

Criteria for the Lawful Use of Force in International Law

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Law includes a system of authorized coercion in which force is used to maintain and enhance public order objectives and in which unauthorized coercions are prohibited. Thus law and coercion are not dialectical opposites. On the contrary, formal legal arrangements are not made when there is a spontaneous social uniformity; then there is no need for law. Law is made when there is disagreement; the more effective members of the group concerned impose their vision of common interest through the instrument of law with its program of sanctions. Law acknowledges the utility and the inescapability of the use of coercion in social processes, but seeks to organize, monopolize, and economize it.

I

The international legal system diverges from these general legal features only in terms of degree of organization and centralization of the use of coercion. In national systems, coercion is organized, relatively centralized, and, for the most part, monopolized by the apparatus of the state. In the international system, it is not. Individual actors historically have reserved the right to use force unilaterally to protect and vindicate legal entitlements.

Political and jurisprudential principles such as these must be kept in mind in an examination and rational interpretation of Article 2(4) of the United Nations Charter. Its sweeping prohibition of the threat or use of force in international politics was not an autonomous ethical affirmation of nonviolence any more than were previous efforts to temper the savagery of international politics. Article 2(4) was embedded in and made initially plausible by a complex security scheme, established and spelled out in the United Nations Charter. If the scheme had operated, it would have obviated the need for the unilateral use of force. States with a grievance could have repaired to the Security Council, which could then apply the appropriate quantum and form of authoritative coercion and thereby vindicate collectively the rights it found had been violated. Under these

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circumstances, the need for and justification of a unilateral resort to force ceased. Even then, as we will see, the Charter acknowledged the inherent limits of its structures in the prevailing international politics by reserving to states the right of self-defense.

But the security system of the United Nations was premised on a consensus between the permanent members of the Security Council. Lamentably, that consensus dissolved early in the history of the organization. Thereafter, for almost all cases but those in which there was a short-term interest in collaboration, the Security Council could not operate as originally planned. Part of the systemic justification for the theory of Article 2(4) disappeared. At the same time, the Soviet Union announced, in effect, that it did not accept Article 2(4): "Wars of national liberation," an open-textured conception essentially meaning wars the Soviets supported, were not, in the Soviet conception, violations of Article 2(4). Arkady N. Shevchenko testified:

[T]he refusal to abandon support for national liberation movements as a weapon against the Western Powers, and persistent efforts by the Kremlin to penetrate the nations of the Third World for the purpose of luring them into its orbit, imply a willingness to project Soviet military power over the globe and risk, if necessary, conventional wars. Here again, the Soviets are guided by Lenin's formulas, which state that "socialists cannot be opposed to all wars," particularly "revolutionary wars" or national wars by "colonial peoples for liberation" or civil wars. Consequently, the Soviet leadership favors and instigates some local conventional wars. In explaining the Soviet military doctrine in 1981, Defense Minister Dmitri Ustinov called attempts to attribute to the U.S.S.R. a willingness to launch the "first nuclear strike" unfounded nonsense, but he said nothing regarding conventional war.¹

Thus the U.S.S.R. could continue to pay lip service to Article 2(4) while ignoring it in practice whenever convenient.

The international political system has largely accommodated itself to the indispensability of coercion in a legal system, on the one hand, and the deterioration of the Charter system, on the other, by developing a nuanced code for appraising the lawfulness of individual unilateral uses of force. The net result is not the value sterility of nineteenth century international legal conceptions of coercion, but neither is it Article 2(4). Some sense of the complexity of the code can be gained by examining, in a single time period, 1979, forceful unilateral interventions without the prior authorization of the United Nations.

