

## REGULATION OF THE USE OF FORCE IN CONTEMPORARY LAW - PRESENT AND PERSPECTIVES

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### **Abstract:**

*War has been considered one of the main instruments of foreign policy of states. The UN Charter proclaimed the non-use of force or threat of use of force and the peaceful settlement of disputes as principles of international law. Under current international rules, the coercive instruments, with or without the use of armed force, may be used in collective measures taken by the UN, based on the Security Council decision.*

**Keywords:** use of force, threat of use of force, international rules, UN Charter, Security Council.

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The war was considered one of the main foreign policy instruments of the states. The current state of international relations, as well as the recent events on the international scene, raised serious questions about the extent and content of the main pillars of the international legal order.

The most important and numerous questions relate to the lawful use of force in relations between states. Traditionally, under the UN Charter, the ban on the use of force and the threat of force was considered one of the essential foundations of the legal construction of the international society, being the result of a constant normative and historical evolution<sup>1</sup>

We can conclude that this evolution was practically parallel with the evolution of humanity, and *pursued the progressive limitation of the cases of force use and force threatening to the widest possible extent.*

In this complex world system built over several decades, the United Nations General Assembly, the Security Council and the UN General-Secretary have played together, complementarily or individually, major roles in the achievement of international peace and security, covering the main areas: achieving, maintaining and building peace<sup>2</sup>. The preamble to the Charter proclaimed the resolution of the Member States to join forces in maintaining

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<sup>1</sup> I. Gâlea, *Folosirea forței în dreptul internațional*, Editura Universul Juridic, București, 2009, p. 5.

<sup>2</sup> O. Russbach, *ONU contra ONU. Dreptul internațional confiscat*, Editura Coresi, București, 1999, p. 152.

international peace and security, to accept principles and to establish methods that "ensure that the armed force will only be used in their common interest."<sup>3</sup>

The UN Charter, in art. 2 par. 4, concerning the principles that should govern relations between states, presents the content of the principle of non-use of force or threat of force in international relations in the following terms: "All members of the organization will abstain in their international relations to resort to the threat of force or to its use, either against the territorial integrity or political independence of any state, or in any manner incompatible with the purposes of the United Nations."<sup>4</sup>

The provision is complemented by the exceptions provided in Art. 51 (the inherent right to legitimate defense) and art. 43 (measures imposed by the Security Council considering Chapter VII of the Charter).

The conventional provision in the Charter is reproduced in a series of UN General Assembly documents, OSCE documents, but also in bilateral and multilateral regional treaties. Thus, the rule is resumed in:

- The Declaration on the principles of international law relating to friendly relations and cooperation between states in accordance with the UN Charter (Resolution 2625 (XXV) of 24 October 1970);

- Resolution no. 3314 (XXIX) of 14 December 1974 of the General Assembly on the definition of aggression;

- Resolution 31/9 of 8 November 1976 of the General Assembly on the signing of a multilateral treaty on the prohibition of the use of force in international relations;

- Declaration on the inadmissibility of intervention and interference in the internal affairs of the States (Resolution 36/103 of 9 December 1981);

- Declaration on the peoples' rights to peace (Resolution 39/11 of 12 November 1984);

- Declaration on the strict respect of the principle of the prohibition of the use of force and the threat of force in international relations (Resolution 42/22 of 18 November 1987);

The general rule prohibiting the use of force in the regulation of relations between States allows two derogations, referred to in Chapter VII of the Charter, entitled "Action in case of threats to peace, peace infringement and other acts of aggression," chapter which also regulates the functions and the powers of the Security Council for the maintenance of peace and security in international relations if it finds that peace is threatened or violated or that it faces an act of aggression.

The first derogation is provided in Art. 39, according to which: "The Security Council shall establish the existence of a threat to peace, a peace violation or an act of aggression and shall make recommendations or decide what measures shall be taken, in accordance with art. 41 and 42 to maintain or restore international peace and security", which, of course, legitimizes the

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<sup>3</sup> V. Crețu, *Drept internațional public*, Editura Fundației România de Măine, București, 2006, p. 251.

