



THE MAINTAINANCE OF INTERNATIONAL PEACE AND SECURITY

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THE PROHIBITION OF THE USE OF FORCE

- A. Establishment of the standard.
- B. The content of the standard.

A. ESTABLISHMENT OF THE STANDARD

- Until 20th century: use of force in international relations was not prohibited by IL.
- During 20th century: Development of the prohibition
 - 1st step: Second Peace Conference The Hague 1907– Convention on the Prohibition of the Use of Force for the Recovery of Contractual Debts (Drago-Porter Convention).
 - After 1st WW: Creation of League of Nations with the aim of reducing the risk of future armed conflicts. It did not prohibit Member States from resorting to war but subordinated it to prior peaceful settlement procedures.
 - Collective security mechanism: automatic sanctions.
 - Break off all commercial or financial Relations.
 - Prohibit all Relations of nations.
 - Cease all financial, commercial or personal communications.
 - General Pact of Renunciation to War (1928):
 - ❖ Article I: renounced war as an instrument of national policy in their mutual relations.
 - ❖ Article II: settlement of all disputes by peaceful means.
 - After 2nd WW: UN main purpose of maintenance of international peace and security to be achieved by the general prohibition of use of force (art. 2.4).
 - Original value: Binding treaty norm for members.

- Continuous development in IL. Consequence: binding to all states (members and non-members UN)- application by ICJ even if the conventional rule has been excluded from the jurisdiction of ICJ.
 - Principle of Customary IL (ICJ Judgment in the case concerning United States military and paramilitary activities in and against Nicaragua (Nicaragua v. United States), 1986).
 - Fundamental principle of IL: GA Resolution 2625 (XXV) of 24 October 1970, "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" (customary IL).
 - Ius cogens rule. Article 53 of the Vienna Convention on the Law of Treaties 1969. ILC commentary.
- Two cases in which the use of force is permitted are expressly provided for in the Charter:
 - self-defense against an armed attack, with the limits indicated in Article 51 UN Charter;
 - military actions carried out based on a decision of the UN Security Council (SC) acting within the framework of Chapter VII of the Charter.

B. THE CONTENT OF THE STANDARD

- Article 2.4 of the UN Charter prohibits:
 - the use of force
 - The threat of use of armed force.
- In international relations, whenever such force is directed against the territorial integrity or political independence of any state or is in any manner inconsistent with the Purposes of the UN. Development: [GA Resolution 2625 \(XXV\), "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations"](#)
- **ICJ distinction** between:
 - "the most serious forms of the use of force" (those constituting an armed attack or aggression).
 - Definition of aggression in [GA Resolution 3314 \(XXIX\)](#): "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 UN.
 - Broad conception by ICJ about "*armed attack*" or act of "*aggression*".
 - ❖ [ICJ 2005 Judgment in the case concerning armed activities on the territory of the Congo \(DRC v. Uganda\)](#).

- ❖ [ICJ 1986 Judgment in the case concerning United States military and paramilitary activities in and against Nicaragua \(Nicaragua v. United States\)](#).
- [“other less serious forms”. GA Resolution 2625 \(XXV\) of 24 October 1970, "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations"](#) (customary IL).
 - Threat or use of force that is not directed against the territorial integrity or political independence of States and is not otherwise inconsistent with the Purposes of the UN may be considered lawful in some circumstances: International jurisprudence police powers that States may exercise in the various marine spaces. [ICJ 1998 Judgment in the fisheries jurisdiction case \(Spain v. Canada\)](#).
 - Regulated by IL and clarified by case law: ITLOS
 - Requires that the use of force must be avoided to the extent possible and, where unavoidable, must not go beyond what is reasonable and necessary in the circumstances.
 - Considerations of humanity must be applied in the Law of the Sea, as they are in other areas of international law.
 - Normal practice used to stop a vessel at sea:
 - ✓ 1st give a visual or audible signal to stop, using internationally recognized signals.

- ✓ When unsuccessful: variety of actions (firing shots over the bow of the vessel).
- ✓ Only when appropriate actions have failed can the pursuing vessel, as a last resort, use force. Even then, appropriate warnings must be issued to the pursued vessel and every effort should be made to ensure that life is not endangered.

