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International law relating to the use of armed force and weapons of mass destruction

Presentation by Dr. Hans Blix, Chariman of the Weapons of Mass Destruction Commission, to the International Law Association Toronto 5 June 2006

I appreciate being given the opportunity to address this conference of the ILA. Although I have spent the second half of my professional life in diplomacy, my first ILA conference was in Dubrovnik in 1956 and I have the rock solid conviction that the rule of law must be continuously expanded in international relations.

It is said that diplomats are people who think twice before they say nothing. However, I have my career behind me and I propose to be frank.

In large measure the rules of international law – mainly embodied in treaties – fulfil their functions. Despite the absence of legislatures, courts and executive organs that we are used to in the national sphere, they provide much needed stability and predictability. We have to recognize, however, that rules regarding the use of armed force and weapons – have offered less stability and predictability.

It is reported that before the US took action to secure the secession of Panama from Colombia about a hundred years ago, President **Theodore Roosevelt** asked his Attorney General whether a legal argument should be made to justify the action. The high legal official replied: 'Mr. President, why let such a beautiful operation be marred by any petty legal considerations…" [Cf. American Journal of International Law, July 2004, p. 519].

More recently, some have told us in effect that you can ignore international humanitarian law or restrictions in the UN Charter at will. Maybe so, but the cost of doing it is higher today than a hundred years ago.

A crucial mark of what we call a **civilized society** is that the citizens have given up the personal possession of arms and conferred upon public authorities a monopoly to possess arms and the right to use them – in accordance with law. All societies have had a long road to reach this stage, which still remains bumpy in many places. In the international community, states continue to possess their own arms and the possibility of using them. We need to identify and promote changes that will transform this community of individually armed states into a society in which the states have disarmed drastically and common institutions control and decide on the use of force in accordance with agreed rules. We undoubtedly have a long way to go.

In the national spheres, the disarmament was mostly achieved forcibly by some strong group, clan or chief overwhelming and subjugating all others. In the international sphere, this pattern is neither desirable nor likely.

It is true, of course, that in today's world the US has an absolute military dominance and is ready to make some use of it to enforce its will, for instance to eliminate WMD. I read in the US National Defence Strategy of 2005 that

"The end of the cold war and our capacity to influence global events open the prospects for a new and peaceful system in the world."[p. 5]

The same document seems to perceive the UN and international law largely as obstacles put on par with terrorism. I quote again:

"Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism." [p.5]

Nevertheless, the world is big and – especially after the experience in Iraq - the US is not likely to try to disarm it by force and assume the task of a global policeman. We need to examine what progress we can make to disarm voluntarily and to refrain from using force against each other.

WEAPONS of MASS DESTRUCTION

While no serious negotiations have ever been undertaken on the subject of general and complete disarmament, important East-West restrictions have been achieved in Europe. Efforts resulting in various degrees of success have further been made to limit traffic in small calibre arms, which are the weapons that crave the largest number of victims, and to prohibit or restrict the **use** of indiscriminate and particularly cruel weapons.

With the arrival of nuclear weapons, bans on **use** have been seen as insufficient. Attention has and continues to be cantered on the outlawing of production, storing as well as use of **biological, chemical and nuclear arms.** These weapons have long been lumped together in the term WMD – weapons of mass destruction. Although they are different in many respects they are all designed to cause terror.

Production, stocking and use are, in fact, prohibited as regards both biological and chemical weapons. A vast number of states – including the great powers – are parties to the relevant conventions. This, however, is – **not yet –** achieved for **nuclear weapons.**

Last week I had the honour to present to UN Secretary-General Kofi Annan the report of the **independent international Weapon of Mass Destruction Commission** that I have chaired for the last two years (www.wmdcommission.org). Naturally, the 14 members of the Commission devoted most attention to the question how the world can reduce the threats arising from the some 27.000 **nuclear weapons** that exist and the possible ambition of some states and groups of people to acquire nuclear weapon capability.

You may recall that in an advisory opinion ten years ago, the **International Court** of Justice saw a very limited scope for a legal **use** of nuclear weapons – mainly in situations where the survival of a state was at stake. Yet, we must recognize that confidence **that nuclear weapons will not be used** will only come from certainty that they **do not exist.**

The WMD Commission report supports the aim of **outlawing** the use, production and possession of nuclear weapons in the same manner as has been done with the biological and chemical weapons. It urges all states

possessing nuclear weapon to consider how they can manage their defence needs without nuclear weapons – just as the vast majority of the world's states must do.

