

Common Interests of Humankind and the International Regulation of the Use of Force

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I. Introductory Remarks

The international regulation of the use of force is closely connected to the communitarian dimension of international law. It represents the outcome of a process of evolution that brought about the awareness that the unfettered power of states to use force to pursue their individual interests constituted a permanent source of instability, potentially jeopardizing all of humankind.

Notoriously, this development led to the inclusion in the UN Charter of the two normative pillars on which the legal regime of the use of force still rests: the prohibition of individual use of force by states, and the setting up of a system of collective security. If the legal regime incorporated in the Charter reflects the balance of values and interests of that time, since then international law has further developed. New collective interests have emerged and acquired a fundamental status under international law, thus demanding a system of implementation. The question thus arises whether the legal regulation of the use of force has correspondingly developed so as to allow force to be used, individually or collectively, to protect common interests of humankind.

This inquiry will be conducted mainly by taking into account the function assigned to the international regulation of the use of force, by itself as well as in its interconnections with other related fields of international law. Due to the limited scope of the present chapter, the analysis will focus on only some of the multiple issues that compose this complex legal regime: Those that, in the view of the current author, better epitomize the tension between the competing values and interests underlying it.

II. Some Philosophical Implications of the Prohibition of the Use of Force

In modern states' legal orders, the use of force is commonly conceived of as part of the executive function, designed to secure compliance with legal rules. In domestic legal orders, permeated by the rule of law and by civil and political liberties, the executive function is embedded in a thickly institutionalized setting, whereby public authorities have the exclusive competence to determine whether a breach of the law has occurred and whether force is necessary to restore compliance with it. Physical

coercion therefore represents the final step of a complex procedure of determination and implementation of the law, which unfolds from the primary rules to the ultimate consequence of their breach. From this perspective, observance of the law is the supreme public good, which justifies intrusions into the liberty of the consociates to enforce it.¹

In the international legal order a different principle applies. In the classical Westphalian system, which asserted itself after the abandonment of the universalist perspective, individual states claimed to possess the unfettered power to resort to force to implement their own rights and interests, thus creating a permanent state of tension and instability that accompanied the evolution of international relations until very recent times. It was this state of tension that, ultimately, engendered a process of change aimed at banning war and, more generally, individual use of force.² This process crystallized, in the aftermath of World War II, with the general prohibition of the individual use of force enshrined in the UN Charter.

The Charter thus seems to have realized the Kantian *Entwurf* of a *pactum societatis*, a legal order which, by virtue of an agreement of all its consociates, has banned the use of force not only as a means for settling political disputes, but also as a means of enforcing legal obligations.

In this framework, the absence of an objective system of assessment of states' respective rights and interests made it implausible to conceive force as a means for securing compliance with the law. Such a mechanism would be based on a unilateral assessment of one's rights as well as on a unilateral enforcement of these rights.³ As previous experience abundantly demonstrated, unilateral enforcement is prone to abuse⁴ by the powerful actors in international relations. The substantial inequality among the international actors would thus prevail over the formal parity assured by international law. The elimination of abuses and the establishment of a legal order effectively ensuring the equality of its members thus entailed a heavy price—namely, the relative authority of international rights and obligations. In this model, which closely resembles more ancient paradigms of contractual political thought, the common interest in preserving peace was regarded as prevailing over the individual rights and interests of states.

¹ Even in the most perfect legal order, recourse to force is subject to conditions and modalities which can greatly impair the effectiveness of the rules the compliance with which it is designed to promote. For the purposes of the present study, however, there is no need to determine whether and to what degree the inefficiency of the process of implementation can affect the effectiveness the primary rules.

² On this process of development, see, recently, Daniele Archibugi, Mariano Croce & Andrea Salvatore, *Law of Nations or Perpetual Peace? Two Early International Theories on the Use of Force*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 56 (Marc Weller ed., 2013).

³ Both methodological defects were noted by IMMANUEL KANT, *ZUM EWIGEN FRIEDEN. EIN PHILOSOPHISCHER ENTWURF* (1795). See the English edition: IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* 133 (George Allen & Unwin/The MacMillan Co., 3d ed. 1917): "The method by which States prosecute their rights can never be by process of law—as it is where there is an external tribunal—but only by war. Through this means, however, and its favourable issue, victory, the question of right is never decided." See also *id.* at 133, an interesting discussion of the law of nations as a form of guarantee of the pact of perpetual peace.

