PRINCIPLES OF PUBLIC INTERNATIONAL LAW

Seventh Edition

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OXFORD
UNIVERSITY PRESS

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THE USE OR THREAT OF FORCE BY STATES

1. INTRODUCTION

The long history of just war in various cultural traditions must be sought elsewhere.[1] However, the current legal regime, which is based upon the United Nations Charter, can only be understood adequately in relation to certain antecedents, and these must be examined.

In the practice of States in nineteenth-century Europe, war was often represented as a last resort, that is, as a form of dispute settlement. However, the prevailing view was that resort to war was an attribute of statehood and it was accepted that conquest produced title. Thus, the conquest of Alsace-Lorraine by the German Empire was not the object of a policy of non-recognition either by France or by third States. Certain other aspects of nineteenth-century practice are worth recalling. In the first place, there was a somewhat nebulous doctrine of intervention, which was used, to a certain extent, in conjunction with coercive measures short of a formal 'State of war', such as reprisals or pacific blockade. This evasion was useful both diplomatically and to avoid internal constitutional constraints on resort to war.

The nineteenth-century practice is relevant to an understanding of the approach adopted by the League of Nations Covenant drawn up in 1919, the provisions of which essentially reflected nineteenth-century thinking. There were innovations, of course, and these took the form of procedural constraints on resort to war. But, provided the procedures foreseen in Articles 11 to 17 were exhausted, resort to war was permissible. This appeared to be the intention of the draftsmen in spite of the provisions of Article 10, according to which there was an obligation by members to respect and preserve as against external aggression the territorial integrity and existing independence of all members of the League.[2]

Independently of the League Covenant, certain groups of States were concerned to establish the illegality of conquest. A recommendation of the International Conference

[1] See generally Brownlie, *International Law and the Use of Force by States* (1963), 3–50. On the European theories see Russell, *The Just War in the Middle Ages* (1975); Sereni, *The Italian Conception of International Law* (1943).

[2] See Brownlie, *International Law and the Use of Force by States* (1963), 55–65.

of American States at Washington in 1890 contained the principle that cessions of territory made under threats of war or in the presence of an armed force should be void.[3]

The Sixth Assembly of the League adopted a resolution on 25 September 1925 which stated that a 'war of aggression' constituted 'an international crime', in accordance with a proposal of the Spanish delegation which had been studied in the First Commission. The report of the First Commission had noted that unhappily the principle that a war of aggression was an international crime had not yet entered positive law. At the Eighth Assembly a Polish proposal for a resolution prohibiting wars of aggression was adopted unanimously on 24 September 1927. Sokal, of Poland, stated that the proposal did not constitute a juridical instrument properly so called but had 'moral and educational' significance.

2. THE GENERAL TREATY FOR THE RENUNCIATION OF WAR (1928)

The more important development was the conclusion in 1928 of a legally binding multi-lateral treaty, the General Treaty for the Renunciation of War. The provisions were as follows:

Article 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.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

This instrument has been ratified or adhered to by 63 States and is still in force. It contains no provision for renunciation or lapse. The treaty was of almost universal obligation since only four States in international society as it existed before the Second World War were not bound by its provisions.[4]

The General Treaty, often referred to as the Kellogg-Briand Pact, constituted the background to the formation of customary law in the period prior to the appearance of the United Nations Charter, and it is in this context that the Kellogg-Briand Pact comes into prominence as the foundation of the State practice in the period 1928 to 1945, including the prosecution case in the International Military Tribunals in Nuremberg and Tokyo. The Kellogg-Briand Pact, as interpreted by the parties, prefigures the legal regime of the Charter. There is, in fact, a degree of continuity between the practice of the period from 1928 to 1945 and the legal regime of the Charter.[5]

[3] Moore, *Digest* (1906), i, 292.

[4] See Brownlie, op. cit., 74–111.

[5] Brownlie, op. cit., 66–111, 216–50.