At the same time, the Commission recommends many measures to **limit the threat and role of nuclear weapons.** It focuses on the **Treaty on Non-Proliferation** of Nuclear Weapons – the **NPT –** which contains a basic bargain in which the states parties that do not have nuclear weapons promise not to acquire them and five nuclear weapon states parties – China, France, Russia, the UK and the US – promise to negotiate toward nuclear disarmament.

Nuclear-weapon states now seem to **think** that the major problem in the sphere of nuclear weapons is the risk that countries like Iran and North Korea might move further in the direction of weapons and that terrorists might seek these weapons. They do **not seem to worry** about the some 27.000 nuclear weapons in their own hands.

Many non-nuclear-weapon states, on the other hand, feel **cheated** that while they have consented to remain without nuclear weapons **indefinitely,** the nuclear-weapon states have **not –** even after the Cold War – **moved decisively toward disarmament**. Indeed, in the US there is discussion about developing new types of nuclear weapons – bunker busters. In China and Russia, they consider how to maintain a second strike and in the UK they may decide on a new nuclear-weapon program to succeed the present one.

Sadly, for some ten years efforts at global disarmament have stagnated and there is an **urgent need for a revival of the disarmament process**, which yielded results even in the worst part of the Cold War.

The WMD Commission recommends that the UN General Assembly convene **a new World Summit** to provide fresh impetus to negotiations on disarmament, non-proliferation and terrorist use of weapons of mass destruction. It also presents a number of concrete proposals. Let me mention a few:

- **First**, that all states which have not done so, should ratify the **Comprehensive Nuclear-Test-Ban Treaty,** which was adopted in 1996 after some 30 years of negotiation. If the US, which signed but

declined to ratify the treaty, were to reconsider and ratify, there are excellent chances that China and other states would follow suit and the treaty would enter into force. This would impede any further qualitative development of nuclear weapons. If, on the other hand, the treaty were seen to lapse, there would be a risk that some nuclear or would-be nuclear weapon states might restart weapons tests.

- **Second,** all nuclear-weapon states should make **cuts in their stocks** of strategic nuclear weapons. The US and Russia, which have the most, should take the lead. With increasing cooperation between Russia and EU, Russian nuclear weapons should be withdrawn from forward deployment to central storage and US nuclear weapons should be withdrawn to US territory.
- **Third**, the long proposed treaty prohibiting the **production of more fissile material** – highly-enriched uranium and plutonium – for weapons production should now be negotiated, as suggested only a few days ago by the US. However, the US should revert to the position that it held in the past and that most other states hold, namely that it should be subject to international verification, which proved considerably more reliable than national verification in the case of Iraq. The combination of a reduction in existing nuclear weapons and a verified closing of the tap for more weapons fissile material would gradually reduce the world inventory of bombs.
- The acute cases of the **DPRK and Iran** must be faced with constructive diplomacy. In most cases states develop nuclear weapons for perceived security reasons. The most rational way to reduce the incentive is to convince the states that they can have **security without the weapons.** This is being wisely attempted in the case of the **DPRK, but not yet in the case of Iran.** It would further be desirable to obtain commitments from the states on the Korean peninsula and in the Middle East (including Iran and Israel) that they would **suspend or renounce any production of enriched uranium and plutonium** in return for assurances of the supply of fuel for any civilian nuclear power.

INTERNATIONAL LAW relating to the USE of ARMED FORCE

I once saw a cartoon in which a somewhat wild looking character stands in front of a judge, who says: “You are accused of slicing the cat of one of your neighbours and trying to set fire to the house of your other neighbour. Do you have anything to say in your defence?” The man answers: “I claim the

rights of a belligerent." The defendant raised the question of ***jus in bello.*** What about the ***jus ad bellum?*** *When is there a right to use armed force in international relations?*

Some would say that it is **as naïve** today as anytime earlier in history to think that the use of armed force between states could be the subject of meaningful legal restrictions.

Is it really? The world is changing and restrictions that once appeared naïve are perhaps no longer absurd as rules guiding the conduct of states. T**he use of armed force** between states of the **European Union is** today considered **unthinkable**. However, before I discuss the present, let me make a quick flashback.

Machiavelli, writing about five hundred years ago (1492 – 1550), as one might expect, did not see any restrictions. He wrote:

*"that war is **just** which is necessary and every sovereign entity may decide on the occasion for war." [Brownlie, p. 11]*

Even in the 19th century, the right to go to war was still not challenged. However, in the **Briand Kellogg Pact** of 1928 the states-parties formally renounced war as a means of national policy and the **Covenant of the League of Nations** developed the notion that there was a duty to try to settle disputes by peaceful means. The efforts failed. The Second **World War** broke out – only twenty years after the end of the First.