⁴ See *infra* note 13 and accompanying text.

Although present in earlier utopian conceptions of a global government,⁵ a different system, whereby states conferred upon a centralized entity the power to determine the law and enforce it, did not find a place in the Kantian philosophical conception; not even in the minimal form of a collective system of administration of the use of force. This further step, namely a *pactum subjectionis*, may have appeared to Kant as purely utopian for what he presented as a realistic political project of reform of international law. There may have been another untold reason for this failure. The conferral of the power to use force upon a sole authority, acting on behalf of the community, requires, on a procedural level, the development of modalities of its exercise and limits. Otherwise, this authority would possess absolute powers, not counterbalanced by any limit. Would it not pave the way for a global form of tyranny? Would it not transform the Kantian model of liberal contractualism into the Hobbesian model of absolute contractualism?⁶

III. Use of Force and Common Interests of Humankind in the Original Setting of the UN Charter

Following a development that started at the beginning of the twentieth century,⁷ the Charter of the United Nations has adopted a complex model which incorporates a full-fledged *pactum societatis* and a basic version of a *pactum subjectionis*. On the one hand, states have waived their overall power to use force, while retaining it for defensive purposes only. By so doing, they have abdicated what for centuries appeared to be an indissoluble corollary of their sovereignty. On the other hand, that power was conferred upon the UN, but not without limitations. From the entire process that brought about the Charter, and from the express stipulation of its Articles 24 and 39, it emerges that the scope of the power to use force by the UN is limited to the actions necessary to safeguard peace and security. These two values thus emerge as the overarching values of the original system set up by the Charter.⁸ It follows that

⁵ For further reference, see Archibugi, Croce & Salvatore, *supra* note 2, at 71.

⁶ In his First Supplement Concerning the Guarantee to the Perpetual Peace, *id.* ch. II, at 170–71, Kant developed the idea that the “separate existence of a number of neighbouring and independent states . . . is better than that all the states should be merged into one under a power . . . which gradually become a universal monarchy.”

⁷ This process of evolution unfolded in a number of steps, among which it is worth mentioning the Drago Porter Convention that, in 1907, prohibited the use of force for the recovery of monetary debts (Convention Between the United States and Other Powers Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Statutes at Large 2241); the League of Nations Covenant that, in 1920, made an attempt to proceduralize the power to use unilateral force as a means for implementing the law, making its legality dependent on the failure by a state to submit a dispute to judicial or diplomatic settlement, or on the failure to comply with such a settlement; the Kellogg–Briand Pact in which its parties, in 1928, condemned “recourse to war for the solution of international controversies,” and renounced it “as an instrument of national policy in their relations with one another” (General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57). See Marc Weller, *Introduction: International Law and the Problem of War*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW*, *supra* note 2, at 3.

⁸ In his opening speech to the San Francisco Conference, U.S. President Truman said emphatically: “This conference will devote its energies and its labors exclusively to the single problem of setting up the essential organization to keep the peace” (Harry S. Truman, U.S. President, Address to the United Nations Conference in San Francisco (Apr. 25, 1945), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES*, HARRY S. TRUMAN, 1945, at 20 (1961).

the maintenance of peace represented, in the original architecture of this instrument, the only common interest of the international community that could be guaranteed through the use of force. Every other legally protected interest, of an individual or collective nature, remained deprived of this special form of protection.⁹

There was considerable speculation about the relationship between the general prohibition of individual use of force and the setting up of an institutional mechanism of administration of force within the UN. According to some views, these two regimes are interconnected, in the sense that the efficiency of the system of collective security constitutes a condition for the waiver of the power to use force by individual states. If this view were correct, the prohibition of the use of force would not be absolute; individual states would have accepted being deprived of their "natural" power to resort to force only if their security were protected, at an equivalent level, by institutional action.¹⁰

No convincing demonstration of this conditional link has been provided. The acceptance of the prohibition of the use of force started to gain ground gradually in the legal conscience of the international community well before the idea of setting up an institutional system of collective security became an issue on the diplomatic agenda.¹¹ Nothing in the preparatory works of the Charter suggests that the inefficient exercise of the competences transferred to the Security Council may bring about a repatriation of the power to use force beyond the case of self-defense. Rather, there is evidence in the opposite direction—namely that the reasons that led to the transfer of the power to use force from individual states to institutional actors cannot be traced back to this simplistic trade-off calculus.¹²

