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INTRODUCTION

Self-Judging Self-Defense

*by Oscar Schachter**

The four leading articles in this issue are concerned with the legal justification for the use of force by national states. The issues they deal with are not academic, nor are they of concern to lawyers alone. We all live under the menace of international violence. Our personal lives are profoundly affected by the material and psychic costs of that insecurity. It is only natural that we look to law for the elements of security. It is, after all, the legal system that sets the limits to force in national societies and provides institutions and procedures to give effect to those limits.

International society has reached for the same goal during this century. It has adopted a set of basic rules in the Charter of the United Nations (to which nearly all States adhere) and it has given more concrete meaning to those rules through declarations, resolutions and treaties. The rules make it clear that national states are no longer free to use force "against the political independence or territorial integrity" of a state or in any manner contrary to the Charter of the United Nations.¹ However, force is recognized as legitimate when used in self-defense or pursuant to a decision of the United Nations Security Council.² The Charter has thus drawn a legal line between permissible and impermissible uses of force. It has also established community institutions - the Security Council, the General Assembly and the International Court of Justice - that are competent under certain conditions to pass on the legitimacy of the use of force and to take measures to ensure peace and security.

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¹ U.N. Charter, art. 2(4).

² U.N. Charter, art. 51, 42. See Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

As we know, this system of law and collective security has not functioned as envisaged. States have resorted to force unilaterally and in some cases collectively, in apparent violation of the Charter principles and in defiance of decisions by competent international organs. Where states have used force, they have generally asserted that such force was employed in individual or collective self-defense. Thus they have not denied the legal force of the Charter rules but have relied on an expressly recognized legal right. As many have observed, self-defense has become the modern equivalent of "just war." The obvious difficulty is that the states employing armed force decide for themselves the conditions under which they may resort to self-defense and they reject on grounds of principle or practicality, determinations by international organs. It is not surprising that their justifications are often perceived as no more than rhetoric.

The authors of the articles that follow are aware, of course, of this weakness but they do not directly address this issue. Their underlying premise, as I read them, is that a law-abiding state will consider as its obligation and presumably its enlightened self-interest to comply with the law. Hence, they consider it important and realistic to clarify the concept of self-defense as applied to new situations and conditions. Three of the articles - those by Intoccia, McCredie and Roberts - examine self-defense in response to state sponsored terrorism directed against nationals of a target state. They are lucid well-argued presentations that support the United States bombing of Tripoli in retaliation for Libya's involvement in an attack on U.S. military personnel in Berlin. However, since others have expressed conflicting views as to the evidence and motivation of the United States, the articles implicitly raise the question of third party review and appraisal.

The same question is raised, even more sharply, by Professor Zedalis' article on anticipatory self-defense. The article goes beyond the usual lawyers' analysis of the rules into an appraisal of values and policies underlying the rules. On that value-oriented approach, the author finds some merit in allowing a preemptive defensive action against a threat of future attack. He would impose two main conditions (1) that the threat of future attack be probable and (2) that no neutralizing counter-measures to meet the threat are available. The article suggests that preemptive war might even be justified against an adversary who has acquired a high degree of protection through defensive technology and who may consequently be perceived as a probable threat because of its protective cover. One wonders whether the Soviet Union might use this kind of reasoning to justify a preemptive attack on the United States because of the threat inherent in a successful strategic defense technology. This possibility and the authors' emphasis on balancing values points up the risks of purely unilateral decisions.

The four articles compel us to face up to the difficult and perhaps intractable problem of imposing legal limits on the exercise of self-defense in the absence of compulsory adjudication and centralized international authority. Consider the positions taken by the present Administration of the United States during and subsequent to the proceedings of the International Court of Justice in the Nicaraguan case. One was that claims of self-defense by a state employing force are reviewable solely by the United Nations Security Council pursuant to Article 51. That Article, it was said, confers exclusive authority on the Council and impliedly excludes other organs such as the Court or General Assembly from passing judgment on the legality of the use of force.³ On this view, if the Security Council does not decide by the required majority that the use of force is impermissible, the state is free to use such force as it deems necessary and proportional. The consequence of this position is that those members with the right of veto namely the United States, the Soviet Union, China, Britain and France, remain entirely free to judge for themselves whether their use of force is legal. Moreover, an additional effect is that any one of those states may unilaterally determine that any other state is also free to use force when that state considers such force to be necessary self-defense. A more direct argument for a unilateral self-judging principle was also advanced by U.S. legal advisers namely, that the exercise of self-defense cannot be subject to the decision of any external body inasmuch as it involves national security. As explained by the State Department legal adviser "such matters are the ultimate responsibility assigned by our constitution to the President and the Congress."⁴ The Legal Adviser did not add that all other states would be entitled to take the same position but this was, of course, clearly implied.

