

Legitimacy of the Use of Force in International Relations: Analysing the State Practices

Aparna Singh*, Udai Pratap Singh**

Abstract

'Use of force' has been the most debatable topic in international law. The principle has been practiced in international relations for a long time and is directly associated with the sovereignty of states and states employ all possible ways to protect it. The international community needs to limit and regulate the use of force in order to secure harmonious and mutually beneficial co-existence. Lack of mutual trust among the nations has been one of the foremost reasons for 'use of force'. The UN Charter is the primary instrument guiding the use of force in international relations. There are two views for the 'use of force' in international relations- restrictive and permissive. Under the UN Charter, as per the restrictive view, there is a total ban on the use of force except for two cases, i.e self-defence under Article 51 and enforcement action under Chapter VII of Charter. As per the permissive view, States are allowed to use force under situations like regime change or for humanitarian intervention. The United States of America in its war against terrorism has adopted pre-emptive self-defence policy. The present paper highlights the current legal regime for the use of force and seeks to analyse the recent developments and their influence on the legality of use of force by states. It tries to find an answer to what are the boundaries for 'use of force' under the UN Charter. An attempt has also been made to discuss in brief the Israel-Palestine conflict.

Keywords: Use of Force; Pre-Emptive Force; Armed-Attack; Humanitarian Intervention Self-Defence.

Author Affiliation

*Assistant Professor of Law
**Research Scholar in Law (UGC-JRF),
Dr. Ram Manohar Lohiya National
Law University, Lucknow, Uttar
Pradesh 226012, India.

Corresponding Author

Aparna Singh,
Assistant Professor of Law, Dr Ram
Manohar Lohia National Law
University Lucknow
LDA, Kanpur Road Scheme,
Lucknow, Uttar Pradesh 226012,
India.
E-mail: greeneyeaparna@gmail.com

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Introduction

The Use of Force is undoubtedly among the most debated topics in international law as well as international relations. Indeed, the rules concerning the use of force form a central part of the international legal system, and, together with other fundamental principles, they have for a long time provided the framework for organized international intercourse and successful coexistence of states.

The domestic societies as well as the international community need to limit and regulate the use of force in order to secure

harmonious and mutually beneficial co-existence. After the 1st World War the international legal system has attempted to maintain peaceful co-existence, but due to multiple reasons this has not been an easy job. Lack of mutual trust among the nations has been one of the most important reason for this. Due to this the states often resort to the Use of Force in their international relations, and they try to justify their actions by giving their own interpretations of the international law.

Further with the rise of neo-colonialism the powerful nations often seek intervention in the domestic matters of other poor and weak nations and use force on false pretexts so as to install puppet regimes in those states for their own interests. Such

use of force is not permitted under the UN charter. Yet the powerful nations are resorting to it on pretext of humanitarian intervention or preventive measures.

Another area which the paper will highlight is the right of pre-emptive self-defence. The most debatable and controversial attempt to widen the exceptional right of self-defence is the argument that States have the right of anticipatory self-defence whenever an attack is expected. This idea seems to be based on 'military necessity', according to which 'the best defence is to attack first.

Although, the law itself is reasonably clear on the question of legality of use of force and prescribes a very limited number of exceptions to the general prohibition of the use of force, states and legal authors have for a long time advocated additional exceptions in order to further their individual interests or to cope with new developments and problems at the international level.

The present paper highlights the current legal regime for the use of force and seeks to analyse the recent developments and their influence on the legality of use of force by states. It tries to find an answer to what are the boundaries for 'use of force' under the UN Charter.

Use of Force under UN Charter: Legal Regime

The United Nations was created in a mood of popular outrage after the horrors of Second World War. The war had caused more destruction than any other armed conflict. This urged the leaders of the state to take steps to maintain international peace and security and to save the succeeding generations from the scourge of war, which twice in our lifetime had brought untold sorrow to mankind [1]. The UN Charter is the primary instrument guiding the use of force in international relations.

When we talk about the prohibition of use of force the starting point is always the Article 2 (4) of the UN Charter which says:

"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."

The Charter of the United Nations in 1945 was a significant progress in regulating use of force in international relations. Few documents like the Covenant of the League of Nations and the Kellogg Briand Pact had earlier made attempts in this

direction. But the United Nations gave the most comprehensive framework for the use of force in international conflicts. The Charter System is in itself a marked departure from that of League of Nations as the language of Article 2(4) and 51 [2] of the charter provides new terminology which lacked in the Covenant of the League of Nations. In the Covenant the term used for the conflict was expressly 'war', but the drafters of the UN Charter deliberately chose the term 'use of force' for prohibition in Article 2(4). The drafters chose this term instead of 'war' so as to broaden its scope to include the minor conflicts as well.