The principal parties to the Kellogg-Briand Pact made reservations, which were accepted by the other parties, relating to self-defence.[6] The regime which emerged includes the following elements:

First: the obligation not to have recourse to war for the solution of international controversies.

Secondly: the obligation to settle disputes exclusively by peaceful means.

Thirdly: the reservation of the right of self-defence and also of collective self-defence.

Fourthly: the reservation of the obligations of the League Covenant.

Thus, the Kellogg-Briand Pact, seen in its context and in relation to the practice of the parties, constituted a realistic and comprehensive legal regime.

In the period following the conclusion of the Pact, it played a considerable role in the practice of States. Thus, the United States invoked the Pact in relation to hostilities between China and the Soviet Union in 1929, again in 1931 in relation to the conflict between China and Japan, and also in the context of the Leticia dispute between Peru and Ecuador in 1933. The Pact continued to play a role until 1939, when, for example, the Pact was cited in the condemnation by the League Assembly of Soviet action against Finland.[7] The practice of the parties was not in all respects consistent, however, and the Italian conquest of Ethiopia was accorded recognition by a number of States, this recognition being rescinded in 1941. This was the legal regime which was the actual precursor of the United Nations Charter.

3. THE LEGAL REGIME OF THE UNITED NATIONS CHARTER[8]

The essentials of the legal regime just outlined reappear in the United Nations Charter brought into force on 24 October 1945. Article 2 thereof formulates certain principles which bind both the Organisation and its Members. The key provisions for present purposes are as follows:

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

[6] Ibid., 235–47.

[7] Ibid., 75–111; and Hackworth, *Digest*, VI, 46, 51–2.

[8] Russell and Muther, *A History of the United Nations Charter* (1958); Simma, *The Charter of the United Nations: A Commentary*, 2 vols. (2nd edn., 2002); Pellet, *La Charte des Nations Unies* (1985); Brownlie, op. cit. See also Gardam, *Necessity, Proportionality and the Use of Force by States* (2004); Stürchler, *The Threat of Force in International Law* (2007); and the Chatham House Principles on Use of Force in Self-defence, *ICLQ*, 55 (2006), 963–72.

4. 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) has been described as 'the corner-stone of the Charter system'.[9]

Article 51 reserves the right of individual or collective self-defence 'if an armed attack occurs against a Member of the United Nations', and this is described as 'the inherent right'. At the Merits phase of the *Nicaragua* case it was recognized that this formulation refers to pre-existing customary law. In the words of the Court:

As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' (in the French text the 'droit naturel') of individual or collective self-defence, which 'nothing in the present Charter shall impair' and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, 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.[10]

It is reasonable to assume that the Court was referring in principle to the customary law existing in 1945, together with any subsequent developments.

The Charter regime presents some questions of interpretation. The first question concerns the formulation 'against the territorial integrity or political independence of any State'. Some writers have relied on this language to produce substantial qualifications of the prohibition of the use of force, and the United Kingdom employed this type of argument to defend the mine-sweeping operation to collect evidence within Albanian waters in the *Corfu Channel* case.[11] However, the preparatory work of the Charter is sufficiently clear and this phrasing was introduced precisely to provide guarantees to small States and was not intended to have a restrictive effect.[12] A further and particularly difficult issue of interpretation relates to the phrase 'armed attack' in Article 51. The present writer takes the view that 'armed attack' has a reasonably clear meaning, which necessarily rules out anticipatory self-defence, but this position calls for clarification. Since the phrase 'armed attack' strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of subversion which do not involve offensive operations by the forces of a State. Sporadic operations by armed bands would also seem to fall outside the concept of 'armed attack'. However, it is conceivable that a co-ordinated and general campaign by powerful bands of

[9] Brierly, *The Law of Nations* (6th edn., by Waldock, 1963), 414.
[10] ICJ Reports (1986), 94, para. 176.
[11] ICJ Reports (1949), 4.
[12] Brownlie, op. cit., 265–8.

irregulars, with obvious or easily proven complicity of the government of a State from which they operate, would constitute an 'armed attack', more especially if the object were the forcible settlement of a dispute or the acquisition of territory.[13]

The definition of armed attack had obvious importance in the *Nicaragua case*[14] where the complaint of Nicaragua and the counter-case assertions of the United States involved alleged support to the operations of irregular forces.

