

CHAPTER-III

THE UNITED NATIONS AND LEGAL BASES FOR THE USE OF FORCE

HISTORICAL BACKGROUND

A. Just War Theory: 335 B.C. to 1800 A.D.

1. A moral/philosophical approach that approved of a resort to force if the cause was "just".

B. State Sovereignty ("War as Fact" Era): 1800-1918

1. War as an instrument of national policy. As sovereigns, states are free to employ force as a normal element of their foreign relations.

C. International Law (Early attempts to regulate the resort to force.)

1. Hague (1899 and 1907): Required a declaration of war.

2. League of Nations (1919): Attempt at a collective security system.

3. The Kellogg-Briand Pact (1928).

a. Renounced recourse to war.

b. "Art. I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the

solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

c. Lacked any enforcement mechanism.

4. Post World War I Tribunals

a. Nuremberg Charter: "Article 6. . . .The following acts, or any of them, ' are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) **CRIMES AGAINST PEACE**: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; . . ."

A. Origin of the United Nations.

1. The name "United Nations" was devised by United States President Franklin D. Roosevelt and was first used in the "Declaration by United Nations" of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers.
2. The United Nations Charter was drawn up by the representatives of 50 countries at the United Nations conference: on international organization, which met at San Francisco from 25 April to 26 June 1945. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks in August-October 1944. The Charter was signed on 26 June 1945 by the representatives of the 50 countries. Poland, which was not represented at the Conference, signed it later and became one of the original 51 Member States.
3. The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories. United Nations Day is celebrated on 24 October each year. ¹³

OVERVIEW OF THE UNITED NATIONS CHARTER

A. General Assembly:

1. Generally treated in Chapter IV of the Charter.
2. May discuss and make recommendations on any matter within the scope of the Charter. However, if the Security Council is exercising its powers over the situation, the General Assembly may not make a recommendation unless the Security Council so requests (Article 12(1)).

¹³ Basic Facts About the United Nations, Sales No. E.95.1.31, reprinted at <http://www.un.org/Overview/origin.html> visited on 25th January, 2010, at 9.30PM

3. Majority vote unless an "important question," which requires a two-thirds vote. Important questions include recommendations with respect to the maintenance of international peace and security (Article 18(2)).

B. Security Council :

1. Generally treated in Chapter V of the Charter.

2. Created "to ensure prompt and effective action by the United Nations." ¹⁴

3. Fifteen members.

a. Five permanent members: United States, United Kingdom, France, China, and Russia (as successor to USSR).

b. Ten nonpermanent members elected to two-year terms by the General Assembly.

c. Decisions require nine votes, and if a non-procedural matter, requires the concurring votes of the permanent members. When North Korea invaded South Korea in 1950, the Soviet Union's delegate to the Security Council was absent (due to a dispute over China's representation in the U.N.). The Security Council authorized collective security measures under the U.N. Charter, and established the United Nations Command in Korea. The Soviet delegate returned and objected, arguing that the resolutions on these non-procedural matters lacked their concurring vote. That argument was rejected, and subsequent practice has confirmed that abstention or absence (i.e., anything short of an affirmative veto) constitutes concurrence.

C. Secretariat:

1. Generally treated in Chapter XV of the Charter.

2. The Secretary-General is the chief administrative officer, appointed by the General Assembly upon the recommendation of the Security Council. Article 97.

D. International Court of Justice.

1. Treated generally in Chapter XIV of the Charter.

¹⁴ Article 24(1)

2. The ICJ is the principal judicial organ of the United Nations¹⁵

3. Fifteen judges are elected by separate vote of the General Assembly and Security Council. Judges serve for nine years, and may be re-elected.

4. The Statute of the ICJ is an annex to the U.N. Charter.

5. Jurisdiction in a contentious case depends on the consent of the parties:

a. Consent may be express or implied in a treaty or other agreement between the parties.¹⁶

b. States may also accept compulsory jurisdiction, either unconditionally or on the condition of reciprocity on the part of other parties.¹⁷

(1)The United States accepted compulsory jurisdiction, with conditions, in 1946. The acceptance was terminated in 1986.

6. "The decision of the Court has no binding force except between the parties and in respect to that particular case."¹⁸.