SELF-DEFENSE

- Exception to the prohibition of use of force (customary IL).
- Fundamental right of every State to its survival (inherent right): resort to self-defense in accordance with art. 51 Charter UN.
 - "Nothing in this 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 exercise of the right of self-defense shall be reported immediately to the SC, and shall in no way affect the authority and responsibility of the Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security".*
 - Resort to individual or collective self-defense.
 - Collective self-defense: Victim State of the armed attack has to assess and declare that this has occurred + request the exercise of collective self-defense.
- Lawfulness: Requirements and conditions that do not depend exclusively on subjective judgment of the State invoking self-defense but may be assessed and controlled by the ICJ (strict and objective).
- **Requirements:**
 - Prior occurrence of an armed attack.
 - Is not the same as suffering a "use of force" by another State.
 - Lawfulness of self-defense in cases of "threat" or "imminent" armed attack?

➤ **Conditions:**

- Customary IL prior to the adoption of the Charter: The armed response must be **immediate** (not in ICJ caselaw), **necessary** and **proportional** to the armed attack previously suffered.
- ICJ case law: the measures of force adopted must not simply be aimed at protecting the vital security interests of the State adopting them but must be "**necessary**" to achieve that end.
 - Condition of necessity: the ICJ considers relevant the date of adoption of measures of force in self-defense (ex. The armed attack had already been repelled).
 - Condition of proportionality: ICJ considers as not met when the armed reaction in self-defense continued long after the period in which any "alleged" armed attack could reasonably be considered to have taken place or cases of broader objectives of military operations.
- Charter of UN: Duty to inform SC.

THE SYSTEM FOR THE MAINTAINANCE OF INTERNATIONAL PEACE AND SECURITY

- A. General considerations
- B. Determining the existence of qualified situations: art. 39 Charter
- C. Provisional measures: art. 40 Charter
- D. Sanction measures that do not involve the use of force: art. 41 Charter
- E. Sanction measures that involve the use of armed force: art. 42 Charter

A. GENERAL CONSIDERATIONS

- Organ in charge: UNSC organ to which Member States have conferred primary responsibility for the maintenance of international peace and security. Accordingly, the SC is mandated with the specific competence to decide on the actions to be taken in this regard (art. 24.1)
- Practice of the UNSC:
 - Cold war: Exercise of right to veto.
 - After invasion of Kuwait (1990): new era of qualitatively increased the measures adopted in cases of threats to peace, breaches of the peace or acts of aggression.
 - Broadening of the concept of international peace and security, which is no longer limited to the avoidance of the use of force in relations between states: 1992 Report entitled "An Agenda for Peace" classified the measures to be taken by the UN in relation to international peace and security into conflict prevention, peacemaking, peacekeeping, peace enforcement and peacebuilding.
 - Peacebuilding Commission (PBC) [SC Resolution 1645 \(2005\)](#) and [GA Resolution 60/180](#): new UN body which, following the end of an armed conflict, aims to achieve the economic, social and institutional recovery of the State that has suffered from it, with the aim of preventing the recurrence of conflict .

- Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity: poor and abusive practical application by some NATO member states of the authorization of the use of force contained entailed the decline of the R2P doctrine.
- The central core of measures for the maintenance of international peace and security: Chapter VII of the Charter.

B. DETERMINING THE EXISTENCE OF QUALIFIED SITUATIONS: ART. 39 UN CHARTER

- Chapter VII of the Charter: measures that the Security Council may take in cases of threats to the peace, breaches of the peace or acts of aggression. The first operation: the determination of the existence of one of the qualified situations of Chapter VII: "The SC 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" (Art. 39).
 - The determination of the existence: decisions of a non-procedural nature referred to in Article 27.3, with the subsequent possibility for any of the permanent members of the SC to decide to exercise its right of veto.
 - No distinction between internal and international armed conflicts.
 - No subject to the subsequent control by any other organ.
- The differences between a threat to the peace, a breach of the peace and an act of aggression are not clear. Generally:
 - Notion of a threat to the peace does not necessarily imply the attribution of specific responsibilities to a particular State or insurrectional movement, whereas the other two notions presuppose the determination of who is responsible for a breach of the peace or an act of aggression.