4. THE LEGALITY OF ANTICIPATORY OR PRE-EMPTIVE ACTION BY WAY OF SELF-DEFENCE AND THE PROVISIONS OF THE CHARTER

Article 51 of the Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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-defence 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 a long-standing controversy as to whether the Charter provisions definitively exclude the possibility of anticipatory self-defence. Much of the literature advocating the legality of such action relies upon two related propositions. The first proposition is that Article 51 of the Charter reserves a right of self-defence which exists in customary law: this view is reasonable in itself. The reference to customary law is important because on its face the text of Article 51 is incompatible with anticipatory action. Thus the partisans of anticipatory self-defence find it necessary to invoke customary law in order to seek to legitimate such action.

The second proposition is that the customary law concerned was formed in the nineteenth century and, in particular, as a result of the correspondence exchanged by the United States and Britain in the period from 1838 to 1842.[15] The cause of the exchange was the seizure and destruction (in 1837) in American territory by British armed forces of a vessel (the *Caroline*) used by persons assisting an armed rebellion in

[13] See Brownlie, op. cit., 278–9, 361.
[14] ICJ Reports (1986), 14.
[15] For the documents see Jennings, at 32 *AJ* (1938), 82–99. The problems presented by the activities of insurgent groups on the territory of a neighbouring State formed a major element in the *Case Concerning Armed Activities on the Territory of the Congo* (DRC v. Uganda), ICJ Reports, 2005. See further Okowa, 77 *BY* (2006), 203–55.

Canada. In protesting the incident the U.S. Secretary of State Daniel Webster required the British Government to show the existence of:

> ...necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities in Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

Lord Ashburton (for the British Government) in his response on 28 July 1842 did not dispute Webster's statement of principle. The formula used by Webster has proved valuable as a careful formulation of anticipatory self-defence but the correspondence made no difference to the legal doctrine, such as it was, of the time. Self-defence was then regarded either as synonymous with self-preservation or as a particular instance of it. Webster's Note was an attempt to describe its limits in relation to the particular facts of the incident.

The statesmen of the period used self-preservation, self-defence, necessity, and necessity of self-defence as more or less interchangeable terms, and the diplomatic correspondence was not intended to restrict the right of self-preservation which was in fact reaffirmed. Many works on international law both before and after the *Caroline* case regarded self-defence as an instance of self-preservation and subsequently discussed the *Caroline* under that rubric.

The reference to the period 1838 to 1842 as the critical date for the customary law said to lie behind the United Nations Charter, drafted in 1945, is anachronistic and indefensible. It is surely more appropriate to know the state of customary law in 1945 rather than 1842, and it is far from clear that in 1945 the customary law was so flexible. Since 1945 the practice of States generally has been opposed to anticipatory self-defence. The Israeli attack on an Iraqi nuclear reactor in 1981 was strongly condemned as a 'clear violation of the Charter of the United Nations' in Security Council Resolution 487 (1981) (adopted unanimously). The Bush doctrine, published in 2002, claims a right of 'pre-emptive action' against States who are seen as potential adversaries. This doctrine is applicable in the absence of any proof of an attack or even an imminent attack.[16] This doctrine lacks a legal basis, but it does have an historical parallel, the attack on Serbia by Austria-Hungary in 1914. When the United States Expeditionary Force began military operations against Iraq in March 2003, the letter to the Security Council of 20 March relied upon Security Council resolutions as the putative legal basis of the action, rather than the principles of general international law.[17]

[16] See the document: *The National Security Strategy of the United States of America*, White House, Washington, September 2002, 15; see Gray, *Chinese Journ. of I.L.*, 2 (2002), 437–47; and Farer, *AJ* 96 (2002), 359–64.

