CHAPTER XX

THE USE OR THREAT OF FORCE AND THE CONCEPT OF ARMED ATTACK

1. *The Use of Force*

THE present work contains many references to 'resort to force' or 'the use of force', and such terms have been employed in Article 2, paragraph 4, of the United Nations Charter[1] and in other important instruments.[2] The use of force is implicit in the terms 'war of aggression', 'invasion', 'attack', and, at least until 1945,[3] 'aggression'. Although the terms 'use of force' and 'resort to force' are frequently employed by writers[4] they have not been the subject of detailed consideration. There can be little doubt that 'use of force' is commonly understood to imply a military attack, an 'armed attack', by the organized military, naval, or air forces of a state; but the concept in practice and principle has a wider significance. The agency concerned cannot be confined to the military and other forces under the control of a ministry of defence or war, since the responsibility will be the same if a government acts through 'militia', 'security forces', or 'police forces' which may be quite heavily armed and may employ armoured vehicles.[5] Moreover, governments may act by means of completely 'unofficial' agents, including armed bands, and 'volunteers', or may give aid to groups of insurgents on the territory of another state.[6]

More delicate questions may arise. Kelsen has asserted that 'use of force' in Article 2, paragraph 4, of the Charter includes both the use of arms and a violation of international law which involves an exercise of power in the territorial domain but no use

[1] *Supra*, pp. 112–13.

[2] e.g. the Inter-American Treaty of Reciprocal Assistance and the Bogotà Charter: *supra*, pp. 116–17; and see also App. II to Chapter VI. Cf. *U.N.C.I.O.* iii. 582, paras. 4 and 6 ('act of violence').

[3] *Supra*, pp. 351–2. Cf. Chapter V, *passim*.

[4] Examples: Eagleton, 39 *R.G.D.I.P.* (1932), p. 509; Wright, 29 *A.J.I.L.* (1935), p. 381. Théry, *La Notion d'agression en droit international* (1937), pp. 111 seq., points to the vagueness of the concept of resort to force.

[5] Verbatim Records of the Meetings of the Ten-Power Disarmament Committee, Misc. no. 10 (1960), Cmnd. 1152, pp. 578–9, 594, 608, 812–13, 831–2. Cf. Sørensen, 101 Hague *Recueil* (1960, III), p. 236. See also the Protocol to the Decl. on the Neutrality of Laos, 23 July 1962, arts. 1–4.

[6] The questions of responsibility are considered *infra*, pp. 369–72.

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of arms.[1] It is true that the *travaux préparatoires* do not indicate that the phrase applied only to *armed* force:[2] but there is no evidence either in the discussions at San Francisco or in state or United Nations practice that it bears the meaning suggested by Kelsen. Indeed, in view of the predominant view of aggression and the use of force in the previous twenty years it is very doubtful if it was intended to have such a meaning. Similarly, whilst it is correct to assume that paragraph 4 applies to force other than armed force,[3] it is very doubtful if it applies to economic measures of a coercive nature.[4]

It is also necessary to decide if use of weapons which do not involve any explosive effect with shock waves and heat involves a use of force. Such weapons include bacteriological, biological, and chemical devices such as poison gas and 'nerve gases'. In so far as such weapons, if used at all, will be employed probably in conjunction with other more orthodox weapons, the question is academic. At the same time effective legal restraint of self-help and conquest demands their classification.[5] It would seem that use of these weapons could be assimilated to the use of force on two grounds. In the first place the agencies concerned are commonly referred to as 'weapons'[6] and as forms of 'warfare'. More convincing is the second consideration, the fact that these weapons are employed for the destruction of life and property, and are often described as 'weapons of mass destruction'.[7] More difficult to regard as a use of force are deliberate and forcible

[1] U.S. Naval War College, *International Law Studies, Collective Security under International Law*, p. 57; and in *The United Nations: Ten Years Legal Progress*, pp. 4–5; McDougal and Feliciano, 68 *Yale L.J.* (1958–9), pp. 1059–60.

[2] *Supra*, pp. 264 seq.

[3] Kelsen, loc. cit., Žourek, 92 Hague *Recueil* (1957, II), p. 814. Cf. Alfaro, A/CN. 4/L. 8; *Yrbk., I.L.C.* 1951, ii. 37, para. 41; *Yrbk., I.L.C.* 1951, i. 111, paras. 45*a*–49.

[4] Žourek, p. 834, considers that it does so apply. *Contra*: Sørensen, op. cit., p. 237; Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas* (Madrid, 1958), pp. 84–85.

