THE IMPACT OF LAW ON CONTEMPORARY MILITARY OPERATIONS–SACRIFICING SECURITY INTERESTS ON THE ALTAR OF POLITICAL CORRECTNESS?

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A. Introduction

Armed forces are a “most dangerous tool”. Therefore there can be no doubt about the necessity of binding legal rules–both national and international–designed to control the conduct of armed forces and, if necessary, to prevent impunity by making certain conduct punishable. The first international treaties regulating the conduct of hostilities, at least to a certain extent, were guided by these findings. The law of armed conflict aims at “alleviating as much as possible the calamities of war”. On the other hand, it may, however, not be left out of sight that that law also recognizes the “legitimate object which States … endeavour to accomplish during war”, i.e. “to weaken the military forces of the enemy”.

One may rightly deplore the fact that, despite the achievements brought about by the UN Charter–often labelled ‘jus contra bellum’–resort to the use of armed force remains an accepted “continuation of politics by other means”. Indeed, it would be rather naïve to believe that the contemporary system of collective security of the United Nations has been sufficiently developed to abolish for good the use of

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2 See the Hague Declarations of 29 July 1907: Declaration (IV, 2) Concerning Asphyxiating Gases, 1 American Journal of International Law 157 (Suppl. 1907); Declaration (IV, 3) Concerning Expanding Bullets, id. 155 Further the 1907 Hague Conventions, especially Convention (IV) Respecting the Laws and Customs of War on Land, including the Regulations Respecting the Laws and Customs of War on Land annexed to the Convention, 2 AJIL 90 (Suppl. 1908).
3 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg 29 November/11 December 1968, 1 AJIL 95 (Suppl. 1907).
4 Id.
6 C.v. Clausewitz, Vom Kriege, Book I, Section 24 (1832/34).
force. There are situations in which even the most peace-loving government may come to the conclusion that it cannot but use its armed forces in order to achieve a given political goal. Such situations are not limited to the exercise of the inherent right of self-defence or to the enforcement of UN Security Council resolutions under Chapter VII of the Charter. The use of military force may also be the last resort when it comes to terminating gross and systematic violations of human rights\(^7\) or to suppressing massive organized crime. Finally, the UN system has not, and will not, prevent the outbreak of internal disturbances and of non-international armed conflicts. A government faced by an internal armed opposition will regularly not be prepared to give in and accept its opponent’s claims. Even if that opponent happens to be a people exercising its right of self-determination there is no absolute obligation for the government to tolerate armed secessionist efforts.\(^8\)

The objective of the present contribution is not to analyse the legality of resort to the use of armed force in the situations just mentioned. Rather, the contribution starts from the premise that governments continue to make use of their armed forces for legitimate—and sometimes illegitimate—reasons. Then, however, it is—to say the least—puzzling why governments, on the one hand, preserve the military option and, on the other hand, impose on their armed forces rules and restrictions which have the potential of preventing the armed forces from achieving the mission politically assigned to them or which may, in the worst case, even result in mission creep. Sometimes one cannot escape the impression that some governments are embarrassed because of the mere existence of their armed forces and, even more so, by having to make actual use of them. They seem to be most anxious to appease


\(^8\) The fact that the ICJ has found that a declaration of independence does not violate international law is without prejudice to this finding: ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, at paras. 78–121, not yet published in the ICJ Reports.