter also a lower level of hostile military action, not reaching the threshold of an 'armed attack' within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within a more limited range and quality of responses (the main difference being that the possibility of collective self-defence does not arise, cf. *Nicaragua)* and bound to necessity, proportionality and immediacy in time in a particularly strict way."

ICJ. *Congo v. Uganda,* Judgment of 19 December 2005 – Separate opinion of Judge Kooijmans: „30. (…) If armed attacks are carried out by irregular bands from such territory against a neighboring State, they are still armed attacks even if they cannot be attributed to

The subject of the ICJ judgment in Bosnia and Herzegovina was not Bosnian self-defence against the Federal Republic of Yugoslavia. It is characteristic, however, that the Court passed over in silence – avoiding even the form of *obiter dictum* – the issue of intervention in internal affairs or the illegality of the use of force by the FRY against Bosnia and Herzegovina, although it did so in the judgments in Nicaragua and Congo[491]. The lack of reference to the significant involvement of a state in subversive activities in another state, as mentioned in UNGA Resolution 3314 (1974) on the definition of aggression, is also striking[492].

International practice shows that self-defence is considered legal in the event of an armed attack of irregular groups. It also demonstrates the evolution of criteria for attributing responsibility to a state for the unlawful actions of third parties. It is worth noting, for example, the difference between the situation in Afghanistan, where terrorists (Al-Qaeda) benefited from the support of the Taliban regime, although they were not completely controlled by it, and the situation in Lebanon, where the Hezbollah military faction was not a *de jure* or *de facto organ* of that state. In Afghanistan, the operation was conducted against the Taliban state and irregular groups, and in Lebanon directly against these groups, but inevitably on the territory of the Lebanese state. Afghanistan's responsibility resulted from various forms of support for Al-Qaeda (without complete dependence or full control), while Lebanon was primarily responsible for toleration and lack of due preventive diligence, although in both cases the violation of the law is not directly attributed to either of these states.

The restrictive attitude of the ICJ is rooted in concerns about lowering the threshold of the legal use of armed force (the definition of an armed attack) and the threshold of state responsibility for the actions of irregular groups (effective control*).* The Court's advocacy, however, seems to be out of step with the increasingly

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the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require. (…) 31. (…) The lawfulness of the conduct of the attacked State must be put to the same test as that applied in the case of a claim of self-defence against a State: does the armed action by the irregulars amount to an armed attack and, if so, is the armed action by the attacked State in conformity with the requirements of necessity and proportionality."

In this sense, also Separate Opinion of Judge Simma to this judgment (§§ 8–15); see also P.H. Kooijmans, *The Legality of the Use of Force in the Recent Case Law of the International Court of Justice,* (in:) S. Yee, J.-Y. Morin (ed.), *Multiculturalism and International Law. Essays in Honor of Edward McWhinney,* Martinus Nijhoff Publishers 2009, p. 465: "Criticism in that time [*Nicaragua* case, JK] had to do with armed activities by irregular forces from the territory of another state, which do not amount to an armed attack in the sense of Article 51 but *are* attributable to the 'harbouring' state; the point raised by Judge Simma and me [*Congo v. Uganda* case, JK] relates to armed activities by irregular forces which by their scale and effects must be classified as an armed attack but *cannot* be attributed to the 'harbouring' state."

491 See fn. 426 and 431.

492 GA Res. 3314 (1974): "Article 3. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (…) (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 of such gravity as to amount to the acts listed above, or its substantial involvement therein"; GA Res. 2625 (XXV): "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.

complex international realities[493]. One of the significant problems is also the limited nature of the Court's jurisdiction[494]. This is clearly visible in the case of Bosnia and Herzegovina, when the Court could only adjudicate on the crime of genocide, without having the competence to adjudicate on other crimes committed during that conflict. Moreover, the Court relies rather on legally non-binding UNGA resolutions and on its own views and does not analyse the practice of states enough. Many cases also exceed the capabilities of the ICJ at the level of the evidentiary procedure[495].

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[493] See ICJ. *Congo v. Uganda,* Judgment of 19 December 2005 – Separate opinion of Judge Bruno Simma: "9. From the *Nicaragua* case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors"; K. Oellers -Frahm, *Der IGH und die „Lücke" zwischen Gewaltverbot und Selbstverteidigungsrecht – Neues im Fall "Kongo gegen Uganda"?,* "Zeitschrift für Europarechtliche Studien", 2007, No. 1, pp. 71-90; V.- J. Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?,* "Berkeley Journal of International Law", 2005, Vol. 23, No. 3, pp. 101-153; J. Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict,* "ASIL Insight" August 24, 2006; G. Travalio, J. Altenburg, *Terrorism, State Responsibility, and the Use of Military Force,* " Chicago Journal of International Law", 2003, No. 1.

[494] See some aspects of this issue – ICJ. *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda).* Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006 (especially Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma).

[495] In this in the sense JA Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice,* "International and Comparative Law Quarterly", 2009, Vol. 58. pp. 163–179; AM Weisburd, *The International Court of Justice and the Concept of State Practice,* " UNC Legal Studies Research Paper", 2008, No. 1282684 : "It is clear then that what the Court has not been doing in C[ustomary] I[nternational] L[aw] cases is basing its judgments on carefully described state practice" (p. 67); "The Court's behavior is that it seems to be moving away from what could be reasonably called a judicial role to that of a free-form policy maker" (p. 76) – http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282684; S. Halink, *All Things Considered: How the International Court of Justice Delegated Its Fact-Assessment To the United Nations in the Armed Activities Case,* New York University Journal of International Law and Politics, 2008, Vol. 40, pp. 13–52; A. Gattini, *Evidentiary Issues in the ICJ's* Genocide *Judgment,* "Journal of International Criminal Justice", 2007, Vol. 5 (4), pp. 889–904 ; A. Cassese, *The Nicaragua and Tadić Tests (*fn. 488), pp. 653/654: "It is, however, a fact that the Court in Nicaragua set out that test without explaining or clarifying the grounds on which it was based. No reference is made by the Court either to state practice or to other authorities. This is in keeping with a regrettable recent tendency of the Court not to corroborate its pronouncements on international customary rules (other than those traditional rules that are largely upheld in case law and the legal literature) with a showing, if only concise, of the relevant practice and opinio juris"; R. Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice,* "The Law and Practice of International Courts and Tribunals", 2007, Vol. 6, No. 1, pp. 119–158.

Critical comments – ICJ. *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion of July 22, 2010, Declaration of Judge Simma : "7. (…) [T]he Court could have delivered a more intellectually satisfying Opinion, and one with greater relevance as regards the international legal order as it has evolved into its present form, had it not interpreted the scope of the question so restrictively. (…) 10. [T]he Court should have considered the question from a slightly broader perspective and not limited itself merely to an exercise in mechanical jurisprudence"; ICJ. *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of 20 April 2010, Joint Dissenting Opinion of Judges Al- Khasawneh and Simma : "3. (…) [T]he Court has approached it [the case, JK] in a way that will increase doubts in the international legal

In this context, it is also worth noting the problem of so-called humanitarian intervention, i.e. armed response without the consent of the Security Council to mass violations of fundamental human rights. States have an obligation to prevent such violations of law on their territory (responsibility to protect). From this understanding of due diligence, it can be concluded that in extreme situations, they must reckon with an armed response from other countries, the legality of which can be justified, for example, by necessity. Thus, the responsibility of the state (perpetrator) will result from its own actions or omissions, while the response of the responding states will not be a violation of law and their responsibility for an act prohibited by international law will be excluded.

These issues usually do not reach international courts, but the position of the doctrine of international law and some international documents seem to confirm this line of thinking.

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community whether it, as an institution, is well-placed to tackle complex scientific questions. (…) 5. (…) The Court here has been content to hear the arguments of the Parties, ask a few token questions, and then disappear and deliberate in camera, only to emerge with terse, formalist replies. (…) In several paragraphs, the Court variously states that it 'sees no need' or 'is not in a position' to arrive at specific conclusions, that 'there is no [clear] evidence to support' certain claims, that certain facts have 'not (…) been established to the satisfaction of the Court', or that the evidence 'does not substantiate the claims'."; ICJ. *Case concerning East Timor (Portugal v. Australia),* Judgment of 30 June 1995 – Dissenting Opinion of Judge Skubiszewski.

5.3.2. Overall control

5.3.2.1. The standard of overall control is used to determine the responsibility of the state for acts committed by irregular groups. It is applied in certain cases by the European Court of Human Rights (ECtHR), but it is also known from the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[496]

A. In the *Loizidou case* (1996), the ECtHR found Turkey (as a State Party to the ECHR) responsible for a violation of the Convention by the local authorities of the Turkish Republic of Northern Cyprus. According to the Court, Turkey had jurisdiction because, as a result of its military presence, it exercised some control over that (foreign) territory through its own organs and through the (self-proclaimed) local authority, functioning only thanks to its support.

The ECtHR formulated the standard of overall (general) control. The Court did not require in this context control of the specific actions of these authorities. It therefore assumed (presumed) that the overall control over the territory and the irregular structure resulted in influence on the local authority and, consequently, in Turkey's responsibility for its acts[497].

B. In the *Ilaşcu case* (2004), the ECtHR considered the issue of the responsibility of Moldova and Russia for certain events (unlawful arrest and imprisonment) in the

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[496] See fn. 446 and 447.

[497] European Court of Human Rights (ECHR). *Loizidou v. Turkey* (Preliminary Objections) (No. 15318/89), Judgment of 23 March 1995: "62. Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory [*exerce en pratique le contrôle sur une zone située en dehors de son territoire national*]. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."

ECHR. *Loizidou v. Turkey* (Merits) (No. 15318/89), Judgment of 18 December 1996: "56. It is not necessary to determine whether (...) Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in Northern Cyprus that her army exercises effective overall control [*contrôle global*] over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC'. Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention (Article 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus."

ECHR. *Cyprus v. Turkey* (No. 25781/94), Judgment of 10 May 2001: "77. (…) Having overall effective control [*contrôle global*] over Northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in Northern Cyprus but must also be engaged by the virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey."

territory of Moldova in the rebellious province of Transnistria. In relation to Moldova, the ECtHR found the limited nature of its jurisdiction and presented the concept of the obligation to take positive action[498]. As for Russia, the Court found that, as a result of its military presence, it exercises, through its own organs, overall control over the territory and the local administration subordinate to it in Transnistria.

In this respect, it considered that Russia is responsible for the acts of the self-proclaimed authorities of that region and that it is not necessary for this purpose to provide detailed direction for the specific actions of those authorities. The ECtHR emphasised that Transnistria is under the effective authority, or at least the decisive influence, of Russia and that it is only with its support that the local (self-proclaimed) authorities can function[499].

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[498] ECHR. *Ilaşcu and Others v. Moldova and Russia* (No. 48787/99), Judgment of 8 July 2004: "333. The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State. Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organizations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.

Partly Dissenting Opinion of Judge Ress: "1. The Court has rightly stated that there is still *jurisdiction* under these circumstances even if a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separate regime is set up. The sovereignty of Moldova over the whole territory was not and is not disputed by the international community, not even by the Russian Federation. (…) I would not conclude as the Court did in paragraph 333 that 'the actual situation reduces the scope of the jurisdiction'."

[499] ECHR. *Ilaşcu and Others v. Moldova and Russia* (No. 48787/99), Judgment of 8 July 2004: "314. (…) [A] State's responsibility may be engaged where, as a consequence of military action – whether lawful or illegal – it exercises in practice effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration. 315. It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned. to acts of the local administration which survives there by virtue of its military and other support. (…) 318. In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention. That is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognized by the international community. (…) 392. "All of the above proves that the 'MRT', set up in 1991–92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by the virtue of the military, economic, financial and political support given to it by the Russian Federation." See also ECHR. *Assanidze v. Georgia* (No. 71503/01), Judgment of 8 April 2004 (§ 138).

5.3.2.2. According to the ICJ, attributing responsibility to the state for the actions of irregular groups is possible only in the case of the total dependence of the perpetrators on the state or its full control over them, which does not necessarily have to mean the state's control over the area of their activity. If it is not possible to establish such control over the perpetrator, then the state's responsibility for the lack of due diligence in preventing violations of the law by a non-state actor comes into play, i.e. responsibility for its own omission, and not for the perpetrator's act. In fact, the ICJ tacitly accepts the concept of a kind of general control, but only in relation to lack of diligence, because the state's responsibility for its own lack of diligence is possible only if there is a certain degree of influence on the perpetrator.

From the ICJ's perspective, attributing responsibility to a state for the actions of irregular groups is only possible in the case of total dependence of the perpetrators on the state or its full control over them, which does not necessarily mean the state's control over the area of their operations.

According to some opinions,[500] the overall control should be related to the establishment of a certain degree of actual authority of the state over a foreign territory, and not to perpetrators of violations of the law. Thus, the establishment of overall control should not mean automatic attribution of responsibility to the state for violations of the law in that territory. If human rights are violated by the *de jure organs* of a state, we attribute this extraterritorial act and the related responsibility to it, because the state does not respect the law (negative obligation – not to violate, i.e. *to respect).* However, if the violation of the law is committed by an irregular local structure supported by this state, then it should not be responsible for this violation, but for the lack of (its own) due diligence in ensuring that this structure complies with the law (violation of the positive obligation to protect/safety – to secure, to ensure)[501].

This view is not entirely convincing[502]. First, in the context of state responsibility for the acts of non-state actors, the territorial aspect is not abstract, and the obvious goal is always control over the potential perpetrator and his actions. We are therefore dealing with a significant influence of the state on the irregular structure of local authority. Note, however, that effective control and overall control do not in every case constitute occupation of foreign territory.

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[500] M. Milanović, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, "Human Rights Law Review", 2008, Vol. 8, p. 411–448 (point 5 C of this study).

[501] Inter-American Court of Human Rights. *Velásquez Rodríguez Case,* Judgment of July 29, 1988, (Ser. C) No. 4 (1988): "In principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because "it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention" (§ 172).

[502] A. Cassese, *The* Nicaragua *and* Tadić *Tests (*fn*.* 488), pp. 649–668.

The actual influence on perpetrators is varied. While the influence of the FRY in Bosnia and Herzegovina was high (similarly in the case of Turkey in the Republic of Northern Cyprus and Russia in Transnistria), it seems to be limited in the case of Iran and Syria over Hamas and Hezbollah or Congo over irregular groups. In some cases, control of country's troops over foreign territory is not a necessary premise for applying the standard of general control (*Tadić*, *Lubanga).*

Secondly, one should not encourage violations of the law by self-proclaimed irregular groups/structures by weakening the responsibility of the states supporting them[503]. In this light, attributing responsibility to the state only for lack of due diligence sometimes seems unsatisfactory. Why facilitate violations of rights by unrecognized by other states Bosnian Serb structures, the authorities of Transnistria or the Turkish Republic of Northern Cyprus? Similar questions may apply to the situation in South Ossetia and Abkhazia[504].

However, it is necessary to take into account the differences between the actual lack of diligence of the state as a result of failure to take preventive measures and the alleged lack of diligence in the conditions of massive and diverse support provided to the perpetrator, which may pass into various forms of participation in the violation of the law. Such participation (for example aiding and abetting) may therefore be an additional form justifying responsibility.

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[503] ICJ. *Georgia v. Russian Federation,* Public sitting held on Monday 8 September 2008, at 3 pm, Verbatim Record, CR 2008/23, Mr. Zimmermann (Agent for Russia): "31. Since Articles 2 and 5 of CERD do not enshrine a duty to prevent, such a duty – or specific, positive measures deduced from it – cannot form the subject of the main proceedings. (…) 42. [T]he measure requested by Georgia contemplates that the Respondent should be held responsible for acts of *all* groups and *all* individuals that commit any of the acts referred to in subparagraph *(b)* of the amended Request. As a matter of fact, if Russia were really ordered 'to take all necessary measures', it might even have to significantly increase its military presence in the area and thereby *establish* effective control. (…) 45. (…) As in many other armed conflicts, these hostilities have unfortunately led to the displacement of a large number of persons from all different ethnicities However, ordering the return of persons, as requested by the Applicant in subparagraphs *(d)* and *(e)* referring to their 'expulsion', once again would have to take it for. granted that the persons in question have not been fleeing an armed conflict, but that they indeed have been expelled by reason of their ethnicity. Besides, the Russian Federation would have to eventually interfere with the sovereign dealings of South Ossetian and Abkhazian authorities which are both, legally and *de facto,* simply beyond its control."