⁹ See the interesting discussion that followed the proposals of a number of states invited to the San Francisco Conference to include in the text of what is now art. 1, para. 1, of the Charter, a reference to the "principles of justice and international law" (see, in particular, the proposal of Egypt in front of the Commission I, Verbatim Minutes of the meeting, June 14 and June 15, Doc. 1006, in THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, APRIL 25 TO JUNE 26 1945: SELECTED DOCUMENT 529, 535 (1946) [hereinafter SELECTED DOCUMENT]). Among the arguments in favor of the amendment, the delegate of Uruguay asserted that peace and security would be empty words without justice (*id.* at 542–43). None of these proposals gained the necessary consent to be approved. Particularly eloquent appears to have been the intervention of Mr. Stassen, delegate of the United States, who argued that the mention of justice and international law as a limit to the powers of the Security Council would obstruct its primary function to maintain international peace and security: "the people of the world wish to establish a Security Council . . . who will say, when anyone starts to fight: 'Stop fighting' . . . unless at that place we add anymore, then we would say 'Stop fighting unless you do not claim that international law is at your side.' That would lead to a weakening and a confusion in our interpretation" (*id.* at 540).

¹⁰ This argument has been frequently used to enlarge the set of objectives for which individual use of force by states would be lawful. It was famously advanced by Derek Bowett, *Reprisals Involving the Use of Armed Force*, 66 AM. J. INT'L L. 1 (1972), to dismiss the idea that the setting up of the mechanism of collective security by the UN Charter would have outlawed the right of individual states to adopt forcible reprisals. A revised version of this argument seems to be suggested by David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 260 (2013). See the reply to this argument by Georg Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 EUR. J. INT'L L. 283 (2013).

¹¹ See *supra* note 7. It is telling that in the 1941 Atlantic Charter, at principle 8, the imperative of the "abandonment of the use of force" is mentioned unconditionally "for realistic as well as spiritual reasons," namely without being counterbalanced by the setting up of a system of collective security.

¹² At the San Francisco Conference, art. 2, para. 4, of the Charter, which lays down the prohibition of individual use of force, was approved in the text resulting from an amendment proposed by Australia. No state intervening in the discussion referred to a possible link of conditionality between this provision and the functioning of the system of collective security. On the basis of the principle of the mutual autonomy

Ultimately, the ban of the individual use of force seems to be based on the awareness that, in the absence of objective mechanisms of control of unilateral use of force, any conditionality attached to the waiver to use force would soon push back the international community to the state of nature, of the *bellum omnium contra omnes*.¹³ In *Corfu*, the ICJ expressed its disapproval of "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."¹⁴

This holding has systemic implications. If the "defects" of the international organization cannot be remedied by a corresponding enlargement of the individual power to use force, it follows that in most cases, international law is deprived of the special protection represented by the possibility of enforcing its rules against the will of their addressees.¹⁵

The consequent relative authority of international law appears to be perfectly logical in a system where international peace and security are overarching collective values that prevail over other conflicting interests. One could wonder whether such a system is still adequate in light of the emergence of a sphere of fundamental collective interests that require special protection.

IV. Common Interests of Humankind and Use of Force in the System of State Responsibility

If the notion of common interests of humankind was not absent in the pre-Charter era, it was only in the second part of the twentieth century that it gained impetus. The enormity of the conduct offensive to the conscience of humankind and the shared perception that a special protection against such conduct was needed prompted the development of a new regime of state responsibility, designed to apply to breaches of

of the two regimes, an amendment to what is now art. 2, para. 4, proposed by Norway, aimed at extending the prohibition to every use of force not "approved" by the Security Council, was rejected. See Rapporteur Subcommittee I/1/A, Rep. to Committee I/1, Doc. 723, in The United Nations Conference on International Organization, San Francisco, Apr. 25-June 26, 1945 (June 1, 1945), in *SELECTED DOCUMENT*, *supra* note 9, at 476, 485 (U.S. Gov't Prtg. Office 1946).