[17] See U.N.Doc.S/2003/351. See further the United Kingdom letter of the same date, which also places reliance exclusively upon Security Council resolutions: U.N.Doc.S/2003/350; and the similar Australian letter of the same date: U.N.Doc.S/2003/352. See also *ICLQ* 52 (2003), 811–14.

5. THE RIGHT OF COLLECTIVE SELF-DEFENCE (ARTICLE 51 OF THE CHARTER)

The right of collective defence was accepted in general international law prior to the appearance of the United Nations Charter but is now given express recognition in the provisions of Article 51 of the Charter.[18] It may be recalled that, in response to the Iraqi attack on Kuwait, Security Council Resolution 661 (1990) made express reference in the preamble to the 'inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait'. In the *Nicaragua* case (Merits), the International Court indicated two conditions for the lawful exercise of collective self-defence. The first such condition is that the victim State should declare its status as victim and request assistance.[19] The second condition is that the wrongful act complained of must constitute an 'armed attack'.[20]

6. THE DEFINITION OF AGGRESSION

In 1974 the General Assembly adopted a resolution on the definition of aggression which provided as follows in the first three articles:[21]

Article 1

Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Article 2

The first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may in conformity with the Charter conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion

[18] See generally: Bowett, *Self-Defence in International Law* (1958), 200–48; Dinstein, *War, Aggression and Self-Defence* (3rd edn., 2001), 222–45; Gray, *International Law and the Use of Force* (2000), 120–43; Simma (ed.), *The Charter of the United Nations* (2nd edn., 2002), i, 802–3.

[19] ICJ Reports (1986), 14, 103–5.

[20] Ibid., 102–4, 110, 127.

[21] Rovine, *Digest of United States Practice in International Law 1974*, Dept of State, 696–8.

or attack, or any annexation by the use of force of the territory of another state or part thereof;

(b) Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;

(c) The blockade of the ports or coasts of a state by the armed forces of another state;

(d) An attack by the armed forces of a state on the land, sea or air forces, marine and air fleets of another state;

(e) The use of armed forces of one state, which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state;

(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The final paragraph of this definition calls for some commentary. Such activity is characterized not as 'indirect aggression' but as an 'act of aggression'.

Moreover, the phrase 'or its substantial involvement therein' strongly indicates that the formulation extends to the provision of logistical support.[22]

The remaining Articles are as follows:

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

No territorial acquisition or special advantage resulting from aggression are or shall be recognised as lawful.

Article 6

Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter including its provisions concerning cases in which the use of force is lawful.

[22] The drafting history of para. (g) is examined in the Dissenting Opinion of Judge Schwebel in the *Nicaragua* case: ICJ Reports (1986), 341–6, paras. 162–71.

Article 7

Nothing in this definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

The definition was adopted by consensus and, as a consequence, contains a number of general provisos and loose ends. None the less, it constitutes a useful epitome of the law and is a form of State practice. The provisions on complicity in relation to the activities of armed bands and irregulars are of obvious relevance today. As Article 6 makes clear, the definition is without prejudice to the provisions of the United Nations Charter.

7. REGIONAL ARRANGEMENTS: CHAPTER VIII OF THE UNITED NATIONS CHARTER

Chapter VIII of the United Nations Charter, under the heading 'Regional Arrangements' provides (in part) as follows:

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.'

Article 53

1. The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council, with the exception of measures against any enemy State, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such State, until such time as the Organisation may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a State.

The Charter thus gives a certain constitutional role to regional arrangements.[23] The supposition behind both Articles is that these organizations will have a role which is complementary to that of the Security Council, both in respect of peaceful settlement of disputes and in respect of enforcement action under the authority of the Security Council. Such organizations currently include the Organization of American States, the Arab League, the African Union, the Organization for Security and Cooperation in Europe (OSCE), and the Organization of Eastern Caribbean States (OECS). In practice the Security Council has been pragmatic in accepting the status of organizations as regional arrangements for the purpose of using its powers to authorize enforcement action.

