Book reviews and Notes

Regulating Recourse to the Use of Force: Theories and Practice

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Redefining sovereignty : the use of force after the end of the cold war / edited by Michael Bothe, Ellen O'Connell, Natalino Ronzitti. - Ardsley : Transnational Publishers, c2005. - xii, 496 p. - ISBN 1-57105-324-7

In the five-year period between the 1999 NATO intervention in Kosovo and the 2003 US-led invasion of Iraq, there was endless debate in the public opinion and among international lawyers on the regulation of the use of force in international relations. Significantly, the 9/11 terrorist attacks and the military operations in Afghanistan lie in the middle of that quinquennium: the concept of "war" resurfaced to describe US efforts to combat the terrorist threat posed by transnational networks.

Redefining Sovereignty is the result of three conferences organised by the editors after each of these events, respectively in Rome, Frankfurt and Columbus, Ohio. As one of the editors observes, every time the use of force is employed, international lawyers start to wonder whether the law is changing.[1]

The book is a comprehensive contribution to the topic of international law and the use of force: not only do the 16 essays written for the workshops and the three reports contained in the book address the main legal questions, but they offer – as the title suggests – a valuable analysis of the impact of the events on the concept of state sovereignty.

Since the adoption of the UN Charter in 1945, the prohibition of the threat or use of force proclaimed in Article 2(4) in pursuit of the supreme goal of universal

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[1] See the comments by N. Ronzitti, p. 447.

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peace, also covers some types of conduct already condemned by the classical principle of non-intervention. The duty to refrain from intervention in the internal or external affairs of other states is aimed at protecting the traditional constitutive elements of sovereignty: independence, equality and territorial integrity.[2] At a fundamental level, the question is whether the use of force after the end of Cold War has affected or weakened these two overlapping principles.

The first general observation refers to the role and relevance of international law with regard to the discipline of the use of force: the contributors to the book generally do not favour theories proclaiming the demise of Article 2 (4) of the UN Charter.[3] They confirm the existence of the principle prohibiting the use of force in international relations, the customary character of which was stated by the International Court of Justice in the *Nicaragua* case: "recourse to force is justified as an exception to the general prohibition".[4] This approach is also accepted in the legal arguments advanced by the UK to sustain the legality of the 2003 military action in Iraq.[5]

On closer examination, the content of the ban of the use of force and of its exceptions is a source of controversy among the participants of the workshops, particularly in evaluating the following three issues: the concept of "humanitarian intervention", the exercise of self-defence and the nature of Security Council authorisations for the use of force.

The NATO operation in Kosovo raised the question whether state sovereignty can be used as a shield against outside intervention in the case of large-scale killing, ethnic cleansing or serious violations of human rights. A specific session of the conference in Rome focused on whether or not a right to humanitarian intervention exists in international law. The dominant view is that the legality of such use of force is doubtful, even though some authors made recourse to the notion of legitimacy to justify the intervention. It is undisputed however that states cannot violate human rights norms with impunity: some essays refer to the emerging notion of a collective international "responsibility to protect" in the event of serious violations of human rights, when a state has proved powerless or unwilling to prevent. Incidentally, this kind of argumentation implies a renewed understanding of the term "sovereignty", based on the rights and duties of the

[2] UN Doc. Res. 2625 (XXV) of the General Assembly: "Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations", 24 October 1970.

[3] See, among others, M. Bothe, "Has Article 2 (4) Survived the Iraq War?", pp. 417-31.

[4] N. Ronzitti, "The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force", pp. 91-110.