- Definition of aggression by GA Resolution 3314 (XXIX) is not binding.
- The determination by SC of the existence of a threat to the peace, breach of the peace or act of aggression, which constitute the presupposition on which the competence of the SC under Chapter VII is based, may have various consequences:
 - The SC may adopt a recommendation or decide on a measure or action (wide margins of discretion) But a SC resolution that is clearly identifiable with a decision, and no longer with a recommendation, will be binding on all UN Members, who must comply with it (Art. 25).
 - Diverse practice.
 - ❖ In some cases, the SC understood that the situation was not serious enough to require a more incisive measure than a simple recommendation.
 - ❖ In many other cases, it happened that any decision to adopt concrete measures or to carry out a particular action proved impossible because of the exercise of the right of veto (actual or foreseeable) by a permanent member. This explains why, in some events, the SC limited itself to drawing some obvious consequences deduced from the finding of a situation qualifying as one of the types of Article 39, without adopting any recommendation or decision on more incisive measures.

- ❖ On some occasions, the SC has considered it appropriate to limit itself to expressing support for a peace process already initiated (or concluded) elsewhere, without recommending or deciding on further action.
- ❖ In other cases, the SC announced the likely adoption of measures if a given situation persisted.

C. PROVISIONAL MEASURES: ART. 40 UN CHARTER

- *"In order to avoid aggravation of the situation, the SC, before making the recommendations or deciding on the measures referred to in Article 39, may call upon the parties concerned to comply with such provisional measures as it deems necessary or advisable. Such interim measures shall not prejudice the rights, claims or position of the parties concerned. The SC shall take due note of any failure to comply with such provisional measures".*
- Discretionary power of the SC.
- Limits to the adoption of provisional measures: the objectives they pursue ("in order to avoid aggravation of the situation") and the fact that they shall not prejudice the merits of the dispute ("shall not prejudice the rights, claims or position of the parties concerned").
- In practice, as provisional measures:
 - Decreed the suspension of hostilities or created, between the disputants, a neutralized zone under international control.
- The SC is obliged to take due note of non-compliance with the provisional measures it has issued. However, it does not necessarily follow that the SC must take sanction measures against the non-compliant party.

D. SANCTION MEASURES THAT DO NOT INVOLVE THE USE OF FORCE: ART. 41 UN CHARTER

- If its initial decisions have had no effect, and even if it considers that it is foreseeable that they will not, the SC may decide to adopt, in relations with one or more States or other subjects (e.g., an insurrectional movement), measures that do not involve the use of armed force and that are of an economic or political nature (so-called "sanctions not involving the use of armed force").
- Article 41 provides a broad (not exhaustive), list of such measures: *"The SC may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and may call upon the Members of the United Nations to apply such measures, which may include the total or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, as well as the severance of diplomatic relations."*
- Decision on the opportunity or convenience and on the specific type of measure: broad sphere of discretion of the SC. Only limit: "constitutional" scope of the competence of the UN.
- Once adopted: legal obligations for the subjects to whom it is addressed and for the Members of the UN, who must refrain from maintaining the prohibited relations with the subject to whom the measures are addressed and the duty of UN Members to assist each other in the implementation of the measures decided by the Security Council (Art. 49).

➤ Practice of UNSC:

- Cold war years: sanctions adopted in relation to Southern Rhodesia in 1966; import and export bans and other measures; and to South Africa in 1977 embargo on the sale of arms and military equipment, because of its racially discriminatory policies.
- After the Cold war: measures taken under Article 41 of the Charter have developed dramatically.
 - Embargo measures on the sale of arms and military equipment have targeted a State or an insurrectional movement responsible for specific breaches.
 - Ban on the supply of arms or military equipment, have been aimed at preventing the continuation or escalation of a conflict, without specifying which of the parties was responsible.
 - Examples of atypical measures, not expressly provided for in any article of the Charter but adopted by the SC acting within the framework of Chapter VII. Decisions with very heterogeneous objectives.
 - ❖ Measures of a political nature, such as the reestablishment of a legitimately elected government in Haiti; in Sierra Leone; etc.
 - ❖ quasi-judicial measures, such as the creation of the international criminal tribunals for the former Yugoslavia and for Rwanda as subsidiary bodies of the SC with competence to try individuals for the commission of international crimes; the creation of the Special Tribunal for Lebanon.

- ❖ quasi-legislative measures, obliging UN Members both to adopt national laws criminalizing and punishing acts of terrorism, and to introduce into their national legislation measures relating to arms control and the fight against the proliferation of nuclear, chemical and biological weapons.
- Conformity with the Charter of atypical measures and of the broad notion of the term "threats to the peace": Generic nature of Articles 39 and 41 of the Charter.