In 1979, forces of Tanzania invaded Uganda, expelled the government

1. A. SHEVCHENKO, *BREAKING WITH MOSCOW* 288 (1985).

of Idi Amin, and ultimately restored the government of Milton Obote. In the same year, French forces, in a quick and bloodless coup, expelled the government of Jean-Bedel Bokassa from the Central African Republic and installed a different president. In the same year, forces of the government of Vietnam entered Cambodia and sought to unseat the Pol Pot government and to replace it with a Vietnamese-backed government led by Heng Samrin. And in the same year, Soviet forces entered Afghanistan to support a government which, it seemed, would not have survived had it not been for the timely intervention and continued presence and operation of a foreign military force. This *annus*, to paraphrase Auden, was not *mirabilis*.

Although efforts were made to arouse the United Nations to criticize the first two of these interventions, the organization resisted. But the organization condemned the latter two. Since all of these interventions, like all unilateral actions, were motivated in key part by the self-interest of the actors concerned, we must assume that there were some additional ingredients that rendered some of them internationally acceptable. I submit that it is in the identification of those factors that one can begin to describe the contemporary international law on the use of force.

II

The deterioration of the Charter security regime has stimulated a partial revival of a type of unilateral *jus ad bellum*. But in sharp contrast to the nineteenth century conception, which was value-neutral and ultimately power-based, the contemporary doctrine relates only to the vindication of rights which the international community recognizes but has, in general or in a particular case, demonstrated an inability to secure or guarantee. Hence, appraisals of state resort to coercion can no longer simply condemn them by invoking Article 2(4), but must test permissibility or lawfulness by reference to a number of factors, including the objective and the contingency for which coercion is being applied.

Nine basic categories appear to have emerged in which one finds varying support for unilateral uses of force. They are self-defense, which has been construed quite broadly; self-determination and decolonization; humanitarian intervention; intervention by the military instrument to replace an elite in another state; uses of the military instrument within spheres of influence and critical defense zones; treaty-sanctioned interventions within the territory of another state; use of the military instrument for the gathering of evidence in international proceedings; use of the military instrument to enforce international judgments; and counter-

measures such as reprisals and retorsions. The categories themselves, however, are not determinative.

Merely locating an individual use of force in a particular category does not mean that it is lawful. While practice varies with regard to each of these, it is significant that a number have certain common factors. In the space allotted by the editors, I cannot develop a comprehensive set of guidelines for assessing lawfulness or permissibility of coercion, but I will suggest what I believe are the major principles of the UN Charter in this regard and try to relate them to our subject.

In the determination of any action, a key and constant factor—less a criterion of lawfulness and more a *sine qua non* of survival—is the need for the maintenance of minimum order in a precarious international system. Will a particular use of force, whatever its justification otherwise, enhance or undermine world order?

When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politics. It is, as anyone familiar with the UN Charter and with such key constitutive decisions as *Namibia*² and *Western Sahara*³ knows, the enhancement of the ongoing right of peoples to determine their own political destinies. That obvious point bears renewed emphasis, for it is, in my view, the main purpose of contemporary international law: Article 2(4) is the means. The basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to be able to express their ongoing desire for political organization in a form appropriate to them. Article 2(4), like so much in the Charter and in contemporary international politics, supports and must be interpreted in terms of this key postulate. Each application of Article 2(4) must enhance opportunities for ongoing self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure. Others have the manifest objective and consequence of doing exactly the opposite.

There is, thus, neither need nor justification for treating in a mechanically equal fashion, Tanzania's intervention in Uganda to overthrow the Amin despotism, on the one hand, and Soviet intervention in Hungary or Czechoslovakia to overthrow popular governments and to impose an undesired regime on a coerced population, on the other. Nor should the

2. 1971 I.C.J. 16.

3. 1975 I.C.J. 4.

different appraisal of these cases by the international legal system occasion any surprise.

