

CHAPTER 7

War and the Prohibition on the Threat or Use of Force

Objectives

- Meaning and nature of use of force under international law;
- Exceptions to the prohibition of use of force;
- Meaning and categories of force;
- The right of self-defense
- Terrorism and self defense;
- Anticipatory or pre-emptive self-defense; and
- Collective security

The UN Charter

Article 2(4) of the Charter declares that:

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 other manner inconsistent with the purposes of the United Nations.

- Article 2(4) was elaborated as a principle of international law in ***the 1970 Declaration on Principles of International law*** and analyzed systematically:
- First, wars of aggression constitute a crime against peace for which there is responsibility under international law;
- Secondly, states must not threaten or use force to violate existing international frontiers (including demarcation or armistice lines) or to solve international disputes;
- Thirdly, states are under a duty to refrain from acts of reprisal involving the use of force;
- Fourthly, states must not use force to deprive peoples of their right to self-determination and independence;
- And fifthly, states must refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state and must not encourage the formation of armed bands for incursion into another state's territory.

Meaning of Force

- One point that was considered in the past and is now being reconsidered is whether the term 'force' in article 2(4) includes not only armed force but, for example, **economic force**. Does the imposition of boycotts or embargo against particular states or groups of states come within article 2(4)?
- Although that provision is not modified in any way, the Preamble to the Charter does refer to the need to ensure that '**armed force**' should not be used except in the common interest, while article 51, dealing with the right to self-defense, specifically refers to armed force, although that is not of itself conclusive as to the permissibility of other forms of coercion.

- The 1970 Declaration on Principles of international Law recalled the 'duty of states to refrain ... from military, political, economic or any other form of **coercion** aimed against the political independence or territorial integrity of any state' and the **international Covenants on Human Rights adopted in 1966** emphasized the right of all peoples freely to pursue their economic, social and cultural development.
- This approach was underlined in the **Charter of economic rights and duties of states**, approved by the General Assembly in 1974, which particularly specified that 'no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights'.

The Phrase 'Against the territorial integrity or political independence of any state'

- Article 2(4) of the charter prohibits the use of force 'against the territorial integrity or political independence of any state, or in any other manner in consistent with the purposes of the United Nations.' There is a debate as to whether these words should be interpreted restrictively, so as to permit force that would not contravene the clause, or as reinforcing the primary prohibition, but the weight of opinion probably suggests the latter position.

The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States

emphasized that:

- No state has the right to intervene, directly or indirectly, for any reason what so ever, in the internal or external affairs of any other state.
- Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political economic and cultural

- This was reaffirmed in the 1970 Declaration on Principles in international Law, with the *proviso* that not only were such manifestations condemned, but they were held to be in violation of international law.
- The International Court of Justice in the **Corfu Channel** case (see annexes) declared specifically, in response to a British claim to be acting in accordance with a right of intervention in minesweeping the channel to secure evidence for judicial proceeding, that:
- The alleged right of intervention was the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot... find a place in international law.

Categories of Force

- Various measures of self-help ranging from economic retaliation to the use of violence pursuant to the right of self-defense have historically been used.
- Since the establishment of the charter regime there are basically three categories of compulsion open to states under international law. These are ***retorsion***, ***reprisal*** and ***self-defense***.

Retorison

- Retorsion is the adoption by one state of an unfriendly and harmful act, which is nevertheless lawful, as a method of retaliation against the injurious legal activities of another state.
- Examples include the severance of diplomatic relations and the expulsion or restrictive control of aliens, as well as various economic and travel restrictions.
- Retorison is a legitimate method of showing displeasure in a way that hurts the other state while remaining within the bound of legality. The Hicken looper amendments to the American foreign assistance act are often quoted as an instance of retorsion since they required the United States president to suspend foreign aid to any country nationalizing American property without proper compensation. This procedure was applied only once, as against Ceylon (now Sri Lanka) in 1963, and has now been effectively repealed by the American Foreign Assistance Act of 1973. Retorsion would also appear to cover the instance of a lawful act committed in retaliation to a prior unlawful activity.

Reprisals

- Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier **illegal act** by another state. They are thus distinguishable from acts of retorsion, which are in themselves lawful acts; the classic case dealing with the law of reprisals is the Naulilaa dispute between Portugal and Germany in 1928. This concerned a German military raid on the colony of Angola, which destroyed property, in retaliation for the mistaken killing of three Germans lawfully in the Portuguese territory.

- Thus, reprisals short of force may still be undertaken legitimately, while reprisals involving armed force may be lawful if resorted to in conformity with the right of self-defense.
- Reprisals as such undertaken during peacetime are thus unlawful, unless they fall within the framework of the principle of self-defense.
- Sometimes regarded as an aspect of reprisal is the institution of pacific blockade. This developed during the nineteenth century and was extensively used as a forceful application of pressure against weaker states. In the absence of war or armed hostilities, the vessels of third states were probably exempt from such blockade, although this was disputed by some writers.

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The right of self-defense

- The traditional definition of the right of self-defense in customary international law occurs in the Caroline Case (see Annexes). This dispute revolved around an incident in 1837 in which British subjects seized and destroyed a vessel in an American port. This had taken place because the Caroline had been supplying groups of American nationals, who had been conducting raids into Canadian territory.
- In the correspondence with the British authorities which followed the incident, the American Secretary of state laid down the essentials of self-defense. There had to exist 'a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.' Not only were such conditions necessary before self-defense became legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, 'such act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.' These principles were accepted by the British government at that time and are accepted as part of customary international law.

