

## THE USE OF ARMED FORCE: ARE WE APPROACHING NORMATIVE COLLAPSE?

This panel was convened at 11:00 a.m., Thursday, April 9, by its moderator Tom Farer of the University of Denver's Josef Korbel School of International Studies, who introduced the panelists: Mahnoush Arsanjani of the World Bank Administrative Tribunal; Ian Hurd of Northwestern University; John Mearsheimer of the University of Chicago; and Tom Ruys of Ghent University.\*

### PERMISSIVE LAW ON THE INTERNATIONAL USE OF FORCE

*By Ian Hurd†*

Does the UN Charter still provide a normative order for the international use of force? The question raises more issues than can possibly be answered—which is a sure sign that it is a good question. Among other things, the question presumes that the use of force has or had a normative order in the first place and that the Charter once did provide it and might still. It also suggests an anxiety that if the Charter's role in the regulation of war has declined, this would be a bad development.

In this short essay I address these very large questions in the briefest of terms: first, I show that the Charter does indeed still provide the crucial framework, normative and legal, for the international regulation for inter-state violence. All international uses of force take place under its light. However, this may mean less than many champions of the international rule of law would like.

My second point is that the Charter's contribution is as much about *endorsing* international war as it is about *restraining* it. In providing the authoritative frame within which states conduct their wars, the Charter becomes an instrument which states can use—indeed do use—in their attempts to legitimize their military operations through law. It authorizes states to engage in war, and defines the circumstances under which they can call it lawful.

Finally, I suggest that this leads to a view of the political contribution of international law that connects law with power—legal power, state power, and political authority—and which contradicts both the liberal internationalist and realist accounts of legalization in international relations theory.

In sum, the Charter does provide the legal and normative landscape for the international use of force. It does this by constituting self-defense as the sole state-centered legal motive for war, but the effect is to coerce states into explaining their wars in terms of their national security needs. Governments are eager to do this since it reinforces the idea that mass violence in the service of perceived national interests is a normal and necessary feature of international affairs. The Charter constitutes a framework of legal resources which are instrumentally useful for legitimating state decisions, but the use of which is governed by certain legal rules and meanings. Whether this legalization is a normative or political improvement, and in comparison with what alternative, are questions that are left open for debate.

\* Mr. Farer, Mr. Arsanjani, and Mr. Mearsheimer did not contribute remarks for the *Proceedings*.

† Ian Hurd is an Associate Professor of Political Science at Northwestern University.

## CHARTER AS LEGAL AND NORMATIVE FRAME FOR WAR

The UN Charter remains the preeminent frame for the legal and moral justification of war by governments. It is the standard referent for states and activists seeking to legitimate or delegitimize the choice to use force. Its categories, which are set out in legal terms and binding on all UN members, are the defining features of the modern *jus ad bellum*. These categories include the “inherent right of self defense” in Article 51, the prohibition on the threat or use of force to resolve international disputes in Article 2(4), and the authority of the UN Security Council to act on behalf of all UN members to take any actions necessary to deal with threats to or breaches of international peace and security (Articles 25, 39, 41, 42). Since 1945 these have been the inescapable terms by which the lawfulness of interstate recourse to force is judged, and together they create a framework in which the use of force by a state is outlawed except as necessary for its individual or collective self-defense. The Security Council is authorized to use force as it sees fit to restore international peace.

These parameters define the framework for the legal use of force. As pieces of law, they are essentially unchallenged in the sense that there is no organized effort to revoke, amend, or replace these rules. While activists and states are mobilized in myriad ways to “reform” the United Nations in any number of dimensions—from enlarging the Security Council and changing its voting rules to enhancing the UN Economic and Social Council, abolishing the UN Trusteeship Council, and establishing early warning or rapid response systems for the UN Secretary-General—no one apparently seeks to change the basic legal arrangements of the Charter around the use of force, at least not formally. The rule that wars of aggression are unlawful is as close as one might find to a universally accepted tenet of international law.

An exception to this generalization might be found in the progress of humanitarian intervention as a recently legitimated motive for cross-border military operations. The prima facie illegality of cross-border force without Council approval is, for many writers, mitigated when humanitarianism is the motive, which might then be construed as an attempt at an informal amendment of the Charter rules on war.<sup>1</sup>

While Charter law against war is widely accepted, this is not the end of the story—it is rather only the beginning. State practice since 1945 shows something more: that states continue to engage in cross-border military operations at a non-trivial rate and they do so under circumstances that implicate these rules.