USE OF FORCE

A. Charter provisions.

1. Article 2(3).

a. "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

b. This provision has not been relied upon independent of those instances in which Article 2(4) is applicable. In other words, leaving a dispute unsettled, without the use or threat of force, has not been claimed to be a violation of Article 2(3).

2. Article 2(4).

¹⁵ Article 92.

¹⁶ Article 36(1).

¹⁷ Article 36(2).

¹⁸ Article 59

a. "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."

b. Has become the basic provision restricting the use of force among states.

c. Note that the prohibition refers to the "threat or use of force," not "war" or "aggression."

d. What constitutes a "use of force"? Economic pressure? Computer network attack? (Western view tends to look at the kinetic effect or impact of an action to determine whether it is a "use of force", however this view is subject to a great deal of debate.

e. The "below the threshold" argument. If an attack is not against the

"territorial integrity or political independence" of another state, it is not a violation of Article 2(4). In other words if an attacker's goal is not to seize territory or overthrow the government, then the attack does not violate Article 2(4). Currently not a widely held view.

(1) But can this theory be applied to a War on Terrorism?

3. Article 2(7).

a. "Nothing contained in the present Charter shall authorize the United

Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

b. Recognition of state sovereignty, but still contemplates Chapter VII

actions which may affect sovereign prerogatives.

B. General Assembly Resolution 2625.

1. Reaffirmed and expanded upon the general Charter principles.

2. Declared the principles stated in Article 2 of the Charter to be "basic principles," or customary, international law.

MAINTAINING INTERNATIONAL PEACE AND SECURITY

A. Security Council.

1. Granted "primary responsibility for the maintenance of international peace and security".¹⁹ "The responsibility conferred is 'primary,' not exclusive. . . . The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security." at the expenses of the United Nations.²⁰

2. Article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

3. Security Council's specific powers are contained in Chapters VI and VII.

B. Chapter VI: Pacific Settlement of Disputes.

1. Chapter focuses on "disputes" (not otherwise defined), especially those which, if unresolved, are likely to threaten international peace and security.

2. Article 33. Obligates Members to seek peaceful settlement to any dispute and authorizes the Security Council to call upon parties to settle.

3. Article 34. Authorizes the Security Council to investigate any dispute or situation to determine whether or not it is likely to endanger international peace and security.

¹⁹ (Article 24(1)).

²⁰ 1962 I.C.J. 151, 163.

4. Article 36. Authorizes the Security Council to make recommendations on procedures and methods for settlement of any dispute which has been referred to it by parties / Members.
5. Article 37. Authorizes the Security Council to make specific recommendations for resolution of the dispute where parties 1 Members have failed to do so under the provisions of Article 36.

C. Chapter VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression:

1. This Chapter gives the Security Council the power to employ non-military or military measures to restore or maintain international peace and security.

2. Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

a. Threshold issue: The existence of a "threat to the peace, breach of the peace, or act of aggression."

(1) General Assembly Resolution 3314 recommended to the Security Council a definition of "aggression": "...the use of armed force by a state against the sovereignty, territorial integrity, or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

(a) Art. 2: first use of armed force by a State in contravention of the Charter is prima facie evidence of an act of aggression.

(b) Art. 3: other acts constituting aggression include:

(i) Bombardment;

(ii) Blockade;

(iii) Land, sea or air attack;

(iv) Using armed forces of one state, which are located within the territory of another (receiving) state under agreement, in contravention of the terms of that agreement; or

(v) Allowing use of state territory, which is placed at the disposal of another state, to be used by that state for perpetration of an act of aggression against a third state.

3. Article 41: Authorizes measures short of use of armed force
1 military

intervention and allows the Security Council to call upon all Members to apply such measures. Includes, but is not limited to, "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

4. Article 42: Authorizes "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security," including "demonstrations, blockades, and other operations by air, sea or land forces, by Members of the United Nations."

5. Article 43: Provides for special agreements between Members and the U.N. to provide armed forces, assistance, and facilities necessary for the purpose of maintaining international peace and security.

D. Chapter VIII -Regional Arrangements.

1. Article 52: Recognized the existence of regional organizations (e.g.,

Organization of American States, Arab League, Organization of African

Unity), and encourages the resolution of local disputes through such arrangements.

