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SESSION 5 : LEGAL DIMENSIONS IN THE SOUTH CHINA SEA

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**The use of force and threat of use of force in  
international law and practices in the South China  
Sea.**

# The notion of use of force in international law

- - A notion wider than the notion of war.
- - A notion implying the use of different kinds of coercive means
- - A notion implying different levels of action :  
military/non military

# Why do states recourse to coercitive means in general?

- Double purpose resulting in double level :
  - - to impose military solutions to actual or alleged international disputes and thus to pursue or defend by military means what it considers as its own essential interests (interstate use of force)
  - - to ensure public order and law implementation

**1) THE PRINCIPLE OF PROHIBITION OF THE USE OR THREAT OF USE OF FORCE UNDER CONTEMPORARY INTERNATIONAL LAW AND ITS LIMITS.**

**2) LAW ENFORCEMENT AND POLICE OPERATIONS AT SEA.**

# 1) THE PRINCIPLE OF PROHIBITION OF THE USE OR THREAT OF USE OF FORCE UNDER CONTEMPORARY INTERNATIONAL LAW AND ITS LIMITS.

## a) Scope of the prohibition : use or threat to use force

- Article 2§ 4 UN Charter :

*“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations”*

# The interpretation of the prohibition by the International Court of Justice

- *“The Court can only regard the alleged right of intervention as the manifestation of a policy of force , such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.” (Corfu Channel case)*
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## The ICJ Nicaragua judgment 1986

- *“The Court concludes that acts constituting a breach of the customary principle of non intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations”.*

## **b) A prohibition with very limited exceptions**

- Article 51 of the Charter : *“inherent right of individual or collective self-defence in case of aggression”* .
- ***Condition along with the Charter:***
  - *Only* until the Security Council has taken measures necessary to maintain international peace and security.
- ***Conditions along with the ICJ jurisprudence :***
  - - Existence of an armed attack against the state invoking the right of self defence ;(Nicaragua judgment)
  - Necessity and proportionality



# The controversial question of preemptive self-defence

- 2007 Resolution of the Institut de Droit International :
- *“The right of self-defence arises for the target state in case of an actual or manifestly imminent armed attack. It may be exercised only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack until the Security Council takes effective measures necessary to maintain or restore international peace and security.”*

# The problem of skirmishes and incidents

- - Incidents at the border
- - Incidents at sea implying not identified submarines or the use of force by public or other vessels acting for a state against private boats, or private vessels with military elements on board (Enrica Lexie)

## The tolerated exceptions

- The authorization given by the Security Council to « use all means ». (In the absence of authorization no ground can legalize the intervention : cf Kosovo case)
- - The difficult case of intervention on invitation.

# The notion of threat

- « *Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal.* »( ICJ Advisory opinion on the Legality of the threat or use of nuclear weapon )

**c) Use of force and threat of use of force  
at sea : the reference to self restraint.**

- The use of force and threat to use follow the same rules on land and at sea but in a different context with a risk of shipwreck and casualties

# **G7 Foreign Ministers Declaration, adopted in Lübeck on 15 April 2015**

- *« We are committed to maintaining a maritime order based upon the principles of international law, in particular as reflected in the United Nations Convention on the Law of the Sea (UNCLOS). We continue to observe the situation in the East and South China Seas and are concerned by any unilateral actions, such as large scale land reclamation, which change the status quo and increase tensions. We strongly oppose any attempt to assert territorial or maritime claims through the use of intimidation, coercion or force »*

# The obligation of self restraint

- 1) The obligations according to general international law :
  - -Abstention to use force
  - - Obligation of negotiation and peaceful settlement of disputes
  - -Obligation not to hamper the solution of a dispute during the transitional period : article 74(3) UNCLOS

# Order of provisional measures by the special chamber of ITLOS (25/4/2015) in the Ghana/Côte d'Ivoire case

- [t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment
- (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 241-242, para. 29);



# **The special obligations of self restraint provided in §5 of the 2002 Asean-China DOC**

- - Obligation to avoid actions which would complicate or escalate disputes
- - refraining from action of inhabiting on the inhabited islands
- Obligation to build trust and confidence during the settlement of disputes in the spirit of cooperation and understanding
- Obligation to undertake cooperation pending the settlement of the disputes
- Obligation to continue consultations and dialogue

## **d) The use of alternative means of coercion and current international law.**

- Unilateral measures as alternative to the use of force
- The frequent use of unilateral economic measures:
  - Not contrary to an international obligation
  - Contrary to an international obligation.

## 2) LAW ENFORCEMENT AND POLICE OPERATIONS AT SEA.

### The competences of the states at sea : where and for what purpose?.

- High sea : exclusive competence of the flag state
- Territorial sea and archipelagic waters : full sovereignty
- EEZ and continental shelf : finalized rights for economic purposes.
- **Purpose of coercion powers at sea** : coercive powers recognized to states in the different parts of the seas for freedom of navigation, prevention of boarding, conservation of marine resources, protection of the marine environment.

Arctic Sunrise award (2015)

*“to assess the lawfulness of measures taken by coastal states [...] the Tribunal considers it necessary to determine whether (i) the measures had a basis in international law; and (ii) the measures were carried out in accordance with international law”*

# The principle of reasonableness in the use of coercion at sea

- Saiga case (ITLOS 1 July 1999)
- *“Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that **the use of force must be avoided as far as possible** and, **where force is unavoidable, it must not go beyond what is reasonable and necessary** in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law”.*

# An obligation of prevention during the settlement of the dispute

- There is a risk of irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute and where such modification cannot be fully compensated by financial reparations;
- 90. *Considering* that, whatever its nature, any compensation awarded would never be able to restore the *status quo ante* in respect of the seabed and subsoil;

# How to evaluate the legality in case of multiple coercive acts

*Is there a cumulative effect in case of several sanctions imposed by a coastal state incompatible with its rights and responsibilities according to UNCLOS.*

*(The Dugit Integrity Case)*