[5] C. Greenwood, "The Legality of the Use of Force: Iraq in 2003", pp. 387-415.

state: sovereignty is associated with responsibility, and the "primary responsibility of protection of its people lies with the state itself".[6]

It is noteworthy that the "responsibility to protect" approach was endorsed by the Final Document of the Millennium + 5 Summit in September 2005. States stressed the necessary involvement of the UN collective security system: they commit themselves to taking collective action through the Security Council in accordance with Chapter VII of the Charter, "should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[7]

In the aftermath of the 11 September terrorist attacks, legal debate focused on the constitutive elements of the notion of armed attack and on the progressive broadening of the right to self-defence, recognised in Article 51 of the UN Charter. The book considers the most controversial issues: the identification of the target of an armed attack; the legal qualification of armed actions committed by terrorist groups; the alleged right of pre-emptive self-defence. The classical interpretation affirms that an armed attack must come from a state. Nevertheless, some scholars criticise the need to attribute an armed attack to a state while others argue for reconsideration of the element of gravity as a defining parameter: in the event of a terrorist act committed by private groups, a military response would not be precluded.[8] While considering state practice, one should not overlook the pronouncements of the International Court of Justice in deciding several cases involving the threat or use of force in recent years. Concerning the legal qualification of attacks by terrorist groups, the Court stated in 2004 that Article 51 recognises the existence of an inherent right of self-defence in the case of an armed attack by one state against another.[9] However, various authors feel that it is doubtful whether Article 51 and the customary rule on self-defence coincide perfectly.

Finally, the legal justification of the use of force in Iraq raises the issue of

[6] M. Weller, "Forcible Humanitarian Action: The Case of Kosovo", pp. 277-333, at p. 313. See L. Brock, "The Use of Force in the Post-Cold War Era: From the Collective Action Back to Pre-Charter Self Defence?", pp. 21-51, at p. 39.

[7] UN Doc. A/RES/60/1, *2005 World Summit Outcome*, para. 139.

[8] See, among others, W. Heintschel von Heinegg, "Legality of Maritime Interception Operations within the Framework of Operation Enduring Freedom", pp. 365-85, at p.375.

[9] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *ICJ Reports 2004*, p. 194, para. 139. For critical comments, see D. Fleck, "National Sovereignty and International Responsibility: Legal and Policy Aspects", pp. 53-64, at p. 56.

authorisation by the Security Council under Chapter VII once again. A few essays[10] offer an overall presentation of the role of the Security Council and the nature of its deliberations: particular attention is devoted to the notion of *ex post facto* authorisation and the debated doctrine of implied authorisation.

The concluding Chapter 19 of the book, which contains the report of the conference in Columbus, records the differences of opinion on the content of customary rules on the use of force. The divergence between those authors interpreting the prohibition strictly and those proposing a more extensive approach reveals a problem of methodology with regard to evaluating the sources of state practice.[11] The latter appear to favour a rapid evolution in the custom, privileging the behaviour of the dominant states (or the hegemonic state), while the former rely on the *opinio juris* of all states, as expressed in UN General Assembly resolutions.

A final general observation might be that "law will always be oscillating between stability and change".[12] There is much tension between law and facts, between law and political developments. Therefore, the new options for the use of force which have appeared since the end of the Cold War need to be assessed from different points of view. One of the merits of *Redefining Sovereignty* is its interdisciplinary approach: from the perspective of an international lawyer, the discussions during the three conferences were greatly enhanced by the contributions of the attending philosophers, legal theorists and political scientists.

[10] Y. Dinstein, "Sovereignty, the Security Council and the Use of Force", pp. 111-22, at p. 116; Ronzitti, "The Current Status of Legal Principles", p. 106; A. Gioia, "The End of the Conflict and Post-Conflict Peace-Building", pp. 161-93; M. Gestri, "ECOWAS Operations in Liberia and Sierra Leone: Amnesty for Past Unlawful Acts or Progress Toward Future Rules?", pp. 211-50.

[11] Cf. the comments by M. Byers, p. 436; see the substantial critique of the methodological approach practised in the US by "the new generation of interdisciplinary scholarship" (cf. A. M. Slaughter, T. Tulumello and S. Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", *American Journal of International Law*, vol. 92, no. 3, 1998, p. 367-97) in A. Fischer-Lescano, "Redefining Sovereignty via International Constitutional Moments? The Case of Afghanistan", p. 335-64.

[12] M. Bothe and A. Fischer-Lescano, "Report from Frankfurt on Redefining Sovereignty", pp. 13-17, at p. 17.