

Respect for Sovereignty, Use of Force and the Principle of Non-intervention in the Internal Affairs of Other States

Natalino Ronzitti

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International law is based on states. They are the fundamental subjects of the international community. Sovereignty means that each State is free to determine its own destiny and its relations within the community of States. Usually sovereignty does not stand alone, but is qualified in respect to other States or in connection with a State's territory and population.

One of the main elements of States' sovereignty is constituted by the principle of "sovereign equality". This principle is enshrined in the Charter of the United Nations¹ and it is spelled out both in the GA Resolution on Friendly Relations (2625-1970)² (FR Resolution) and in the CSCE Helsinki Final Act (HFA) of 1975.³ The FR Resolution affirms that "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature". The FR Resolution enumerates the corollaries and consequences of sovereign equality in a list which is not exhaustive and includes a reference to basic norms of international law, such as the inviolability of the territorial integrity and political independence of States.

The principle of sovereign equality mentioned in the HFA (*rectius* Sovereign equality and respect for the rights inherent in sovereignty) does not follow the method of the list, but makes the principle explicit by reference to a number of duties that States should observe in order to implement it. In particular the principle of sovereign equality encompasses "the right of every State to juridical equality, to territorial integrity and to freedom and political independence" as well as "the right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations". Of utmost importance is also the second part of the principle restating the duty that frontiers may be changed only in accordance with international law, i.e. by peaceful means and by agreement. Taking into account the recent events in Eastern Europe one has also to underline the following elements:

¹ Charter of the United Nations, Article (1).

² Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV).

³ Declaration on Principles Guiding Relations between Participating States.

- The right to belong or not to belong to international organizations;
- The right to be or not to be a party to bilateral or multilateral treaties, including the right to be or not to be a party to treaties of alliance;
- The right to neutrality.

The FR Resolution and the HFA principles are not in themselves binding, being documents of soft law, which are not per se obligatory unlike treaties and the international custom. However they are, in all or in part, declaratory of customary international law and for that reason they should be observed by States.

Have the HFA principles been repealed by the OSCE members and should a new European order substitute them? There are no signs, i.e. formal declarations, that this happened or that there is a process aimed at their substitution. One may quote the Final Report of the Panel of Eminent Persons on European Security as a Common Project, called *Back to Diplomacy*, issued in December 2015. According to the authors, the disagreement between the West and Moscow was not so much on the permanent validity of such principles, as rather on their application in a given situation. For instance, as far as Eastern Ukraine and Crimea, the view from the West is that Russia “.....decided to resort to force by annexing Crimea and intervening in other parts of Ukraine. With this it seems to have abandoned the basic principles of international order: sovereignty, territorial integrity and non-use of force”⁴. On the contrary, according to Moscow, “The people of Crimea overwhelmingly favoured its reunification with Russia in a referendum. Russia, unlike the West in many cases, did not use force in Crimea, only assured that others would not use it”⁵.

As already noted, State sovereignty is connected with State’s territory and population. The limits in this regard may be derived both from customary international law and from treaty law. For instance, a State is obliged to respect the sovereign immunity of foreign States within its own territory and cannot subject a foreign State to its tribunals for *acta jure imperii*: for instance a domestic tribunal can judge a commercial transaction of a foreign State, but not the conduct of its army⁶. Likewise a State cannot impose degrading and inhuman treatment to its own citizens. In particular, as far as human rights are concerned, the freedom of States is limited by the two UN 1966 Covenants (Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights). The European States are all members of the Council of Europe, with the exception of Belarus (and leaving aside those Central Asia Republics that are only OSCE members). They are thus obliged to respect the European Convention on Human Rights. Individual claims may be brought against a State party to the European Court on Human Rights. Inter-state claims are also possible, but less frequent. At the moment there are three cases pending, concerning claims lodged by Ukraine against the Russian Federation for the events related to Eastern Ukraine and Crimea.⁷

⁴ *Back to Diplomacy*, Final Report of the Panel of Eminent Persons on European Security as a Common Project, December 2015.

⁵ *Back to Diplomacy*, op.cit.

⁶ See the UN Convention on Jurisdictional Immunities of States and Their Property (2004).