[504] Council of Europe. Parliamentary Assembly – Resolution 1647 (2009), 28 January 2009: "14. The Assembly considers it unacceptable that persons residing in Abkhazia and South Ossetia should not be effectively covered by the human rights protection mechanisms granted to them as citizens of a Council of Europe member state under the European Convention on Human Rights, as well as other relevant Council of Europe conventions, as a result of the consequences of the war between Russia and Georgia. Such a human rights protection black hole should not be allowed to exist within the Council of Europe area"; Human Rights Committee, Ninety-seventh session, 12–30 October 2009. *Concluding observations of the UN Human Rights Committee on Russia's report on International covenant on civil and political rights* : "13. The Committee remains concerned about the prevalence of large-scale, indiscriminate abuses and killings of civilians in South Ossetia during the military operations by Russian forces in August 2008. The Committee recalls that the territory of South Ossetia was under the *de facto* control of "an organized military operation of the State party, which therefore bears responsibility for the actions of such armed groups."

It seems reasonable in principle to apply differentiated standards when attributing responsibility to the state. Do we only have a choice between attributing to the state the actions of non-state actors on the basis of complete dependence or full control, or limited state responsibility for lack of due diligence? An attempt to get out of this dilemma is the standard of overall control, which seems reasonable, although not always easy to apply.

The standard of overall control makes it easier to attribute responsibility to the state for the acts of irregular groups/structures and may encourage caution on the part of the state engaging in support of these groups. Importantly, it clearly shifts the burden of proof. Avoiding responsibility on the basis of the overall control would in principle be possible if the state proved that it had made every possible effort to prevent the operations of irregular groups.

However, caution should be exercised when applying the overall control criterion, as it is easy to fall into attributing responsibility to the state for less advanced forms of assistance to non-state actors. Nor should this criterion lead to a risky automatism, which could be used especially against weaker states[505]. It should be noted that the ECtHR applies the standard of overall control only when both states concerned by the dispute are parties to the ECHR.

In conclusion, the overall control standard has merit and does not seem so unreasonable or revolutionary that it cannot be justified as well as the other options.

[505] See V.-J. Proulx (fn. 493) and fn. 475.

5.4. Conflict of norms, *vacuum* and *droitdel'hommisme*

5.4.1. The European Court of Human Rights (ECtHR) goes beyond the territorially regional scope of application of the Convention (*espace juridique).* The intention of the states negotiating the European Convention on Human Rights and Fundamental Freedoms (ECHR) was not its extraterritorial application[506], which, however, became a fact as a result of the evolution and the judgments of international courts. Contrary to the critics of the *Banković* judgment*,* it should be assumed that the regional application of the ECHR is the right approach, with the Court specifying exceptions to this rule[507]. Therefore, the important question is whether and when, in the conditions of an external armed conflict, it would be permissible to apply the norms of the Convention to a limited extent or not to apply them, as well as how to resolve the conflict of norms between the ECHR and other sources of law.

The Court applies the presumption that a state occupying a foreign territory has jurisdiction there and thus may be responsible for a violation of the Convention. Otherwise, according to the ECHR, a legal *vacuum* would be created, *i.e.* a lack of protection provided for in the Convention. This *vacuum* concerns extraterritorial activity of state organs and may be the result of a permanent and actual impossibility of applying the ECHR or of another justified legal reasons.

However, the construction of *a vacuum* was formulated by the ECHR in the context concerning the impossibility of the actual exercise of power on part of the territory of one state party by a self-proclaimed and internationally unrecognized local structure of authority supported by another state party, to which responsibility

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[506] ECHR. *Banković v. Belgium* (No. 52207/99), decision of 12 December 2001: "63. Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words 'all persons residing within their territories' with a reference to persons 'within their jurisdiction' with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States."

[507] ECHR. *Banković v. Belgium and Others* (No. 52207/99), decision of 12 December 2001: "80. The Convention is a multi-lateral treaty operating (…) in an essentially regional context and notably in the legal space of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or *vacuum* in human rights' protection has so far been relied on by the Court in favor of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."

United Kingdom House of Lords. *R (Al- Skeini and others) v Secretary of State for Defence,* Judgment of 13 June 2007 (Lord Rodger of Earlsferry): "78. The essentially regional nature of the Convention is relevant to the way that the court operates. (…) The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. (…) The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observation of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd.

cannot be attributed under the Convention[508]. Consequently, the Court attributed responsibility for a violation of the ECHR to the state supporting the irregular structure (overall control).

In relation to state actions, the problem is not that a state must comply with the ECHR on its territory but might not comply with it in its extraterritorial actions. It is not only about the area of application, but about the type of specific situation. In one case, a state party to the ECHR does not exercise its authority and cannot guarantee the rights provided for in the Convention because another authority (state and/or self-proclaimed) operates on part of its territory, for example *Loizidou* and *Ilaşcu.* In the second case, we are dealing with the problem of whether a state whose troops are stationed in a foreign territory in connection with an armed conflict can comply with the ECHR in its entirety (for example *Al- Jedda).* The latter option does not have to be tantamount to the unpunished violation by state parties in their external actions of all ECHR norms. In such a situation, the remaining ECHR norms, as well as some other norms (domestic law, international law), may apply. So does a *vacuum* arise in every case and what kind?

It is difficult, for example, to see a violation of the ECHR if the occupying authorities prohibit assembly or restrict freedom of expression. Furthermore, the ECHR permits deprivation of life if it results from the use of force that is absolutely necessary in defence against unlawful violence, in order to prevent the escape of a person lawfully detained or in order to quell a riot or insurrection (Article 2, paragraph 2). Humanitarian law permits the deprivation of life of a combatant, and sometimes also of a civilian, who actively participates in an armed conflict by causing harm to the enemy's armed forces or by attacking their civilian population[509].

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[508] ECHR. *Banković v. Belgium and Others* (No. 52207/99), decision of 12 December 2001: "80. (…) It is true that, in its above-cited *Cyprus v. Turkey* judgment (at § 78), the Court was conscious of the need to avoid 'a regrettable *vacuum* in the system of human-rights protection' in Northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation "to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's 'effective control' of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfill the obligations it had undertaken under the Convention."

[509] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: "Art 51.3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities"; International Committee of the Red Cross. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* 2009: "V. In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus (…) IX. In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct

Internment is permitted under humanitarian law and is not excluded in the territory of a State Party to the ECHR after the application of its Article 15.

In practice, we are dealing with competition in the application of norms of different systems. The question therefore arises as to the principles on which to resolve a conflict of norms, consisting in the fact that the implementation of one norm contradicts the content of the other[510]. This can be avoided by using a friendly interpretation of different norms, especially when gaps in one system (for example, the definition of concepts) can be filled by the other; in this sense, we can speak of complementarity or *lex specialis* in the context of specific norms. Another option is the application of Article 103 of the UN Charter. As for the derogation in the application of Article 15 of the ECHR (similarly Article 4 of the Covenant on Civil and Political Rights), it does not refer to an external armed conflict. Sometimes, however, the conflict of norms cannot be resolved. Then a situation will arise when a state will be faced with the choice of either violating the ECHR or violating another treaty. An international court must nevertheless issue a judgment, and this judgment should be based primarily on certain values and goals.

The ECtHR case law does not seem consistent in this respect. In the *Al- Saadoon case,* the Court applied ECHR norms contrary to the British-Iraqi agreement (which the United Kingdom did not recognise). However, it should be noted that in the *Al-Adsani judgment,* the customary law norm (the jurisdictional immunity of the state) was given priority over Article 6 of the Convention (the right to a fair trial)[511]. As for the legally binding resolutions of the Security Council (in the context of Article 103 of the UN Charter), in the *Al- Jedda case,* the Court did not take into account the significance of Resolution 1546, while it ruled the opposite in the *Berić case* (to some extent also in the *Behrami/ Saramati case).* In the *Medvedyev case,* the Court did not find norms that could take precedence over the ECHR and issued a judgment that is excessively formalistic.

In this context, the judgments in the *Al- Jedda* and *Medvedyev* cases do not seem to be relevant. The *Al- Saadoon case* is more complicated due to the lack of sufficient

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attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."

[510] On this topic M. Milanović, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, "Journal of Conflict & Security Law", 2009, Vol. 14/3, p. 459-483; KE Boon, *Regime Conflicts and the UN Security Council: Applying the Law of Responsibility,* "The George Washington International Law Review", 2010, Vol. 42, pp. 101-147.

[511] B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law,* EJIL, 2006, Vol. 17/3, p. 496 : "As Andreas Paulus has convincingly argued, however, 'the indeterminacy of the content and the precise legal effect of *jus cogens* has largely condemned it to practical irrelevance'. [A. Paulus, Jus cogens *Between Hegemony and Fragmentation: An Attempt at a Re-appraisal,* „Nordic Journal of International Law", 2005, Vol. 74, p. 330] The *Al- Adsani* judgment by the European Court of Human Rights (…) is a case in point: while the *jus cogens* character of the prohibition against torture is, in principle, uncontroversial, it is not at all clear under which conditions a state is barred from pleading immunity; and under which conditions domestic courts must consequently entertain civil claims by torture victims to meet states' obligations under Article 6 of the European Convention. Hence, what remains open is precisely the question of how a *jus cogens* rule affects the international legal order in general."

guarantees from Iraq (compared to, for example, the *Maya Evans* case*).* The judgment in the *Behrami/ Saramati* case also raises legitimate doubts.

While accepting in principle the application of treaties protecting human rights in armed conflicts, it should be remembered that they cannot replace all other norms (including humanitarian law), because they were not designed for such a situation. However, it is difficult to assume that limiting the application of the ECHR leads to a complete legal vacuum.

The objectives and scope of both systems are not identical. Humanitarian law guarantees minimum protection for combatants and civilians and is an expression of a compromise between military necessity and humanitarian considerations, accepting to some extent negative side effects for civilians and their rights. Its norms are applicable in every armed conflict, although it is known that it is difficult to define the international and non-international variant of the conflict. Given the limited scope of application of humanitarian law in non-international conflicts, human rights can play an important role here.

The protection of human rights has a slightly different, more maximalist nature and scope. Treaties in this area were programmed for peacetime and were concluded later than the basic agreements on humanitarian law. Pursuing violations of humanitarian law is relatively more difficult in international law, while some treaties protecting human rights allow – importantly and new – the possibility of an individual complaint against a state before international judicial or political bodies. Treaties on human rights also allow for the derogation of some norms in certain circumstances. It should be added that under the influence of new threats, weapons and methods of combat, both systems encounter adaptation difficulties.

It is sometimes believed that these are complementary systems, attributing to humanitarian law the character of *lex specialis*[512]. However, this qualification seems

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[512] ICJ. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination,* Order, 15 October 2008: "112. The acts alleged by Georgia appear to be capable of contravening rights, provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law."

ICJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004: "106. The Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis,* international humanitarian law.

ICJ. *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996: "25. (…) The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

The ICJ omitted a reference to *the lex specialis* in the ICJ judgment. *Congo v. Uganda,* Judgment of 19 December 2005, § 216. There is also no reference to this in Human Rights Committee. International Covenant on Civil and Political Rights. *General Comment No. 31 on* to be too general and is rightly criticized[513]. There is no doubt, as confirmed by international practice, that both of these systems are applicable during armed conflict. Therefore, it should not be assumed that humanitarian law as a whole will constitute *lex specialis* in relation to human rights, but the reverse thesis is also untrue.

These systems are not in a hierarchical relationship to each other, and treaties in both areas do not contain clauses resolving conflicts between their norms. Neither of these systems affects the validity of the other. Thus, it is difficult to assume that one will always gain an advantage over the other. It is rather possible to assume that these are systems that cooperate and need each other, although their goals and axiology are not identical. In a situation of conflict of norms, which is nothing extraordinary, not only a good analysis and interpretation of the law is needed, but also a pragmatic approach, sometimes based simply on common sense.

5.4.2. The varied protection of human rights is a fact in many regions of the world, which results from the actions of dictatorial regimes and/or from the shortcomings of international legal regulations. It is also known that the concept of *responsibility to protect* is not welcome outside the circle of Western culture. Political divisions lead to a situation in which the world watched the massacre of millions of people during the so-called Cultural Revolution in communist China, for many years of murderous conflict in southern Sudan or in Congo, or most recently in Syria. In recent years in the domestic politics of Western countries, the conflict between freedom and security requirements has become more visible - not without connection with the external situation. In this way, some freedoms are being restricted. Similar dilemmas appear in the foreign activities of these countries.

When extending the application of human rights treaties to an external armed conflict, one must be aware of its specific conditions (e.g. higher security considerations, military necessity, collateral damages). Without questioning the extraterritorial application of human rights, one should consider whether and what limits their application should have in conditions of armed conflict, because enforcing human rights should not lead to absurd or utopian judgments.

Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant – UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004): "10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. (…) This "principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation."

[513] M. Milanović, *A Norm Conflict (*fn*.* 510); B. Bowring, *Fragmentation,* Lex Specialis *and the Tensions in the Jurisprudence of the European Court of Human Rights,* „Journal of Conflict & Security Law", 2009, Vol. 14/3, pp. 485-498 ; I. Scobbie, *Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict,* "Journal of Conflict & Security Law", 2009, Vol. 14/3, pp. 449-457.

It is necessary to take into account whether we are dealing with a programmatic violation of human rights by dictatorships only to a small extent related to international law regulations, or with an actual and permanent inability to respect these rights by the state (e.g. civil war, occupation of part of its territory), or whether we are dealing with necessary and justified restrictions on these rights in democratic states and in conditions of armed conflict.

Common sense dictates that the protection of human rights should not turn into so-called *droit-de-l'hommisme* (Alain Pellet).[514]

In appreciating the achievements of the ECtHR, one must remember the constant tension between state security and human rights. The latter were created as a defence mechanism in opposition to state authority. The state is indeed strong in the rights of its citizens, but their security depends on the security of the state. In this context, armed conflict (internal or external) must encourage a certain moderation in referring to treaties protecting human rights. A severe armed conflict, for example in Iraq or Afghanistan, is a situation in which the limitation of certain rights becomes inevitable, whether for factual or legal reasons.

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[514] A. Pellet, « *Droits-de-l'hommisme* » *et droit international*, « Droits fondamentaux », n° 1, juillet - décembre 2001, pp. 167-179.

5.5. Final remarks

5.5.1. Cases of **responsibility for violating the prohibition of the use of force by states** (*jus ad bellum)* rarely come before international courts. The most significant are the judgments of the ICJ in the cases of the *Corfu Channel* (United Kingdom v. Albania - 1947), *United States Diplomatic and Consular Staff in Tehran* (USA v. Iran - 1980), *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America – 1986/1991), *Armed Activities on the Territory of the Congo* (Congo v. Uganda – 2005/2022) and *Oil Platforms* (Iran v. USA - 2003). They mainly concerned the reaction of the state in self-defence and its responsibility for the use of force. The case brought by Serbia and Montenegro against some NATO countries for the illegal use of force in connection with the situation in Kosovo was not considered by the ICJ for formal reasons[515].

The position of the ICJ in this matter is based on a restrictive definition of the concept of armed attack. The basic standard of state responsibility is based on the criterion of control over the perpetrator and attributing responsibility to its *de jure organs* (the standard of effective control or overall control of the perpetrator). However, in international practice, there is a visible tendency to attribute the responsibility to a state that militarily supports or merely tolerates irregular groups on its territory for their use of force against another state, and also to allow self-defence in such situations.

5.5.2. Responsibility for the consequences of the use of force (*jus in bello)* is associated with the actions *of de jure state* organs or non-state actors. This primarily involves violations of humanitarian law and human rights.

In the case of **actions of *de jure* state bodies,** its jurisdiction results from attributing acts to it based on the criterion of full control over the perpetrator.

In the case of **non-state actors** (irregular groups/structures) violating international law, we are dealing with a situation where a separate and to some extent effective, self-proclaimed authority operates on the territory of a state. This usually happens as a result of prior military support from another state, without which these structures could not function.

In the context of violations of humanitarian/human rights law by non-state actors, the ICJ's <u>standards of complete dependence and full control</u> link the state's responsibility to the degree of its control over all or specific acts of non-state actors, i.e., <u>the state's control over the perpetrators of the violation</u> (rather than over the territory or victim), for example, *Nicaragua v. USA, Congo v. Uganda, Bosnia and Herzegovina v. Serbia and Montenegro.* In the case of less than fully convincing evidence, the ICJ rules on responsibility for lack of due diligence. The ICJ standards make it difficult to attribute responsibility to the state for acts of irregular structures.

Some other international courts apply a more liberal standard of overall control in the context of armed conflict. On the one hand, it concerns the substantial

[515] ICJ. *Legality of Use of Force (Serbia and Montenegro v. Portugal, United Kingdom, Netherlands, Italy, Germany, Canada, France, Belgium),* Judgment of 15 December 2004.

influence of the state on irregular groups/structures, i.e. control over the perpetrator without necessarily having to control the territory (for example, ICTY in *the Tadić case,* ICC in the *Lubanga case).* On the other hand, this standard applies when the state has some control over the territory and the irregular groups/structures operating there, i.e. it is an aspect of control over the perpetrator with a rather limited control over the territory (ECtHR – *Loizidou, Ilaşcu).*

5.5.3. The standards for attributing the act and responsibility for the use of armed force and its consequences do not seem to be fully established. They are provided for in obligations arising from specific norms of international law (primary rules) or in general norms formulated by the International Law Commission (secondary rules). The work of the ILC and the case law create a good basis for further evolution.