In claiming that self-defense is entirely and exclusively a matter for each state to decide, the U.S. position contradicts the prevailing conception of self-defense as a legal right. For it is incontrovertible that if a state or an individual claiming a right has the exclusive authority to decide on the lawfulness of its exercise, the law has reached a vanishing point. This was recognized by the International Tribunal at Nuremberg in 1946 when it rejected the argument of the counsel for the Nazi leaders that Germany had acted in self-defense and that every state is the judge of whether in a given case, it has the right of self-defense. The Judgment of the Tribunal declared that "whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to be en-

³ Sofaer, Statement in Hearing Before the Subcommittee on Human Rights and International Organization of the House Comm. on Foreign Affairs 99th Cong., 1st Sess. 27-28 (1985).

⁴ *Id.* at 13. See also Sofaer, Statement to Senate Comm. on Foreign Relations, 2105 DEP'T ST. BULL 58, (1985).

forced.”⁵ The International Court of Justice in its decisions in *Nicaragua v. United States* also rejected the U.S. arguments that a claim of self-defense was not justiciable. It declared:

“As to the inherent right of self-defense, the fact that it is referred to in the Charter as a right is indicative of its legal dimension.”⁶

The American member of the Court, Judge Schwebel, who disagreed with the majority on a number of issues, concurred with their conclusion that the right of self-defense was justiciable.⁷ Schwebel quoted some comments of Sir Hersch Lauterpacht which merit repetition here:

The right of self-defense is a general principle of law and as such it is necessarily recognized to its full extent in international law It is recognized to the extent - but no more - that recourse to it is not itself illegal. It is regulated to the extent that it is the business of the courts to determine whether, how far and for how long there was a necessity to have recourse to it. There is not the slightest relation between the content of the right of self-defense and the claim that it is above the law and not amenable to evaluation by the law. Such a claim is self-contradictory inasmuch as it purports to be based on legal right and as, at the same time, it dissociates itself from regulation and evaluation by the law.⁸

The view expressed in this passage treats self-defense in international law essentially as it is recognized in national law - namely, that a state, like an individual, has the right to decide in the first instance whether immediate action to use force is necessary but that the ultimate judgment of lawfulness must be made by the larger community. To maintain that the state or the individual has the final word on self-defense would make a sham of the legal restraints on the use of force.

This is not, of course, the end of the matter. For it can be argued that as long as states generally do not accept compulsory adjudication by a court, the requirement of community review and judgment remains an unrealized ideal. Consequently, it is said to be unrealistic to expect a state to submit its actions to the judgment of a tribunal or other international organ when others are not required to do so and compliance is essentially voluntary. Stated in more political terms, why should the United States submit to international adjudication when the Soviet Union, China and France do not? Would this not be contrary to the

⁵ *Judgment of the International Military Tribunal at Nuremberg* 1 Trial of the Major War Criminals Before the International Military Tribunal 208 (1967).

⁶ *Military and Paramilitary Actions in and against Nicaragua (Nicaragua v. U.S.)* 1984 I.C.J. 392, 436 (Judgment of Nov. 26.)

⁷ *Id.* Schwebel, Dissenting Opinion to Judgment of June 27, 1986 (Merits) 1986 I.C.J. 14, 284-87.

⁸ H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 179-80 (1933).

national interest? Although this line of reasoning may have an initial appeal, it does not withstand closer analysis.

For one thing, the argument does not adequately take into account the basic long term interest of the United States in achieving a secure and stable world order. That objective has long been perceived by the United States as requiring a clear distinction between the lawful and unlawful use of force. The main step toward that end was taken in the United Nations Charter and other treaty obligations adhered to by the United States. These obligations were not conditioned on the universal acceptance of compulsory jurisdiction. Nor did states reserve a unilateral right to decide on the legitimacy of self-defense.⁹ To introduce these conditions at the present time is to repudiate the essence of the obligations widely accepted as necessary to international order. The political effect of such unilateralism is far from minimal. In effect, the Soviet Union is being told that the legality of its use of force in Afghanistan claimed by it as collective self-defense, is a matter for it alone to judge. A similar message goes to all other states, great and small. Can it be plausibly maintained that these messages would further the U.S. interest in a stable and lawful international society?

What of the argument that submission of self-defense claims to an international tribunal would endanger the security of the United States and impinge on the constitutional responsibilities of the President and the Congress? One part of an answer is that, under the law, recourse to self-defense is in the first instance left to the state that considers itself attacked or in imminent danger of attack. The United States has not given up the right nor would it do so by submitting to a subsequent judgment of the community. Can it be said that the acceptance of an obligation to exercise self-defense only in accordance with international law violates the constitutional authority of the President and the Congress? The short answer is that the obligation was accepted in accordance with constitutional processes when the Charter was ratified. Neither the President nor the Congress has since made any statement that would deny the legal effect of the Charter rules.