<sup>4</sup> R. Miga-Beșteliu, *Drept internațional public*, vol II, Editura CH Beck, București, 2008, p. 158.

state, if there is a threat of peace, a peace violation or aggression against it, to take all necessary measures for the restoration of international peace and security.

In other words, the Charter leaves, through this derogation, the possibility of lawful use of force as a constraint measure provided by art. 42, for sanctioning aggressors, by a decision of the Security Council.

Unlike the recommendations that the Security Council may make on the basis of Chapter VI (Peaceful Resolution of Conflicts) of the Charter, which are optional, the recommendations referred to in Art. 39 have a warning character, as well as the recommendations of art. 40, which refers to temporary measures to prevent an aggravation of the situation. According to it, "The Security Council may, before making recommendations or deciding on the measures to be taken in accordance with art. 39, invite interested parties to comply with the temporary measures they consider necessary or desirable. Such measures shall not prejudice the rights, claims or position of the interested parties. The Security Council will take due account of the failure to implement these temporary measures."<sup>5</sup>

The second exception referred to in the UN Charter is regulated in Art. 51: "Nothing in this Charter shall prejudice the inherent right of individual or collective self-defense if there is an armed attack against a Member of the United Nations until the Security Council will have taken the necessary steps to maintaining peace and international security. Measures taken by Members in the exercise of this right of self-defense shall be immediately brought to the attention of the Security Council under this Charter to undertake at any time the actions they consider necessary for the maintenance or restoration of international peace and security."<sup>6</sup>

In other words, the Charter leaves, through this derogation, the possibility of lawful use of force as a form of legitimate defense for the exercise of the right to individual or collective legitimate defense.

Therefore, in the Charter's view, these derogations give the right to legitimate defense two meanings<sup>7</sup>, for two different cases in which a country can use force against another country: a broad sense, which denotes the armed resistance to the actions of a state which, through the illegal use of force, violates the imperative norms of international law, which includes both the self-defense measures of the aggrieved state and the actions taken by the United Nations and the regional organizations in the event of a threat to peace, a peace violation or an act of aggression<sup>8</sup>.

In a narrow sense, the right to legitimate defense refers to the second derogation, the right to self-defense, individual or collective, regulated in art. 51. This is also the only legal situation when states have the right to resort to armed forces without the prior authorization of the Security Council, but under its control. This right, limited in time and conditioned in exercise, arises when the armed aggression is committed and ceases when the Security Council takes the

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<sup>5</sup> C. G. Balaban, *Securitatea și dreptul internațional. Provocări la început de secol XXI*, Editura CH Beck, București, 2006, p. 169.

<sup>6</sup> R. Miga-Besteliu, *op. cit.*, p. 159.

<sup>7</sup> I. Cloșcă, I. Suceavă, *Dreptul internațional umanitar la începutul secolului XXI*, ARDU, București, 2003, p. 615.

<sup>8</sup> G. Geamănu, *Drept internațional public*, Editura Didactică și Pedagogică, București, 1983, p. 434.

necessary measures to restore and maintain international peace and security. This right can only be exercised in three situations, namely: in case of armed aggression; if the act of armed aggression is prior to self-defense measures and if the act of aggression is of some degree serious<sup>9</sup>.

Although the Member States generally renounce the use of force against other countries as a means of settling disputes between them, both in the provisions of the United Nations Charter and in subsequent developments, there are still situations in which the use of military force is allowed.

*The right to legitimate defense (individual or collective)*

It is the legitimate right, but limited in time and constrained in execution, which can only be used when a state or a group of states is the object of an aggression of another state or group of states.

The right to engage forces in such a situation will continue until the Security Council will have taken the necessary steps to maintain peace and security. But the September 11, 2001 terrorist attacks on United States territory have brought a new element into international legal practice, because instead of appealing to the Security Council to authorize the application of Art. 42 of the UN Charter, the United States has resorted to art. 51, the right to legitimate defense, whether individual or collective, triggering military action (by invoking the threat brought by Taliban terrorists in Afghanistan and the danger to the whole of humanity) against Afghanistan. Even the North Atlantic Council, meeting on September 12, 2001, made a similar decision, considering attacks on the United States as falling under Art. 51 of the North Atlantic Treaty. However, the NATO General Secretary Lord Robertson, at the opening of the NATO Defense Ministers Meeting on 26 September 2001, said the Alliance would not proceed until it would have received "clear evidence" from the US about the identity and guilt of the suspects, and "the first step will be to eliminate the term" if "in the declaration adopted by the NATO Council."<sup>10</sup>