⁷ ECHR, Ukraine v. Russia, application no. 20958/14; Ukraine v. Russia (II), application no. 43800/14; Ukraine v. Russia (IV), application no. 42410/15. Another case, Ukraine v. Russia (III), was struck out from the Court’s list since Ukraine renounced to pursue its application, because an individual application covering the same issue was lodged.

Intervention is prohibited by international law if it is “dictatorial”, i.e. if it is accompanied by the threat or use of force or other forms of coercion. Mere criticism or asking a foreign State to respect human rights do not constitute intervention. The same is true for representations as to the treatment of minorities in a foreign State. However, political pressure accompanied by a threat to use force is not permitted. There is a grey area in which the legality of such actions is doubtful, for instance hostile propaganda, financing opposition parties or corrupting State officials in order to obtain a change of government.⁸ Countermeasures against the wrongdoer are lawful, provided that they do not infringe basic principles of international human rights/humanitarian law. For instance, extreme forms of economic coercion are illegal. Countermeasures (sometimes improperly labelled as sanctions even if they are adopted by States) may be resorted to, even if the targeted State has not committed an international wrong against the State adopting the countermeasure, but has violated an *erga omnes* obligation (for instance the annexation of a territory of a third State).⁹

The exceptions to the prohibition of the use of force are often controversial. There are also contending interpretations on the right to self-defence, for instance whether only self-defence after the occurrence of an armed attack is permitted, or whether also anticipatory (or even preventive) self-defence is lawful. As far as humanitarian intervention is concerned, the present writer does not believe that it is lawful, unless authorized by the UN Security Council. However, “genuine humanitarian intervention” is not aggression and opens the way for its ex post facto endorsement, as happened with Security Council Resolution 1244 (1999) concerning Kosovo. Intervention for protecting nationals abroad is an old customary rule which survived the entry into force of the UN Charter. Such intervention, which was in the past exercised only by Western countries, has now gained currency within the international community. The intervention is admissible only if the territorial sovereign is unable or unwilling to cope with the situation and the intervening country intends to rescue its own citizens and bring them back to their motherland (or to other safe place). The intervention should not be admissible as an excuse to maintain a presence in a foreign country.¹⁰

How is it possible to apply this categorization of the permissible use of force to new dimensions? Intervention or use of force by proxy is not a new categorization, but a time-honoured

⁸ See, for instance, P. Kunig, “Intervention, Prohibition of”, *Max Planck Encyclopedia for Public International Law* (2008).

⁹ Countermeasures differ from sanctions in that the former may be taken only against a State which has committed an international wrong vis-a-vis the State adopting countermeasures. Countermeasures may also be adopted by a State which has not materially been affected by the violation of an obligation if the wrongdoer has committed a breach of an *erga omnes* obligation, for instance an act of aggression. On the contrary sanctions may be resorted to only by the UN Security Council whether or not an international wrong has been committed. According to the Moscow narrative in the Report *Back to Diplomacy*, sanctions may be taken only by the Security Council. It is there stated that “The sanctions against Russia are unjustified and counterproductive and another blatant violation of international law as they were imposed without a decision of the UN Security Council” (op. cit). However this kind of reasoning cannot be accepted since the restrictive measures adopted by the European Union, United States and other OSCE Western countries should be qualified as countermeasures as they were taken in reaction to a violation of an *erga omnes* obligation, i.e. the violation of the norm of non-use of force and territorial integrity of States. On the legal difference between sanctions and countermeasures (and retorsions) and on the current debate on restrictive measures taken against Russia and other countries see N. Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law*, Leiden/Boston, 2016.

¹⁰ These ideas have been spelled out by the present writer in his book on *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, 1985.

stratagem to try to avoid State responsibility. However a State, in such a case, is and remains responsible under international law. The GA Resolution 3314-XXIX (1974) on the definition of aggression qualifies “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein” as an act of aggression. The Draft Article on the Law of States’ Responsibility by the International Law Commission (2001) contains provisions both on the attribution of a wrongful act committed under direction and control of a State and on complicity in participation to an international wrong. The Charter of Paris for a New Europe (1990) labels “illegal activities involving outside pressure, coercion and subversion” as a violation of the independence, sovereign equality or territorial integrity of the CSCE (now OSCE) States.¹¹