In extraterritorial actions, the term jurisdiction has a specific meaning and concerns the actual exercise of authority over a foreign territory and population (regardless of the legality of the initial use of force). In this context, establishing jurisdiction comes down to identifying the perpetrator and the state's control over him (attribution of the act) and examining the extent of control over the foreign territory and/or the victim. The criteria for attributing the act and/or responsibility may differ in the case of actions by state organs and actions by non-state actors.

Jurisdiction understood in this way should be distinguished from legality and responsibility. Jurisdiction is a prerequisite for the international legal responsibility of a state and the application of appropriate legal norms, but it does not determine the legality of actions. The determination of the factual circumstances is of significant importance and the criterion of control (effective or overall) over the territory and/or the victim is used to determine and assess the facts.

A state may be held responsible under international law also for the actions of another entity (irregular group) when, in the form of complicity, aiding or abetting, it takes part in the violation of the law by that entity. Another method is responsibility for the actions of irregular groups, depending on the differently defined control.

The state’s responsibility may arise from a lack of due diligence, especially where, for various reasons, it tolerates or supports (within or outside its territory) irregular groups that violate international law against other states .

The practice of military operations conducted under the auspices of international organizations, as well as some related court decisions, demonstrate the weakness of the current international legal regulations. An additional problem is the lack of control within international organizations.

Problems related to conflict of norms and priority of application (for example human rights law, humanitarian law and legally binding Security Council resolutions) are resolved in different ways in practice.

When applying the ECHR to extraterritorial actions, emphasis should be placed on ensuring better control mechanisms and procedures. Applying the ECHR in situations of acute armed conflict (Afghanistan, Iraq) seems risky and not productive. It is however necessary to strive to balance the specificities and requirements characteristic of different legal regimes.

Chapter 6. Necessity and proportionality criteria

Proportionality should not be misunderstood:
it is not a narrowly defined tit-for-tat approach
(which would limit, if not rule out, the option to escalate),
but rather a self-imposed restriction.

K. Naumann, J. Shalikashvili, The Lord Inge, J. Lanxade, H. van den Breemen (2007)

The failure to prevent an attack in advance may in fact mean depriving oneself of the possibility of an effective response. There is therefore a tendency to use armed force before it is too late (pre-emptively), i.e. it is considered necessary or/and proportionate to use armed force and to inflict damage on a potential adversary that is judged to be less than the damage that could result from his possible (later) attack.

In assessing the use of force some legal criteria should be taken into account, as well as factual and political premises and objectives. This includes in particular the nature and scale of the threat (for example, the type of weapon used, the form of the expected attack and the military capabilities of the enemy), the degree of probability of the threat being realized and the lack of rationality on the part of the potential enemy (examination and assessment of intentions), exhaustion of alternative measures (including within the UN, for example, the determination by the Security Council of a threat to international peace and security, the implementation by a state of legally binding Security Council resolutions), the degree of international support (for example, the multilateral nature of the armed operation), compliance with the purposes of the UN Charter.

On the legal side, the starting point is the existing norms on the use of armed force (*ius ad bellum* and *ius in bello*), including the norms on the state's international responsibility for the wrongful acts. Taking into account the practice and doctrine, two criteria should be considered: necessity and proportionality[516]. These are so-

[516] S. Cassella, *La nécessité en droit international. De l'état de nécessité aux situations de nécessité,* Leiden 2011; M.N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,* "Virginia Journal of International Law", 2010, Vol. 50/4, pp. 795–839 ; M. Agius, *The Invocation of Necessity in International Law,* Netherlands International Law Review, 2009, Vol. LVI, pp. 95–135; Th.M. Franck, *On Proportionality of Countermeasures in International Law,* AJIL, 2008, Vol. 102, pp. 715–767; T. Christodoulidou, K. Chainoglou, *The Principle of Proportionality in Self- Defence and Humanitarian Intervention,* „Humanitäres Völkerrecht", 2007, No. 2, pp. 79–90; S. Heathcote, *Est-ce que l'état de nécessité est un principe de droit international coutumier?,* « Revue belge de droit international », 2007/1, pp. 53–89; CJS Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts,* "California Western International Law Journal", 2007, Vol. 37, No. 2, pp. 177–219; F. L. Kirgis, Jr., *Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon,* ASIL Insight, August 17, 2006; E. Cannizzaro (fn. 344); A. Zimmermann (fn. 344); D. Kaye, *Adjudicating Self-Defence: Discretion, Perception and the Resort to Force in International Law,* Columbia Journal of Transnational Law, 2005, Vol. 44, No. 1; N. Ochoa-Ruiz, E. Salamanca- Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self- defence,* EJIL, 2005, Vol. 16/3, pp. 499–524; A. Laursen, *The Use of Force and (the State of) Necessity,* "Vanderbilt Journal of Transnational Law", 2004, Vol. 37, No. 2, pp. 485–526; J. Gardam,

called undefined legal notions (*unbestimmte Rechtsbegriffe*), which are directives for the application and interpretation of legal norms, in our case concerning the use of armed force; they are therefore not independent operational rules.[517] The application of these standards does not change the content of the original substantive norm (for example, the prohibition of the use of force), but it may exclude or limit responsibility for an act.

The criterion of necessity essentially comes down to assessing the inevitability of action (the lack of other possibilities) in the face of a serious and direct threat to the essential interests of a state. In turn, the criterion of proportionality refers to assessing whether the action is appropriate in the choice of means and in its specific effects. The definition and application of these criteria in the context of *jus ad bello* and *jus in bellum* must be discerned due to the different situations in both areas.

In the face of new threats, especially weapons of mass destruction and terrorist attacks, the criteria of necessity and proportionality require reflection and are subject to increasing pressure for interpretation[518]. Their application involves an examination of the facts and the establishment of certain objectives and values, because there is no universal standard of necessity, proportionality or reasonableness.

6.1. The choice of how to respond rests with the attacked country. The form of self-defence depends on the type of attack, on the one hand, and on the objectives of the response, on the other. Generally speaking, armed self-defence should be characterized by rational necessity, temporal proximity of the response, and proportionality, as confirmed in the judgments of the International Court of Justice[519]. However, this view should be treated with caution, since the scope and purpose of applying these criteria do not result from the UN Charter and depend on specific circumstances.

Necessity, Proportionality and the Use of Force by States, Cambridge 2004; M. Patel, *Israel's Targeted Killings of Hamas Leaders,* ASIL Insight, May 6, 2004; E. Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures,* EJIL, 2001, Vol. 12/5, pp. 889–916; WJ Fenrick, *Targeting and Proportionality During the NATO Bombing Campaign against Yugoslavia,* EJIL, 2001, Vol. 12/5, pp. 489–502; R. Higgins, *Problems and Process: International Law and How We Use It,* Oxford 1994, pp. 219–237; J. Salmon, *Faut-il codifier l'état de nécessité en droit international?*, in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century. Essays in honor of Krzysztof Skubiszewski,* The Hague-London-Boston 1996, pp. 235-270.

[517] A situation of necessity (or *distress)* is different from a *force majeure* in that the decision-maker still has the possibility of choice, but it is practically limited. The concept of force majeure is understood as an external event of a random or natural (spontaneous) nature, difficult to predict and impossible to prevent, over which a given entity has no control. In turn, the feature of the state of necessity (*état de nécessité) is* a direct and serious threat to the essential interest of the international community or the state towards which a given international obligation is directed; however, the state's action is not forced - there is a possibility of choice. The difference between a situation of coercion and a state of necessity is that the protected good is not the lives of persons who are under the authority of a state (i.e. persons towards whom the state has certain protective obligations), but a threat to certain essential interests of the state or the entire international community.

[518] L. Blank, A. Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare,* Harvard National Security Journal, 2010, Vol. 1, pp. 45–85.

[519] See *supra* fn. 177.

When deciding whether to use force, the criterion of necessity seems decisive, whilst the benchmarks of 'unable' or 'unwilling' determine the specific form of reaction and the type of responsibility (due diligence, strict liability or various forms of fault).

In the case of use of force of lesser importance, especially armed incidents of various kinds, the criteria of necessity, temporal proximity and proportionality have greater weight. An isolated attack of a relatively small scale does not justify a mass armed response. However, this view changes significantly in the perspective of cross-border terrorist attacks.

In the case of large-scale aggression, these criteria have limited significance because the purpose of self-defence is not only to repel an armed attack, but also to prevent further attacks and ensure the security of the state and its citizens. When the fate of the attacked state is at stake, even the use of nuclear weapons can be considered as legal. The problem is who should evaluate it and according to what criteria.

The criterion of necessity will be of importance in the case of pre-emptive self-defence (or possibly also preventive operation), and the criterion of proportionality will be relegated to the background, because the scope and effect of a possible attack, as well as the scope and objectives of the armed response, are not known in advance. In a pre-emptive or preventive operation, the analysis and assessment of the enemy's intentions and the approaching threat or its probability are primarily important for assessing necessity[520].

In the case law of the ICJ, there is a tendency to treat the criteria for the use of armed force restrictively, for example in the ICJ judgment of 2003 concerning oil platforms[521]. The response to the use of force or the threat of its use must by its very nature contain a subjective element[522] – this applies to both the Security Council

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[520] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) – commentary to Article 14: "Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a breach if it does not predetermine the final decision to be taken. Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgment and degree, which it is not possible to determine in advance by the use of any particular formula."

ICJ. *Case Concerning the Gabčikovo-Nagymaros Project,* Judgment of 25 September 1997: "§ 79. A wrongful act or offense is frequently preceded by preparatory actions which are not to be confused with the act or offense itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'."

[521] ICJ. *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment of 6 November 2003: "[T]he requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'." (§ 73).

[522] ECHR. *Handyside v. The United Kingdom* (No. 5493/72), Judgment of 7 December 1976: "48. The Court notes at this juncture that, whilst the adjective 'necessary', within the meaning of Article 10 para. 2, is not synonymous with 'indispensable' (cf. in Articles 2 para. 2 and 6 para. 1, the words 'absolutely necessary' and 'strictly necessary' and, in Article 15 para. 1, the phrase 'to the extent strictly required by the exigencies of the situation'), neither has it the flexibility of such expressions as 'admissible', 'ordinary' (cf. Article 4 para. 3), 'useful' (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), 'reasonable' (cf. Articles 5 para. 3 and 6 para. 1) or 'desirable'. it is for the national authorities to make the

resolutions and the institution of self-defence. This subjectivity refers to the assessment of the premises (*latitude de jugement, Beurteilungsspielraum*) but does not eliminate the discretionary elements at the decision-making stage (*pouvoir discrétionnaire, Ermessen).* Rigorous exclusion of the subjective element does not seem convincing, especially in such an important issue as self-defence. Subjectivism does not, of course, eliminate errors in assessment (especially in the light of later knowledge) and the possible international legal responsibility of states[523].

The necessity criterium is indicated in Article 25 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), which refers to a "serious and imminent threat" to a "fundamental interest"[524]. This Article contains only general principles of responsibility, but the ILC does not prejudge the detailed application in specific areas of international law (primary rules). According to the ICJ, the threat must be highly probable and irresistible by other means[525].

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initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. relevant, Article 10 para. 2 leaves to the Contracting States a margin of appreciation."

[523] D. Raab, *'Armed Attack' after the Oil Platforms Case,* Leiden Journal of International Law, 2004, Vol. 17, pp. 719–735; WH Taft, IV, *Self-Defence and the Oil Platforms Decision,* "Yale Journal of International Law", 2004, Vol. 29, pp. 295, 299–306.

ICJ. *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment of 6 November 2003 (Dissenting opinion of judge Peter Kooijmans): "44. (…) With regard to the assessment of the risk run by the essential security interests, the term 'reasonableness' is used; with regard to the 'measures taken', the Court states that it is not sufficient that they may be deemed 'useful' but that they must be necessary. This seems to indicate that with regard to the measures taken a stricter test must be used than with regard to the assessment that essential security interests are at risk. (…) 45. In the case before the Court the United States has concluded that a missile attack on and the mining of ships flying its flag (…) are a threat to its essential security interests and to conclude that the American assessment cannot stand that test (…) 46. Confronted with this threat its essential security interests of the United States decided (unlike other States) no longer to use diplomatic and other political pressure, but to opt for a reaction which involved the use of force. By doing so, it opted for means the use of which must be subjected to strict legal norms, since the prohibition of force is considered to have a peremptory character. "The measure of discretion to which the United States is entitled is therefore significantly more limited than if it had chosen, for instance, the use of economic measures."

[524] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001): "Article 25.1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."

ICJ. *Case Concerning the Gabcikovo-Nagymaros Project,* Judgment of 25 September 1997: "51. The Court (…) observes moreover that such ground [the state of necessity, JK] for precluding wrongfulness can only be accepted on an exceptional basis. (…) Thus, according to the [International Law] Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met."

[525] ICJ. *Case Concerning the Gabcikovo-Nagymaros Project,* Judgment of 25 September 1997: "The Court considers, however, that, serious though these uncertainties might have been, they could not, alone, establish the objective existence of a 'peril' in the sense of a component element of a state of necessity. The word 'peril' certainly evokes the idea of 'risk' that is precisely what distinguishes 'peril' from material damage. But a state of necessity

The plea of necessity is not intended to cover conduct, which is in principle regulated by the primary obligations,[526] for example in the case of classic self-defence as separate legal title of action. However, this criterion can be considered as a possible argument justifying exemption from responsibility in the case of the use of force without an appropriate legal title (e.g. humanitarian intervention).

There are arguments in favour of treating the concept of necessity restrictively as excluding the illegality of an act and as an auxiliary rule of interpretation of legal norms[527]. This is, for example, how the ICJ treated this standard in its judgment in the case of *Nicaragua v. United States of America* (1986)[528].

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could not exist without a 'peril' duly established at the relevant point in time; the mere apprehension of a possible 'peril' could not suffice in that respect. It could hardly be otherwise, when the 'peril' constituting the state of necessity has at the same time to be 'grave' and 'imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'. As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable" (§ 54).

[526] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), Article 25 – commentary: "(21) The plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of 'military necessity'. It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention. The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25. The same thing is true of the doctrine of 'military necessity' which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law "both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations."

[527] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), Article 25 – commentary: "(2) The plea of necessity is exceptional in a number of respects. Unlike consent (article 20), self-defence (article 21) or countermeasures (article 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (article 23), it does not involve conduct which is involuntary or coerced. Unlike distress (article 24), necessity consists not in danger to the lives of individuals in the charge of a state official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse".

[528] See also ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment of 27 June 1986: "On the question of necessity, the Court observes that the United States measures taken in December 1981 (…) cannot be said to correspond to a 'necessity' justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed

6.2. The criterion of proportionality known in domestic and international law (in the Anglo-Saxon system as reasonableness*)* concerns, on the one hand, the limitation of responsibility for the effects of specific military actions in relation to civilian subjects (*jus in bello*) and, on the other hand, the choice of the appropriate means of response to a violation of the law, i.e. the method and purpose of the military response (*jus ad bellum*)[529].

The criterion of proportionality is generally threefold[530]. It must be established, first, whether an action is appropriate for achieving the objective; second, whether this objective cannot be achieved by other methods; third, whether the measure used is not disproportionate (is not excessively burdensome) in comparison with the effects it produces, and therefore whether the negative aspects are commensurate (proportionate) to the result achieved.

6.2.1. In several judgments, the ICJ has treated the principle of proportionality in a restrictive manner[531]. The ICJ concept is based on an interpretation that limits

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(January 1981), and the actions of the opposition considerably reduced in consequence. Thus, it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua (…) Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. (…) [T]he Court must also observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated" (§ 237).

[529] See on example RD Sloane, *The Cost of Conflation: The Dualism of Jus Ad Bellum and Jus In Bello in the Contemporary Law of War,* "Yale Journal of International Law", 2008, Vol. 34; N. Balendra, *Defining Armed Conflict,* New York University Law School, Public Law Research Paper, 2007, no. 22; GS Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize A Hybrid Category of Armed Conflict,* "Vanderbilt Journal of Transnational Law", 2006, Vol. 40, No. 2; C. Stahn, *'Jus ad bellum', ' jus in bello'… 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force,* EJIL, 2006, Vol. 17/5, pp. 943–967; JG Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict,* "International Review of the Red Cross", 2003, no. 850, pp. 313–349.

[530] Ph. Kunig, *Das Verhältnismäßigkeitsprinzip im deutschen öffentlichen Recht,* (in:) Ph. Kunig und M. Nagata (Hrsg.), *Deutschland und Japan im rechtswissenschaftlichen Dialog,* Köln 2006, pp. 169–186.

[531] ICJ. *Iran v. United States,* Judgment of 6 November 2003: "The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence" (§ 51); "As to the requirement of proportionality (…) the Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, inter alia, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence" (§ 77).