It can be emphasized, in full agreement with the International Court of Justice, that the legitimate defense, either individual or collective, is justified only under well-defined conditions when measures proportional to the act of armed aggression are adopted, being necessary to end it<sup>11</sup>. In addition, as has been shown repeatedly, any action taken under Art. 1 of the UN Charter, it will last until the Security Council takes the necessary steps to maintain peace.

*The collective use of force*

This measure is aimed at restoring peace and can be taken against a state that would threaten international security only when other measures proved to be ineffective in removing the threat. A first case for passing on the collective use of force against a state under the above-mentioned conditions is the commitment of the United Nations against the DPRK in the context of the Korean War of 1950-1953. This measure, the first in the history of the UN, which provided for the application of art. 42 of the Charter was taken on the basis of the Security

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<sup>9</sup> D. Ș. Paraschiv, *Sistemul sancțiunilor în dreptul internațional public*, Editura CH Beck, București, 2012, p. 75.

<sup>10</sup> C. G. Balaban, *op. cit.*, p. 172.

<sup>11</sup> I. Cloșcă, *A fost legală sau ilegală atacarea Irakului?*, în *Revista Română de Drept Umanitar*, nr. 1/2003, p. 11.

Council's decision and Resolution 377 / V adopted by the UN General Assembly on 3 November 1950<sup>12</sup>.

Entitled "United for Peace"<sup>13</sup>, that resolution provided: "In all cases where there appears to be a threat of peace or an act of aggression and where, owing to the fact that unanimity could not be achieved among the permanent members, the Council of security, being deprived of its primary responsibility for the maintenance of international peace and security, the General Assembly will immediately examine the issue in order to make recommendations to members on the collective measures to be taken, including the use of armed forces in case of need, to maintain or restore international peace and security. If the General Assembly is not in session at that time, it will be able to meet in an extraordinary emergency session within the next 24 hours, at the request for that purpose."<sup>14</sup>

Of course, this resolution does not dispute the rights and powers of the Security Council conferred by the Charter, with the aim of avoiding a veto. But it was strongly criticized, some criticisms being legally based.

Recognizing that the resolution in question empowers the General Assembly to decide on coercive measures with the use of the armed force, the exclusive competence of the Security Council, the specialists in the matter also invoked art. 11 paragraph 2, which provides that "any such matter requiring an action shall be referred by the General Assembly to the Security Council before or after its discussion"<sup>15</sup>.

Resolution 377 / V was also invoked in several difficult international situations, the specialized publications mentioning the Conflict of Suez, a conflict triggered in 1956 following the invasion of Egypt by the Anglo-Franco-Israeli forces as a retaliatory measure for nationalization by the Company of the Suez Canal<sup>16</sup>. A delicate international situation for which to solve, the Security Council convened an emergency session of the General Assembly on 30 October 1956 to make recommendations. As a consequence, on November 2, 1956, the Extraordinary Emergency Assembly called for an immediate ceasefire, and later on November 5, decided to create a "UN Emergency Force" based on Resolution 377 / V and not art. 42 of the Charter<sup>17</sup>. Resolution 377 / V was also invoked following US and British military intervention in Lebanon and Jordan.

If we were to try to conclude on the nature, evolution and content of the principle of forbidding the use of force and force threatening, the idea that would result would be under the influence of two opposite factors: on the one hand, the evolutions in the sense of strengthening the prohibitive rule and the coverage of a wider range of acts involving the use of force - a sense in which the *soft law* instruments adopted over time in the UN and regional organizations could be observed - and, on the other hand, a trend of some states, reflected in practice and doctrine, to

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<sup>12</sup> C. G. Balaban, *op. cit.*, p. 173.

<sup>13</sup> Doc. ONU A/Rez.377/V.

