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"Human Enhancement": The perspective of the Charter of the United Nations[1]

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I. The Charter

As may be inferred from its Article 103, claiming precedence over all other international treaties, and Article 2 (6), claiming applicability also with regard to third parties as far as "the maintenance of international peace and security" are concerned, the Charter holds, (maybe still) currently, the supreme position in positive international law.

This rank reflects the ambition of the founding "United Nations" to restore and to preserve effectively global civilization – against the background that exactly this civilization had been fundamentally challenged by the "axis powers" (the "enemies" within the meaning of Article 107) in the years before and during World War II.

The two **core values** of this global civilization - which in general has also been addressed, as source of law, in Article 38 (1) (c) of the Statute of the International Court of Justice, annexed to the Charter – are enshrined in the Charter, showing a **dialectic** structure, thus resembling to the two **focal points of an ellipse**:

A. The Prohibition of "Aggression"

1. The Normative Setting

Already the preamble outlaws the "scourge of war"; hence, "acts of aggression" are to be suppressed (Article 1 [1]).

While it being fully true that, abiding to this principle, all members (but also third parties) "shall settle their international disputes by peaceful means" (Article 2 [3]; Article 1 [1]), the overarching approach for suppressing aggression

[1] Due to the request of the author, no external language revision was provided.

is, however, **not a pacifistic** one, i.e. an absolute command to refrain from military force at any rate, but, right to the contrary, a commitment "to **take effective collective measures** for the prevention and removal of threats to the peace" (Article 1 [1]; cf also the preamble "save in the common interest").

As Chapter VII tells us, these "effective collective measures" comprise

- "the **use of armed force**" (cit Article 41 e contrario), "by air, sea, or land forces" (Article 42 ff), the taking of "*urgent* military measures" (Article 45) included, based on a *decision of the Security Council which the Member States are bound to comply with*
- the exercise of "the inherent **right** of individual or **collective self-defence** if an armed attack occurs … until the Security Council has taken the [necessary] measures …" (Article 51). In the same vein works, already beneath the threshold of an "aggression" ("armed attack"), the more recent concept of the "responsibility to protect".

2. The Assessment

When the Charter does not ban outright "military measures", but **clearly distinguishes** between those which are **strictly prohibited** ("acts of aggression") and those not only **permitted** but necessary to restore peace, so that Member States are even **obliged** to take part in these measures, the legitimacy to use military force (the "ius *ad* bellum") has been made dependent again on the legitimacy of the **underlying aim**.

In a considerable contrast to classical international law (including the still current "humanitarian law" as enshrined in the Geneva Conventions and in the Rome Statute [with the exception of its Article 8 bis]), the Charter thus has returned to the medieval concept (stemming from the ancient Romans) of "**iustum bellum**". This means, in a nutshell, that the **law is on the side of the "restorer of peace",** implying that

- while the only lawful option for the aggressor is to put an end to the aggression
- the fight against aggression is not limited to pure "defence" but includes **all effective** – also "offensive" - **means** which might be necessary for the "removal of" the "threat […] to the peace" occurred.

Ultimately this logic is incompatible with the classical approach of an "ius *in* bello" applying tel quel for all parties of an armed conflict, notwithstanding the respective legitimacy of the aim underlying the concrete military action.

Nevertheless even this logic has its **limits for the "restorer"** – as may be inferred from the *transitional* exception clause of Article 107: by exempting military action against the former "enemies" from abiding with the Charter, it has been admitted that *not all military actions* taken by the "United Nations" *before* the adoption of the Charter *would doubtlessly have complied* with it (and that, thus, *in the context of this previous conflict* even necessary *future* measures could still exceed the limits newly set out in the Charter).

This finding reflects the *second focal point*:

B. The Faith in Human Dignity

1. The content

According to the preamble of the Charter, "the Peoples of the United Nations" are also "determined … to reaffirm faith" not only "in fundamental human rights", but "in" their ultimate conceptual root, "the dignity and worth of the human **person**."

Even more precise, the *preamble* of the Universal Declaration of Human Rights speaks of the "**recognition**" of "the **inherent** dignity … of all members of the human family", thus, by employing the same term as used in Article 51 of the Charter where "inherent right" is, in the official French version, the equivalent to "droit **naturel**", stipulating that not only the right to self-defence, but also the concept of "human dignity" has **not been constituted** by the positive legislator, "the Peoples of the United Nations", but is rooted in **Natural Law** superior to positive law which **can only be "recognized"** by any legislator.

In order to be able to protect human dignity, we have not only to know what the very nature of any human being really is but what its **specific "worth",** its specific **telos**, is, which justifies the said reaffirmation.