ICJ. *Congo v. Uganda,* Judgment of 19 December 2005: "The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from proportionality to a balanced relationship between the harm caused and the scale and scope of the necessary armed response in self-defence. However, reducing proportionality to a quantitative dimension does not exhaust its content. It also refers to the assessment of specific self-defence objectives, which usually consist in effectively stopping an action and preventing future, similar actions. A rigorous interpretation of the principle of proportionality may sometimes thwart the elimination of threats and make it easier for the attacker to achieve his intentions.

It is difficult to assume that a response to a border incident or a single terrorist attack would be, for example, the destruction of the capital of another country. However, in the case of a broader armed attack, as well as repeated attacks by terrorists or irregular forces, proportionality refers to the scale of the threat and the purpose of the armed response. German aggression (1939-1945) was not ended as a result of negotiations with Hitler, and the Holocaust was not stopped because it constituted a violation of international law[532].

In the case of (peaceful) countermeasures, the ILC Articles (2001) provide that the countermeasure must correspond to the damage caused, taking into account the scale of the violation of international law and the significance of the rights violated[533]. This is because the main criterion is quantitative (the scale of the damage caused), but there are also qualitative criteria (the significance of the actions violating the law and the rights violated), which only in their entirety allow us to obtain an outline of the purpose of the countermeasure.

The principle of proportionality does not imply that the scale or manner of response should be limited to the scale of a previous attack, but rather the broader context must also be taken into account, including the effectiveness of the action in achieving the main objective of eliminating the threat.[534] In other words,

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Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end" (§ 147).

[532] A. Applebaum, *Deutsche, ihr müsst wieder Abschreckung lernen!*, Welt Online, 24 April 2014: "It wasn't *Ostpolitik* that kept the Russians away from West Germany and the rest of Western Europe. (...) The Red Army was scared off by a large number of American soldiers, weapons, tanks, and nuclear weapons".

[533] ILC. *Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (*2001): "Art. 51. Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." Commentary: "(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely 'quantitative' element of the injury suffered, but also 'qualitative' factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but 'taking into account' two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to 'the rights in question' has a broad meaning and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

[534] FL Kyrgyz, *Israel's Intensified Military Campaign Against Terrorism,* "ASIL Insight", December 2001: "Customary international law requires proportionality in the exercise of a right of self-defence, but it is not precise as to how proportionality is to be measured. Proportionality could mean either of two things. It could mean that the intensity of force used in self-defence must be approximately the same as the intensity defended against. Or it could

proportionality in the *jus ad bellum* perspective concerns not only the potential or actual damage to the opponent, but also the response in the context of the conflict and the existing threat. There is therefore no requirement for symmetry between the attack and the manner of response[535]. An armed operation in self-defence may sometimes aim to completely defeat the opponent, and not only to stop his attack[536]. The assessment will not be easy in every case, but the response must be convincingly justified (reasonable).

In the decision to use armed force (*jus ad bellum*), the criterion of necessity plays an important role. The criterion of proportionality will be applied in assessing whether the measure used is appropriate to the reason and purpose of using force (whether the response is appropriate and justified – non-excessive, reasonable*).*

The difficulty lies in assessing not only the choice of means of response, but also its purpose in the light of the existing threat.[537] This purpose does not always have

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mean that the force, even if more intensive than that, is "permissible so long as it is not designed to do anything more than protect the territorial integrity of the defending state."

[535] According to R. Ago, ILC rapporteur: "The requirement of the proportionality of the action taken in self-defence (...) concerns the relationship between that action and its purpose, namely (...) that of halting and repelling the attack or even (...) of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. (…) If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks", ILC. *Eight Report on State Responsibility.* A/CN.4/318/Adds.5–7, para. 121, "Yearbook of the International Law Commission ", 1980, Vol. II, part I, p. 69.

[536] "[A] war of self-defence may be carried out until it brings about the complete collapse of the enemy belligerent (as in the case of World War II)", Y. Dinstein (fn. 8), p. 240.

[537] L. Rühl, *Interventions- und Eskalationsproblematik bei der militärischen Konfliktbewältigung. Die Ultima ratio des bewaffneten Eingriffs als Mittel der Sicherheitspolitik,* „Aus Politik und Zeitgeschichte", 2002, no. 24: „[D]as erste und schwierigste Problem jeder militärischen Intervention [liegt] in der Verbindung von politischer Zielsetzung und strategischen Zielen. Nicht alle strategischen Ziele, die eine Kriegführung sich setzen kann, um Erfolg zu haben, sind für die Politik, der die Strategie dienen soll, günstig oder auch nur mit ihr vereinbar (…) Der Kosovo-Krieg bietet mehrere Beispiele hierfür: Zur vollkommenen Isolierung Serbien-Montenegros von der Erdölzufuhr bot sich eine Bombardierung der beiden Adriahäfen Kotor und Bar an der Küste Montenegros und der Ölabfüllanlagen an der Donau bei Belgrade an. Doch aus politischen Gründen, die mit dem Nachkriegs-Krisenmanagement zur Stabilisierung der Balkansituation zusammenhingen, wurde (…) darauf verzichtet. Umgekehrt wurden alle serbischen Donau-Brücken zerstört, um den Munitionsnachschub aus dem Norden, insbesondere aus den Fabriken in der Voivodina, zu unterbinden, obwohl damit die Donauschifffahrt zwischen Ungarn und Rumänien unterbrochen und ganz Südosteuropa auf Jahre ein empfindlicher wirtschaftlicher Schaden zugefügt wurde, der noch nicht behoben ist".

C. Greenwood (fn. 8), p. 628: "Targets many miles from Kosovo were capable of making an effective contribution to FRY military action. It was legitimate to attack such targets so long as the principles set above [necessity, proportionality, perm. JK] were respected."

J. Gardam (fn. 516), p. 21: During the Gulf War in 1991, for example, coalition forces sought "to isolate and incapacitate the Iraqi regime. To achieve this aim, it was deemed necessary to attack aspects of the Iraqi electricity production facilities and the telecommunications system. The legitimacy of this objective of incapacitating the regime and the targets selected to achieve it is a matter for the proportionality equation in jus ad bellum.

to be connected only with the previous use of force by the opponent (for example, repelling a specific attack), but may also concern the elimination of sources of threat (for example, preventing further attacks, destroying the opponent's combat capabilities, stopping massive and grave violations of human rights, or ensuring a minimum of stability and democracy).

Proportionality may therefore refer to the threat perceived in a broader context[538]. However, the goals of a military response cannot be set arbitrarily but must be reasonably justified. Disproportionate action may sometimes prove ineffective and bring the opposite effect to that expected[539] (the assessment de pends to some extent on the short- or long-term perspective).

For example, doubts arose as to whether the British sinking of the Argentine cruiser *General Belgrano* during the Falklands conflict (1982) met the criteria of necessity and proportionality (supporters of this action believed that it made it easier for United Kingdom to achieve its goal and reduced potential losses).

It was pointless and impossible to limit attacks to terrorist bases or military facilities in Afghanistan, whose locations were not always known, but it was necessary to remove by force the source of the threat, i.e. the structure of the Taliban regime.

The detailed conduct of the attacks on these targets is a matter for the proportionality equation in IHL, and in the case of the Persian Gulf conflict, was worked out frequently on a daily basis. The timing and level of command at which the decisions are made in jus ad bellum and IHL respectively, therefore, will differ."

[538] ICJ. *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of July 8, 1996 : "[T]he Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake" (§ 105 - 2E); "The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances" (§ 42); "Certain States have (…) suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. (…) [I]t suffices for the Court to note that the very nature of all nuclear weapons and the "considerable risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality" (§ 43).

Y. Dinstein, *Military Necessity,* EPIL, May 2009: "Either nuclear weapons are lawful under certain conditions, or they are not, but the fact that the very survival of a State is at stake cannot possibly affect that conclusion. If nuclear weapons are lawful, they are lawful to all States. If they are not lawful, the illegality cannot be diminished only because the survival of a particular State is at stake" (§ 11).

K. Naumann, J. Shalikashvili, The Lord Inge, J. Lanxade, H. van den Breemen (fn. 35), pp. 93–94: "Proportionality should not be misunderstood: it is not a narrowly defined tit-for-tat approach (which would limit, if not rule out, the option to escalate), but rather a self-imposed restriction. (…) The new principle – in line with the progress of technology – is the principle of minimum damage and victory through paralysis, involving the surgical use of all available instruments of power. Simultaneously observing proportionality and limitation of damage will become extremely difficult in cases where the use of nuclear weapons must be considered. The first use of nuclear weapons must remain in the quiver of escalation as the ultimate instrument to prevent the use of weapons of mass destruction, in order to avoid truly existential dangers.

[539] K. Nilsson, *Might Does Not Make Right: The Flawed Effort to Redefine Jus ad Bellum Proportionality,* "Tilburg Law Review – International Law", 2008, Vol. 14, pp. 379–422.

The case of the Hezbollah military faction in Lebanon shows that destroying mobile and hidden rocket launchers in populated areas is very difficult, and at the same time it is necessary to prevent further weapons deliveries as a result of bombing roads and bridges.

In the context of a pre-emptive operation, if an attack on the scale of 11 September 2001 is expected, one cannot rule out a bombing campaign or a longer military operation in order to destroy the aggressive capabilities of the state that is leading the attack or supporting the terrorists.

In the case of humanitarian intervention, there is usually no other option than the use of armed force and the removal of the criminal government, which seems to be a desirable effect and is essentially proportionate to the threats and crimes.

In turn, Russia's armed response in the conflict with Georgia (2008) is an illustration of a violation of the principle of proportionality as excessive.[540]

6.2.2. Specific military actions are subject to a proportionality assessment in the context of responsibility for the consequences of a military operation on the civilian population (*jus in bello*). While the jus ad bellum sphere concerns the decision of the state to choose its response and is to some extent subjective and places the interests of the attacked state in the foreground, the jus in bello sphere is more objective, balanced and apolitical. The criteria of necessity and proportionality apply in both cases, but in each of them they are viewed from a different perspective[541].

It is sometimes important to determine whether we are dealing with an armed conflict, and if so, whether it is international or non-international in nature. However, it must be taken into account that in every armed conflict, the basic principles of humanitarian law apply – as a minimum. The use of certain weapons is prohibited by this law, while the use of permitted means should not be excessive. In the context of *jus ad bellum,* it should not be assumed in advance that the designated (just) goal justifies violations of humanitarian law, because states are obliged to comply with this law in the case of both legal and illegal use of force. The legal use of armed force does not prejudge the legality of the manner in which specific military actions are carried out; on the contrary – in an illegal armed response, the principles of humanitarian law can and must be observed[542].

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[540] J. Kranz, *Der Kampf um den Frieden und sein besonderer Facilitator. Anmerkungen zur Georgienkrise*, "Archiv des Völkerrechts", Vol. 46 (2008), p. 481–501.

[541] O. Ben-Naftali, *The Extraterritorial Application of Human Rights to Occupied Territories,* American Society of International Law. Annual Meeting 2006: "Both IHR and IHL may use identical terms, but to different effect. Thus, for instance, the term 'proportionality' is used in IHR to balance between the effect of a violation of the rights of an individual vis-à-vis the gain from the perspective of the public good, whereas in IHL, if the individual is a legitimate target, proportionality is used to balance between the collateral effect of the injury and security."

[542] Th.M. Franck (fn. 516): "Always, in determining whether a countermeasure is proportionate, the first task is to examine whether the initial provocation was illegal. If it was not, the countermeasure, *ipso facto,* would be disproportionate and illegal. That, however, is not the end of the inquiry. Even if the illegalness of the initial provocation can be demonstrated, that would not, by itself, establish the proportionality, and, thus, the legality, of the response. Only if the provocation is illegal and the countermeasure is proportionate would its illegality be cured."

Proportionality in the sphere of *jus in bello* refers to determining whether in specific military operations the foreseeable damage caused to the civilian population is not excessive in relation to the military benefits (military necessity)[543]. It is wrong to compare this damage with the objectives of the armed response (*jus ad bellum*), because in such a case the principle of "the end justifies the means" will usually prevail, which can lead to a dangerous disregard of *jus in bello* norms. It is also wrong to compare - in the context of proportionality - the number of victims of the conflict on both sides, because it is necessary to distinguish between combatants and the civilian population. According to humanitarian law, the principle of proportionality refers only to the assessment of foreseeable civilian losses in the event of attacking objects of military significance[544]. In internationally protected human rights the criterion of proportionality is formulated in a more demanding way [545].

For example, one may wonder to what extent Israel's response to the long-term rocket fire (*jus ad bellum*) into its territory during the Gaza conflict (turn of 2008/2009) was necessary and proportionate? As to the necessity of an armed

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[543] In this sense ICJ. *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, Dissenting Opinion of Judge Rosalyn Higgins: "It must be that, in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage, the 'military advantage' must indeed be related to the very survival of a State or the avoidance of conflict (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population: and that no other method of eliminating this military target be available" (§ 21); "The duty not to attack civilians as such applies to conventional weapons also. Collateral injury in respect of these weapons has always been accepted as not constituting 'intent', provided always that the requirements of proportionality are met" (§ 22).

[544] See article 51 paragraph 5 of Additional Protocol I of 1977. L. Moreno-Ocampo, Chief Prosecutor of the International Criminal Court: "Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur. A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b) (i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv) [ICC Statute – JK]" – www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

Article 8 of the ICC Statute: "2. For the purposes of this Statute, 'war crimes' means: (...) (b) (...) (iv) intentionally carrying out an attack, in knowledge that the attack will result in death, injury to civilians, damage to civilian objects, or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the specific, direct and overall military advantage expected."

[545] A.L. Paulus, *The Protection of Human Rights in Internal Armed Conflict in Europe – Remarks on the Isayeva decisions of the European Court of Human Rights,* "The Uppsala Yearbook of East European Law", 2006, p. 75: "In human rights law, proportionality also applies to the relationship between the use of force and the military or law-enforcement objective. (…) The use of force must also be proportional if its targets are of an exclusive military character. The respective standard of humanitarian law only requires avoiding 'unnecessary suffering'. (…) The proportionality only applies to the relationship between the use of military force and the risk to life and property of civilians and persons not engaged in hostilities. See ECHR. *Isayeva v. Russia (*No. 57950/00), Judgment of 24 February 2005, §§ 174–174, 180–181, 191; ECHR. *Isayeva and Others v. Russia (*nos. 57947/00, 57948/00 and 57949/00), Judgment of 24 February 2005, §§ 170–171, 178, 195.

response, one must determine how long the armed actions of Hamas (which is on the official list of terrorist organizations of some states) can be tolerated and whether there really was another possibility of preventing the shelling of Israeli territory? As to proportionality: did the objectives and scale of the armed operation correspond to the existing and future threat?

The problem of proportionality in the context of *jus in bello* requires answering several other questions. For example: which victims should be considered combatants and which civilians?[546] Did the Hamas fighters wear any markings that distinguished them from the civilian population? Which civilians lost their status protected by humanitarian law as a result of their direct involvement in armed combat (*direct participation*)?[547] Did Hamas use civilians as human shields? Does the law prohibit attacking facilities (rocket launchers and other offensive weapons) placed in the middle of the city? Has Israel demonstrated any desire to limit civilian casualties? The picture of the situation is sometimes distorted and comes down to the fact that the Israeli army is fighting mainly civilians, as if there were no combatants on the Palestinian side[548]. Meanwhile, the principle of distinction *and* proportionality applies to all parties in an armed conflict, including Hamas units, which cannot deliberately and intentionally endanger their own civilian population.

These issues require establishing the facts and then confronting them with the norms of humanitarian law[549]. In general, the decision is not easy, because there is

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[546] Secretary-General (SG/SM/12031, SC/9561), 31 December 2008: "[A]ll are trapped between the irresponsibility displayed in the indiscriminate rocket attacks by Hamas militants and the disproportionality of the continuing Israeli military operation. (…) Let me be clear: I condemn unequivocally and in the strongest possible terms the ongoing rocket and mortar attacks by Hamas and other Palestinian militants. But I also condemn the excessive use of force by Israel"; Security Council (SC/9266), 1 March 2008: "The Secretary-General placed blame on both sides, calling on them to cease the violence and restore order. 'I condemn Palestinian rocket attacks and call for the immediate cessation of such acts of terrorism, which serve no purpose, endanger Israeli civilians and bring misery to the Palestinian people', he said. 'While recognizing Israel's right to defend itself, I condemn the disproportionate and excessive use of force that has killed and injured so many civilians, including children".

[547] More broadly International Committee of the Red Cross. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* 2009; M.N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis,* Harvard National Security Journal, 2010, Vol. 1, pp. 5–44.