<sup>14</sup> M. D. Lungu, *Rolul organizațiilor internaționale în soluționarea pașnică a diferendelor internaționale*, Editura Universul Juridic, București, 2010, p. 249.

<sup>15</sup> C. G. Balaban, *op. cit.*, p. 173.

<sup>16</sup> S. Scăunaș, *Drept internațional public*, Editura CH Beck, București, 2007, p. 336.

<sup>17</sup> I. Cloșcă, *op. cit.*, p. 8.

create certain breaches in the legal system that allow the use of force in certain cases: either by restrictive interpretation of the general rule contained in Article 2 para. 4, either by extending the scope of the two "classic" exceptions from the prohibition rule, or by proposing theories on "new exceptions".

September 11, 2001, even though it is considered a turning point in contemporary international relations, has led to a change in international law through two elements: first, in that it has led to a fundamental change in the foreign policy of the main power at the level world; the second, September 11, 2001 has fundamentally altered the nature of global conflicts and threats, with classical state-state conflicts being replaced by "asymmetric" threats.

Some authors question the existence of new exceptions to the use of force<sup>18</sup>. There is a tendency to create / modify the existing framework - either through the extensive interpretation of previous norms - as in the case of legitimate preventive defense or through the establishment of a new rule - as in the case of the "humanitarian" right of intervention. Both proposed rules are the result of pressure on the international legal system. At the practical level, the pressure comes from the divergence between the way in which the world legal order was conceived at the end of the Second World War and adapted to a situation of "equilibrium" between the two major political-military blocks, on the one hand, and the structure of the contemporary international system, on the other hand, dominated by the power of the United States of America. Ideally, the pressure comes from invoking a discrepancy between the norms of ethics or morals and the rule of law.

In the evolution of the right to use force, the influences that contemporary values have on the formulation of the norms of law must not be neglected. One of them may be humanity. Certainly, current international law contains clear tendencies towards the wider protection of human rights, a legal expression of the values of humanity<sup>19</sup>.

However, applying the idea of humanity, respect for human rights in the use of force, can hardly lead to a concrete result, due to the possibility of generating two opposite tendencies. Thus, on the one hand, the values of humanity would determine that the use of force in the world would appear in as few cases as possible. We were talking about the "ascendant" evolution of the principle of forbidding the use of force and of the force threat in contemporary international law as a result of its historical construction and of the level reached by international society. On the other hand, the values of humanity, transposed at the level of law regarding the respect of human rights and freedoms, may justify exceptions or derogations from the prohibition of the use of force.

Even though states are attached to the idea of *rule of law* internationally, in its various forms of expression, the reality of the contemporary international system does not allow its full respect. This does not mean that the idea should not be postulated, given its legal and ethical fundamentals. Moreover, this does not mean that the international system will not evolve to the

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<sup>18</sup> I. Gâlea, *op. cit.*, p. 273.

<sup>19</sup> M. Voiculescu, *Drepturile omului și problemele globale contemporane*, Casa editorială Odeon, București, 2003, p. 269.

awareness of the need to respect the rule of law. This evolution can occur in a reasonable future (even one generation) through one of the following two variants<sup>20</sup>:

- the general evolution of states' "conscience" in the sense of designing the value of respecting *the rule of law* from a local to an international level. Thus, just as human rights have become a globally accepted value, it is possible, given the positive internal developments in different states, for the *rule of law* to become an international value;

- the possibility of rebalancing the global power system. An ascent of a power pole in Asia, centered around China, is increasingly plausible and is mainly based on economic development in this region.

Balancing the global power system would not be an ideal solution, as the first option, but would be a realistic and pragmatic solution. The respect for the rule of law would work. In such situations, not necessarily because of the states' conscience regarding the fairness and ethical foundation of the concept of rule of law, but as a result of the fact that there will be no possibility for an international actor to act ignoring the behavior of the other actors - which, as a consequence, will determine the need to respect the rule of consent or the will of states, the basis of the rule of law in the international system.

The rules regarding the ban on the use of force remain one of the foundations of international law, although there have been evolutions of the rule of law on the use of force after the end of the Cold War and, particularly, after the events of 11 September 2011.

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<sup>20</sup> I. Gâlea, *op. cit.*, p. 281.