III

It is important to remember that norms are instruments devised by human beings to precipitate desired social consequences. One should not seek a point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, with appropriate regard for the factual constellation in the minds of the drafters. Legal statements, like all others, are made in a context whose features are part of the expectations of speaker and audience. The expression of Article 2(4), in the form of a rule, is premised, I submit, on a political context and a technological environment which has been changing inexorably since the end of the nineteenth century. The rule assumes that the only threat to or usurpation of the right of political independence of a people within a particular territorial community is from external and overt invasion. It makes a historicist assumption as well: internal changes are deemed to be personnel changes in the composition of an elite which do not bring about basic changes in systems of public order within the country or in its external political alignments; governments come and go but the life of the people continues in its traditional fashion. Most important, it does not presuppose division, maintained by a precarious nuclear equipoise, between two contending public order systems, either of which might find itself substantially disadvantaged and pressed to intense coercion by the defection of a particular community from its own critical defense zone.

The rule-formulation of Article 2(4) is oblivious to these factors. Hence, its purpose notwithstanding, it has been unable to provide would-be strict appliers with a legal characterization consistent with the relevant international policies for all-too-familiar scenarios:

In communities without established or durably institutionalized procedures for the transfer of power, a group of military officers, without a base of popular support, seizes the government. In an equally familiar variation of this scenario, the *putsch* itself is externally inspired, encouraged and/or financed. As their control is precarious, the officers immediately seek the support of an outside Superpower; it responds by providing military and administrative assistance within the country and material help and support in external political arenas. Because of this foreign reinforcement, what would probably have been an evanescent violation of the popular will persists. Ironically, most of the sequences of this scenario are compatible with traditional international law and Article 2(4) as it has been mechanically applied. The usurpers of power are entitled to recognition as a government

if they appear to have effective control, a doctrine established clearly since Chief Justice Taft's holding in *Tinoco*. As such, the new "government" is entitled to request assistance from abroad. Other governments responding to it are not deemed to be "intervening," yet another foreign force, entering the country, putting the mutinous military back in the barracks and reinstalling the ousted government and the former constitutional procedures would violate the terms of Article 2(4).⁴

The net effect of a mechanical interpretation of Article 2(4) may be to superimpose on an unwilling polity an elite, an ideology, and an external alignment alien to its wishes. This may entail far-reaching social and economic changes and grave deprivations of human rights for substantial numbers and strata of the population. Recall that all of this occurs in a century whose politics are marked by relentless mass mobilization, with frequent, radical, and far-reaching intervention by the apparatus of the state.

In consequential terms, the scenarios we have rehearsed are as destructive of the political independence of the community concerned as would be a massive invasion by the armed forces of another state. To characterize the second form of intervention per se as impermissible or unlawful and the first as permissible or lawful or at least not cognizable by international law violates the basic policy which international law seeks to achieve.

IV

Coercion should not be glorified. The promulgation of a norm such as Article 2(4), for all of its ineffectiveness, is a major achievement. But it is naive and indeed subversive of public order to insist that coercion never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. In a contest with an adversary that does not accept the prohibition, to forswear force is to disarm unilaterally.

The critical question, in a decentralized international security system such as ours, is not whether coercion has been applied but whether it has been applied in support of or against community order and basic policies, and whether it has been applied in ways whose net consequences include increased congruence with community goals and minimum order. Given the magnitude of destructive power of the weapons concerned and the violence and wickedness of which human beings have demonstrated themselves capable, the notion of ineffective international

4. Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 644-45 (1984).

Reisman: Criteria for Lawful Use of Force

institutions and hence a decentralized security system is terrifying. But it is a fact. We do not enhance security, minimum order, or the values of human dignity which require and justify them by pretending otherwise, any more than does an ostrich enhance its security by putting its head in the sand at the approach of danger. The possibility of making the security functions of the United Nations effective in the near future is slim. The effort to improve the organization is always important and justified. But in the meanwhile, rational and responsible decisions will have to be made in the many cases that continue to present themselves. For them, an important part of the control on impermissible coercion will be a clear conception of the licit community objectives for which coercion may be used: the basic and enduring values of contemporary world public order and human dignity.