[548] *Responding to Hamas attacks from Gaza - Issues of Proportionality* (29 December 2008). Background Paper. Israel Ministry of Foreign Affairs – https://www.gov.il/en/pages/responding-to-hamas-attacks-from-gaza-issues-of-proportionality; *Responding to Hezbollah attacks from Lebanon: Issues of proportionality – legal background,* 25 July 2006 – https://www.gov.il/en/pages/responding-to-hezbollah-attacks-from-lebanon-issues-of-proportionality-25-jul-2006; *Hamas Exploitation of Civilians as Human Shields,* January 2009 – https://www.gov.il/en/pages/hamas-exploitation-of-civilians; *Hamas's Illegal Attacks on Civilians and Other Unlawful Methods of War - Legal Aspects,* January 7, 2009. *Legal Appendix* of *Hamas Exploitation of Civilians as Human Shields.* Report by The Intelligence and Terrorism Information Center, with the assistance of the International Law Department of the IDF Military Advocate General's Corps.

[549] Israel. Ministry of Foreign Affairs. *The Operation in Gaza (27 December 2008 – 18 January 2009) - Factual and Legal Aspects,* 29 July 2009 – https://www.gov.il/en/pages/the-operation-in-gaza-factual-and-legal-aspects-introduction; *Gaza Operation Investigations: Second Update,* 19 July 2010 – https://reliefweb.int/report/occupied-palestinian-territory/gaza-operation-investigations-

no universal standard of necessity and proportionality. The use of armed force is not possible in principle without causing a limited damage to the civilian population and infrastructure, which does not automatically constitute a violation of humanitarian law. For example, it is not known in advance what number of civilian casualties should be considered permissible (*proportional, non- excessive)* in the event of an attack on a military facility. Moreover, while proportionality is a criterion applied by the military commander before or during an armed action based on available information, the actual legal assessment is made after the action has ended.[550]

In conclusion, necessity and proportionality are not self-sufficient criteria, but interpretative directives of other norms. Their validity is not questioned, but their application in practice is not easy; it is crucial to take into account the evolution of new threats, new weapons, new methods of combat) and the situations to which they are applied, as well as the different values[551]. These criteria are interpreted somewhat differently today than in the past, which corresponds to the evolution of the international realities.

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second-update; *Gaza Operation Investigations: An Update,* 29 January 2010 – https://reliefweb.int/report/israel/gaza-operation-investigations-update

[550] E. Cannizzaro, *Contextualizing proportionality: jus ad bellum and jus in bello in the Lebanese war,* International Review of the Red Cross, Vol. 88 (864), 2006, pp. 779–792; E. Cannizzaro (fn. 344): "The question is whether there is any justification for violating humanitarian law in response to the corresponding violations by the other party. (…) [T]he question admits but one answer, namely a clear negative. A different question (…) is whether the conduct of civilians and the asymmetry resulting from the connections between militias and those civilians in modern conflicts alter the nature of the balance of values required by the proportionality test, and whether the 'excessiveness' of the damage should be judged in that light. In other words, according to this solution a certain amount of collateral damage could be 'less excessive' in situations where there is a strong presumption that civilians are aware of the danger and accept it voluntarily as part of their participation as human shields, than in situations in which the civilians are genuinely unconnected to the violence (…) [T]his argument is unconvincing" (p. 790). "This means that proportionality under *jus in bello* must be considered as an element of the more general assessment of proportionality to be conducted under *jus ad bellum.* (…) [I]t means that a state cannot freely determine the standard of security for its own population if the achievement of that standard entails excessive prejudicial consequences for civilians of the attacked state" (p. 792).

[551] Th.M. Franck (fn. 516): "If courts are to be charged with reviewing the proportionality of choices made by states and persons in real combat, their credibility, as also the purchase of the idea of proportionality itself, will depend on the persuasiveness with which the judges are able to weigh the evidence and enunciate and apply consistent secondary rules" (p. 732); "What emerges is the seemingly irresistible proclivity of parties – and even of bystanders – to conduct their discourse on the assumption that proportionality is not merely an applicable, but an important, factor in conflict containment. Incongruously, however, that realization has not as yet generated a textured, mature jurisprudence conducive to the credible weighing of a military wrong against concomitant countermeasures" (p. 734); "Too often tribunals, in the face of scant evidence, fail to make a credible calculation of proportionality, settling for a defensible, but largely undefended, conclusion that a disputed action was, or was not, proportionate. Aware that majorities become harder to build as the judges seek to explain their conclusions, tribunals are tempted to write as if the thing explained itself" (p. 739).

Chapter 7. Politics and Law

The survival of states is not a matter of law.
Dean Acheson

7.1.1. International realities are characterized by a constant tension between (power) politics and law, between domestic and international jurisdiction, between anarchy and order. This aspect is particularly reflected in the dominance of the strongest or most influential states, which has both positive and negative facets.

The question is not only about leadership (unipolar, bipolar and multipolar world), but also about its content and principles. The post-war international legal order was shaped by Western countries and its acceptance by Russia, China, and most countries of the so-called Global South was/is to some extent just lip service. The contribution of these countries, to the development of liberal democracy is negligible.

This general observation does not mean tolerance for errors and abuses in the policies of great powers, including neocolonial territorial appropriations or the imposition of zones of political and economic influence. Note, however, that the United States is often condemned for the actions it has taken, but the same criticism is sometimes met with its lack of will to lead.

7.1.2. International law is a framework for cooperation and coexistence between states. The international society cooperates on the basis of the principles and rules of law – a body of norms established by states mainly for themselves. Within this framework, states justifie their activities with legal arguments and values, whilst at the same time being judged in the light of their compliance with them.

In the formation of international law, the consent of a state to be bound by a treaty and the practice of states with respect to customary law are significant. The application and interpretation of these rules lie in the hands of states and international organisations; however, the monitoring of compliance by international institutions (including judicial ones) is dispersed and limited.

This international structure is shaped with the participation of the most powerful partners (great security powers, nuclear-armed states, exporters of oil or certain other raw materials) and international law neither replaces nor alters the global balance of power. It is difficult to blame the largest and most powerful for their existence. Great powers will not disappear; what remains crucial, however, is the scope of their international obligations and the willingness to honour them. This situation, often referred to as hegemony (a catch-all term), does not necessarily have to be viewed negatively in every case.[552] Last but not least, it can only be pedagogically reminded that due to their position and role, they also bear, to a certain

[552] K. Anderson, *Living with the UN: American Responsibilities and International Order,* 2011; N. Ferguson, *A World without Power,* "Foreign Policy", 2004 (July-August): "Critics of US global dominance should pause and consider the alternative. If the United States retreats from its hegemonic role, who would supplant it? Not Europe, not China, not the Muslim world – and certainly not the United Nations. Unfortunately, the alternative to a single superpower is not a multilateral utopia but the anarchic nightmare of a new Dark Age."

extent, additional political and moral responsibility for the state of international relations.[553]

States are equal in terms of the quality of their international legal status, but unequal in terms of their possibilities of action. Furthermore, the development of international law is expressed in its growing influence on the exercise of states competences, which limits the scope of their domestic jurisdiction.

The problem of the systemic completeness of international law does not lie solely in the presence or absence of legal rules on the basis of which disputes can be formally resolved, but to a large extent on the scarcity or inefficiency of international adjudicating bodies, and in particular – even where such bodies exist – on the voluntary nature of states' acceptance of their jurisdiction.[554]

Subordination to international law is one of the fundamental elements of protecting the state and its sovereignty. In other words, state sovereignty does not rely on the equal ability to violate international law. Sovereignty "does not mean freedom from law but freedom within the law."[555] Last but not least, sovereignty does not exempt a state from the need to legally justify its actions or to unilaterally and arbitrarily exempt itself from the obligation to comply with the rules and principles that bind it.

> "International law may not be determinative in international affairs, but it is relevant and influences foreign policy 'first, as a constraint on action; second, as the basis of justification or legitimization for action; and third, as providing organizational structures, procedures, and forums' within which political decisions may be reached."[556]

Threats and opportunities are now cross-border in nature, which calls for joint action. The need to embrace international cooperation and the entanglement of decision-making processes within the network of international governance pose a challenge to the traditionally understood role of the state. This results in a redistribution of power, influence, and interests among international actors and a multi-dimensional nature of cooperation.

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[553] J.S. Nye, Jr., Judging Henry Kissinger. Did the Ends Justify the Means?, Foreign Affairs, November 30, 2023: "Kissinger was not an amoralist. "You can't look only at power," he told the audience at Harvard. "States always represent an idea of justice." In his writings, he noted that world order rested on both a balance of power and a sense of legitimacy. (...) At the same time, leaders cannot always follow simple moral rules. Ultimately, as analysts look at ends, they should not expect that leaders will pursue justice at the international level in ways that resemble what they might pursue in their domestic societies."

[554] Ch. Leben (fn. 207), p. 36 : « [A]lors qu'en droit interne les personnes sont en général inégales dans le droit, mais égales devant le droit, dans la société internationale décentralisée les Etats sont égaux dans le droit, mais complètement inégaux devant le droit. Ou plus exactement cette notion perd toute signification aussi longtemps que l'application du droit n'est pas le fait d'un organe tiers aux parties ».

[555] J. Crawford, *Chance, Order, Change: The Course of International Law. General Course on Public International Law*, RCADI, vol. 365 (2014), para. 98.

[556] A. Chayes, *The Cuban Missile Crisis: International Crises and The Role of Law,* 1974, p. 7.

Law and politics, and similarly international law and national law, coexist, overlap, influence each other and are mutually dependent.[557] The links between law (whether national or international) and the politics (power) of states are, contrary to appearances, obvious and inevitable. In other words, for international law to be effectively applied, it requires national law; conversely, national law extends, enriches and clarifies its scope as a result of the operation of international law.

The power of the modern state is, on the one hand, a social reality; on the other, however, its scope and form (competences) are defined by law. Law, in turn, is a product of political power, and its observance or violation is the work of states and, in this sense, an act of state policy. Violation of legal rules and principles are not unusual, but it does not deprive the law of its binding force.

Regarding the relationship and tension between international law and national law, it is worth citing the opinion of the Spanish Constitutional Court from 2004:

> Primacy is not set forth as a hierarchical superiority but as an 'existential requirement' of the Law of the Union [international law], in order to achieve in practice the direct effect and equal application in all states. (…) The primacy of Union legislation […] does not contradict the supremacy of the Constitution. Supremacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former.[558]

Thus concepts of primacy and supremacy coexist but have different functions and express different perspectives – primacy does not prejudge supremacy, and supremacy does not exclude primacy.[559]

7.1.3. In the context of security threats and the use of force, the question inevitably arises: is international law an effective instrument, and to what extent does its application and compliance depend on political elements?[560] In practice, we are faced with difficult challenges and dilemmas.

For example, Dean Acheson stated (case of the Cuban Missile Crisis) that the survival of a state is not just a matter of law[561]. This opinion concerns extreme

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[557] International Law Commission. UN Doc. A/61.10 of 2006: Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: "International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms" (para. 251).

[558] Constitutional Court of Spain, Declaration 1/2004, DTC 1 /2004 (unofficial translation) - https://www.tribunalconstitucional.es/ResolucionesTraducidas/Declaration%201-2004.pdf

[559] J. Kranz, *Supremacy over primacy...? Reflections on legal controversies between Poland and the European Union (2015-2023)*, "Polish Yearbook of International Law", vol. XLIII (2023), p. 13-41.

[560] See *supra* chapter 4.

[561] "The power, position, and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power – power that comes close to the sources of sovereignty. I cannot believe that there are principles of

circumstances. On the one hand, this does not have to mean the negation of law; it rather reflects the imperfections of international security mechanisms. On the other hand, it encourages reflection on the evolution and adaptation of international law to the new challenges.

It is in this context that one should interpret the statement of the French Minister of Foreign Affairs, Bernard Kouchner, who stated that in the event of failure of negotiations with Iran on the issue of control over its nuclear program, the ultimate measure is the use of military force.[562]

If one believes in the principle of the force of law before the law of force (*plus ratio quam vis caeca valere solet*), one must also be certain that others also observe it. It is doubtful whether this is always the case. The reaction does not always have to involve immediate military action, but effectively countering radical threats can ultimately involve the use of military force when other means fail.

7.2. The issue of the use of force is closely linked to the political concepts of national and international security, which are reflected in the official doctrines of international organizations and states. These doctrines echo new threats and military strategy and are not without influence on international law and the practice of states.

7.2.1. The US National Security Strategy of 2002 and then of 2006 made an accurate diagnosis of threats, but the countermeasures and their consequences are sometimes considered as controversial[563]. In this strategy, we find traces of the

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law that say we must accept destruction of our way of life. (…) The survival of states is not a matter of law" – D. Acheson, *Remarks at the Proceedings of the American Society of International Law,* 57th Annual Meeting 13–15 (1963), (in:) R.J. Beck et al. (eds), *International Rules: Approaches from International Law and International Relations,* New York 1996, p. 108.

[562] « Il faut se préparer au pire, a déclaré Bernard Kouchner, au sujet de l'Iran. Interrogé (…) pour savoir ce que cela signifiait, le chef de la diplomatie a répondu: c'est la guerre. (…) Nous devons négocier jusqu'au bout, a dit le ministre. Mais la possession de l'arme atomique par Téhéran serait 'un vrai danger pour l'ensemble du monde', a dit Bernard Kouchner, même si 'aucun signe ne nous permet de penser en dehors des préparations militaires' qu'un bombardement de l'Iran soit proche. 'Je ne crois pas que nous en soyons là' mais il est 'normal qu'on fasse des plans', a-t-il dit » – « Le Figaro », 16 septembre 2007.

[563] *The National Security Strategy of the United States of America,* September 2002: "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends (….). Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. (…) We cannot let our enemies strike first. (…) We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. (…) The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively" – www.whitehouse.gov/nsc/nssall.html; version this one strategy from March 2006 brings in this in regard no essential changes – www.whitehouse.gov/nsc/nss/2006/print/index.html; US *National Defense Strategy,* June 2008: "The United States will, if necessary, act preemptively in exercising its right of self-defense to forestall or prevent hostile acts by our adversaries" (p. 14). See also *National Strategy to Combat Weapons of Mass Destruction,* December 2002 and *National Strategy for Combating Terrorism,* February 2003; *Defense*

concept of pre-emptive (anticipatory) strike, but the controversy concerns the admissibility of preventive military strikes[564].

The terminology of the security strategy seems imprecise due to the lack of a precise distinction between pre-emption and prevention, or to the extension of the concept of imminent threat to the preventive armed operation. However, it is true that "new technology requires new thinking about when a threat actually becomes 'imminent'. (...) We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[565]

Contrary to appearances, the policy of President Barack Obama (the version of the security strategy from May 2010) does not constitute a fundamental breakthrough, which can be justified on the one hand by the US interests, and on the other by legal complications related to new threats[566]. The president did not formally question the previous national security doctrines, although he added some new accents. He did not rule out the unilateral use of force (pre-emptive, preventive or for humanitarian purposes), which goes beyond the narrowly understood self-defence[567]. Moreover, he stated that armed force can serve to ensure peace, but on

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Counterproliferation Initiative, December1993 and speeches secretary state, G. Shultz, from 1984–1986; W.W. Reisman, A. Armstrong (fn. 278), pp. 527–532.

[564] H. Kissinger ("International Herald Tribune", April 13, 2006): "Of course, the United States, like any other sovereign nation, will, in the end, defend its vital national interests – if necessary, alone. But it also has a national interest to make the definition of national interest of other nations as much parallel its own as it can. (…) These applications of preventive force suggest the following conclusions: The analysis underlying the Strategic Doctrine document is correct in emphasizing that the changes in the international environment create a propensity toward some forms of preventive strategy. But stating the theory is only a first step."

[565] C. Rice, *Remarks on the President's National Security Strategy* (New York, October 1, 2002).

[566] *Strengthening our Security by Adhering to our Values and Laws,* Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Program on Law and Security, Harvard Law School, Cambridge, Massachusetts, September 16, 2011: "As the President has said many times, we are at war with al-Qa'ida. (…) Our ongoing conflict with al-Qa'ida stems from our right - recognized under international law - to self-defence. (…) The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. (…) And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves."

[567] US. *National Security Strategy,* May 2010: "Military force, at times, may be necessary to defend our country and allies or to preserve broader peace and security, including by protecting civilians facing a grave humanitarian crisis. (…) [W]e will exhaust other options before war whenever we can and carefully weigh the costs and risks of action against the costs and risks of inaction. (…) The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force" (p. 22).

Remarks by the President on National Security. The White House. Office of the Press Secretary, May 21, 2009: "After 9/11, we knew that we had entered a new era – that enemies who did not abide by any law of war would present new challenges to our application of the law; that our government would need new tools to protect the American people, and that these tools would have to allow us to prevent attacks instead of simply prosecuting those who try to carry them out. (…) Now let me be clear: We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so condition that the international legal standards of its use are maintained. The main difficulty comes down to establishing and assessing the facts and then qualifying them legally.

