

## M42Law

### International Law in the Contemporary World Arena

#### 1500-word Essay

**Title :** “International law, or some particular interpretation of international law, is sometimes found actually to hinder measures to maintain international order”.

(Bull Hedley, 1995: “The Anarchical Society”,  
2<sup>nd</sup> edition, MacMillan, p.138.)

**Discuss.**

**Submission deadline: 22<sup>nd</sup> November 2004**

## Introduction

International law has been defined by the legal theorist Hedley Bull as “(...) a body of rules which binds states and other agents in world politics in their relations with one another (...)”<sup>1</sup>. However, we can decipher, even from the same piece of work that the “balance of power” in the international system as an “essential condition of the operation of international law (...) often requires [in order to preserve international order] the breaking of these rules”<sup>2</sup>.

Aren't these two statements contradictory ? How is it possible that international law is imbued with a binding character on the one hand, but is allegedly faced with the necessity of being breached on the other ? Is it that we are faced with mere power politics considerations; and is it really as easy as Dixon seems to suggest when he says that “(...) because international law lacks formal enforcement machinery, the temptation and opportunity to violate the law is greater than in other systems.”<sup>3</sup>? The question arises as to whether we have to accept this paradox as a fact of international life or not.

This short paper will seek to briefly examine the apparent (or real) clash of imperatives of international law and the measures necessary for maintaining international order (as a political position of “peace and security between states”<sup>4</sup> and a system in which relationships between states are “stable, predictable, controlled, and not characterized by violence, turbulence, or chaos”<sup>5</sup>). While doing so, we intend to develop tentative insights into the foregoing question by putting it into the (by necessity selective) context of preventive war.

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<sup>1</sup> Bull Hedley, 1995: The Anarchical Society, 2<sup>nd</sup> edition, MacMillan, p.122.

<sup>2</sup> Bull Hedley, 1995: The Anarchical Society, 2<sup>nd</sup> edition, MacMillan, p.104; also consider the thoughts portrayed in: Lamy Steven L., 2001: The Globalization of World Politics, Baylis, John and Smith, Steve (Oxford University Press, 2<sup>nd</sup> edition), pp. 185, 186.

<sup>3</sup> Dixon, Martin 2000: Textbook on International Law, 4th edition, Oxford University Press, page 13.

<sup>4</sup> Tayler, Paul, 2001, in The Globalization of World Politics, Baylis, John and Smith, Steve (Oxford University Press, 2<sup>nd</sup> edition), p. 347.

<sup>5</sup> Tayler, Paul, 2001 in The Globalization of World Politics, Baylis, John and Smith, Steve (Oxford University Press, 2<sup>nd</sup> edition), p. 337.

## Argument

According to Bull, the classical paradigm of the above mentioned paradox is the clash between international law and the concept of the balance of power. However, before we can analyse this concept, we have to clarify briefly that the main statement of this thought of Bull's analysis views the notion as "a state of affairs such that no one power is in a position where it is preponderant and can dictate the law to others."<sup>6</sup> He puts forth the following three main functions, which he ascribes to the foundational balance of power in the modern states system:

- (i) The existence of a general balance of power throughout the international system as a whole has served to prevent the system from being transformed by conquest into a universal empire;
- (ii) The existence of local balances of power has served to protect the independence of states in particular areas from absorption or domination by a locally preponderant power;
- (iii) Both general and local balances of power, where they have existed, have provided the conditions in which other institutions on which international order depends (diplomacy, war, international law, great power management) have been able to operate.<sup>7</sup>

Following the author in his hypothesis (especially paragraph (iii)) and putting these ideas into a nutshell, we can establish, that without the maintenance of the balance of power, there will be no ground on which international law can successfully operate as a mechanism that prescribes the fundamental rules of coexistence between the states and further agents of international life. Hence in other words: without a balance of power, international law is not operable and therefore irrelevant.<sup>8</sup>

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<sup>6</sup> Bull Hedley, 1995: The Anarchical Society, 2<sup>nd</sup> edition, MacMillan, p.97.