¹³ In *LEVIATHAN*, after famously describing the state of nature as a "Warre of every one against every one," Hobbes added: "to this Warre of every man against every man, this is also consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have no place. Where there is no common power, there is no law; where no law no injustice" (THOMAS HOBBS, *LEVIATHAN*, ch. XIII at 90 (Richard Tuck ed., 1991) (1651)).

¹⁴ *Corfu Channel case (U.K. & N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, 35 (Apr. 9). This holding clarifies that the main reason for setting aside the previous regime of self-help lies in the risk of abuse inherent in the unilateral assessment of the conditions that justify recourse to force. According to a classical remark by LOUIS HENKIN, *HOW NATIONS BEHAVE* 142 (2d ed. 1979), the UN "recognize[s] the exception of self-defense in emergency, but limit[s] [it] to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."

¹⁵ See the ICJ decisions in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, 114 (June 27), and in *Oil Platform (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶¶ 40-41 (Nov. 6), where the Court found that the scope of the power to use armed force conferred by a treaty upon its parties to protect their individual security interests is restricted to measures consistent with the customary international regulation of the use of force.

obligations under peremptory norms of general international law that protect fundamental common interests of humankind.¹⁶ These developments are now reflected in the 2001 Articles on State Responsibility (ASR).¹⁷ One might wonder whether this development also has implications concerning the possible use of force to prevent or repress offenses to these interests.

It is common knowledge that a breach of fundamental common interests entails, beyond the "ordinary" consequences of a breach of international rules, additional consequences under Article 41(1) and (2). These provisions do not impose obligations on the wrongdoer as a consequence of the breach; rather, they establish obligations for every other member of the international community, for the purpose of bringing the breach to an end: A negative obligation not to recognize and a positive obligation to cooperate.¹⁸

Both these obligations are *erga omnes*, in the sense that every state is legally entitled to claim compliance with them from every other state of the international community.¹⁹ As the ICJ pointed out in *Belgium v. Senegal*,²⁰ if the secondary obligations designed to protect common interests of humankind were owed to the injured state only, it would be difficult, in many circumstances, to identify an entity empowered to claim compliance.

Article 41 thus has the effect of transforming the right to react to "ordinary" breaches of *erga omnes* obligations into a duty to react to serious breaches of *jus cogens*. Furthermore, the reaction's only purpose is to "bring the breach to an end." Whereas the duty to react is incumbent on every individual state, the duty to bring the breach to an end pertains to the international community as a whole.

The existence of a duty to bring the breach to an end indicates that serious breaches of common fundamental interests are intolerable under international law and that all the *omnes* must contribute to a comprehensive action designed to bring about the cessation of the breach. One might wonder whether the intolerability of these breaches entails that force can be used to attain this purpose.

¹⁶ On the transition from a bilateral to a communitarian conception of state responsibility, see, *ex multis*, Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994); JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 362 (2013). The issue has been dealt with in general terms by Giorgio Gaja, *The Protection of General Interests in the International Community*, 364 RECUEIL DES COURS 9 (2011).

¹⁷ See James Crawford, *International Crimes of States*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 405 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

¹⁸ For a more detailed analysis of these provisions, I refer to Enzo Cannizzaro, *On the Special Consequences of a Serious Breach of Obligations Arising Out of Peremptory Rules of International Law*, in *THE PRESENT AND FUTURE OF JUS COGENS* 133 (Enzo Cannizzaro ed., 2015), http://www.editricesapienza.it/sites/default/files/5287_Cannizzaro_Jus_Cogens.pdf. Whereas the ILC in the Commentary to the ASR indicated that the obligation to cooperate pertains to the progressive development of international law (Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Sess., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10, at 287 (2001)), in the Wall opinion, the ICJ seems to conceive of both obligations as part of general international law (see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 159 (July 9)).

¹⁹ See also Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT'L L. 553, 570 (2006).

²⁰ Questions Relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, 2012 I.C.J. Rep. 422 (July 20).

Under the law of state responsibility, the question cannot but have a negative answer. Permissible reactions to serious breaches of fundamental interests of the international community, under the law of state responsibility, do not include forcible measures.