Much has been made of the fact that other major powers, and in particular, the Soviet Union have similarly refused to accept international determinations as obligatory. The implication is that the United States would disadvantage itself if it were more respectful of international decisions than the Soviet Union. But by taking the conduct of the U.S.S.R. as the standard of U.S. performance, the United States puts its weight on the side of a world order in which might makes right. Even apart from this fundamental point, it is hard to see what political gain is achieved by considering Soviet disregard of international judgments as an

⁹ See Schwebel, Dissenting Opinion, *supra* note 7 at 51-60.

excuse for American noncompliance. The fact that the U.S.S.R. has not heeded the resolution of the United Nations General Assembly that it withdraw its troops from Afghanistan has been rightly criticized by the United States and many other states. Does the United States achieve any political advantage by declaring that it too can ignore United Nations decisions condemning its use of force? All it means is the the U.S. incurs the same opprobrium and political costs as has the Soviet Union. We can hardly regard this as political realism, let alone appropriate respect for the opinions of mankind.

It is perhaps too often forgotten in international law discussions that international review and evaluation do not depend on acceptance of the Court's jurisdiction. The truth is that whenever a state has recourse to armed force outside its borders, the legitimacy of that action is judged by other states, by international organs, by non-governmental groups and by concerned individuals everywhere. These judgments may be made by political organs such as the Security Council and the General Assembly. They command attention, when the resolutions receive a large majority and especially when that majority includes governments allied to or generally sympathetic to the impugned states. The resolutions concerning Afghanistan and Grenada fall into that category. Even if these decisions lack the binding authority of judicial decisions, they impose political costs on the offending state. Such condemnations by large majorities have contributed to transforming the image of a great power from a champion of national independence to that of a threat to the sovereignty of weaker states. Neither superpower has escaped this effect and its negative consequences. It is true of course that even if states cannot escape collective judgments, they may still decide to disregard them. In most cases, they need not fear effective collective sanctions. But they are subject to losses of credibility, to retaliatory measures, and to weakening the fabric of order on which they must rely to co-exist. This does not amount to enforcement in the sense of domestic law. But it does mean that the illicit use of force when condemned by others is far from cost free.

All in all, a sober view of the U.S. national interest in this respect supports the long standing commitment to an international rule of law in regard to the use of force. It would be a mistake to consider the recent statements of U.S. officials made under the stress of the Nicaraguan Case as conclusive evidence of a lasting reversal of the American commitment. Surely the Congress and the people do not favor permitting states to use force freely whenever such use is called self-defense. Nor would they be so naive as to maintain that the United States could have a unilateral right to resort to force that is denied to all others. As a matter of realistic self-interest, the United States will have to treat claims of self-defense as subject to legal restraints. Its efforts should be directed to giving effect to

such restraints, not merely by elaborating principles but, more important, by specific legal regimes that set limits on force and include means of verification.¹⁰ The United Nations and the regional organizations could play an enhanced role in this regard.

These steps are likely to be more effective in constraining the illegitimate use of force than recourse to the International Court. For a variety of reasons, it is unlikely that the Court could have a major role in limiting the use of force. On the other hand, there is no a priori reason why the Court may not be utilized by states under some circumstances to resolve disputes as to the legality of specific self-defense measures. The United States itself recognized the utility of the Court when it instituted proceedings in the International Court of Justice against the U.S.S.R., Czechoslovakia and Hungary for the shooting down of U.S. airplanes under the claim of self-defense.¹¹ To be sure, not all disputes over use of force would be suitable for adjudication. A court may not be in a position to determine critical issues of fact when armed hostilities are taking place or the crucial issues may be political, with little or no significant legal aspect. These limitations of adjudication should be taken into account. But that is not a reason to conclude that all disputes involving claims of self-defense are unsuitable for judicial review and judgment. A considered policy in this respect would lead to a new U.S. declaration of acceptance of compulsory jurisdiction that would confirm the national interest in the rule of law including its application to the use of force.

However, a failure to accept the Court's jurisdiction should not be construed as a repudiation of the legal limits on the use of force. Those limits constitute a fundamental basis of co-existence in a plural society of independent states. Whether or not the Court is given jurisdiction, it is essential to recognize that any state which resorts to force can be held internationally accountable if its use of force does not meet the legal requirements of self-defense. This principle is almost a truism but it should nonetheless be affirmed by the United States so as to remove any doubt as to its position created by statements made in connection with the Nicaraguan Case.

¹⁰ For example of such treaty regimes, see Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV 113, 135 note 94 (1986).

¹¹ See Schachter, *Disputes Involving the Use of Force* in THE INTERNATIONAL COURT AT A CROSSROADS 223 (L.F. Damrosch ed. 1987).