The important distinction is between the concept of a collective self-defence organization, which hinges on a member being the victim of an armed attack, and the looser concept of a 'threat to the peace of the region'. In the Cuban missile crisis the United States justified the blockade of Cuba on the basis of the provisions in the Inter-American Treaty of Reciprocal Assistance which related to the regional peacekeeping function, no doubt because the emplacement of Soviet missiles in Cuba did not constitute an 'armed attack'.[24]

8. THE UNITED NATIONS AS A SYSTEM OF PUBLIC ORDER

The analysis of the legal regime of the United Nations Charter presented thus far stands in need of completion. The design of the United Nations constitutes a comprehensive public order system. In spite of the weakness involved in multilateral decision-making, the assumption is that the Organization has a monopoly of the use of force, and a primary responsibility for enforcement action to deal with breaches of the peace, threats to the peace or acts of aggression. Individual Member States have the exceptional right of individual or collective self-defence. In the case of regional organizations the power of enforcement action is in certain conditions delegated by the Security Council to the organizations concerned.

Enforcement action may involve the use of force on behalf of the community against a State. However, the practice has evolved of authorizing peacekeeping operations which are contingent upon the consent of the State whose territory is the site of the operations. In recent history the roles of peacekeeping and enforcement action have on occasion become confused, with unfortunate results.[25]

[23] Simma, *Charter of the United Nations* (2nd edn., 2002), i, 807–95; Gray, *International Law and the Use of Force* (2000), 204–6, 233–6; Dinstein, *War, Aggression and Self-defence* (3rd edn., 2001), 268–73.

[24] See Akehurst, 42 *BY* (1967), 175–227.

[25] See Gray, *International Law and the Use of Force* (2000), 150–75.

9. THE EMERGENCE OF COROLLARIES TO THE LEGAL REGIME OF THE UNITED NATIONS CHARTER

At this point, it is useful to look briefly at the crystallization of corollaries to the legal regime as it has developed. The corollaries include the following legal principles:

First: The principle of non-recognition of territorial acquisitions obtained by use or threat of force.[26]

Second: The principle that any treaty the conclusion of which was procured by the threat or use of force in violation of the Charter of the United Nations shall be void.[27]

These two principles are the most significant of the corollaries. There can be no doubt that the conclusion of the Kellogg-Briand Pact gave an impetus to the development of corollaries, particularly in the form of the Stimson doctrine of non-recognition formulated in 1932 in relation to the invasion of Manchuria by Japan.[28] The appearance of such corollaries is both significant in itself and provides evidence of the maturity and internal consistency of the legal regime.

The emergence of corollaries can be seen in the Vienna Convention on the Law of Treaties (1969), Article 52, dealing with the invalidity of treaties procured by coercion, and in the draft articles on State Responsibility produced by the International Law Commission in 2001.

10. SOURCES OF CONTROVERSY SINCE 1945

It is now time to return to the examination of the general structure of the legal regime. In the period since the adoption of the United Nations Charter in 1945 there were four significant sources of controversy in the rather tidy legal regime presented thus far in this Chapter.

These sources of controversy were as follows:

(a) The alleged right of forcible intervention to protect nationals:

(b) Hegemonial intervention on the basis of regional arrangements in the absence of explicit Security Council authorisation.

(c) Forcible intervention in a State on the basis of consent of the territorial sovereign; and

[26] See Brownlie, op. cit., 410–23; Whiteman, *Digest*, Vol. 2 (1963), 1145–61.

[27] Brownlie, op. cit., 404–5; Whiteman, *Digest*, Vol. 5 (1965), 871–2; McNair, *Law of Treaties* (1961), 209–11, 234–6.

[28] Brownlie, op. cit., 411–12.