Article 51 Provides:

- Nothing in the present Charter shall impair the inherent right of individual or collective self-defense ***if an armed attack occurs*** against a member of the United Nations, ***until*** the Security Council has taken the measure necessary to maintain international peace and security.
- Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the security council and shall not in any way affect the authority and responsibility of the security council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

- There is extensive controversy as to the precise extent of the right of self-defense in light of Article 51.
- On the one hand, it is argued that article 51 in conjunction with article 2(4) now specifies the scope and limitations of the doctrine of use of force. In other words, self-defense can only be resorted to '**if an armed attack occurs**' and in no other circumstances.
- On the other hand, there are writers who maintain that the opening phrase in Article 51 specifying that 'nothing in the present Charter shall impair the inherent right of...self - defense' means that **there does exist in customary international law a right of self-defense over and above the specific provisions of article 51**, which refer only to the situation where an armed attack has occurred.
- A number of academics and some states have regarded Article 51 as merely elaborating **one kind of self-defense** in the context of the primary responsibility of the Security Council for international peace and the enforcement techniques available under the Charter.

- The International Court of Justice in the Nicaragua case (see Annexes) has however, clearly established that the right of self-defense exists as an inherent right under customary international law as well as under the UN Charter. It was stressed that:
- Article 51 of the Charter is only meaningful on the basis that there is a ***'natural' or 'inherent'*** right of self-defense and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter... it cannot, therefore, be held that Article 51 is a provision which include and supervenes' customary international law.

- The Court also discussed the notion of an 'armed attack' and noted that this included not only action by regular armed forces across an international border, but ***additionally*** the sending by or on behalf of a state of armed bands or groups which carry out acts of armed force of such gravity as to amount to an actual armed attack conducted by regular armed forces or its substantial involvement there in.
- The court did not accept, however, that this concept extended to ***assistance to rebels*** in the form of the provision of weapons or logistical or other support, although this form of assistance could constitute a threat or use of force, or amount to intervention in the internal or external affairs of the state. This lays open the problem that in certain circumstances a state under attack from groups supported by another state may not be able under this definition to respond militarily if the support given by that other state does not reach the threshold laid down.

- Another aspect of the problem as to what constitutes an armed attack is the difficulty of categorizing particular uses of force for these purposes. For example, would an attack upon an embassy or diplomats abroad constitute an armed attack legitimating action in self-defense?
- On 7 August 1998, the US Embassies in Kenya and Tanzania were bombed, causing the loss of over 250 lives and appreciable damage to property. On 20 August, the US launched a series of cruise missile attacks upon installations in Afghanistan and Sudan associated with the organization of Bin Laden deemed responsible for the attacks. In so doing, the US declared itself acting in accordance with Article 51 of the Charter and in exercise of its right of self-defense. Another argument that has been made is that, with regard to actions against aircraft, an armed attack begins at the moment that the radar guiding the anti-aircraft missile has 'locked on'.

Terrorism

- **Terrorism** is the systematic use of terror especially as a means of coercion." There is no internationally agreed definition of terrorism. Most common definitions of terrorism include only those acts which are intended to create fear (terror), are perpetrated for an ideological goal (as opposed to a lone attack), and deliberately target or disregard the safety of non-combatants. Some definitions also include acts of unlawful violence and war.
- Most government definitions outline the following key criteria: target, objective, motive, perpetrator, and legitimacy or legality of the act. Terrorism is also often recognizable by a following statement from the perpetrators.

- **Violence** – According to Walter Laqueur of the Center for Strategic and International Studies, "the only general characteristic of terrorism generally agreed upon is that terrorism involves violence and the threat of violence." However, the criterion of violence alone does not produce a useful definition, as it includes many acts not usually considered terrorism: war, riot, organized crime, or even a simple assault.
- **Psychological impact and fear** – The attack was carried out in such a way as to maximize the severity and length of the psychological impact. Each act of terrorism is a "performance," devised to have an impact on many large audiences. Terrorists also attack national symbols to show their power and to shake the foundation of the country or society they are opposed to. This may negatively affect a government's legitimacy, while increasing the legitimacy of the given terrorist organization and/or ideology behind a terrorist act.

- **Perpetrated for a political goal** – Something all terrorist attacks have in common is their perpetration for a political purpose. Terrorism is a political tactic, not unlike letter writing or protesting, that is used by activists when they believe no other means will effect the kind of change they desire. The change is desired so badly that failure is seen as a worse outcome than the deaths of civilians. This is often where the interrelationship between terrorism and religion occurs.
- **Deliberate targeting of non-combatants** – It is commonly held that the distinctive nature of terrorism lies in its intentional and specific selection of civilians as direct targets. Specifically, the criminal intent is shown when babies, children, mothers, and the elderly are murdered, or injured, and put in harm's way.

- **Disguise** – Terrorists almost invariably pretend to be non-combatants, hide among non-combatants, fight from in the midst of non-combatants, and when they can, strive to mislead and provoke the government soldiers into attacking the wrong people, that the government may be blamed for it. When an enemy is identifiable as a combatant, the word terrorism is rarely used.
- **Unlawfulness or illegitimacy** – Some official (notably government) definitions of terrorism add a criterion of illegitimacy or unlawfulness to distinguish between actions authorized by a government (and thus "lawful") and those of other actors, including individuals and small groups. Using this criterion, actions that would otherwise qualify as terrorism would not be considered terrorism if they were government sanctioned. For example, firebombing a city, which is designed to affect civilian support for a cause, would not be considered terrorism if it were authorized by a "legitimate" government.