Accepting the Nobel Peace Prize (2009), US President Barack Obama stated[568]:

> "There will be times when nations – acting individually or in concert – will find the use of force not only necessary but morally justified. (…) A non-violent movement could not have halted Hitler's armies. Negotiations cannot convince al Qaeda's leaders to lay down their arms. (…) The world must remember that it was not simply international institutions – not just treaties and declarations – that brought stability to a post-World War II world. (…) So yes, the instruments of war do have a role to play in preserving the peace. (…) I – like any head of state – reserve the right to act unilaterally if necessary to defend my nation (…) [A]ll nations – strong and weak alike – must adhere to standards that govern the use of force. I believe the United States of America must remain a standard bearer in the conduct of war. (…) And this becomes particularly when the purpose of military action important extends beyond self-defence or the defence of one nation against an aggressor. (…) I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. (…) Those who claim to respect international law cannot avert their eyes when those laws are flouted. Those who care for their own security cannot ignore the danger of an arms race in the Middle East or East Asia. Those who seek peace cannot stand idly by as nations arm themselves for nuclear war. The same principle applies to those who violate international laws by brutalizing their own people".

The US position on the use of nuclear weapons since the presidency of Barack Obama includes some additional restrictions. These consist in the US committing not to use nuclear weapons against states parties to the NPT (which comply with the control regime of this Treaty), including if they attack the United States or its allies and partners with chemical or biological weapons. According to the new doctrine, the United States treats nuclear weapons primarily as an instrument of deterrence but allows for the possibility of their use in extreme situations against states that are not

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with an abiding confidence in the rule of law and due process; in checks and balances and accountability."

American Society of International Law. International Law, 2008 - Barack Obama: "The US has today and has always had the right to take unilateral military action, including the pre-emptive use of force, to eliminate imminent threats to our country and security. No nation or organization has a veto over our right of self-defense – and none ever will. In fact, Article 51 of the UN Charter recognizes this right of self-defense for every nation. The preventive use of force – in anticipation of potential threats that may not be imminent – is a different matter. This is the so-called Bush doctrine. Sometimes, the preventive use of force may be necessary, but rarely. (…) I will not hesitate to use force, unilaterally if necessary, to protect the American people or our vital interests whenever we are attacked or imminently threatened self-defense, we should make every effort to garner the clear support and participation of others" – http://www.asil.org/obamasurvey.cfm

[568] *Remarks by the President at the Acceptance of the Nobel Peace Prize,* Oslo City Hall, December 10, 2009 – https://obamawhitehouse.archives.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize

parties to the NPT or that violate the control regime of this Treaty[569]. In this context, the latest American doctrine is more restrictive than the Russian or French doctrine.

US policy and strategy are a response to new types of threats, against which the world, including the UN, is to some extent helpless.[570] Let us note, however, that the concept of preventive operation does not pose the greatest threat to the current legal regulation, especially since such operations rarely occur in practice.

7.2.2. Since the late 1990s, there has been an evolution of Russian doctrine that allows Russia to use nuclear weapons even if it is not attacked with such weapons, to use nuclear weapons in response to some attacks using conventional weapons,

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[569] *Nuclear Posture Review Report.* US Department of Defence, April 2010: "During the Cold War, the United States reserved the right to use nuclear weapons in response to a massive conventional attack by the Soviet Union and its Warsaw Pact allies. Moreover, after the United States gave up its own chemical and biological weapons (CBW) pursuant to international treaties (while some states continue to possess or pursue them), it reserved the right to employ nuclear weapons to deter CBW attack on the United States and its allies and partners" (pp. vii-viii). "The United States is now prepared to strengthen its long-standing 'negative security assurance' by declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations. (…) In making this strengthened assurance, the United States affirms that any state eligible for the assurance that uses chemical or biological weapons against the United States or its allies and partners would face the prospect of a devastating conventional military response – and that any individuals responsible for the attack, whether national leaders or military commanders, would be held fully accountable. Given the catastrophic potential of biological weapons and the rapid pace of bio-technology development, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and US capacities to counter that threat – states that possess nuclear weapons and states not in compliance with their nuclear non-proliferation obligations – there remains a narrow range of contingencies in which. US nuclear weapons may still play a role in determining a conventional or CBW attack against the United States or its allies and partners. The United States is therefore not prepared at the present time to adopt a universal policy that deterring nuclear attack is the sole purpose of nuclear weapons but will work to establish conditions under which such a policy could be safely adopted. Yet that does not mean that our willingness to use nuclear weapons against countries not covered by the new assurance has in any way increased. Indeed, the United States wishes to stress that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners" (p. viii).

[570] TM Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?,* "Hastings International and Comparative Law Review", 2004, Vol. 7, no. 3, p. 429: "The new doctrine is not meant to create a world in which every nation keeps a nuclear weapon in its bedside drawer (...) with a license to shoot anyone suspected of being unfriendly. It is very unlikely that Washington is eager to have its new doctrine adopted by New Delhi and Beijing, let alone Tehran and Pyongyang."

and to use pre-emptive or preventive nuclear strikes[571]. This applies to both global war and regional conflicts. Russia does not rule out preventive strikes either[572].

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[571] *Военная доктрина Российской Федерации Утверждена Указом Президента Российской Федерации* (5 февраля 2010 года): "16. В случае возникновения военного конфликта с применением обычных средств поражения (крупномасштабной войны, региональной войны), ставящего под угрозу само существование государства, обладание ядерным оружием может привести к перерастанию такого военного конфликта в ядерный военный конфликт. (…) 22. (…) Российская Федерация оставляет за собой право применить ядерное оружие в ответ на применение против нее и (или) ее союзников ядерного и других видов оружия массового поражения, а также в случае агрессии против Российской Федерации с применением обычного оружия, когда под угрозу поставлено само существование государства. (…) 26. В целях защиты интересов Российской Федерации и ее граждан, поддержания международного мира и безопасности формирования Вооруженных Сил Российской Федерации могут оперативно использоваться за пределами Российской Федерации в соответствии общепризнанными принципами и нормами международного права, международными договорами Российской Федерации и федеральным законодательством" – http://news.kremlin.ru/ref_notes/461;

The Russian Federation Military Doctrine (April 21, 2000): "8. (…) The Russian Federation reserves the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it and (or) its allies, as well as in response to large-scale aggression utilizing conventional weapons in situations critical to the national security of the Russian Federation. The Russian Federation will not use nuclear weapons against states party to the Nonproliferation Treaty that do not possess nuclear weapons except in the event of an attack on the Russian Federation, the Russian Federation Armed Forces or other troops, its allies, or a state to which it has security commitments that is carried out or supported by a state without nuclear weapons jointly or in the context of allied commitments with a state with nuclear weapons" [The 1997 doctrine allowed the first use of nuclear arms only 'in case of a threat to the existence of the Russian Federation'].

N. Sokov, *Russia's 2000 Military Doctrine*, October 1999 (revised July 2004): "The 1993 document defined the mission of nuclear weapons as 'the removal of the danger of a nuclear war by means of deterring [other states] from unleashing an aggression against the Russian Federation and its allies'. They were supposed to be used only under conditions of a large-scale (global) war that put the sovereignty and very existence of Russia at risk. The Doctrine, however, contained two important warnings: first, that even a limited conflict could escalate into a global war and, second, that any use of nuclear weapons risked an all-out, unrestrained nuclear exchange. (…) This represented, in essence, deterrence of any (including limited) conflict by threat of world annihilation. (…) The Doctrine, further, contained important limitations on the use of nuclear weapons, which repeated Russia's obligations under the negative security assurances under the Non-proliferation Treaty. (…) The right to use nuclear weapons first was not spelled out, but, rather, was introduced 'by default', i.e., by not mentioning the previously traditional no-first-use plank. Although the 2000 language sounds similar, it contains certain subtle, but important changes: (…) The Russian Federation reserves the right to use nuclear weapons in response to the use of nuclear weapons or other weapons of mass destruction against itself or its allies and also in response to large-scale aggression involving conventional weapons in situations that are critical for the national security of the Russian Federation and its allies'. (..) [T]he right to use nuclear weapons first in response to a conventional attack is clearly spelled out. (…) Perhaps the most important innovation is the broadening of conflict scenarios under which nuclear weapons could be used. (…) The use of nuclear weapons is associated with the last two types of conflict [regional war (attack by a state or a coalition of states pursuing significant political goals); and global war (attack by a coalition of states; survival and sovereignty of Russia are at stake)], whereas in the 1993 Doctrine nuclear weapons are only associated with a global war" – http://www.nti.org/db/nisprofs/over/doctrine.htm

National Security Concept of the Russian Federation. Approved by Presidential Decree No. 1300 of 17 December 1999 (given in the wording of Presidential Decree No. 24 of 10 January 2000): "The Russian Federation must have nuclear forces capable of delivering

7.2.3. In early 2006, French President Jacques Chirac clarified that nuclear weapons are not intended to deter terrorists, but that leaders of states that would use terrorist methods against France, as well as those who would use weapons of mass destruction, must expect that France will respond with conventional or other weapons. However, France has a limited ability to conduct major military operations on its own, which is why it sees nuclear strikes not so much as an essential element of warfare, but rather as a method of deterrence and self-defence consistent with Article 51 of the UN Charter[573]. Compared to the previous French doctrine, the emphasis has changed somewhat: France wants to deter not only militarily strong states, but also weaker, politically irresponsible states[574].

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specified damage to any aggressor state or a coalition of states in any situation. (…) The Russian Federation proceeds from the following principles when regarding the possibility of using military force for ensuring its national security: the use of all available means and forces, including nuclear weapons, in case of the need to repel an armed aggression when all other means of settling the crisis situation have been exhausted or proved ineffective".

[572] "General Nikolai Makarov, Russia's most senior military commander, warned NATO that if it proceeded with a controversial American missile defence system, force would be used against it. 'A decision to use destructive force pre-emptively will be taken if the worse situations', he said," The Telegraph, May 3, 2012;

Russia's new military doctrine allows pre-emptive nuclear strikes, October 14, 2009 (RIA Novosti): "Russia's new military doctrine does not rule out pre-emptive nuclear strikes against potential aggressors, the head of its Security Council said on Wednesday. 'An option is stipulated for the possibility of using nuclear weapons depending on the situation and the intentions of a potential enemy', Nikolai Patrushev said. (…) 'In situations critical for national security, a nuclear strike, including a pre-emptive one, against an aggressor is not ruled out', he went on" – http://en.rian.ru/russia/20091014/156461160.html

La nouvelle orientation de la doctrine militaire russe: entretien avec le colonel-général Balouïevsky, 12 novembre 2003: « Nous considérons les frappes préventives comme une mesure extrême, devant être utilisée lorsque tous les autres moyens d'influence disponibles ont été épuisés - politiques, économiques et internationaux. Les frappes préventives sont une violation de la loi internationale, puisqu'il est écrit très clairement qu'un Etat ne peut faire usage de la force que dans l'éventualité où il a été sujet à une attaque. Mais les réalités du jour sont telles que des membres de la communauté globale utilisent déjà la force militaire comme une mesure préventive » – www.checkpoint-online.ch/CheckPoint/Forum/For0057-EntretienGenBalouievsky.html.

[573] Ministère des Affaires étrangères. Point de presse, 7 Avril 2010: « la France a donné en 1995 des assurances de sécurité contre le recours ou la menace de recours aux armes nucléaires aux Etats non dotés de l'arme nucléaire parties au TNP. Le Conseil de sécurité des Nations unies a pris note de cette déclaration, ainsi que de celle des autres Etats dotés, dans sa résolution 984 du 11 avril 1995 ; il a de nouveau rappelé ces déclarations des Etats dotés dans sa résolution 1887 en soulignant que ces garanties renforçaient le régime de non-prolifération nucléaire. (…) [L]'octroi de garanties de sécurité donné par les Etats dotés ne saurait, en aucune manière, faire obstacle à l'exercice du droit de légitime défense conformément à l'article 51 de la Charte des Nations unies ».

[574] « L'intégrité de notre territoire, la protection de notre population, le libre exercice de notre souveraineté constitueront toujours le cœur de nos intérêts vitaux. Mais ils ne s'y limitent pas. (...) Par exemple, la garantie de nos approvisionnements stratégiques ou la défense de pays alliés, sont, parmi d'autres, des intérêts qu'il convient de protéger. Il appartiendrait au Président de la République d'apprécier l'ampleur et les conséquences potentielles d'une agression, d'une menace ou d'un chantage in supportables à l'encontre de ces intérêts. (…) La dissuasion nucléaire (…) n'est pas destinée à dissuader des terroristes fanatiques. Pour autant, les dirigeants d'Etats qui auraient recours à des moyens terroristes contre nous, tout comme ceux qui envisageraient d'utiliser, d'une manière ou d'une autre,

Signals about the use of nuclear weapons also appear openly in the circles of former high-ranking NATO commanders[575]. However, the nuclear states declared in 1995 that they would not use nuclear weapons against NPT states that do not possess them[576]. In any case, nuclear weapons remain a last resort, as envisaged in NATO's 2010 strategic concept[577]. International law and lawyers cannot escape this dilemma.

des armes de destruction massive, doivent comprendre qu'ils s'exposent à une réponse ferme et adaptée de notre part. Et cette réponse peut être conventionnelle. Elle peut aussi être d'une autre nature », *Allocution de M. Jacques Chirac, Président de la République,* Landivisiau – l'Ile Longue/Brest, 19 Janvier 2006.

« L'emploi de l'arme nucléaire ne serait à l'évidence concevable que dans des circonstances extrêmes de légitime défense, droit consacré par la Charte des Nations Unies. Notre dissuasion nucléaire nous protège de toute agression d'origine étatique contre nos intérêts vitaux – d'où qu'elle vienne et quelle qu'en soit la forme. (…) Tous ceux qui menaceraient de s'en prendre à nos intérêts vitaux s'exposeraient à une riposte sévère de la France, entraînant des dommages inacceptables pour eux, *hors de proportion avec leurs objectifs*. Ce serait alors en priorité les centers de pouvoir politique, économique et militaire qui seraient visés. (…) Dans le cadre de l'exercice de la dissuasion, il serait alors possible de procéder à un avertissement nucléaire, qui marquerait notre détermination. Il serait destiné à rétablir la dissuasion », *Discours de M. le Président de la République, Nicolas Sarkozy,* Cherbourg, 21 March 2008.

Loi n°2003-73 du 27 janvier 2003 relative à la programmation militaire pour les années 2003 à 2008 (Journal Officiel de la République Française du 29 janvier 2003, Rapport annexé, point 2.3.1): prévenir les menaces le plus tôt possible. Dans ce cadre, la possibilité d'une action préemptive pourrait être considérée, dès lors qu'une situation de menace explicite et avérée serait reconnue.

Defence et Sécurité nationale. Le Livre blanc, Paris, 17 juin 2008: « La typologie des menaces et des risques oblige à redéfinir les conditions de la sécurité nationale et internationale » (p. 13). «Ce Livre blanc introduit une innovation majeure (…). Il expose une stratégie non seulement de défense, mais aussi de sécurité nationale » (p. 16). « La dissuasion nucléaire est strictement défensive. Elle a pour seul objet d'empêcher une agression d'origine étatique contre les intérêts vitaux du pays, d'où qu'elle vienne et quelle qu'en soit la forme. (…) L'emploi de l'arme nucléaire ne serait concevable que dans des circonstances extrêmes de légitime défense, au sens où celle-ci est consacrée par la Charte des Nations unies » (p. 70). « La stratégie de la France exclut toute guerre préventive, même si elle ne s'interdit pas, dans des circonstances de menaces précises et imminentes, des actions préemptives ponctuelles » (p. 165). « Par ailleurs, dès qu'une menace d'agression armée explicite, imminente et engageant la sécurité nationale est identifiée, la France devra aussi être capable de planifier, conduire et exécuter des actions militaires préemptives seule ou en coalition » (p. 213).

[575] See fn. 35.

[576] SC Res. 984 (1995): "1. Takes note with appreciation of the statements made by each of the nuclear-weapon States [...], in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons."

[577] *Strategic Concept* (fn. 170): "17. Deterrence, based on an appropriate mix of nuclear and conventional capabilities, remains a core element of our overall strategy. The circumstances in which any use of nuclear weapons might have to be contemplated are extremely remote. As long as nuclear weapons exist, NATO will remain a nuclear alliance. 18. The supreme guarantee of the security of the Allies is provided by the strategic nuclear forces of the Alliance, particularly those of the United States."

Chapter 8. Concluding reflexions

If we want everything to remain as it is, everything must change.
Giuseppe di Lampedusa, The Leopard (1958)

8.1. New weapons, new security threats and new international balance of power are a contemporary challenge for politics and international law. We sometimes face dilemmas when international reality exceeds the legal regulation, although the difficulty does not always lie in determining what is legal (illegal), but in defining the real problem and the accompanying facts and politics. Are international realities shaped by legal norms? Do these rules reflect only practice? Are certain universal values reflected in international law, and to what extent?