[5] We are concerned here with the problem of unlawful resort to force. States bound by the Geneva Protocol of 1925 are prohibited from using such weapons under any conditions (apart from reservations on reciprocity), and it is possible that a customary rule or 'general principles of humanity' forbid the use of such weapons for all states. See Greenspan, *The Modern Law of Land Warfare*, pp. 356–9; Stone, *Legal Controls of International Conflict*, pp. 555–7; Singh, *Nuclear Weapons and International Law*, pp. 162–6; U.K. *Manual of Military Law*, part iii (1958), para. 107, n. 1 (*b*).

[6] See Verbatim Records of the Ten-Power Disarmament Committee, pp. 910, 917, 923 (Annexes 7 and 8), 928, 935.

[7] Ibid., pp. 910, 923 (Annex 7), 928, 935; Alfaro, loc. cit.; Aroneanu, *La Définition de l'agression*, p. 106; Jiménez de Aréchaga, p. 85. However, 'nerve gas', if it exists, may incapacitate temporarily although it cannot be said to destroy, but its use would in any case be followed by an entry of military forces. The 'Neutron Bomb', or neutron flux, takes human life but does not destroy property.

expulsion of population over a frontier,[1] release of large quantities of water down a valley, and the spreading of fire through a built up area or woodland across a frontier.[2]

Further problems arise in the case of violations of airspace and territorial waters by units of the armed forces of a state, since the penetration may be undetected and, or, unopposed, and no actual use of force may occur. Violations of airspace by military aircraft give rise to protest by the territorial sovereign but in general do not lead to specific charges of violation of Article 2, paragraph 4, of the Charter or of 'aggression'.[3] However, in particular cases such violations have been referred to as 'acts of aggression'.[4] The Soviet government has stigmatized military intelligence flights by reconnaissance aircraft over Soviet territory and territorial waters as 'acts of aggression'.[5] The Soviet protests and official documents relating to the U-2 flight in 1960 place emphasis on the possibility that, in modern conditions, the incursion of a single plane is 'an act of aggression' because it might carry a deadly load and, further, might cause those in charge of detection systems to order retaliation on the assumption that an attack had begun. It is necessary to distinguish four types of situation. First, aerial and territorial sea intrusions may be made in the course of an armed attack, and even an isolated violation may involve an attack on a single vital objective. Secondly, the intrusion may not be part of an attack but consist in an act of self-help which will be carried out in such a manner that the territorial sovereign is powerless to prevent it. 'Operation Retail' of 12–13 November 1946, in the North Corfu Strait was of this character.[6] Such intrusions are forms of dictatorial intervention and would seem to involve a use

[1] Cf. Degras, *Soviet Docs. on Foreign Policy*, ii. 448, 453, 469, 502. [2] *Infra*, p. 376.

[3] Degras, iii. 490; Soviet Note to U.S. government, 10 July 1956, *Sov. News*, no. 3428, 11 July 1956; Soviet Note of 15 Dec. 1956, ibid., no. 3534, 17 Dec. 1956; Soviet Note of 27 June 1958, ibid., no. 3867, 30 June 1958; Soviet Note of 21 July 1958, ibid., no. 3883, 23 July 1958; Saudi-Arabian protest to U.K., *The Times*, 14 Feb. 1956; Czechoslovak protest to U.S., Apr. 1955, *The Times*, 22 Apr. 1955. See also *Survey of Int. Affairs, 1949–1950*, pp. 18, 494–5; Lissitzyn, 47 *A.J.I.L.* (1953), pp. 569 seq. Cf. Chinese P.R., Statement of 2 Sept. 1956, *People's China*, no. 18, 1956, on 'provocative violations of China's territorial air and waters' by U.S. planes and naval vessels.

[4] U.N. Gen. Ass., 5th Sess., 1st Committee, 407th Meeting seq.; 5th Sess., Plen. Meetings, 319th Meeting, para. 12 seq.