The ASR are silent on the means that states can employ in discharging their duties under Article 41, in particular their obligation to cooperate to bring the breach to an end.²¹ However, measures taken by individual states under Article 41 constitute a special kind of implementation measures and should encounter the same limits established under Article 50 and, in particular, the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations. This limit is consistent with the broad logic of the law of state responsibility, based on the premise that the need to secure compliance with international obligations, important as they may be, does not justify the use of force by individual states. The necessity to use force for this purpose marks the outer limits of the law of state responsibility, beyond which extends the realm of international institutional law.

Article 59 ASR may take the matter a step further, by pointing out that "these articles are without prejudice to the Charter of the United Nations." Although the Commentary indicates that this provision was meant to have a restrictive scope only, namely to limit the effect of obligations arising out of the law of state responsibility where they interfere with obligations flowing from the Charter,²² its broad phraseology suggests a broader scope. A plausible reading, in the light of the previous practice of the Security Council, suggests that this provision intends to establish a bridge between the system of state responsibility and the system of collective security established by the Charter.²³

This reading is supported by a systematic argument. Although they do lay down, in Article 41, the special consequences arising from serious breaches of fundamental interests of the international community, the ASR abstain from determining special means of implementation. The reason for this failure may be found in the limited scope of the Articles, which include only rules designed to govern international responsibility at the level of inter-state relations. If forcible action were necessary to bring to an end offenses that are intolerable to the international community as a whole, the Articles would not be the proper instrument. Article 59 can be reasonably interpreted as a provision that links the system of state responsibility to the system of the Charter. The

²¹ The question is left undetermined in the Commentary to art. 41. With regard to the modalities, the ILC indicates that "[c]ooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation." With regard to the means of action, after recalling that art. 41 does not "prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40," the ILC adds that "[s]uch cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation" (Int'l Law Comm'n, *supra* note 18, at 114).

²² See the commentary to art. 59, Int'l Law Comm'n, *supra* note 18, at 143.

²³ This threefold system of reaction, hinging upon the existence of individual, collective and institutional reactions, emerges from the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, *supra* note 18. The Court said: "It is [. . .] for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end" (§ 159) . . . "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime" (§ 160).

mechanisms of collective security could thus be conceived as a special rule designed to implement, at the institutional level, the responsibility for serious offenses to the conscience of humankind.

V. The Protection of Common Interests of Humankind by the UN

This latter observation raises the further issue whether the system of collective security can be conceived of as a means of implementation of obligations protecting fundamental common interests of humankind. Although the issue is certainly not novel, a general reappraisal, in light of recent practice, seems to fall within the scope of this chapter.

A negative answer emerges from the phraseology of the Charter. Article 39 indicates that use of force—and, more generally, Security Council action under Chapter VII—is functionally limited to what is necessary and proper to maintain or restore the international peace and security. However, notoriously, the practice of the Security Council has spilled over these limits through a broad interpretation of the notion of a threat to peace. In the practice of the Security Council, a threat to the peace not only covers situations where there is a well-founded fear of an imminent armed conflict, but also situations where common interests of the international community are offended to an intolerable extent.²⁴

This practice of the Security Council seems to express the belief of the international community that the gap in the international regime as regards individual use of force as a means of enforcement can be partly filled by a creeping expansion of the competence to use force by the UN.²⁵ It is based on the idea that an offense to fundamental interests of the international community may create acute tensions and endanger the stability of the international system to a much greater extent than many of the dozens of minor armed conflicts that erupt yearly throughout the world.²⁶

²⁴ This practice, and some of its most controversial aspects, made the subject of extensive studies, in correspondence with the intense activity of the Security Council in the early 1990s: see GIORGIO GAJA, *RÉFLECTIONS SUR LE RÔLE DU CONSEIL DE SÉCURITÉ DANS LE NOUVEL ORDRE MONDIAL*, in *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 306 (1993); Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 *INT'L & COMP. L.Q.* 74 (1994); more recently, see MATHIAS FORTEAU, *DROIT DE LA SÉCURITÉ COLLECTIVE ET DROIT DE LA RESPONSABILITÉ INTERNATIONALE* (2006); Christian J. Tams, *Individual States as Guardians of Community Interests*, in *FROM BILATERALISM TO COMMUNITY INTERESTS* 379, 392 (Ulrich Fastenrath et al. eds., 2011). This practice was also the target of sharp criticism. See in particular Martti Koskenniemi, *The Police in the Temple Order, Justice and the UN: A Dialectical View*, 6 *EUR. J. INT'L L.* 325 (1995), who referred to the Council's willingness to use "its exceptionally 'hard' powers of enforcement, binding resolutions, economic sanctions and military force for 'soft' purposes of international justice." Koskenniemi went on to quote the famous passage of Fitzmaurice, in his dissenting opinion to the ICJ decision in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 *I.C.J. Rep.* 16, 282 (June 21), according to which "[i]t was to keep the peace, not to change the world order, that the Security Council was set up."