Cyber warfare represents a new dimension¹². A cyber operation, to be considered a threat or use of force, must produce a kinetic effect, such as a flood provoked by the non-functioning of a dam whose electronic governance has been disrupted by a cyber-attack. The intrusion into a banking network in order to disrupt the financial system of the targeted State may also be considered as a violation of the principle of non-intervention, taking into account that it might also be evaluated under the principle of non-use of force. A cyber operation aimed at blinding the electronic defence of the adversary may show that an armed attack is imminent, and thus trigger the exercise of the right of self-defence. Cyber information warfare should be assessed in a different way, whether the cyberwar operations are conducted in a time of peace or in a time of war. In a time of peace intelligence gathering in order to collect military information is not in itself illegal unless a crossing of the border into the country is involved.¹³ In a time of armed conflict the rules of espionage apply, with the consequence that the operator gathering the information may be considered as a spy, if he/she is acting clandestinely or under false pretences in the territory under the control of the enemy.¹⁴ However espionage does not carry out the responsibility of the party to the conflict benefiting from the information gathered, but only that of the individual acting as a spy, who may be tried and punished by the Captor State.

The above discourse on the principles of sovereignty equality of States and non-intervention deserves the following remarks by way of conclusion:

- The situation in Europe has changed since the conclusion of the Helsinki Final Act and the Charter of Paris. However, the two principles of sovereignty equality of States and non-intervention are still in operation and are the foundation of international law. They are enshrined in the Charter of the United Nations and were referred to several times by the International Court of Justice;

¹¹ Charter of Paris for a New Europe, Paris, 19-21 November 1990, under Chapter “Security”.

¹² See generally M. Roscini, *Cyber Operations and the Use of Force in International Law*, Oxford, 2014.

¹³ See generally S. Chesterman, “Secret Intelligence”, Max Planck Encyclopedia of Public International Law (2009).

¹⁴ The problem here is to apply classical rules on espionage in time of war, which are contained in Article 29 of the Hague Regulations annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land (1907) and Article 46 of Additional Protocol to the Geneva Conventions of 12 August 1949 (Protocol I), relating to the protection of Victims of International Armed Conflicts (8 June 1977)..

- The disagreement between the West and Moscow is not on the existence and the relevance of the two principles, but on their violation in given circumstances (for instance in Kosovo and Crimea);
- There are grey areas that deserve further examination, since there are different opinions and contending interpretations between the West and Moscow. These areas include:
 - a) humanitarian intervention;
 - b) sanctions and countermeasures;
 - c) cyber operations (which are quite a novelty for international lawyers and are not subject to a common understanding as their lawfulness even in the West).

A proposal of the future might be not to formulate new principles on sovereign equality and non-intervention, but, on the contrary, to spell out the existing principles by including new items on which consensus has already been achieved; a technique already experimented with by the FR Resolution and with the HFA. For instance the Charter of the United Nations, in prohibiting the threat/use of force does not address the question of armed reprisals, whilst both the FR Resolution and the HFA affirm that they are prohibited.

Other principles stemming from sovereignty and non-intervention are objects of the disagreement between the West and Moscow and are more difficult to address in legal terms without changing them. The reference here is to the right to be or not to be member of an international organization or of a military alliance. For instance Moscow is challenging both NATO expansion to the East and also the EU neighborhood policy (Eastern Partnership).¹⁵ In such circumstances it is very difficult to formulate new rules without undermining the existing principles. A possible way out is to draft treaties or formulate principles which are the expression of the free choice of States and at the same time meet the concern of the European States (or some of them). A number of proposals to address this issue are contained in the above-mentioned document *Back to Diplomacy*, under the Chapter "Toward a Security Meeting. Key Agenda items for this Process/ Security status".

¹⁵ For instance in the Document *Back to Diplomacy*, already quoted, is written the following on the Moscow's view: "Under the slogan of promoting democratic values eastwards the West continued to expand its institutions at the expense of Russian security interests. It was the

main dynamic after the Cold War. Consecutive waves of NATO's expansion reduced Russia's security. The EU's expansion took over Russia's markets, and as new member states joined Schengen the area of visa free travel for Russian citizens was reduced. In each case, as compensation, Russia was offered a formal junior partnership: the NATO-Russia Founding Act and the NATO-Russia Council were sugar coating for the bitter pill of enlargement; the EU's idea of partnership is that Russia should adopt its rules".