Well, the fourth question of *Immanuel Kant*: "What is the human being?" has been answered, for our purposes, by Article 1 UDHR, stating (as "a **common standard of achievement**" for all peoples and all nations):

"**All** human beings are born **free** and equal in dignity and rights. They are endowed with **reason** and **conscience** and should act towards one another in a spirit of **brotherhood**."

This is fully compatible with *Kant's* famous "self-purpose formula", stipulating that every **human being** is – at least also – an **end in itself** and, therefore, should not be fully instrumentalized for the sole benefit (profit) of others. This formula does, however, not only apply to individuals, but also – even primarily – to the "humanity" as a whole (as a general term, as an etirety [as an "universal"]), thus also comprising the **collective** dimension.

And again: this collective dimension is, in current international law, not only addressed, from the negative perspective of criminal law, by the "**crime against humanity**" (which is, in German language, more often than not misunderstood as "Verbrechen gegen die Mensch*lich*keit" instead of "Verbrechen gegen die Menschheit"), but, as already mentioned, by calling not any majority, but only the "**civilized** nations" to be considered as a positive source of international law, and by the purpose of the UNO enshrined in Articles 1 (3) and 55 (a) and (b), respectively.

Given the inevitable atrocities even of most legitimate military actions it is in particular this collective dimension which allows to comply with the commands of preserving human dignity even in this very extreme area, as presupposed not only by the "Martens clause", but also by the doctrine of "iustum bellum" already mentioned, also in its Catholic version (leaving aside only the most recent encyclical "Fratelli Tutti" which, however, might very well be already outdated, having been published right before 24/2/2022), and by *Kant* himself (cf § 55 of his "Rechtslehre").

2. Application

In sum, human dignity is respected also in the extreme area of military actions if these actions

- contribute, at least in the **collective** dimension, to promoting conditions that allow, in the status quo post, a **more close approach to the ideal of Article 1 UDHR**
- while refraining from any interference with the **individual** dimension **not strictly necessary** (and, thus, **disproportionate**) to the legitimate end of the actions at issue.

II. Human Enhancement

A. "Enhancement" versus "Reduction"

When applying this yardstick of the UNC to the question at issue – the normative limits set out by the Charter for human enhancement measures, in particular in the military context – we should first dispute the term "enhancement":

Not every measure interfering with human beings (individually or collectively) for the sake of strengthening military effectiveness should be labelled "enhancement", in particular **not measures widening the gap** between the reality and the "common standard of achievement", and certainly **not measures depriving the human beings concerned of the essentials of a "human person",** i.e. approaching them to either a **machine** (robot) or to a non-human **animal** or to a fundamentally unfree human (a **slave**).

These measures should better be called "measures of human **reduction**" and dealt with separately – if necessary at all: why reducing human beings instead of refraining from using any human element and relying on **pure robots & artificial intelligence**, if pressing need be also on animals?

B. Principle of Effectiveness

The main divergence between the traditional humanitarian law and the UNC being that the former sets out the *very same rules* for the aggressor and the attacked, while the latter allows the aggressor nothing but to stop the aggression, whereas the attacked is allowed to defend itself also collectively effectively until the aggression has been suppressed, it is obvious that also human enhancement measures are **not allowed to the aggressor**, whereas in prin-

ciple there can be **no objection against employing** these means **by the attacked** or by anyone of its defenders, even and if the aggressor should not dispose of these means.

Or, to put it differently: a military conflict is not considered by the UNC to follow the logic of a sports competition where fair and equal conditions should apply to each competitor (one reason, why doping is strictly prohibited). Right to the contrary, every means putting the attacked in a better position is, **in principle**, highly welcome.

C. Limits of the Consequences of the Principle of Effectiveness

Nevertheless, there are some limits:

- As already mentioned, all measures have to be **proportionate** (according to the general fundamental rights' interference test). However:

  Given that not only compulsory military service is not as such disproportionate, but that also the inevitable consequences of military operations may by far exceed the limits of "inhuman treatment" (within the meaning of Article 5 UDHR), the proportionality test will not be a strong limit, in particular not with regard to measures enhancing immediate capabilities at the cost of even heavy adverse effects later (not least because it is very likely that without the enhancing measures the soldier would not even have survived the operation).
- Measures transcending the individual dimension will deserve more caution than measures the effects of which are limited to certain individuals.
- Lastly: while it may be fully compatible with the requirements of respecting human dignity to call even human beings equipped with prostheses to taking part in military action, it seems obvious that the respect for the integrity (not only of the mind, but also of the body) of a human being would strictly forbid any mutilation for the purpose that thus the military capacities of the soldier concerned could be enhanced.