[5] Notes to U.S., 10 May 1960, *Sov. News*, no. 4266, 11 May 1960; and 16 May 1960, ibid., no. 4271, 18 May 1960; Notes to Turkey and Pakistan, 13 May ibid., no. 4269, 16 May 1960; Notes to U.K., U.S., and Norway, 11 July 1960, ibid., no. 4305, 12 July 1960; Note to U.S., 2 Aug. 1960, ibid., no. 4318, 3 Aug. 1960; Soviet complaint to the Security Council, 19 May 1960, ibid., no. 4273, 20 May 1960. See also on the international law aspects of the U-2 affair, the indictment and speech for the prosecution in the trial of Powers, pilot of the U-2 aircraft, for espionage before a Soviet court: *Sov. News*, 11 and 23 Aug. 1960. See *infra*, p. 373. See also *The Times*, 5 Sept. 1962. [6] *Supra*, pp. 288, 349.

of force, even if in fact no resistance is encountered.[1] Thirdly, the intrusion may be deliberate and illegal but not form a part of any resort to force: military intelligence flights and tactics of 'psychological warfare' come within this category.[2] However, such flights may be regarded by the state which is their object as circumstantial evidence of an intention to attack or preparation for future attacks; it is this aspect which has given rise to epithets such as 'aggressive activities', 'acts of aggression', 'hostile acts', and the like. Lastly, violations of territorial airspace and waters may be the result of negligence or inevitable accident.[3] In practice it is of course difficult for the recipient to distinguish the four types at the time of commission and defensive measures may not bear any close relation to the four categories. Questions of defence in reaction to aerial intrusions will be considered subsequently.[4]

2. *The Threat of Force*

The discussions of the question of defining aggression in the various United Nations bodies were concerned, *inter alia*, with the question whether a definition should include the threat of force.[5] The opposition to its inclusion by certain representatives arose from a desire to avoid giving countenance to anticipatory self-defence.[6] There is no reason why the legality or otherwise of the threat of force should not be discussed independently of the problem of anticipatory action. A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.[7] The Kellogg–Briand Pact did not expressly prohibit threats but a threat to resort to war for political motives would seem to be a 'recourse to war for the solution of international controversies' and 'as an instrument of national policy'.[8] The doctrine of non-recognition[9] applies to the use of coercion and Article 2, paragraph 4, of the Charter and treaties with similar provisions[10]

[1] Cf. the German 'peaceful invasion' of Bohemia and Moravia in Mar. 1939. See *supra*, pp. 88, 105, 211, 249; *infra*, pp. 415–16. Cf. the Italian invasion of Albania: Langer, *Seizure of Territory*, p. 245; *Docs. on British Foreign Policy, 1919–1939*, Third Series, v. 120.

[2] See further Wright, 54 *A.J.I.L.* (1960), p. 837; Gelberg, 15 *Państwo i prawo* (1960), p. 272; and Anon., 61 *Col. L.R.* (1961), p. 1074. And see *supra*, p. 363, n. 5.

[3] On responsibility for such acts: *supra*, p. 146; *infra*, p. 377.

[4] *Infra*, pp. 373–4.

[5] See, for example, Report of the 1956 Special Committee, paras. 53–56.

[6] *Supra*, pp. 257–61.

[7] See Oppenheim, ii. 133, 295–8; U.K. *Manual of Military Law*, part iii (1958), para. 11; Jiménez de Aréchaga, pp. 83–84.

[8] *Supra*, pp. 88–89.

[9] *Infra*, Chapter XXV.

[10] *Supra*, pp. 112–13, 116–17, 127 (App. B).

prohibit the threat of force. Prohibitions of forcible intervention[1] almost certainly extend to threats and in this connexion the statements of the International Court of Justice relating to 'Operation Retail' in the *Corfu Channel Case (Merits)* may be recalled.[2] Particular instances of the use of threats of force have been castigated in diplomatic practice as 'indirect aggression'[3] or otherwise 'illegal'.[4] Finally, it is worthy of note that the International Law Commission has included in the Draft Code of Offences against the Peace and Security of Mankind 'any threat by the authorities of a State to resort to an act of aggression against another State'.[5] Invasion and unopposed military occupation following a threat of force, as in the case of the German occupations of Bohemia and Moravia in March 1939, are usually regarded as a case of actual resort to force.[6]

3. *The Concept of Armed Attack*

The present section will be devoted to some considerations of a general nature relating to the concept of armed attack and the mechanics of attack, its beginning, and the quantum of force employed. The points considered arise also in relation to the concepts of 'resort to' and 'use of' force. It is not to be assumed, however, that every unlawful use of force will involve an armed attack in the tactical or military sense of the phrase. Thus a naval blockade involves an unlawful use of force,[7] although the tactical

[1] *Supra*, pp. 96–99, 101, 117.

[2] *Supra*, p. 288. Note also opinions of dissenting judges who regarded the passage of 22 Oct. as a naval demonstration: *supra*, p. 287; I.C.J. Reports 1949, pp. 75, 109.

[3] Halifax to Finnish Minister, *Docs. on British Foreign Policy, 1919–1939*, Third Series, vi. 266 of no. 243.