<sup>7</sup> Bull Hedley, 1995: The Anarchical Society, 2<sup>nd</sup> edition, MacMillan, p.102.

<sup>8</sup> Whether this suggestion is satisfactory will be left for subsequent analysis.

The most challenging question in this realm of thought about the balance of power is probably provided by the subject of pre-emptive war. According to the rules of international law, such venture is illegal.<sup>9</sup> There is neither an international convention nor a customary law that would justify any pre-emptive military strikes. Taking into account the UN-Charter, which sets a standard for the use of force between its member states, we allude to its Article 2 (reflecting the so-called “doctrine of non-intervention”), which affirms that “All Members [member states] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, (...).”<sup>10</sup> In form of enumerative exceptions, there are only two cases under international law in which the use (or threat) of force may be allowed in the international relations between member-states.

Firstly, there is the right of self-defence, mentioned in Article 51 UN-Charter, which states that every member state of the UN is imbued with “(...) the inherent right of individual or collective self-defence if an armed attack occurs (...). Secondly there is the possibility of legal military action on grounds of chapter VII of the UN-Charter, which reiterates in its Art. 43 that “(...) the Security Council (...) may take such action [by virtue of a Security Council Resolution] by air, sea, or land forces as may be necessary to maintain or restore international peace and security. (...).” Yet, preventive war is neither a case of self-defence, nor of a measure based on chapter VII of the UN Charter. The former one can legally emerge (considering the wordings of Art. 51 UN-Charter) only after the country forcibly defending itself has witnessed a violation of legal rights. But this is not the case when we look at a war that is purely ‘preventive’.

The latter finds its pedestal in Art. 39 UN-Charter, which requires the “existence of any threat to the peace, breach of the peace, or act of aggression”. Yet, when preventive military actions are being called for, the threat will in reality most probably not be eminently threatening enough to drive the (highly political) UN Security Council into voting for a Resolution that warrants an anticipatory confrontation with another (member) state. As we have already mentioned above, preventive wars therefore do not find any justification in international law.<sup>11</sup>

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<sup>9</sup> This assumption may not be uncontested, as (e.g.) Dixon points out: “While every state agrees that the use of force is generally impermissible, there is considerable disagreement over the precise circumstances in which it may lawfully be used”. (Dixon, Martin, 2000: Textbook on International Law, 4th edition, Oxford University Press, page 293.) Different interpretations of international law (generally) can concern the range, its applicability, the binding character or even its existence.

<sup>10</sup> This primary obligation of all member states of the UN has attained the status of *ius cogens*, compare Dixon, Martin, 2000, Textbook on International Law, 4th edition, Oxford University Press, page 293.

<sup>11</sup> Also the “North Atlantic Treaty” of the NATO and the “Warsaw Treaty” of the Warsaw Treaty Organization do not intend to give a justification for any preventive military actions.

However, returning to Bull's assumption, the upholding of the balance of power that we have established above, may possibly have to entail the use of, or at least the threat of military force in response to the rising supremacy of another state, whether that state would have already violated legal rules or not. Hence, for obvious reasons, the balance would be threatened prior to a legal injury or justifying counter-action actually occurring. From that point of view, it seems reasonable and necessary to take preventive action, before the actual distribution of power becomes too unequal.

In the context of international law it would not sound plausible to argue that there are no other solutions to our dilemma than preventive warfare. Since we are talking about potential (international and large-scale) military confrontations and not just about stealing an apple from our neighbour's garden<sup>12</sup>, we should try to take a more critical stance and attempt to find solutions that might be more in line with both the imperatives of international law as well as the ones of the balance of power.

Crucially, it seems, there is the possibility of an integration of states in international organisations. We have been able to observe the rise of organisations like the supranational EU, or the more loose intergovernmental organisations like the UN, the AU, and the OAS as well as mere military alliances like the NATO. Certainly, we have to ask ourselves the question: "Can governance be effective in the absence of central authority?"<sup>13</sup>, as we witness that all of the above mentioned international organisations lack far-reaching enforcement authority. Still, we wish to insist, if these bodies would be (both politically and legally) strengthened, the probability of an upset of the balance of power would decline both regionally as well as internationally. Hence, the more interconnected states become with one another (e.g. due to international organisational links), the more they have to loose in terms of often very valuable ties by taking actions that threaten the balance of power<sup>14</sup>.