The United Nations

In 1945, there was a leap forward. **Art. 2:4** of the United Nations Charter stipulated that members **must refrain from the threat or use force** against the territorial integrity and political independence of any state. The rule was not just an exhortation: Under Chapter 7 the **Security Council** was authorized to take measures – including military action – when it determined that there was a threat to the peace, breach of the peace or act of aggression. Member states undertook in Art. 25 to accept and carry out such decisions of the Council.

In practical terms, upholding the ban on the use of armed force was made dependent on the five victors in the Second World War, whose consent was

needed for all decisions of substance. As we know, this construction led to paralysis. States could not expect to be protected by the Council but had, as before, to protect themselves through **individual or collective self-defense, a right** that was explicitly preserved in **Article 51**. I quote:

"*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence* ***if an armed attack occurs*** *against a Member of the United Nations,* ***until the Security Council*** *has taken measures necessary to maintain international peace and security. …"*

On paper, the reliance on the "inherent" right of individual or collective **self-defence** looked like an exception. The sad reality was that **during the Cold War** the collective **security system of the UN** Charter was mostly inoperative.

The end of the Cold War

After the end of the Cold War and the collapse of Communism, the security situation changed drastically. In the Security Council, consensus between the five permanent members was now within the realm of the possible. The most important UN action made possible by the new political climate was, of course, the authorization given by the Security Council to the broad alliance created by President George H. W. Bush to intervene in 1991 to **stop Iraq's naked aggression against and occupation of Kuwait.**

For some time the action gave hope to the world that **a new will of the five great powers to cooperate** would at long last make the Charter work as originally envisaged. President Bush spoke about a **new 'world order'.**

The Iraq war in 2003

However, in 2003 the war in Iraq was launched by a number of states **without** the authorization of the Security Council. Indeed, they were perfectly aware that their action **would not** obtain an authorization of the Council.

The **political justification** given for the Iraq war was above all the contention that Iraq retained **weapons of mass destruction** in violation of Security Council resolutions. It is unlikely that any other argument would

have persuaded the US Congress or the UK parliament to authorize armed action.

As we know, the evidence was faulty and the reports of UNMOVIC and the IAEA were ignored by the states launching the war. UNMOVIC had carried out some **700 inspections** of some 500 different sites, dozens of them proposed by the intelligence organizations, and had reported no finds of WMDs. Quite to the contrary, UNMOVIC and the IAEA had expressed doubts about some of the evidence that had been presented. The pleas of the majority of the Council that inspections should be continued were ignored by the states launching the war.

The US did **not** officially argue that it was taking pre-emptive armed action against Iraq, but there is no doubt that this view was and is held. A **US National Security Strategy** had been published in September 2002. It stated flatly that **a limitation of the right unilaterally to use armed force in self-defence** to cases where "armed attacks" were occurring – the language of the UN Charter –or were "imminent" **would be insufficient** in the era of missiles and terrorists.

Many statements by the US President and other officials to the effect that in the cases of Iran and North Korea **"all options are on the table"** confirm that the current US administration **feels free to use force**, if it so chooses, without any authorization by the Security Council, even if there is no armed attack or imminent attack.

The same impression is gained from debates in the US presidential election campaign in 2004. Both candidates thought **pre-emptive actions** could be necessary, but **Senator Kerry** said that such action would have to stand up to what he called a **'global test'**. However, the idea of assessing a US right to pre-emptive use of force against any "**outside yardstick"** or asking the Security Council for a '**permission slip**' was ridiculed by the administration.

Was there, in the view of the US administration, any level of threat below which pre-emptive armed action would be impermissible? Or is the administration giving itself a completely free license?

Before the war on Iraq in 2003, Dr. Condoleeza Rice said that you don't have to wait for "**a mushroom cloud**" before taking military – pre-emptive or preventive – action and, recently she was reported to have argued that the

US would be justified to take action in "self-defence" against Iran. One is driven to the conclusion that the right to take unilateral pre-emptive or preventive action is deemed to arise very long before an armed attack and a mushroom cloud. Indeed, it would seem to arise even when the first milligrams of low enriched uranium comes out of a cascade of centrifuges.

It is hard to avoid reading this as anything but a **good bye** to the restrictions laid down in San Francisco on the use of force – at least as regards actions to stop the development of weapons of mass destruction.

