The Use of Force and the Responsibility to Protect

Rainer Hofmann
Professor of International Law, Faculty of Law, University of Frankfurt, Germany

The author analyses the pre-emptive, preventive and protective uses of force, considering that the Security Council has the power to evaluate in which situations there are threats to international peace. This body has also the mandate to authorize the necessary measures to confront these threats, including the use of force. The paper focuses on the cases of international terrorism and failed states.

I. Introduction

In his report "In larger freedom: towards development, security and human rights for all", the UN Secretary-General affirms that a basic consensus on security principles is needed, and that an essential part of that consensus must relate to the crucial issue as to "when and how force can be used to defend international peace and security". He then identifies three areas of deep disagreement: Do States have the right to use military force pre-emptively, i.e. to defend themselves against imminent threats? Do they have the right to military force preventively, i.e. to defend themselves against latent or non-imminent threats? Do they have the right – or perhaps the obligation – to use military force protectively, i.e. to defend the citizens of other States against genocide, ethnic cleansing or other comparable crimes under international law?

Obviously – we all know this - there is a fundamental difference between the mentioned three varieties of the use of military force: the reason for resorting to such force. Whereas the two former ones aim at defending one State, i.e. its population, against either an imminent or a latent, or non-imminent, armed attack by another State or threat emanating from that State, the goal of the third variety is essentially different: Here, the military force of one State is employed with a view to protect not its own population, but the population of another State. This obviously raises a number of additional questions which do not have to be addressed when dealing with the question as to the legality of the use of force in the two former varieties.

But there is a further, additional difference which I think needs to be taken into account: The issue of international terrorism. The events of September 11 and later developments have shown to all of us, that the traditional concept according to which an armed attack which results in the right to resort to self-defence under Art. 51 UNC, or a threat to peace and security which enables the Security Council to adopt measures under Chapter VII UNC, will always be made by, or result from the acts of a state, does not any longer reflect reality. This means that I agree with all those who state that the issue must not be limited to discuss the legality of pre-emptive (anticipatory) or preventive self-defence against situations which are perceived as constituting an imminent or non-imminent threat and which emanate from actions attributable to a State, but that we also have – and I should like to stress: even more so – to look into the question of the legality of measures of pre-emptive and preventive self-defence against imminent or non-imminent, but latent threats emanating from terrorists and their actions not attributable to any State.

Moreover, an additional aspect should be taken into account: Since the demise of State power in Somalia, we are increasingly faced with the phenomenon of failing or failed states. As to all three varieties of the use of force, it might well be that different

parameters apply in order to assess the legality of such action depending on whether military force is employed against the territory of a well-functioning State or a failing or failed State.

Finally, I am convinced that the Security Council has, under the provisions of Chapter VII, the power to decide, in all three scenarios, that there exists a threat to the peace in the meaning of Article 39 UNC and is, thus, entitled also to decide to adopt, or to authorize member States to take, all measures necessary to end that threat, including the use of force.

II. The pre-emptive use of military force

Let me start by describing what I consider to have been the predominant view among international lawyers concerning the pre-emptive and unilateral use of military force, i.e. as a means of self-defence and therefore without prior authorization by the UN Security Council: According to this view, self-defence was only allowed if exercised in conformity with Article 51 UNC which necessitated that an armed attack actually occurred; this meant, that a mere threat of an armed attack was not considered to justify any pre-emptive military action. This opinion was – and is – based upon the argument that the right to self-defence under article 51 UNC, as an exception to the general rule of Article 2 para. 4 UNC, must be narrowly construed.

I think, however, that the discussion before and after the military attack of the USA and their allies against Iraq in spring 2003 can be understood in such a way that there is now a strongly increasing tendency to allow, under certain circumstances, pre-emptive self-defence against an imminent armed attack. This argument dates back to the *Caroline* – formula and implies that a State might use military force pre-emptively and as an *ultima ratio* measure: The government wishing to resort to pre-emptive self-defence needs "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation". It seems – at least to me – that the presently dominant view is to accept the parallel existence of both the Charter right to self-defence and the customary law right to limited pre-emptive self-defence; in view of the development, and proliferation, of modern technology and weapons of mass destruction, this position is indeed convincing: No State can be legitimately expected to wait until missiles with nuclear, chemical or biological warheads have actually reached their targets since in most cases such attacks would be so destructive that re-active self-defence would not be any acceptable option. It is indeed most interesting to see that the UN Secretary-General in para. 124 of his paper entitled "In Larger Freedom" fully subscribes to this view.