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<sup>12</sup> Essentially, there is the imminent risk of abuse of preventive warfare. Who is going to establish whether or not there is some need for a preventive attack on another political entity? Who is going to say how far another country has to be destroyed until the balance is restored? For very apparent motives, there is an unmistakable risk of hegemony that states might cover with 'balance-of-power-reasons', claiming that they attack another country because they just want to avoid a potentially larger conflict that would have to be expected if one waited any longer. Furthermore, the recourse to force is always stained with the uncertainty of the outcomes that often emerge due to lack of control of the different forces and events that go along with warfare and chaos.

<sup>13</sup> Rosenau, James N., 1992 in Governance without government: Order and Change in World Politics, Cambridge University Press, page 4.

<sup>14</sup> This thought can also be found in the Keohane's and Nye Jr.'s reflections on globalisation, when they talk about the "expansion of areas of complex interdependence", Keohane, Robert O., Nye Jr., Joseph S., 2000: "Globalisation: What's New? What's Not? (And So What?)", Foreign Policy, p.115. A useful thought in this respect has also been contributed by Lamy, see: Lamy Steven L., 2001: The Globalization of World Politics, Baylis, John and Smith, Steve (Oxford University Press, 2<sup>nd</sup> edition), p. 187.

Thus, strengthened international institutions would bear the chance of preserving the status quo in a peaceful manner, in a congenial system, and to settle conflicts peacefully that might actually otherwise be a real threat to some equilibrium of control and influence.

Indeed, we do not want to claim that this idea is some sort of panacea and it would indeed not be the only measure that might have to be taken to uphold balances of power in the states arena.<sup>15</sup> This short paper, already for reasons of space, can impossibly give an answer to all the aspects that might be involved herein. But it seems, that in the end, Bull's view might be just too focussed on a neo-realist view, and on one, that leaves out some of the optional fruits of the table that the modern states are able to choose from.

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<sup>15</sup> A fairly neat array of arguments claiming that the UN-System is not apt to ensure international security has been put forth by the article written by Saadia Touval, "Why the U.N. Fails", Foreign Affairs, 73 (5); 1994, p.44-57.

## Conclusion

As with every other legal system, international law must seek to prevent its subjects from using violence to settle their differences. It is worthwhile to recognise the point that in most cases, international law is being respected and actually is a mitigating element in many conflict areas and hence provides important impulses for the international order that we have to achieve or maintain in the end, the idea of the balance of power notwithstanding. It sets out not only rules that the states often obey. They also proclaim virtues that have become guidelines for many governments around the world – be it for mere power reasons or for the sake of reputation and credibility. However, the belief that the pure compliance with international law is an assurance for the maintenance of international order might be wishful thinking and genuine reforms so-far have rather remained but a vision.

It might be true that in the absence of effective enforcement mechanisms in international law, we have to expect more illegal actions in the gambling about balancing the power and maintaining or restoring international order. In spite of this, even if there may be a cause that is ‘just’ (as Bull might claim), already Grotius cautioned against going to war rashly.<sup>16</sup> The doctrine of “I do it just because I am able to” is indeed dangerous and does not necessarily bring about stable balances of power. In effect, we live in a state of affairs that is characterised by the absence of a world government with a preponderant power – and we don’t see any indication for the fact that there will be one soon.

We would like to note in conclusion that in order to maintain a strong balance of power in the global political system, it might be necessary to exploit the powers and mandate of the United Nations, as well as other regional organisations, in the most effective and legally unobjectionable ways. This is the most secure way of preserving international order all the shortcomings of international law in many respects notwithstanding. Furthermore it promises in consequence a more peaceful solution to problems that may arise in the evolution of world politics.

*Gabriel Vockel, November 2004*

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<sup>16</sup> Bull, Hedley, Kingsbury, Benedict, Roberts, Adam, 1995: Hugo Grotius and International Relations, Clarendon Press, Oxford, p.206.

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