A statement by the current US ambassador to the UN confirms that, in his view, restrictions in the UN Charter on the use of force are simply not relevant to the US. He said:

*"Our actions, taken consistently with Constitutional principles**, require no separate, external validation to make them legitimate…"** (2003)*

How worrisome is it when Art. 51 of the UN Charter is seen as irrelevant by the militarily most powerful state in the world?

It might perhaps be said that the **restrictions** on the use of force in the UN Charter are only some 60 years old and for most of that time the rules were **inoperative** and **often violated** in the shade of the Cold War. However, even though the restrictions introduced at San Francisco were placed in the deep freeze during the Cold War, they had been **thawed in 1991.**

Moreover, pre-emptive and **preventive** uses of armed force – by definition – take place **before** any enemy attack has actually occurred. It is generally agreed that if bombers or missiles are approaching and an attack is **imminent,** article 51 of the UN Charter does **not require a country to delay** self-defence until the arms have **struck**. It may take preventive or pre-emptive action without asking the Security Council.

However, a problem inherent in all self-defence taken **before** an attack is even imminent (and visible) is that it is based **on intelligence.** After the Iraq affair, we know that this can be a very shaky a basis on which to start a war. Iraq in 2003 was not about to start an attack on the US, nor on any other country.

The **WMDC report now published** assesses that the majority of the world's governments have not endorsed the wide license to unilaterally decided self defence that was claimed to justify the armed action in Iraq in 2003. I agree with this position. The question nevertheless remains at which point such unilateral action does become justified. Is the generally accepted "imminence" of an **armed attack** today a too restrictive criterion? There is no serious discussion of this question at the governmental level. The argument can reasonably be made that if an armed attack is **not** imminent there would be time to go to the Security Council, which would have authority to decide on action, if it determined that there was a 'threat to international peace and security'.

The **Security Council**

It is important to note that – unlike a State – the **Security Council** can take or authorize enforcement measures not only when attacks are imminent but already when it determines that there is a "threat to international peace and security." The spectrum of measures includes economic and military sanctions and – under art. 25 of the UN Charter – member states agree "to accept and carry out" such Chapter VII "decisions".

Thus, whenever the Council – including the permanent members – is able to agree that there is **a "threat to the peace"** it gives itself enormous power to decide on measures that are binding on all members. But what is a 'threat to the peace'?

In 1991, when the Council met at summit level, a presidential statement made on behalf of the full Council declared that

"the proliferation of all weapons of mass destruction constitutes a threat to international peace and security."

The statement should be interpreted – I think – as a signal that the Council was ready in the future – "in cases of proliferation" -- to decide on measures which could be binding.

In 2004 the Council made interesting use of this authority. In resolution 1540 it affirmed

"**that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security."**

On the strength of this determination the Council decided – with binding effect for all Members – that all states shall *inter alia* adopt laws prohibiting non-state actors to engage in the production and acquisition of weapons of mass destruction.

By this resolution the Security Council clearly moved from concrete threats raised by specific cases of proliferation to potential threats arising from a large number of possible unidentified actions. Member states were ordered to enact legislation to reduce the risk of proliferation flowing from such actions.

Resolution 1540 raises hopes about an invigorated Security Council. At the same time, perhaps some caution is needed. The Council, already both judge and executive authority, makes itself legislator.

The presidential statement in 1991 and Resolution 1540 did not point to any specific situation as constituting "a threat to the peace". However, in neither case did the Security Council require member states to take any measures of enforcement character.

The case of Iran, now before the Security Council, may be different. Economic and other enforcement measures may come to be requested. While some Council members are convinced that Iran's **ambition** to enrich uranium is part of an effort to develop a nuclear weapon – to "proliferate" – **in a number of years time,** it would be hard to claim that such ambition, if it is there, constitutes "a threat to international peace and security" today.

My conclusions are **firstly** that it was worrisome that the right of self-defence was claimed to justify armed action to eliminate WMD, which did not exist. **Secondly**, that it would be a great setback for the world if it were to dump the UN Charter restrictions on the unilateral use of armed force and recognize a right of self defence against the threat of some milligrams of low-enriched uranium and possible intentions to proliferate in a number of years time. **Thirdly**, we might welcome that a Security Council that is made more representative of today's world and acts in tune with it requests all UN members to take some action to reduce potential future threats to the peace.

However, in my view, Council decisions on concrete enforcement actions should be limited to situations that are urgent – where there is an acute, not just a potential future threat to the peace.

For situations where there is not an acute threat, the authors of the UN Charter wisely wrote Chapter VI about the peaceful settlement of disputes, "the **continuation** of which is likely to endanger the maintenance of international peace and security."

The UN Charter authors who emerged from the Second World War were not pacifists. They were also not trigger- happy.