The term 'war' refers to a narrow and technical legal situation, which begins with a declaration of war and ends with a peace treaty. Since, the war was prohibited, States found a way to avoid this prohibition by using terms like military operations [3], border clashes, etc. Thus, the term 'use of force' was preferred to cover all forms of hostilities which fall short of the term 'war'.

There has been a lot of confusion over the scope of term 'force'. The proponents of traditional view interpret the word force as referring to only military force. They generally speak for the developed Western countries [4]. On the other hand, there is liberal view, which expands the word force to include economic and political force. The developing states generally favour this view. The liberal view emphasizes that the developed states are prohibited to apply economic and political sanctions in their international relations, which are directed against territorial integrity, political independence of any other state or in any other manner inconsistent with the purposes of United Nations [5].

Although, Article 2(4) was originally intended to be binding only on members of United Nations, but it has now become a peremptory norm of international law or *jus cogens* [6]. This is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character [7].

Permissive or Restrictive View: Interpretation of Article 2(4)

Permissive View

There are two views regarding the principle of 'use of force' and interpretation of Article 2(4) under the UN Charter. The first is the permissive view, which says that Article 2(4) does not lay

down a total ban on the use of force and States are still permitted to use force in quite a number of situations [8], for example:

1. Use of force in anticipation of a future attack;
2. Use of force to rescue nationals abroad.
3. Humanitarian intervention;
4. Regime change (intervention for democracy).

In this paper only humanitarian intervention and regime change have been analyzed.

Regime Change/ Pro-Democratic Invasion

It has been clearly stipulated in Article 2(4), that there is a prohibition of the unilateral use of force as threat by states in their international relations. However, Professor Reisman in his article [9], has given a different interpretation. He tries to justify the use of force to oust a repressive government. He argues "In construction of Article 2(4), attention must always be given to the spirit of the charter and not simply to the letter of a particular provision [10]." According to him, it is a 'rape of common sense' to deny right of forcible intervention to overthrow a despotic government in another country. Where a repressive government deprives people of their free choice, a foreign state is legally entitled to use force to bring about desirable and ongoing "self-determination". He has advocated reinterpretation of Article 2(4) to allow force for a good cause.

However, Professor Schacter has criticized Reisman's interpretation of Article 2(4) [11]. According to him, Reisman's view is against the text of the charter as well as against the interpretation which states have given in the past. He has remarked "It would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to be goal of self-determination" [12]. Schacter's view has been supported by Professor M.K. Nawaz who has remarked, "The up-shot of this is to say that no state under international law, especially UN Charter, can intervene with armed forces either to change the existing government or to create political environment for installing a government of its liking. Nor can it act militarily to suppress the process of self-determination, the only exception being a state that cannot go to aid another state, if an armed attack occurs against it, presumably at the request of attacked state [13].

International Court of Justice in the *Corfu Channel Case* rejected the defence of U.K. that it had used armed force in the cause of international

justice. It noted:

"The court regards the alleged right of intervention as the manifestation of a policy of force, such as has, in the past given rise to most serious abuses and cannot whatever be the present defects in international organization find a place in international law [14]."

Humanitarian Intervention

Intervention denotes an act of interference by one state in the affairs of another. Oppenheim defines the word intervention as "dictatorial interference by a State in the affairs of another State for the purpose of maintaining the actual condition of things [15]."

There is an essential link between international law and moral, political philosophy and the proposition that a particular norm of customary international law necessitates a normative moral assumption. By the end of 19th century, the majority of publicists admitted that a right of humanitarian intervention exists. A state which had used its sovereignty by brutal and cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to actions by any state which was prepared to intervene. The action was in nature of a police measure and no change in sovereignty could result [16].

The doctrine of humanitarian intervention was vague and subjected to various interpretations by different writers. For some, it was an action to free an oppressed nation by another, for others, it was with the object to put an end to crime and slaughter [17]. Some referred to it as tyranny, others to as extreme cruelty, some to religious persecution and lastly some conferred the issue by considering as lawful intervention in case of feeble government or misrule leading to anarchy [18].