²⁵ See Gaja, *supra* note 16, at 75.

²⁶ One can hardly disagree with Jean d'Aspremont, *The Collective Security System and the Enforcement of International Law*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW*, *supra* note 2, at 129, 147, according to whom "Chapter VII actions . . . cannot be seen from the standpoint of international law, as constituting enforcement action per se." However, the question remains as to whether

Insofar as this institutional practice identifies one of the possible meanings of Article 39, it appears to be consistent with the Charter.²⁷ Only occasionally has the use of the powers of the Security Council to implement common collective interests been opposed by states, and mainly with regard to the modalities employed rather than to the existence of the power in itself,²⁸ thus confirming the acceptance of a broad, albeit not unlimited, construction of the UN Charter provisions that determine the conditions for Security Council action.²⁹

Additional powers in the field of the protection of common interests have been conferred on the Security Council by provisions included in treaties of a universal nature.³⁰ None of these provisions explicitly confers on the Security Council the power to use force beyond the limits set by Article 39 of the Charter.

The attribution of new power of action to the Security Council under a treaty is not, in itself, inconsistent with the Charter, provided that it does not alter the role of the Security Council under the Charter and that it does not affect the legal position of states not party to the treaty. For example, when referring to the International Criminal Court (ICC) situations in which international crimes appear to have been committed, the Security Council acted under a dual legal basis: the Rome Statute and the Charter. The use of a dual legal basis suggests that the exercise of new powers of action conferred upon the Security Council under the Statute are compatible with the Charter, as they broadly fall within the primary responsibility to maintain the international peace and security assigned to the Security Council by the Charter.³¹

international law provides a legal basis, in the Charter or outside it, for the power of the Security Council to use force to bring to an end offenses to common interests of humankind.

²⁷ The ICJ has considered the practice of UN organs as a means of interpretation of a Charter provision only if consistent with the Charter (see the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 18, ¶ 28). This consistency test may at times have been stretched to the limits of the reasonable meaning that could be extracted from a text. See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Sess., U.N. Doc. A/71/10, at 177 (2016). On the consistency with the Charter as a limit to permissible interpretation through institutional practice, see José E. Alvarez, *Limits of Change by Way of Subsequent Agreements and Practice*, in TREATIES AND SUBSEQUENT PRACTICE 123, 127–29 (Georg Nolte ed., 2013).

²⁸ Beyond the notorious cases concerning measures short of force, a problem mainly arose with regard to the use of force authorized by the Security Council. For a recent overview, see Niels Blokker, *Outsourcing the Use of Force: Towards More Security Council Control of Authorised Operations*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 2, at 202.

²⁹ See Nico Krisch, *Article 39*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1275, 1291 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012); ERIKA DE WET, THE CHAPTER VII POWERS OF THE SECURITY COUNCIL 133 (2004).

³⁰ Possibly the most famous of these provisions is Convention on the Prevention and Punishment of the Crime of Genocide art. VIII, Dec. 9, 1948, 78 U.N.T.S. 277. See also Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and of their Destruction art. XII(4), Sept. 3, 1992, 1974 U.N.T.S. 45; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 89, June 8, 1977, 1125 U.N.T.S. 3. More recently, see Rome Statute of the International Criminal Court arts. 13(b), 16, July 17, 1998, 2187 U.N.T.S. 3.

³¹ It is worth noting that, in S.C. Res. 1593 (Mar. 31, 2005), which referred to the ICC the situation in Darfur since July 1, 2002, and, again, in S.C. Res. 1970 (Feb. 26, 2011), which referred to the ICC the situation in Libya since Feb. 15, 2011, the Security Council has carefully distinguished, with regard to the obligation of states not party to the Statute to cooperate with the ICC, between two situations: states from which a threat to peace originates, which are under an obligation to cooperate with the ICC, and other states not party to the Statute, which are simply "urged" to cooperate with the ICC. With regard to the

VI. The Protection of Collective Interests of Humankind and the Responsibility to Protect

A further issue concerns the possibility of grounding forcible action to implement common interests of humankind on general international law.