The legality of the use of armed force is primarily a matter of law. Politics, however, provides a complementary perspective by justifying the premises and objectives of the use of force on the basis of specific values. The political aspect also has a significant influence on decision-making and on predicting effectiveness.[578] Legality and legitimisation thus form a common framework.[579]

We also have to ask what contributes more to the depreciation of international law: the unilateral use of armed force by states, the lack of effective cooperation structures between states, the inefficiency of existing institutions, the failure to adapt international law norms (revision of the United Nations Charter is practically unrealistic), or inability to react in the face of aggression and crimes against humanity.[580]

The answer should be sought through the interpretation of existing rules and principles (including customary ones) and the new challenges can serve as an inspiration for legislative change. International courts (including the ICJ[581]) do not seem to be in this regard a viable alternative.[582]

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[578] See *supra* 4.1.

[579] ICJ. *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion of 22 July 2010, Declaration of Judge Simma: "9. (…) That an act might be 'tolerated' would not necessarily mean that it is 'legal', but rather that it is 'not illegal'." See N. Petersen, *Demokratie also teleological Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht,* Heidelberg, New York 2009; R. Wolfrum, V. Röben (eds), *Legitimacy in International Law,* Berlin–Heidelberg–New York 2008; Th.M. Franck, *The Power of Legitimacy Among Nations,* New York–Oxford 1990.

[580] "It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by", *The Responsibility to Protect*. *Report of the International Commission on Intervention and State Sovereignty*, December 2001, para. 6.37 (p. 55).

[581] J. Green (fn. 8).

[582] As extreme example: "Assuming for the sake of argument that by recognizing the DPR and LPR and by launching the ‚special military operation', the Russian Federation sought to implement its obligations under the Convention, and that the acts in question are contrary to international law, it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to the recognition of States and the use of force. These matters are not governed by the Genocide Convention, and the Court does

The security and existence of states depend not solely on law and its observance, but ultimately on the power factor, which, however, does not mean eliminating the role of law. The world order rest on both a balance of power and a sense of legitimacy and values (justice).

The international community is not a political or ethical monolith. Hence, there are probably greater problems with a common axiology of the prohibition of the use of force than in the Middle Ages. Not only the differences between the increasingly numerous states are becoming a significant problem for the development of international law, but also their qualitative contrasts in the sphere of ideology, and especially legal culture. It is difficult for democratic states, non-democratic (dictatorial) states and failed or failing states to find common ground.[583] Therefore, the transition from international society to an international community based on universal principles and values needs time.[584] In this sense, the modern world differs from the medieval *societas christiana*.

8.2. Legal norms cannot regulate every issue – they concern typical situations, while exceptions can be discussed or tolerated.

The evolution of the international environment implicates that international law (including the UN Charter) is not always adequately adapted – states and international organizations are looking for ways to adjust it to new circumstances. The failure of legal rules to keep up with social phenomena is not something extraordinary. In national systems, the law can be amended more easily and quickly and its application is subject to the compulsory jurisdiction of courts. In the international community, the situation is different and more difficult – modifications occur much slower and the role of international courts is limited.

There are also difficulties in defining some fundamental terms, such as self-defence and armed attack,[585] combatant, occupation or armed conflict. Their meaning and their interpretation are not today understood in the same way as they were by the drafters of the UN Charter in 1945.

Another aspect is the political tension between democratic states and autocratic or totalitarian regimes; the shortcomings of control concerning weapons of mass

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not have jurisdiction to entertain them in the present case", *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States Intervening) (Judgement) (2 February 2024) para 146.

[583] See R.J. Delahunty, J. Yoo, *Kant, Habermas and Democratic Peace,* University of St. Thomas School of Law, Legal Studies Research Paper No. 10-01, p. 3: "Our core claim, then, is this: Habermas conceives the 'Kantian project' to be one of securing global peace and upholding basic human rights through strengthening and expanding supranational and transnational institutions. In substance, he is offering a kind of Kantian world federalism as the way forward for the global community of states. We consider that approach fundamentally mistaken. In our view, democracy-promotion is clearly the better path. It recognizes the necessity and desirability of a plurality of independent nation states. It is more protective of both the freedom of individuals and the cultural identities of peoples. It is far more likely to yield a durable global peace."

[584] See A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung,* München 2001.

[585] See J. Green, *The International Court of Justice and Self-Defence in International Law*, Oxford and Portland 2009.

destruction; problems related to international terrorism; the adaptation of international law in the face of cyberattacks; energy security (blackmail), especially in conditions of high dependence on energy suppliers. Finally, the problem of state responsibility is becoming more complicate especially for the actions of irregular groups.

As a consequence, it is not surprising that controversy arises in assessing the legality of the use of force, specifically concerning pre-emptive self-defence, preventive military operation or humanitarian intervention, as well as in the context of cyberattacks or the so-called hybrid war.

Some authors see these new ideas as leading to erosion or even collapse of the UN system and consequently suggest maintaining the rigor of the Charter's interpretation. For example, in the work on the UN reform, it was clearly recommended to leave Article 51 of the UN Charter unchanged, suggesting that the problem is not so much the adoption of new norms or concepts as ensuring greater effectiveness of the Security Council[586]. Such difficulties were revealed, among others, in the work of the UN summit in 2005.[587]

Caution should be exercised in criticizing the Charter or declaring its norms outdated. New weapons, tactics and threats put the problem of the potential use of armed force in a different light and this tendency should be seen not so much as a desire to dismantle the existing system. We are, in fact, dealing with hard cases, which we confront not only with imperfect international legal regulations, but also with the principles of justice and common sense. As usual, however, the question arises of who should make the assessment and according to what criteria.

The solution is not to cling dogmatically and rigidly to existing standards. It is not so much about the unlimited loosening of current rules as about their clarification and adjustment to the changing situation. We can speak for now of tolerated (accepted) and sometimes justified, extraordinary and extenuating circumstances-based cases of the use of armed force.[588]

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[586] *A More Secure World (*fn. 24), §§ 192, 198; *Larger Freedom* (fn. 289): "126. The task is not to find alternatives to the Security Council as a source of authority but to make it work better. When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion. I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force."

[587] *2005 World Summit Outcome,* A/RES/60/1: "79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter."

[588] Th.M. Franck (fn. 52), p. 68: "It is possible to conclude that the use of force by a state or regional or mutual-defense system is likely to be tolerated if there is credible evidence that such first-use was justified by the severe impact of another state's indirect aggression or by clear evidence of an impending, planned, and decisive attack by a state or by an egregious

Confronted with changing circumstances, the current legal regime for the use of force seems imperfect. Consequently some military operations falls within a grey area. The greatest controversy relates to the category of formally illegal actions (lack of a Security Council decision or of grounds for self-defence).

In this context, it is necessary to consider whether the tolerance or indirect acceptance of certain actions means recognition of relics of customary law (which the UN Charter does not replace or invalidate), whether we are dealing with a flexible interpretation of the Charter norms by the Security Council, or whether we are in the process of shaping new norms of customary law. Customary international law results from the practice of states combined with appropriate legal convictions. This is also the path to its evolution and change.

8.3. The persistence of tension – between security and legality, legality and legitimacy, sovereignty and human rights, stability and change – underscores the need for renewed reflection on the limits and possibilities of regulating the use of force in the era of global politics.

Legal evaluation sometimes leads to real puzzles and to the assessment of legality mainly at the political level. The international order established after 1945 has and continues to have a positive impact on international relations, but this does not negate its weaknesses, including the selective or asymmetrical application of its rules and principles. This is particularly true with regard to the regulation of the use of force and its application in practice, where in reality the strongest can do more, which means tacit acceptance of double standards.

However, such accusation must be made with caution, because this order (in its essence of Western provenance) serves nevertheless as a benchmark and fulfils an organizing function in many areas of international cooperation. François de La Rochefoucauld's maxim: "Hypocrisy is a kind of homage that vice pays to virtue"[589] should be understood in such a way that hypocrisy, after all, appreciates the value of virtue (which it does not eliminate).

Attempts to return to the imperial rule are more an expression of a crisis of politics than of law. While the functioning of the rules is not perfect (as in the case of Ten Commandments or Penal Code) their violations do not automatically dismantle the concept itself, because the validity of law does not depend on its compliance. The practice of several countries - including Russia, China or the United States - is not able to suddenly destroy the foundations of the international legal order – this is a process that requires time and an appropriate reaction from other countries.

By engaging with both state practice and scholarly debate, this study argues that international law is undergoing a process of adaptation, though not without contradictions and risks.[590]

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and potentially calamitous violation of humanitarian law by a government against its own population or a part of it."

[589] « L'hypocrisie est l'hommage que le vice rend à la vertu », François duc de La Rochefoucauld, *Réflexions ou Sentences et Maximes morales* (1664).

[590] See *supra* 4.1.

8.4. The UN Charter system has been in force for only a few decades, compared to thousands of years, when war was an almost unlimited extension of politics.

The UN system is still fragile but subject to practical evolution.[591] In contrast to centralized, national legal systems, the international level remains imperfect in terms of definitions of concepts, objectivity of assessments, legally binding decisions, or shared values. The scope of jurisdiction of international bodies settling disputes is limited. The Security Council deals with only a part of armed conflicts.

The history of the UN is to some extent one of its weakness. However, it is difficult to blame the UN in every case, because its activities and itself are only a reflection of international realities and, above all, the politics of the member states. In fact, the veto system of the permanent members means that no decision of the Council can be taken against the interests of one of them. Furthermore, despite the less frequent blockades after 1990, the decisions adopted by it under Chapter VII encounter a barrier of enforceability, because Member States boycott legally binding resolutions for years.

The Security Council faces another challenge, especially if it lacks the political will to apply non-military sanctions or use armed force. It is then inclined to adopt compromise resolutions that satisfy everyone and no one at the same time. The justification provided by the Security Council in this context is not always precise, as it focuses more on the political aspect than on legal analysis.

That being said, the role of the UN should not be underestimated because its practice demonstrates a search for constructive solutions involving, among others, a creative interpretation of the UN Charter. The following examples can be mentioned:

– clarification and practical extension of such UN Charter concepts as threats to international peace and security, self-defence, armed attack;

– limitation of the concept of force in Article 2, paragraph 4, to armed force;

– toleration of certain armed actions by regional organizations without prior consent of the Security Council;

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[591] K. Anderson (fn. 51): "The international security situation since 1990 is, in fact, quite different. It is actually two systems – the UN and US security systems – operating in parallel while conjoined at several points. There is a weak one, the UN collective security apparatus, and there is a strong one, the US security guarantee. Understood this way, the US is not merely *a,* or even *the* dominant and most powerful actor within a system of security either collective or selective. Rather, the US offers a genuinely alternative system of international peace and security that is separate from the role it also plays as a dominant actor within the UN collective security apparatus of the Security Council" (p. 66); "The US offers a hegemonic yet parallel system. It is hegemonic rather than imperial, hegemonic without rejecting UN collective security as such, 'hegemonically cooperative' with UN collective security most of the time rather than constantly competitive with it – but, importantly, it is hegemonic rather than multilateral. (…) It is a stable system so long as the US is able and willing to bear the cost, and provided it is not undermined – or made unmanageably expensive – by the rise of competitive new powers, especially regional ones, in a competitive world" (p. 87); "In the multipolar world, the function of the Security Council thus becomes that of the 'talking shop of the nations'. Only rhetorically and on special occasions is the Security Council the 'management committee of collective security', and only sometimes the 'concert of nations'. In times of genuine conflict and crisis among the Great Powers themselves, of course, a 'talking shop' is always what the Security Council becomes, precisely as it was intended to do. (…) A place for diplomacy – and that is all" (p. 83).

– authorization for the use of force by a coalition of states (*coalition of the willing)* in combination with the formula *of all necessary means;*

– establishment of peacekeeping operations *on the* basis of special resolutions of the Security Council or the General Assembly and *peace-enforcement* as a result of authorizing a group of states to use armed force (dead articles 43–47 of the UN Charter);

– failure to recognize an abstention or absence from the Security Council by one of the permanent members of the Council as an obstacle to valid substantive decisions (article 27, paragraph 3 of the UN Charter);

– tolerance (lack of condemnation) of certain humanitarian interventions (without the consent of the Security Council);

– development of the quasi-legislative function of the Security Council (for example resolutions 827, 955, 1373, 1540);

– creation of *Peacebuilding Commission* (2005);

- Arria-formula (informal SC meetings, initiated in 1992).

However, the UN or other organizations, as well as states, sometimes offer diplomatic solutions, knowing in advance that they are not willing (or able) to resort to force in extreme cases, and in this way weaken their position, strengthen the attackers, and disregard the victims.[592] The extreme variant can be described as self-deterrence, i.e. the unwillingness to lawful use force for fear of so-called escalation (extra-legal argument).

The policy of concessions (appeasement) is sometimes justified by the desire to maintain peace. However, the price may turn out to be the dramatic fate of entire communities (for example, mass murders, concentration camps). Waiting and making concessions can be particularly dangerous when politically unpredictable states gain access to weapons of mass destruction and their means of delivery.

In practice, political creeping does not protect against political collapse.

8.5. Maintaining a rigorous interpretation of the UN Charter can be problematic given the changing international realities and the consideration of moral values, especially human rights.

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[592] D. Pletka, *The Iran Counter-Proliferation Act of 2007,* April 21, 2008: "Those who rule out war in any circumstance, however, should recognize that the prospect of military action is what prompts Iran's leadership to take seriously the sanctions now on the table. More importantly, it is obvious that the limited multilateral sanctions now in effect will not have their desired effect. Then what? If war is off the table, submission and tribute will remain. This leaves us with the hope that harsher and more effective economic sanctions can raise the cost to Iran of pursuing nuclear weapons and change the calculus of decision-makers in Tehran" – www.aei.org/publications/pubID.27841/pub_detail.asp; O.F. Kittrie, *New Sanctions for A New Century: Treasury's Innovative Use of Financial Sanctions,* University of Pennsylvania Journal of International Law, 2009, Vol. 30/3, pp. 789–822; O.F. Kittrie, *Using Stronger Sanctions to Increase Negotiating Leverage with Iran,* "Arms Control Today", Vol. 39, December 2009 – http://www.armscontrol.org/print/3982; F. Leverett, H.M. Leverett, *The Fog of Containment. George Kennan shouldn't be our Cold War guide to dealing with Iran. Try Richard Nixon,* "Foreign Policy," November 15, 2010; K. Sadjadpour, *The Sources of Soviet-Iranian Conduct. How George Kennan is still the best guide to today's villain inside a victim behind a veil,* "Foreign Policy", November 2010; "X" (G.F. Kennan), *The Sources of Soviet Conduct,* Foreign Affairs, July 1947.

Positivist interpretation of the UN Charter leads to immobility, and the veto of the permanent members of the Security Council leads to paralysis. In turn, concepts similar to the law of nature and moral norms turn out to be too weak to guarantee effectiveness. The most promising seems to be combining both arguments[593].

Between unrealistic revision of the Charter and simple recognition of the law-making effects of facts, there is a middle way – the study of the practice of states and their legal opinions in order to creatively interpret the norms and legal concepts of the UN Charter. The Charter provides such possibilities, because it contains many legally undefined or only partially defined concepts.

However, the practice is often an expression of camouflage, ideological orthodoxy, political or economic pressure, political correctness, and hypocrisy. States avoid legally justifying their actions, although the UN Charter remains an important point of reference for them. There is therefore no doubt that the practice must be subject to some filtering, so the opinion of states with an established international position must be taken into account. For example, it is difficult to expect broad support for the concept of humanitarian intervention, because it is known that dictators will never accept it.

The fundamental question is who is to decide about the use of force and to assess whether and to what extent it is not only legal but also justified.[594].

The Security Council is not effective enough to guarantee the security of states. The path through the UN is nevertheless the right one, because states thereby submit to external control and at the same time to self-control. This path is dominated by a large extent of the extra-legal interests of the member states. For this reason, the legal significance of many resolutions, especially those of the General Assembly, seems limited.

As a consequence we are faced with the tendency to replace or supplement the UN by coalitions of states. The weaknesses of the Security Council favour the formation of such coalitions, which sometimes deserve to be assessed positively. Can they go, and if so, how far can they go in applying force?

We must keep in mind that "not everything noble is lawful; not everything noble and lawful is feasible; and not everything noble, lawful, and feasible is wise."[595]

8.6. Contemporary evolution proves that the increase of international tensions, as well as difficulties in applying international law, should be sought not only on the side of states reacting to threats, but also on the side of dictatorial states or terrorists provoking threats.

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[593] "Law (...) does not thrive when its implementation produces *reductio ad absurdum*; when it grossly offends most persons' common moral sense of what is right", T.M. Franck (fn. 8), p. 178. See also *Vienna Convention on the Law of Treaties* (1969), Article 32: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, (...) when an interpretation based on article 31: (a) leaves the meaning ambiguous or unclear or (b) leads to a manifestly absurd or unreasonable result."