However, there are strategic and moral advantages to expressly articulate a right of humanitarian intervention (*jus ad interventionem*) under international law, that is, to stop or prevent genocide or violent mass ethnic expulsions. Although, scholars as far back as Grotius have argued for right to use force for humanitarian intervention, there is lack of consistent consensus under international law.

In his study, Francis Fukuyama, the author of internationally renowned book, "The End of History and the Last Man", stresses the need for military interventions by the international community not only as a right but primarily as a responsibility [19]. Serious human right violations, humanitarian catastrophes with elements of ethnic cleansing, as

well as international terrorism, are according to Fukuyama, a product of non-functioning nation states, thus putting into question the usefulness of their sovereignty, bearing in mind that they endanger peace and security beyond their borders.

Protection of human rights has become a central concern of the international community in spite of the Charter's apparent overriding concern for the maintenance of international order and non-intervention in domestic affairs. However, there is little or no reason to believe that humanitarian intervention is lawful within the regime of the UN Charter. The overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons:

1. The UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right.
2. The State practice in past two centuries and specially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and on most assessments, none at all.
3. On prudential grounds, the scope of abusing such a right argues strongly against its creation.

In essence, therefore the case against making humanitarian intervention an exception to the principle of non-intervention is that doubtful benefits by its costs in terms of respect for international law.

Restrictive View

According to the restrictive view, Article 2(4) lays down a *total ban on the use of force* except the explicit exceptions give in the Charter. The Charter allows only two exceptions for use of force, namely:

1. Self-defence under Article 51
2. Enforcement action under Chapter VII of the Charter.

Self-Defence (Article 51)

With the formation of UN Charter, there have been revolutionary changes regarding the valid grounds of intervention. One of these grounds is self-defence. Every state must have a right to defend itself when being attacked. Article 51 states that 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 United Nations [20].

Article 51- "*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.*"

The right of self-defence has six ingredients

1. The right is available against an armed attack. What constitutes an armed attack depends upon the nature and intensity of attack and the context in which it occurred [21].
2. It is an inherent right because it is recognized as such in general international law, subject to the requirements that law imposes. These requirements include principle of proportionate and immediate response in conformity with the principles of international law [22].
3. The right includes collective right of states to go to the aid of a victim of armed attack upon its request [23].
4. The right ceases the moment when Security Council takes measures necessary to maintain international peace and security [24].
5. The state invoking the right of self-defence has an obligation to immediately report to Council as it resorts to force against the attacker on the basis of right of self-defence.
6. The unilateral measures taken by it shall in no way inhibit or prejudice the authority and responsibility of the Council under the Charter to take any action including enforcement action at any time [25].

Anticipatory or Pre-Emptive Self-Defence

Article 51 explicitly requires an armed attack as a pre-condition to the use of defensive force; states have the right to exercise self-defence if an armed attack occurs. Thus, the terms of article 51 are in stark contrast with the words of Article 2(4), because the latter prohibits both the use of force and the threat of force. All this permits to conclude that neither the threat of force nor an imminent armed attack justifies the use of defensive force under the United Nations Charter [26].

There are two major arguments in favour of anticipatory self-defence. Firstly, it is allowed by customary international law; and secondly, nuclear weapons and modern sophisticated technology has made it inadvisable to wait for the attack [27].

Most of the authorities accept the restrictive interpretation. But practice of a few states has been contrary to this view. In the recent times especially with the changing dynamics of the international issues, the problem has become more complex. The adoption of pre-emptive self-defence as a policy by the United States of America in its war against terrorism has generated a renewed interest in the legal norms that govern the use of force at the international level. The United States reliance upon the doctrine of pre-emptive self-defence, to justify the war against Iraq in 2003 has caused a great deal of controversy relating to the permissibility of pre-emptive self-defence in advance of an 'armed attack'. As the journalist Glenn Greenwald observed, it seems "Empires bomb who they want, when they want, for whatever reason."

Enforcement Action under Chapter VII of UN Charter

The main task of maintaining international peace and security has been assigned to Security Council [28]. Chapter VII of the charter lists out the powers of Security Council which it can impose against aggressor or actions which it can take with respect to threats to peace, breaches of peace and acts of aggression. Following are the powers:

1. The Security Council must determine whether there is 'threat to the peace, breach of the peace, or act of aggression' and then, it may recommend what measures shall be taken to restore peace and security [29].
2. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include 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 [30]. The measures under article 41 are binding on the members. In order to take measures States have made provision in their municipal laws, i.e., India in 1947 enacted the Security Council Act.
3. If the Security Council considers, measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take

such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations [31].