This perspective was largely identified, in the past, with the doctrine of humanitarian intervention. In the absence of a settled practice, the supporters of this doctrine tended to rely on a logical argument—namely, that the growing concern for humanitarian values had ultimately prevailed over the conflicting value of state sovereignty.³² However, even if it were conceded that the changing balance of values could, by itself, bring about a corresponding change in law, this argument would remain unconvincing. As indicated in the previous section, the main function of the legal regime on the use of force is not to protect states' sovereignty, but rather to protect the stability of the international system from uncontrollable escalations that could endanger it.

On a different theoretical paradigm rests the doctrine of the responsibility to protect, the legal nature and status of which is, however, quite controversial.³³

This doctrine has gained considerable support among states and UN organs.³⁴ The gist of it seems to rely on the assumption that states' authorities have the responsibility to ensure the fundamental rights of the territorial community on behalf of the international community. The failure to discharge this responsibility should entail legal consequences that are, however, not easily drawn.

It seems safe to assume that the failure to protect does not entitle individual states to forcibly replace the defaulting territorial state in its function. The idea that the doctrine provides a legal basis for forcible action by individual states has been met with skepticism by a large part of the international community.³⁵

But there are other ways to look at this doctrine. An interesting perspective is to consider the responsibility to protect as the connective link between the law of

latter group, the Security Council pointed out that "States not parties to the Statute have no obligation under the Statute."

³² For different views about this and other related arguments, see HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE (Philip Alston & Euan MacDonal eds., 2008). See in particular Euan MacDonal and Philip Alston, *Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE, *supra*, at 1; Hélène Ruiz Fabri, *Human Rights and State Sovereignty: Have the Boundaries Been Significantly Redrawn?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE, *supra*, at 33; Olivier Corten, *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE, *supra*, at 87; Anthea Roberts, *Can Uses of Force Be Illegal but Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE, *supra*, at 179.

³³ For an account of the different views on the legal status of the doctrine, see Mindia Vashkmadze, *Responsibility to Protect*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 29, at 1201, 1228.

³⁴ See the recent report of the U.N. Secretary General, *Implementing the Responsibility to Protect: Accountability for Prevention*, ¶¶ 2–5, U.N. Doc. A/71/1016–S/2017/556 (Aug. 10, 2017) (stressing the growing consensus for the doctrine, but also the deep disagreements about its implementation regime).

³⁵ See the U.N. Secretary General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, ¶13, U.N. Doc. A/69/981–S/2015/500 (July 13, 2015).

Such a system relies on the unilateral assessment by the individual states members of the Security Council regarding the existence of situations that require Security Council action and the use of force. A recent debate within the Security Council on the reasonableness of the Russian vetoing of a draft resolution, aimed at alleviating the desperate situation of the civilian population in Aleppo, offers ample evidence of these difficulties.⁴¹

A major obstacle in the attempt to set up an objective and impartial system of enforcement of common interests of humankind lies in the many imperfections of the instrument of authorization of the use of force. One recent example is the implementation of Security Council Resolution 1973 (2011), which authorized the use of force for the protection of civilians in a small part of Libya. However, the military operations, which were initially carried out by individual states and subsequently coordinated in the framework of the NATO operation "Unified Protection," went well beyond the Security Council mandate, extending to the entire territory of Libya with a view to prompting a regime change.⁴² This therefore constitutes a vivid example of the risk of distortion of the humanitarian objectives by unilateral implementation.⁴³ The Libyan events and their aftermath demonstrate that the goal of transforming the collective system of security into an objective and impartial mechanism of enforcement of the rules protecting the common interests of humankind is still far from being attained.⁴⁴

VII. Closing Remarks

At the end of the analysis, it is not easy to formulate definite conclusions. The international regulation of the use of force has evolved over time to correspond with

more disillusioned considerations contained in the 2017 Report, U.N. Secretary General, *supra* note 34, ¶¶ 30–31. Political attempts to curtail the discretion of the states members of the Security Council, in particular its permanent members, in casting their vote have been made recently. See the proposal on veto restraint by France and Mexico at the opening of the 70th General Assembly, https://onu.delegfrance.org/IMG/pdf/2015_08_07_veto_political_declaration_en.pdf, to date supported by 93 states, and the ACT States, *Explanatory Note: Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity and War Crimes* (Sept. 1, 2015), http://www.unelections.org/files/Code%20of%20Conduct_EN.pdf, to date supported by 110 states.