Now, what is the legal assessment concerning the pre-emptive use of military force against terrorist attacks? In order to address that question, I should like to begin by remind us of what is the actual state of international law as concerns the exercise of the right to self-defence when an attack – which could be qualified as an armed attack under Article 51 UNC as the UN Security Council did with respect to the attacks of September 11 – has been made by terrorists: I think that international law still demands - for re-active self-defence in such a case to be legal – that the State from the territory of which the terrorists are operating has not only been a "safe harbour" to such terrorists, but has assisted them, be it on a minor scale; thus, I think that the test applied by the ICJ in the *Nicaragua* – Case still constitutes the currently applicable state of international law. This again means that the attack on Afghanistan was lawful although I should like to stress that – for reasons of legal policy – I had strongly preferred the USA and their allies to obtain a pertinent mandate of the UN Security Council. I should like to present the following thesis: If indeed the conditions which are necessary to allow the recourse to pre-emptive use of military force against a State under the *Caroline* – doctrine are fulfilled with respect to an imminent threat of such an attack performed by terrorist groups and it can be established beyond any reasonable doubt that the State from which

such terrorists are operating is assisting such terrorists, then the pre-emptive use of military force against such terrorists on the territory of that State does not constitute a violation of the prohibition of the use of force.

Finally, as concerns the scenario of such armed attacks committed by terrorists from the territory of a failing or failed State, the situation is slightly different: While it is clear that also failing or failed States are protected by Article 2 para. 4 UNC, we have the special situation that there is no government in place which does represent state authority in that State. So, if again the conditions for the application of the *Caroline* – doctrine are fulfilled, the pre-emptive use of military force against terrorists in that failing or failed State is legal under international law if the group exercising factual authority over the respective part of the territory of that failing or failed State supports the terrorists or – and here I think one has to make a difference as compared to the situation in a non-failing or non-failed state – is factually not in a position to control the acts of such terrorists. I am aware of the fact that this opinion can be criticized as opening up possibilities for abuse – a kind of "slippery slope – argument" – but I think no State can be expected to refrain from the use of pre-emptive military force against a territory only because there is no government in place which would effectively exercise state authority.

III. The preventive use of military force

The legal assessment is, however, fundamentally different as concerns the preventive use of military force. This concept - which is by and large based upon the US National Security Strategy of 20 September 2002 - differs profoundly from the concept of pre-emptive (or anti-cipatory) self-defence as understood by those who consider it to form part of currently applicable customary international law: Whereas the latter insists on the imminent character of the attack, the former seeks to justify military action geared to prevent an adversary from developing structures and weapons that, in the future, might justify the assessment that an armed attack is imminent. In other words: In a situation of pre-emptive self-defence, the State which strikes does so in order to forego an imminent strike by the adversary; in a situation of preventive self-defence, the State which strikes does so in order to prevent the adversary from developing the capacity to threaten, in the future, with an imminent attack.

Here I think there is no need whatsoever for an additional right to self-defence outside the Charter law: The intention of a State to possess and to develop weapons of mass destruction might very rightly be considered as a threat to international peace and security in the sense of Article 39 UNC. It is then up to the Security Council to meet its responsibilities to secure international peace and security. Thus, the Security Council might, e.g., establish a system of international inspection or even, if the State would not comply with such an obligation, authorize Member States to use all necessary means, including the use of armed force, to enforce compliance. So, only the UN Security Council is entitled to use, or authorize the use of, preventive military force. Again, it is most interesting to note that the UN Secretary-General in para. 125 of his paper "In Larger Freedom" clearly states that in situations of latent threats the "Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security".

I also think that there is no need whatsoever to deviate from this position as concerns terrorists and failing or failed States. In the absence of the imminence of an armed attack, there is clearly no justification to add to the system established by the UN Charter.

IV. The protective use of military force

Finally, I should like briefly to address the issue of the protective use of military force which, in my understanding does not differ – as to its substance – from those actions which were – and still are – discussed under the notion of *humanitarian intervention*. At the outset, I should like to stress again that the UN Security Council is entitled – and I should like to add: also obliged in the sense of a responsibility to protect - within its powers under Article 39 UNC, to adopt measures against States in order to stop their governments from committing acts of genocide, ethnic cleansing or large-scale violations of the most fundamental human rights.

The real question is, of course, whether States are entitled to act, i.e. to use military force protectively, if the UN Security Council does not act in such a way as to meet its responsibilities. The prime example, of course, is constituted by the NATO intervention against the former Yugoslavia in order to stop the on-going ethnic cleansing in Kosovo. In hindsight it is interesting to note that, before that intervention, most international lawyers considered such an intervention as maybe morally legitimate, but illegal; during and shortly after that intervention, many international lawyers – also in my country and including myself – endeavoured to find and establish legal arguments which, under strict conditions, would justify such protective use of armed force; however, today I think it is correct to state that most international lawyers, in particular in the light of the pertinent reaction of the international community, consider the NATO intervention – again – as morally legitimate but illegal.

This, I think, leaves us with the task to embark upon developing criteria under which such interventions – I repeat: in the absence of adequate action by the Security Council - might be considered morally legitimate and legal. I should like to propose that such interventions are legal if they conform to the following substantive and procedural criteria: That there exists a clear case of an on-going genocide or large-scale and gross violations of the very fundamental human rights; peaceful sanctions have shown not to end such a scenario; it is clear that the Security Council will not authorize the use of protective military force; the decision militarily to intervene is taken by a regional organisation – or regional arrangement in the sense of Article 52 UNC – according to previously enacted procedural standards; the military intervention is strictly proportionate as to the military means employed and targets attacked and also strictly limited to enforcing an end to such crimes.