The fact that war continues despite the Charter rules is frequently used to illustrate the weakness, perhaps even foolishness, of the ambition to regulate war through interstate legal instruments. Thomas Franck famously declared of the ban on war that states had so “violated it, ignored it, run roughshod over it, and explained it away” that “as with Ozymandias, only the words remain.”<sup>2</sup> Michael Glennon in 2003 suggested the rules had suffered desuetude and that as a consequence states were released from any legal obligation to comply with them.<sup>3</sup>

<sup>1</sup> On informal amendment of the Charter, see Ian Hurd, *Security Council Reform: Informal Membership and Practice*, in *THE ONCE AND FUTURE SECURITY COUNCIL* (Bruce Russett ed., 1997). On the legality of humanitarian war, see THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* Ch. 10 (2002) and Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 *ETHICS & INT’L AFF.* (Summer 2011).

<sup>2</sup> Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 *AJIL* 809, 810 (1970).

<sup>3</sup> MICHAEL GLENNON, *WHY THE SECURITY COUNCIL FAILED* (2003).

However, to dismiss the laws against war in these ways is a mistake. It is wrong to take the continuation of war as evidence that the Charter is being disrespected, because it is wrong to assume that the Charter forbids war. The Charter framework changes the legal reasons by which war can be legitimated. It does not outlaw war. The fact that war continues says nothing about whether the rules of the Charter are being respected or ignored. What matters then are the *reasons* for war: specifically, is war being conducted for reasons that are Charter-compliant or Charter-violating?

I have argued that the Charter regulates the reasons for war rather than war itself. It establishes “self-defense” as the only lawful motive for war. This is often understood as a ban on aggression but it is worth noting that it also outlaws war for profit, domination, colonialism, honor, retaliation, humanitarianism, and any other reason. By design, it legitimates wars of self-defense and delegitimizes the rest. As “self-defense” has come to dominate states’ justifications for war, the Charter is indeed having a significant effect on state practice; the rules do indeed have compelling political power.

### CONSTRAINT, PERMISSION, AND EMPOWERMENT

The Charter aims to change states’ practices toward war by defining acceptable and unacceptable reasons for war. This is both limiting and empowering for UN members. It limits them by shortening the list of acceptable reasons for war to just one—self-defense. But it empowers them by institutionalizing that one motive into the fundamental legal apparatus of world politics. Constraint and empowerment are twin effects that are inseparable from each other—legalization necessarily produces both. However, most analyses of these issues examine only the *constraint* entailed by rules such as these; they see states’ commitments to the Charter as a promise not to go to war. I highlight the other side—the empowering, permissive function of international law, by which the Charter *encourages* states to go to war under the banner of self-defense.

The Charter empowers states to go to war when necessary to preserve their national security needs. It gives them a solid foundation on which to argue for the legality, legitimacy, and necessity of their wars. And while such claims are commonly contested by those beyond the state as unpersuasive, hypocritical, or downright false, the language of the law implies that the agency to decide whether a war is necessary for self-defense lies with the state that is making the claim. The legal right to use force begins with the internal perception by a state of being under threat and of the need to respond to that threat with force.

The permissive effect of law is important. It reflects the fact that legalization draws distinctions between kinds of actors, actions, and categories. It organizes the responsibilities such that it is possible to say what kinds of acts are acceptable for what kinds of actors under what kinds of conditions.<sup>4</sup> In international affairs, public international law assigns obligations and rights to entities with international legal personality.

The political consequence of legalization is that some state actions are sorted into categories of lawful and unlawful. Acting unlawfully carries more costs and dangers than does acting lawfully. Proponents of international law hope for an outcome in which states perceive that lawful policy options are more attractive, more cost-effective, and less controversial, than the unlawful.<sup>5</sup> The advent of legalization as an ordering system for world politics organizes

<sup>4</sup> PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* (2002). SCOTT VEITCH, *LAW AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING* (2007).

<sup>5</sup> ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2007).

interstate relations along lines that are defined by law. This limits state agency in some directions but enhances it in others.<sup>6</sup>

By instituting the legal category of self-defense, the Charter paves a lawful path toward the international use of force. Self-defense of course existed before 1945, but the Charter amplifies its political power by encoding it as a legal right, protected by the black-letter law of a treaty with almost-constitutional status. It makes self-defense an even more powerful tool for states than it was before. It is therefore no surprise that states now regularly invoke self-defense to justify their uses of force, associating their actions with it as a strategy of legitimation. The extensive use of self-defense to justify the international use of force is a testament to the power of the law to constitute the social world, and its utility in the hands of those who get to use it.<sup>7</sup>

### LAW, POWER, AND NOT BEING A REALIST

International law is therefore closely connected to political power. It strengthens policy decisions that conform to the law and weakens those which violate it. It is also subject to change under the influence of powerful actors whose interpretations of the law carry great weight for future practice. The effort to separate international law as a distinct domain from international power politics is hopeless—the two are intimately connected: international law enhances and limits state power; it is also shaped by it.