⁴¹ See the debate at U.N. SCOR, 71st Sess., 7785th mtg., U.N. Doc. S/PV.7785 (Oct. 8, 2016).

⁴² For an accurate report of the events, see Geir Ulfstein & Hege F. Christiansen, *The Legality of the NATO Bombing in Libya*, 62 INT'L & COMP. L.Q. 159, 161 (2013).

⁴³ See also Enzo Cannizzaro, *Responsibility to Protect and the Competence of the UN Organs*, in THE RESPONSIBILITY TO PROTECT (R2P), *supra* note 38, at 207.

⁴⁴ The first backlash was probably Russia and China's veto of a draft Resolution proposed on October 4, 2011, which stressed the duty of the Syrian authority to protect its populace. Interestingly, in the course of the debate, many voices were raised to express the fear that adherence to the doctrine of the responsibility to protect amounted to a blind mandate for regime change. See various interventions at the U.N. SCOR, 66th Sess., 6627th plen. mtg., U.N. Doc. S/PV.6627 (Oct. 4, 2011). Other draft Resolutions proposed to alleviate the tragic humanitarian situation in Syria met the same fate. See S.C. Draft Res., U.N. Doc. S/2012/77 (Feb. 4, 2012); S.C. Draft Res., U.N. Doc. S/2012/538 (July 19, 2012); and the two recent draft Resolutions of the same date (Oct. 8, 2016), on the situation of the city of Aleppo: S/2016/846, tabled by France and Spain, vetoed by Russia, and S/2016/847, tabled by Russia, that failed to gain the positive vote of nine members, but was also vetoed by the US, France, and the UK. The only counterexample in recent practice is S.C. Res. 2085 (Dec. 20, 2012), which authorized the use of force in Mali and refers, albeit implicitly, to the doctrine of the responsibility to protect.

the emerging rules protecting common interests of humankind. This evolution progressively substantiates the idea that a rudimentary form of implementation of these common interests is slowly emerging in international law.

However, such a system is not free of shortcomings.

On the institutional level, the composition and the decisionmaking procedure of the Security Council do not appear fully consistent with the conception of this organ as the enforcer of common interests. This function requires legitimacy and impartiality, hardly possessed by an organ that rather epitomizes the inequality of states and the primacy of the political will over the quest for universal justice.

Even more acute are the perplexities on the normative level, which concern the effectiveness of a system of protection of common values ultimately based on positive obligations incumbent upon states and upon organs composed of states, such as the Security Council. The fulfillment of these obligations seems to require the capacity of states, acting unilaterally or within the institutional context of the UN, to detach themselves from their egotistic interest in order to genuinely pursue interests pertaining to a vague entity such as the international community as a whole.

These shortcomings are probably due to the asymmetrical development of the law protecting common interests of humankind. Whilst international law has developed a set of substantive rules that bestow legal protection upon these interests, the level of the instrumental rules, designed to secure compliance therewith, remains quite underdeveloped. In other words, whereas states are inclined to accept the emergence of a body of substantive rules protecting common interests, they are much less keen to accept a system of implementation that, by nature, would deeply intrude into the sphere of their sovereign prerogatives. In consequence thereof, the system of implementation of common interests of humankind appears to be still patchy and incoherent, based as it is on the adaptation of tools and procedures devised to meet other needs, such as those established by the UN Charter.

To remedy such asymmetry, a further and decisive process of institutionalization of the international community is needed, whereby organs acting on behalf of the international community would be vested with the power to assess, objectively and impartially, whether a breach of these common interests has occurred, and with the duty to adopt appropriate measures, including the use of force, to bring the breach to an end: a development that pertains more to the realm of Utopia than to that of the current state of international law.

However, in spite of its rudimentary character, the system of selective and intermittent implementation of common interests of humankind outlined in the previous sections is not completely meaningless. Imperfect as it may be, its existence contributes to deterring offenses against these interests and to promoting the further development of international law.