[4] Ibid. i. 18, no. 39; p. 24, no. 47; p. 44, no. 79 (*Parl. Deb., H. of C.*, cccxxxiii, cols. 45–52). Statements on the *anschluss*. Also *Docs. on British Foreign Policy*, loc. cit. iii, p. 61, no. 87; p. 62, no. 89 (on Polish and Hungarian ultimata to Czechoslovakia in 1938). See further: *supra*, pp. 79, 105; *infra*, pp. 415–16. Some governments consider that Soviet policy toward the Baltic States in 1940 involved the threat of force: see *infra*, p. 417. See statement of the American Under-Secretary of State on 27 July 1940: *Dept. of St. Bull.* 27 July 1940, p. 48; and *U.S. For. Rel.* 1939, i, *passim*.

[5] Art. 2, para. 2, Report of I.L.C., 3rd Sess., Gen. Ass., 6th Sess., Suppl. no. 9 (A/1858), ch. iv, para. 59; *Yrbk., I.L.C.* 1951, ii. 135. See also *Yrbk., I.L.C.* 1951, i. 58–60, paras. 32–66. See also *supra*, p. 212.

[6] *Supra*, pp. 79, 105; *infra*, pp. 415–16. See, however, the view of the Nuremberg International Military Tribunal, *supra*, pp. 211–12.

[7] It appears in the Politis draft definition of aggression presented to the Committee on Security Questions of the Disarmament Conference of 1932–3; in the Soviet draft presented to the same committee and in Soviet drafts presented to the Sixth Committee of the U.N. General Assembly and the Special Committees on Defining Aggression. References to these documents: *supra*, pp. 353–5; Report of 1956 Special Committee, pp. 26 and 30. See also Iranian-Panamanian draft, A/AC. 77/L. 9, Report of the 1956 Special Committee on the Question of Defining Aggression, Gen. Ass., Off. Recs., 12th Sess., Suppl. no. 16

posture is passive, since its actual enforcement includes the use of force against vessels of the coastal state.

It is considered that the terms 'attack', 'use', and 'resort to' imply an act or the beginning of a series of acts. This statement, though perhaps pleonastic, is necessary in view of the opposition of some to the principle of the first attacker, the 'priority principle', in definitions of aggression.[1] To describe any act is to determine when it is committed and to enumerate its characteristics, and it would seem that the 'priority principle' is inherent in all definition. The question is of course closely related to that of anticipatory self-defence.[2] The real problem is to determine what is an attack or resort to force as a matter of law. A requirement stated by some writers is that the use of force must attain a certain gravity and that 'frontier incidents' are excluded.[3] The category 'frontier incident' is certainly vague[4] but, from the point of view of assessing responsibility *ex post facto*, the distinction is only relevant in so far as the minor nature of an attack is prima facie evidence of absence of intention to attack, of honest mistake, or simply the limited objectives of an attack. When the justification of self-defence is raised the question becomes one of fact, viz., was the reaction proportionate to the apparent threat?

The question of anticipatory self-defence has been examined in Chapter XIII[5] and it was suggested that, although the classical or customary law recognized a right of anticipatory action, considerations of principle were unfavourable to it and the customary rule had lately been under attack. In particular the terms of

(A/3574), p. 31; Mexico, Working Paper, A/AC. 77/L. 10, ibid., pp. 32–33; draft of Dominican Rep., Mexico, Paraguay and Peru, A/AC. 77/L. 11, ibid., p. 33; Philippine amendments, *U.N.C.I.O.* iii. 538. Some of these definitions refer also to air blockade. See also, on pacific blockade and intervention, *supra*, pp. 44 seq., 219–25. Cf. McNair, *International Law Opinions*, iii. 212.

[1] For definitions expressly stating the principle: *supra*, pp. 247–8, 353, 360. Criticism of such definitions: Stone, *Aggression and World Order*, pp. 69–72; Fitzmaurice, U.N. Gen. Ass., 9th Sess., Off. Recs., 6th Committee, 406th Meeting, para. 22; and 416th Meeting, para. 18; Report of the 1956 Special Committee, paras. 72, 73; Aroneanu, pp. 251–5; Alfaro, *Yrbk., I.L.C.* 1951, ii. 38, para. 44. See also Žourek, 92 Hague *Recueil* (1957) ii. 818–22; Al Chalabi, *La Légitime défense en droit international* (Cairo, 1952), pp. 78–82; Kelsen, U.S. Naval War College, *International Law Studies, Collective Security under International Law*, pp. 58, 61; McDougal and Feliciano, 68 *Yale L.J.* (1958–9), pp. 1093–6, idd., *Law and Minimum World Public Order*, pp. 168–71; Verbatim Recs. Ten-Power Disarmament Committee, pp. 447, 541.