[594] I. Johnstone, *Legislation and Adjudication in the Un Security Council: Bringing down the Deliberative Deficit,* AJIL, 2008, Vol. 102, No. 2, pp. 275–308.

[595] WM Reisman, *Why Regime Change Is (Almost Always) A Bad Idea?* AJIL, 2004, Vol. 98, No. 3, p. 525.

They take responsibility for the weakening of existing treaty regimes concerning arms control and weapons of mass destruction, and finally for the evolution of norms concerning the use of force. It is worse when we are dealing with terrorists whose only goal is destruction and intimidation. Fanatics in power do not hesitate to expose their own or other states, as well as the civilian population, to armed reaction and its consequences.

Dictators or terrorists do not care about legalism and thrive in the shadow of political rivalry between great powers and endless legal debates. They manipulate the interests of great powers, drawing them into provocations or intimidating them. Iraq in the era of Saddam Hussein, Yugoslavia in the times of Milosevic, and today Iran and North Korea exploit the weakness of the Security Council, counting on impunity and the survival of their criminal regimes, which are more willing to provoke tensions than to take responsibility for peace and security. It cannot be denied that these regimes sometimes benefit from the "protection" (veto) of one of the permanent members of the Security Council.

In addition, they deliberately create threats and conflicts that are difficult to resolve without their participation in negotiations. For example, due to the role of Iran and Syria in destabilizing the situation in Lebanon or Gaza, it is extremely difficult to predict whether and to what extent including these destructive regimes in multilateral negotiations may prove to be advisable.

North Korea makes the continuation of multilateral talks dependent on prior economic aid and treats its starving population as a hostage. How and with what can one bribe Iran or North Korea to abandon their military nuclear program? How can one ensure Pakistan's predictability given the strong ties of some of its authorities with Taliban organizations? The question of the political price therefore arises: is it worth paying it at any price?

In this context, faith in the effectiveness of diplomacy, international law and the concepts of deterrence or containment is weakening. The political problem is not about assuming the primacy of diplomacy over the use of force or *vice versa*, but rather about a reasonable balance in switching from one instrument to another. This is an extremely difficult decision and almost always burdened with the risk of error in the short and long term[596].

The use of armed force as a last resort can be defined as one of the options.

In the opinion of Lothar Rühl:

> "In these cases, it is a matter of limited warfare with an offensive strategy of suppression focused on the war zone, and thus a return to the classical concept of the '*ultima ratio*' as the ultimate response to a challenge or threat. This is in the sense of the motto on the cannons of the King of France, '*ultima ratio regis*', which should not mean 'the king's last resort after all others have been exhausted' (as '*ultima ratio*' was still understood by the North Atlantic Council in 1990), but rather the opposite: the 'last word of the king' that definitively decides the conflict, as Louis XIII, Richelieu, and Louis XIV

[596] D. Frum, *No Nukes, No War,* "National Post", 12 December 2007: "War should be seen as what it always is: a sign of policy failure, rather than a tactic to be used for failure to imagine anything better."

understood it, before France was devastated by enemies or the royal power was shaken. With this neoclassical understanding of '*ultima ratio*' for the use of military force in international crises and conflicts, this is shifted forward on the timeline of conflict development for timely intervention and thus for effective prevention of a conflict or its spread".[597]

The moment of transition from diplomacy, rapprochement of interests or deterrence policy to military coercion always remains a great dilemma. Diplomacy without the perspective of using force is an illusion, as is force that rejects diplomacy.

However, we must remember that "All bad precedents began as justifiable measures"[598].

8.7. In case of the use of force, the situation after a military victory must be taken into account (the day after). International practice shows that such victory sometimes comes quite easily, while stabilisation of the region turns out to be a task beyond one's strength, or in any case a long-term one, requiring the involvement of police and civilian personnel. There is a serious risk of errors, as well as long-term failure. Contemporary conflicts and threats cannot be prevented only by means of armed force or only by diplomacy and development aid. All these instruments must be applied appropriately.

Some questions arise in this context: whether and when stabilization of a country has a chance of success. Should a large-scale and long-term operations be undertaken and why? What is the purpose and interest of the international community? What is the point of holding elections in conflict conditions or immediately after its resolution?

The situation is often hopeless, because it comes down to a choice between barbarism and dictatorship. Should a coup be facilitated only in order to replace one dictatorship with another – a milder one? Moreover, while a military operation can be conducted without the support of local authorities, stabilizing the situation after an armed conflict is in fact difficult or even impossible with weak local structures, especially (and this is often the case) if they are corrupt.

The increasing number of peacekeeping and peace enforcement operations since 1990 prove insufficient to the need to stabilize the situation, because eliminating the

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[597] L. Rühl (fn. 537): "Es handelt sich in diesen Fällen um begrenzten Krieg mit einer auf das Kriegsgebiet bezogenen offensiven Niederwerfungs-Strategie und somit um eine Rückkehr zum klassischen Begriff der '*Ultima ratio*' als ultimative Erwiderung auf eine Herausforderung oder Bedrohung; dies im Sinne der Devise auf den Kanonen des Königs von Frankreich '*ultima ratio regis*', was nicht bedeuten sollte: 'des Königs letztes Mittel nach Erschöpfung aller anderen' (wie '*Ultima ratio*' noch 1990 vom Nordatlantikrat verstanden wurde), sondern im Gegenteil: das den Konflikt definitiv entscheidende 'letztes Wort des Königs', wie Ludwig XIII., Richelieu und Ludwig XIV. es verstanden hatten, bevor Frankreich von Feinden verheert oder die Königsmacht erschüttert sei. Mit diesem neoklassischen Verständnis von '*Ultima ratio*' für die Anwendung von militärischer Gewalt in internationalen Krisen und Konflikten wird diese auf der Zeitachse der Konfliktentwicklung nach vorn verschoben für ein rechtzeitiges Eingreifen und damit für effektive Prävention eines Konflikts oder einer Konfliktausbreitung".

[598] Julius Caesar in Sallust, *The Jugurthine War / The Catiline Conspiracy,* London 1963, p. 219.

internal causes of the conflict often exceeds the capabilities of the international community[599].

The operation in Afghanistan (2001), considered legal, and the US operation in Iraq (2003), questionable in terms of legality, encounter the same obstacles at the stage of stabilizing the internal situation. Another example: "the attempt to apply the lessons of social liberal détente policy to the Iran dossier of our day is (...) misguided. What worked for the Marxists will by no means work for the mullahs. (...) Here, the will to survive is frowned upon and replaced by a longing for death."[600]

In the case of the use of force against failed states, an additional dilemma arises: to support one of the sides of the internal conflict or to tolerate a situation of a specific division of spoils? Stabilization in such cases means building state structures from scratch, often in tribal conditions. This turns out to be an almost hopeless task, but the alternative is often turning a blind eye to mass crimes.

The paradox is that some fundamentalist movements provide a minimum of order, for example by putting an end to widespread robberies or preventing poppy cultivation and drug trafficking[601]. Dictatorial power sometimes seems (in the short term) to be a salvation from chaos. From another perspective, post-conflict stabilization in some countries of the Global South is only possible in the form of replacing one dictatorship with another, less brutal one.

International practice shows that the legal use of armed force – often resulting in a cessation of bloodshed – does not always lead to the stabilization of a state or region, because the causes of the conflict do not automatically disappear. This is evidenced, for example, by the evolution of events not only in Iraq after 2003, but also in Kosovo, Afghanistan, East Timor, Somalia or Libya.

Against this background, it is worth supporting concepts of multilateral action (if possible). On the one hand, we must strive to strengthen the effectiveness of peacekeeping operations, and on the other hand, to develop crisis management, including in the form of new multilateral forms of international territorial administration[602]. This management (especially in the civilian sphere) turns out to be

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[599] L. Arbour (fn. 63): « L'idée que les pays directement concernés doivent s'approprier le projet de paix est bien fondée. (…) Mais en même temps, nous ne devrons pas nous étonner du fait que les parties directement impliquées dans le conflit ne s'avèrent pas les mieux équipées pour consolider la paix. La stratégie de reconstruction de l'Etat poursuit un double objectif: le renforcement de l'État et l'assurance de son monopole sur l'utilisation légitime de la force, en même temps que la création et le raffermissement des institutions démocratiques pour contrôler l'exercice du pouvoir ».

[600] M. Küntzel, *Harte Sanktionen, was sonst?,* "Die Zeit", 10. Dezember 2009 (No. 51): "[Der] Versuch, die Lehren der sozialliberalen Entspannungspolitik auf das Iran-Dossier unserer Tage zu übertragen ist (...) verfehlt. Was bei den Marxisten funktionierte, klapt deshalb bei den Mullahs noch lange nicht. (…) Hier ist der Überlebenswille verpönt und durch die Sehnsucht nach dem Tod ersetzt".

[601] For example, the eradication of drug crops in Afghanistan is met with resistance not only by local warlords but also by the local peasantry for whom these crops are the basis of existence. See D. Buddenberg, W. W. Byrd (eds.), *Afghanistan's Drug Industry,* United Nations Office for Drugs and Crime/The World Bank 2006.

[602] See E. de Brabandère, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority, and Foreign Occupation in Theory and Practice*, Leiden, Boston 2009; O. Tansey, *Regime-Building: Democratization and International Administration*, Oxford 2009; C. Stahn, *The Law and Practice of International*

very difficult and complicated not only in the post-conflict phase (especially in terms of the concept and coordination of international actions), but also at the stage of political planning. This is a challenge for many international organizations, especially since none of them has a comprehensive and effective set of instruments combining military operations with stabilization mechanisms after the military phase.

8.8. Confronted with changing circumstances, the current legal regime for the use of force seems imperfect. Consequently some military operations falls within a grey area. The greatest controversy concerns the category of formally illegal actions (lack of a Security Council decision or of grounds for self-defence).

In the context of the use of force, one must simultaneously take into account the political elements - namely the premises and objectives – and then the state's capabilities (military, political and economic), as well as the anticipated effects, which in turn are linked to the state's actual possibilities for action (feasibility).

It is from this perspective that we assess the use of force (or refraining from using it or being unable to use it), with legal arguments being an important, but not the sole, element. Consequently, it is difficult to separate the legal aspects from the political elements in the decision to use force.

The use of force in such cases does not necessarily mean a negation of law – it rather reflects the imperfections of the diplomacy or of the international legal framework. In the absence of a sound legal basis, an effective solution to some hard cases is possible by a flexible interpretation of international legal principles and rules.

The conflict between *droit* and *justice*, between *Recht* and *Gerechtigkeit* (*ius* and *lex*), is resolved by the national constitutional court on the basis of constitutional values, whilst also taking into account what is rational and reasonable. In international law, there is no such universal court; however, the essence of the problem remains.[603]

In practice, ideas have emerged that offer a way out of legal impasses. These include, for example, concepts such as humanitarian intervention (the responsibility to protect), pre-emptive self-defence, and preventive armed operations (the right to self-preservation). Even if at first glance there appears to be no formal legal basis, the justification does not lie in a *vacuum*. The assessment is made in light of the interpretation of legal rules, principles, and values, but also political or moral principles and objectives.

A hasty finding that the use of force was unlawful does not always have to be decisive and sufficient in the specific situation. It is important to bear in mind that every (formally identical) use of armed force (whether lawful or unlawful) is based on different premises and objectives, which are of crucial importance when assessing

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Territorial Administration. Versailles to Iraq and Beyond, Cambridge 2008; R. Wilde, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away,* Oxford 2008; H.F. Kiderlen, *Von Triest nach Osttimor. Der völkerrechtliche Rahmen für die Verwaltung von Krisengebieten durch die Vereinten Nationen,* Berlin, Heidelberg, New York 2008; B. Knoll, *The Legal Status of Territories Subject to Administration by International Organisations,* New York 2008.

[603] See J. Tischner (fn. 272).

each case. An assessment of legality without taking these elements into account is incomplete and of limited informative value.[604]

8.9. Anarchy in international relations can be prevented by building a balance between force and law. "Extreme peace – in the sense of absolute priority – creates the conditions of war, while extreme justice similarly generates the conditions of injustice".[605]

Peace does not only mean the absence of war, and the real world is not only a universe of law. The alternative to peace at all costs may turn out to be war[606]. The fight for peace cannot make the task easier for aggressors and dictatorships, and fear of the use of armed force (appeasement) cannot be the main assumption of politics – its task is to recognize the most serious threats and propose remedies. It also happens that when peace has been the central goal of states, the international system was often at the mercy of the most ruthless member of the international community.

Refusing to use force is sometimes easy, but facing the threat is difficult.

> Die Welt: "Kissinger defines diplomacy as the art of avoiding war by maintaining a 'balanced unease.' When does politics turn into appeasement?" Robert D. Kaplan: "Politics becomes appeasement when core strategic and moral interests can no longer be protected through diplomacy, but one shies away from military action. Often, diplomacy only gains the necessary credibility because of the very real possibility of military action."[607]

When assessing the use of force and security dilemmas, it's impossible to ignore some hard cases. Let us recall in this context Dean Acheson's opinion: "The survival of states is not a matter of law"[608].

Let us also quote Wilhelm Grewe's view: "The possibilities of law are overestimated if one believes that the power politics of states can be judicialized, captured in a system of binding legal norms and resolved through judicial procedures. This is a misconception."[609]

They express the belief that not all world problems can be captured, let alone solved, within a legal framework. Conversely, from another perspective, whilst the

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[604] For example there is a fundamental difference between the premises and objectives in the case of the use of force in Korea (1950), Hungary (1956), Czechoslovakia (1968), Ukraine (2014, 2022), the Middle East (1948, 1956, 1967, 1973, 2024, 2025), Cambodia (1978), Kosovo (1998), Iraq (1981, 1991), Afghanistan (2001), Georgia (2008) or Syria (2007, 2013-2015, 2017).

[605] T.M. Franck (fn. 8).

[606] "Peace is precious and desirable. But peace, like almost all matters of this world, has its price, high but measurable. We in Poland do not know the concept of peace at any price", Speech of the Minister of Foreign Affairs of the Republic of Poland, Józef Beck, in the Sejm (May 5, 1939).

[607] „Die Welt", 8. Februar 2016 - http://www.welt.de/151873900

[608] See fn. 561.

[609] W.G. Grewe, *Friede durch Recht?* Vortrag gehalten vor der Juristischen Gesellschaft zu Berlin, 1985, p. 20: „[Doch werden] die Möglichkeiten des Rechts überschätzt, wenn man glaubt, das machtpolitische Kräftespiel der Staaten lasse sich juridifizieren, in ein System verbindlicher Rechtsnormen einfangen und durch gerichtsförmige Verfahren zum Austrag bringen. Das ist ein Irrglaube". See also President Barack Obama's speech (fn. 568).

law provides for lawful action (including the use of force), it is sometimes thwarted by considerations that are political par excellence (a lack of political will).

This do not amount to disregarding or eliminating the law: as it concerns extraordinary situations, even after a revolution, the law does not disappear and, after any necessary change, it still remains a point of reference. However, the search for a new international order cannot be about abolishing force, but solely about its rationalizing institutional integration.[610]

For Blaise Pascal:

> « Il est juste que ce qui est juste soit suivi, il est nécessaire que ce qui est le plus fort soit suivi. La justice sans la force est impuissante: la force sans la justice est tyrannique. La justice sans force est contredite, parce qu'il y a toujours des méchants: la force sans la justice est accusée. Il faut donc mettre ensemble la justice et la force; et pour cela faire que ce qui est juste soit fort, ou que ce qui est fort soit juste ».[611]

In this context, numerous dilemmas remain.

Und so sehen wir betroffen / den Vorhang zu und alle Fragen offen[612].

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[610] U.K. Preuß, *Der Wandel der Formen und der Rechtfertigung von Gewalt in den internationalen Beziehungen*, in: *Herausforderungen des staatlichen Gewaltmonopols. Recht und politisch motivierte Gewalt am Ende des 20. Jahrhunderts*, hg. v. F. Anders u. I. Gilcher-Holtey, Frankfurt/M.-New York 2006, p. 61: „Einer Einsicht jedoch wird man sich schwerlich verschließen können, nämlich der, dass es bei der Suche nach einer neuen internationalen Ordnung nicht um eine Abschaffung der Gewalt gehen kann, sondern allein um ihre rationalisierende institutionelle Einbindung".

[611] B. Pascal, *Pensées*, n°298 de l'édition Brunschwicq (n°285 de l'édition Chevalier): "298. Justice, might. – It is right that what is just should be obeyed; it is necessary that what is strongest should be obeyed. Justice without might is helpless; might without justice is tyrannical. Justice without might is gainsaid, because there are always offenders; might without justice is condemned. We must then combine justice and might and, for this end, make what is just strong, or what is strong just."

[612] B. Brecht, *Der gute Mensch von Sezuan* [And so we watch, dismayed, / The curtain falls and all questions remain open].