The connection between law and power is sometimes described by scholars as the hallmark of “realism” in international relations theory. Richard Steinberg makes this case.<sup>8</sup> But this is short-sighted, since it fails to recognize the wide range of international relations theories that have a central interest in power and specifically in state power. This is true of many constructivists, critical theorists, Marxists, feminists, post-structuralists, and others. The interest in power is not in itself a sign of “realism”—what makes an argument “realist” for international relations scholars is the focus exclusively on material forms of power (brute material facts, such as tanks, bombs, and minerals) and an assumption that states are in constant competition with each other over these material resources.<sup>9</sup> A brute materialist theory of power leads logically to a disinterest in law and legalization.

My analysis of the laws on war brings together international law and international power in a decidedly non-“realist” fashion. Rather than see political power as diminishing the power of law, I show instead that law enhances the power of some states by providing the social resources that they use to advance their desires. International law provides resources with which states explain and legitimate their behaviors to audiences who expect them to conform to international law.<sup>10</sup> The rules, categories, and resources of international law make

<sup>6</sup> Scott Veitch, *supra* note 4.

<sup>7</sup> I side with Louis Henkin in his exchange with Thomas Franck in 1970-71 over the political impact of the ban on war. Louis Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 AJIL (1971); Thomas Franck, *supra* note 2.

<sup>8</sup> Richard Steinberg, *Wanted—Dead or Alive: Realism in International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

<sup>9</sup> See, e.g., JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2014, updated); Ian Hurd, *IL/IR Book Discussion: Comment on Richard Steinberg, “Wanted Dead or Alive: Realism in International Law,”* OPINIO JURIS (Sept. 16, 2013, 12:30 PM EDT), <http://opiniojuris.org/2013/09/16/ilir-book-discussion-comment-on-steinberg/>. Ian Hurd, *Constructivism*, in *The Oxford Handbook of International Relations* (Christian Reus-Smit and Duncan Snidal eds., 2008).

<sup>10</sup> Ian Hurd, *The International Rule of Law and the Domestic Analogy*, 4 GLOBAL CONSTITUTIONALISM (2015).

foreign policy possible by giving a language of terms and signs by which agents can understand their actions and themselves and others.<sup>11</sup>

I suggest here an explicitly instrumental account of international law that does not accept the conventional equation of instrumentalism with skepticism,<sup>12</sup> realism,<sup>13</sup> or the failure of law.<sup>14</sup> On the contrary, the success of the UN Charter in constituting and regulating the lawful use of force by states is convincing evidence of the power of international law. This helps to show law's power and justifies paying close attention to how law works, how it is constituted, and who gets to use it.

### **DIVERGENT VIEWS ON THE CHARTER NORMS ON THE USE OF FORCE – A TRANSATLANTIC DIVIDE?**

*By Tom Ruys\**

As is well-known, there is a long tradition of distinguishing between a restrictive and extensive approach to the Charter rules on the use of force, and in particular, the right of self-defense. More generally, distinct labels are often used to identify groups of scholars adopting differing views on the interpretation of the rules governing the use of force between states, and which often reflect different underlying methodological approaches. Thus, some have distinguished between “bright-liners” and “balancers,”<sup>1</sup> between “purists” and “eclectics,”<sup>2</sup> or, on a more fundamental level, between formalists and pragmatists (Anderson) and between legalists and rejectionists.

Against this background, the chair of our panel raised the question whether there exists a transatlantic divide between U.S. and European legal doctrine. Clearly, this is not a simple black-or-white issue. It hardly needs explaining that it would be wrong to place all U.S. scholars in the expansionist camp and to label all European members of the invisible college of international lawyers as restrictionists. Still, at the risk of simplifying reality, I do believe there are certain distinctions between the college of international lawyers on both sides of the Atlantic.

At the methodological level, it seems that there is a stronger adherence to the traditional positivist approach on the European side, with scholars paying greater attention to the distinction between the law as it is, and the law as one might think it ought to be. By contrast, U.S. scholars seem more open to alternative, policy-oriented, and other methodological approaches. In turn, this sometimes translates into different views on the actual content of the Charter rules on the use of force. I would, however, not exaggerate this divide. Thus, on both sides of the Atlantic, there have been important shifts in legal doctrine with regard to the permissibility of anticipatory self-defense and self-defense against attacks by non-state actors. Still, it is worth noting that within European legal doctrine, there are, for instance,

<sup>11</sup> Charles Taylor, *To Follow a Ruleo*, in BOURDIEU: CRITICAL PERSPECTIVES (Craig Calhoun, Edward LiPuma, & Moishe Postone eds., 1993). INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS (2014).

<sup>12</sup> JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2006).

<sup>13</sup> Steinberg, *supra* note 8.

<sup>14</sup> BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

\* Tom Ruys is an Associate Professor of Public International Law at Ghent University.

<sup>1</sup> Mathew Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24:1 EUR. J. INT'L L. 151-89 (2013).

<sup>2</sup> Tom Farer, *Can the United States Violently Punish the Assad Regime?: Competing Visions (Including that of Anthony D'Amato) of the Applicable International Law*, 108:4 AJIL 701-15 (Oct. 2014).