[2] *Supra*, pp. 257–61.

[3] Al Chalabi, pp. 74–78; McDougal and Feliciano, pp. 1115–20. See also Report of Sec. Gen., A/2211, paras. 299–306; U.N. Gen. Ass., 6th Sess., 6th Committee, 279th Meeting, para. 13; 281st Meeting, para. 10; 283rd Meeting, para. 9; U.N. Gen. Ass., 9th Sess., 6th Committee, 417th Meeting, para. 4; Report of 1956 Special Committee, para. 78. Cf. Delbos, French Foreign Minister, *Docs. on British Foreign Policy, 1919–1939*, Third Series, i. 83 (encl. in no. 106).

[4] See *supra*, pp. 209–11; *infra*, pp. 388–9.

[5] *Supra*, pp. 257–61.

Article 51 of the Charter would seem to preclude preventive action.[1] The customary rule is usually stated to permit action only in exceptional cases but little guidance is available as to what situations justify anticipatory action beyond the verbal formula of Webster in the *Caroline* case.[2] In all probability the question which should be posed is not when is anticipatory action justified but, when has an attack occurred? This is a question which is not solved by reference to the 'priority principle'.[3] Preparations for attack can only be countered by preparations to resist effectively, and, in general, activities which do not affect the territorial domain of a state, including its airspace and territorial waters,[4] do not justify forcible measures of defence. Thus, if an unexplained force of warships or aircraft approached a state *via* the high seas and the superjacent airspace, this will constitute a threat to the peace[5] but, it is submitted, does not of itself justify forcible measures of self-defence since there is no resort to force by the putative aggressor and there is no unequivocal intention to attack.[6]

It may be that in certain cases technical means of countering the instrument of aggression will not adequately ensure protection if action is only taken when the object enters the territorial domain. Thus it would be reasonable to put an interception system into operation against a rocket approaching through airspace over the high seas, through the airspace of third states, or through outer space. If the state which launched the rocket has frontiers contiguous with the state threatened the preventive measures may be taken over the territory of the putative aggressor.[7] Such relaxation should only be allowed in the case of rockets in flight: if it is extended to fast aircraft and other instruments the possibilities of abuse of the law increase.

The situation in which there is an unequivocal intention to attack unaccompanied by an actual use of force creates problems of its own: what measures of defence may be taken by a state which is faced with a declaration of war or other statement of intention to attack, or expired ultimatum, issuing from a state which gives no sign of following the statement of intention or fulfilment of the condition by a resort to force? It is suggested

[1] *Supra*, pp. 270 seq., and especially pp. 275–8.
[2] *Supra*, pp. 42–43.
[3] *Supra*, p. 366.
[4] *Infra*, pp. 382–3.
[5] See art. 39 of the U.N. Charter.
[6] *Contra*, Röling, Report of the 1956 Committee on the Question of Defining Aggression, para. 206. Cf. the case of vehicles approaching through outer space.
[7] Obviously such action is justified even if the rocket was launched without authority or by mistake.

that the requirement of proportionality should still place restrictions on reaction to this situation although acts which would otherwise have been equivocal may be treated as offensive operations. Thus a naval force of a state which had stated its intention to attack, approaching territorial waters, might be regarded as offensive and intercepted on the high seas. The dangers of permitting defensive action outside the territorial domain—even in exceptional cases such as the approach of rockets—may be minimized if the proportionality principle is observed and some distinction made between interception and defence on the one hand and retaliation on the other. The whole problem is rendered incredibly delicate by the existence of long-range missiles ready for use: the difference between attack and imminent attack may now be negligible.[1]

[1] The problems can probably be approached most successfully by means of organizational measures rendering surprise attacks difficult to achieve. Cf. on orbiting space vehicles: Verbatim Recs., Ten-Power Disarmament Committee, pp. 843–4. See also *infra*, p. 373. Further, on modern means of sudden attack, Christopher Shawcross, letter in *The Times*, 29 Aug. 1960. The U.S.S.R. has claimed the right to strike at the base of the U.S. Polaris submarines in the event of a rocket attack from a submarine under or on the high seas: *Tass Statement*, 11 Dec. 1960, *Sov. News*, 13 Dec. 1960. In February 1962 it was announced that the U.S.S.R. had developed the 'anti-missile missile': *The Times*, 23 Feb. 1962.