4. It is further provided that the Council may ask the members of the United Nations to contribute to the maintenance of international peace and security and to make available on its call, armed forces, for the purpose of peace [32].

During the 1990s, the Security Council authorized intervention in internal conflict in Somalia, Rwanda, Haiti and Zaire, under Chapter VII without even invoking the possible international dimensions of the conflict.

For example, Security Council made universal and mandatory the trade embargo on Haiti [33] recommended by the Organisation of American States. The SC linked the threat to international peace and security with the humanitarian crisis in Haiti, including mass displacement of population. Many Haitians tried to flee to the US and other neighbouring states following 'a climate of fear and persecution and economic dislocation' as a result of the failure to reinstate the legitimate government of Haiti. The Resolution says that 'in these unique and exceptional circumstances' the continuation of this situation threatens peace and security in the region [34].

Israel Palestine Conflict

Israeli-Palestinian relations has remained tense since mid-20th century. International efforts to revive negotiations have failed, with Israel continuing to develop illegal settlements on territory it occupies. The UN Security Council passed a resolution calling on Israel to cease all settlement activities in the West Bank. The West Bank is a landlocked territory near the Mediterranean coast of Western Asia, forming the bulk of territory now under Israeli control, or else under joint Israeli-Palestinian Authority Control, and which final status of the area is yet to be determined by the parties concerned [35].

The year 2015 marked the highest number of deaths and injuries among the Palestinian people caused by Israeli forces. The forces unlawfully killed Palestinian civilians, including children, in both Israel and the Occupied Palestinian Territories (OPT), and detained thousands of Palestinians from the OPT who opposed Israel's continuing military occupation, holding hundreds in

administrative detention. Torture and other ill-treatment of detainees remained rife and were committed with impunity [36].

Fragmented lives: Humanitarian overview 2015, the report has been released each year by the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) in the occupied territories since 2011. It provides an overview of the causes of the humanitarian vulnerabilities in the occupied Palestinian territory in a given year [37]. UN Concerned about Israel's excessive Use of Force, available at:

The authorities continued to promote illegal settlements in the West Bank, including by attempting to retroactively "legalize" settlements built on private Palestinian land, and severely restricted Palestinians' freedom of movement, closing some areas after attacks by Palestinians on Israelis. Israeli forces continued to blockade the Gaza Strip, subjecting its population of 1.9 million to collective punishment, and to demolish homes of Palestinians in the West Bank and of Bedouin villagers in Israel's Negev region, forcibly evicting residents [38].

The last quarter of 2015 saw a wave of lone-wolf attacks, largely by young disgruntled Palestinians, leading to the highest number of casualties among Israelis since 2005. The majority were killed in the West Bank, the rest in Israel proper, the report said. But these incidents also raised concerns, the UN said, about Israel's "excessive use of force and arbitrary deprivation of life, both in the context of clashes and in response to Palestinian attacks, including multiple cases where perpetrators and alleged perpetrators were shot and killed on the spot by Israeli forces [39]."

What is required is highest level of sanctions be placed against Israel for these gross violation of human rights of people living in that area. Maintaining peace is one of the most essential functions of Security Council. It is the duty of United Nations to uphold and maintain peace and security in Israel Palestine region.

Conclusion

The use of force among states is governed by Title VII of the Charter of United Nations, which is an international treaty with an almost universal membership. This treaty installed a system of collective security based on ban of use of force. This ban is universally recognized as *jus cogens*, i.e. as

peremptory law from which no derogation is permitted.

Article 2(4) of the UN Charter deals with the ban on use of force. There are two views on the ban- restrictive view and permissive view. Permissive view, as the name suggests does not lay a total ban on use of force and states can resort to it in certain exigencies like when there is a regime change or in case of humanitarian intervention. This kind of intervention can be used to prevent genocide or violent mass ethnic expulsions. Also, it is to be noted right to intervene must be limited in purpose and scope.

Restrictive view on 'use of force', on the other hand lays a total ban on use of force except in two situations- one when it is required for self-defence under Article 51 of the Charter and secondly, for the enforcement action by Security Council. This means Security Council too has a power to authorize intervention in internal conflicts of the states.

Finally the paper discusses the ongoing Israel-Palestine conflict. There has been excessive use of force by Israel in the West Bank region which has led to gross human rights abuses. It is incumbent upon United Nations Security Council to impose sanctions against Israel and restore peace and stability in the region.

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