2. Article 53: The Security Council may utilize regional arrangements for enforcement actions; regional organizations may not undertake enforcement actions without Security Council authorization.

E. General Assembly Resolution 337(V): "Uniting for Peace." ". . .

. . . if the Security Council, because of a lack of unanimity of the

maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

F. Examples of Claimed Chapter VII Uses of Force:

1. Iraq (1990) (Desert Shield / Desert Storm) Iraq invasion of Kuwait.

a. UNSCR 660: "The Security Council .. .determining that there is a breach of the peace by the Iraqi invasion of Kuwait.. . ." (Article 39 trigger).

b. UNSCR 678: "Authorizes Member States cooperating with the government of Kuwait, unless Iraq on or before January 15, 1991 fully

implements.. .the foregoing resolutions, to use all necessary means to

uphold and implement [UNSCR] 660 and all subsequent resolutions and to restore international peace and security in the area.. .

2. Haiti (1994): UNSCR 940 authorized states to use all necessary means to facilitate the departure from Haiti of the military leadership.. and to effect the prompt return of the legitimately elected President.

3. Kosovo (1998):

a. Recognized as threat to international peace and security. Art 39 trigger.

b. Demanded Serbia comply with the October 1998 peace agreement.

c. Did not authorize "all means necessary."

d. Did not authorize regional enforcement actions.

4. Afghanistan (2001)

UNSCR 1368:

- (1) Condemned 9/11 attack,
- (2) Calls on all states to work together to bring perpetrators to justice,
- (3) Calls upon all states to redouble efforts to suppress terrorist acts, and
- (4) Expresses the Security Council's readiness to take all necessary steps to respond to the attack.

UNSCR 1373: Decides that all states shall-

- (1) Prevent and suppress the financing of terrorist acts,
- (2) Take the necessary steps to prevent the commission of terrorist acts and
- (3) Deny safe haven to terrorists.
- (4) Iraq (2003)

a. **UNSCR 678:** "Authorizes Member States cooperating with the government of Kuwait, unless Iraq on or before January 15, 1991 ally

implements the foregoing resolutions, to use all necessary means to uphold and implement [UNSCR] 660 and all subsequent resolutions and to restore international peace and security in the area.. . (Still in effect from Desert Storm.).

b. **UNSCR 687:** Established cease fire conditions. Among them a continuing obligation to eliminate and account for their WMD program.

Never terminated the authority to use force established in 678.

c. **UNSCR 1441:** Affirmed that Iraq has been and remains in material

breach of UNSCR 687. Iraq given one final opportunity to fully comply,

or else face "serious consequences."

SELF DEFENSE AND OTHER USES OF FORCE

A. Self Defense.

1. Article 5 1 : "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 measures 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."

2. Prerequisites / Criteria:

a. Necessity: peaceful means of resolution exhausted.

b. Proportionality: force utilized must be limited in scope, intensity, and duration to that which is reasonably necessary to counter the attack or neutralize the threat.

c. Timeliness: proximity to the hostile act.

3. With the general acceptance of the prohibition on the use or threat of force (Article 2(4)), self-defense has become the focus of contention.

a. Those arguing for a broad or expansive right of self defense generally believe that it provides greater deterrence, international stability, and ultimately less uses of force.

b. Those arguing for a limited right of self-defense are concerned that a broader interpretation erodes the basic prohibition against the unilateral use of force.

c. There is a lingering issue regarding whether Article 5 1 completely codified the right of self-defense or if there is some remainder of the pre- existing "inherent" right outside the Charter?

d. The definition of an "Armed attack" and whether the right of self-defense is triggered when there is something than an armed attack is

unclear. For example, in *Military and Paramilitary Activities In and Around Nicaragua*²¹, the ICJ decided that Nicaragua's provision of arms to the opposition in El Salvador was not an armed attack.

e. "Until the Security Council has taken measures": When the Security

Council was stalemated during the Cold War, this was rarely an issue.

Now that the Security Council is more active and effective, it is not clear what level of UN Security Council action would extinguish a State's right to continue its self-defense. The US. view is that the Security Council must take "effective" action.

4. Anticipatory self-defense.

a. Refers to the concept that self defense is permissible in anticipation of an armed attack.

b. Classic statement of the requirements for anticipatory self defense made by Secretary of State Daniel Webster in correspondence relating to the Caroline incident: self defense in anticipation of an actual attack should be confined to cases in which "the necessity of that self defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

c. State practice has not respected the restrictive Webster formulation of the right. Two cases in point: the Israeli attack on the Iraqi reactor in 1981 (Israel contended that the reactor would give Iraq a nuclear weapons capability which would be used against Israel); the U.S. bombing of Libya in 1986 (in which part of the justification for the attack was the desire to prevent Libya from exporting terrorism in the future).

d. CJCSI 3 121.01A, Standing Rules of Engagement for US. Forces,

²¹ *Nicaragua v. U.S.*, 1986 I.C.J. 14

implements anticipatory self-defense in the concept of "hostile intent," by which U.S. forces may respond with force to the threat of force.

5. Examples of Claimed Article 5 1 Uses of Force

a. Israel-Iraq (1 98 1)

- (1) Iraq building a nuclear reactor at Osirak.
- (2) Israel attacked and destroyed the site 6-9 months prior to completion.
- (3) Unanimous UNSC condemnation.
- (4) Does it matter that Israel and Iraq were technically still "at war" as a result of events 8 years earlier?

b. Libya (1986)

- (1) December 1985: Abu Nidal terrorists conducted bombings at the Rome and Vienna Airports.
- (2) 4 April 1986: Bombing at "La Belle Disco" in Berlin. (Club was frequented by American military personnel.)
- (3) 5 April 1986: Communications intercepted between the bombers and Libyan government officials in Tripoli.
- (4) 14 April: Operation El Dorado Canyon. Air and Naval assets struck targets in and around Tripoli.
- (5) President Reagan announced, "These strikes were conducted in the exercise of our right of self-defense under Article 5 1 of the United Nations Charter. This necessary and appropriate action was a preemptive strike.. .designed to deter acts of terrorism by Libya.. ."

c. Iraq (1993)

- (1) 14 April 1993: Kuwaiti authorities thwart a plot to assassinate former President Bush when he visits Kuwait.
- (2) 26 June 1993: US launches 23 Tomahawk missiles at Iraqi intelligence Headquarters from ships in the Persian Gulf and Red Sea.
- (3) Secretary of State Albright: "We responded directly, as we were

entitled to do under Article 51 of the U. N. Charter, which provides for the exercise of self-defense in such cases.. .Our response has been proportional and aimed at targets directly linked to the operation against President Bush.. ."

d. Afghanistan and Sudan (1998)

(1) US Embassies in Kenya and Tanzania were attacked.

(2) Approximately 10 days later, U.S. Naval forces strike terrorist training camps in Afghanistan and a chemical production facility in the Sudan.

e. Afghanistan (2001): Operation Enduring Freedom.

(1) Post 9/11 operations against the al Qaeda terrorist network and the Taliban regime, which gave them safe haven.

6. Pre-emptive uses of Force

a. The National Security Strategy of the United States of America (September 2002). "The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed. We will build defense against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain and curtail our enemies' efforts to acquire dangerous technologies. And, as a matter of common sense and self- defense, America will act against such emerging threats before they are fully formed."

b. "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."

c. "The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction-and more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the

enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."

B. Humanitarian intervention. Although not universally recognized, some States contend that there exists a right to intervene within the territory of another State (without that State's consent, and without Security Council sanction) in order to prevent certain large-scale atrocities or deprivations. The argument is that such intervention does not violate Article 2(4) because the purpose is not to affect the territorial integrity or political independence of the State. The intervening State bears the heavy burden of proving its "pure motive."

Sum Up:

Protection of nationals has aspects of both self-defense and humanitarian intervention. The State in which the nationals reside has the primary responsibility for providing protection within its territory, and it would only be in cases in which that State was unable or unwilling to provide protection that another State would be justified in intervening. This issue is most likely to be addressed during a Non-Combatant Evacuation Operation (NEO). Despite the need for the amendment in the laws of war there is no likelihood of sincere efforts to amend them for the obvious reason that war may even use of force has been prohibited under the Charter of settlement of international dispute. Hence, use of force which is permitted under UN Charter also to be applied taking into the humanitarian aspects under consideration.