E. SANCTION MEASURES THAT INVOLVE THE USE OF FORCE: ART. 42 UN CHARTER

- If measures of an economic or political nature prove or are deemed inadequate, the SC may decide to resort to action of a military nature: *"If the Security Council considers that the measures referred to in Article 41 may be inadequate or have proved to be inadequate, it may take such action by air, naval or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades and other operations by air, naval or land forces of Members of the United Nations"* (art. 42).
- Decisions on the opportunity and advisability of undertaking action and the specific type of action fall within the broad sphere of discretion of the SC. Limits: constitutional competence of UN.
- Practice of UNSC:
 - End of Cold War: Explosion of sanction measures adopted by the SC involving the use of force.
 - Restore territorial sovereignty.
 - Sole purpose of ensuring compliance with the economic measures previously decided by the SC concerning the trade embargo or the supply of arms.

- In other cases, actions involving the use of force were qualified by a precise objective, such as ensuring, in a situation of civil war and famine, the effective distribution of aid provided on a humanitarian basis to its intended recipients; the restoration of legitimate political authority; to prevent the continuation of a genocide...
 - Atypical measures not provided in the Charter: authorizations to use armed force. The action of the States remains subject to the control of the authorizing organ and may not exceed the limits and objectives indicated in the authorization itself, interpreted in a restrictive sense.
 - Use of regional arrangements or bodies to apply coercive measures
- Military actions decided by the SC are also subject to the rules of the International Law of Armed Conflict, which regulate the conduct of military operations and establish rights that protect combatants and the civilian population.
- Provisions of the Charter:
 - Agreements SC-UN members on Military contingents and other instruments necessary to carry out military actions decided by the SC: never concluded. In its absence, UNSC has authorized the creation of multinational intervention forces, multinational forces in which the weight of the operation was assigned to some regional body;

- Establishment of a Military Staff Committee, composed of the Chiefs of Staff of the 5 permanent members of the SC and charged, inter alia, with assisting the SC in plans for the employment of armed force and assuming the strategic direction of the forces placed at its disposal. Never established.

PEACEKEEPING OPERATIONS IN THE UN SYSTEM

- Peacekeeping Operations (PKOs) were born as a UN practice due to the blockade of the SC because of the exercise of the veto right by the permanent members during the "cold war".
 - Deployment of armed contingents of several UN Members (known as "blue helmets") acting under their mandate, with the prior consent of the State on whose territory the deployment takes place and the cooperation of all parties involved, for the purpose of interposing between the warring parties or controlling a cease-fire or a demilitarized zone.
 - Distinct from the sanction measures involving the use of armed force that the SC may adopt under Article 42 of the Charter.
 - Not provided for in any provision of the Charter, nor have they been otherwise generally regulated. Their basis is found in the prior consent given by the State on whose territory they are deployed.
- Creation:
 - **1956: Nationalization of Suez Canal.** GA created the United Nations Emergency Force (UNEF), after acceptance by Egypt and the other parties involved, "charged with achieving and monitoring the cessation of hostilities" including the withdrawal of forces from Egyptian territory and, subsequently, to interpose itself between Egyptian and Israeli forces.

- Two years later, the SC created a new PKO requested by Lebanon to prevent the illegal entry of people and weapons into its territory.
 - In 1960: SG, in execution of the mandate received from the SC to provide such military assistance as the Republic of Congo might require until the national security forces were able to fully carry out their duties, created a new PKO in response to the situation created by the Belgian intervention and the secession of the Katanga province.
- These first PMOs raised practical problems:
- Conformity with the provisions of the Charter?
 - Refusal of several UN Members to finance the costs of these operations.
 - [Advisory Opinion of 20 July 1962 in the case concerning certain expenses of the United Nations](#), the ICJ held that the costs of FUNU were included in "UN expenses" and, consequently, the GA was authorized to distribute them among the UN Members . Moreover, the ICJ, after ruling out that the UNIFIL was not reducible to coercive action under Article 42 of the Charter, added that "it is obvious that the operations were conducted to achieve a primary purpose of the United Nations, namely, to promote and maintain a peaceful settlement of the situation" . This situation was complemented by a political agreement reached within the Special Committee on PKOs to the effect that for future to be established, the SC (and not the GA) would be the principal UN organ with the authority to create, direct and control them, the SG being the commander-in-chief.

- Present: it is up to the SC to adopt a resolution deciding on the creation. This resolution will specify the maximum number of military and civilian members of the PKO, its mandate and its duration.
 - In practice, once the SC decides on the creation, it is up to the SG to negotiate with UN Members the dispatch of armed contingents:
 - Forces are under the authority of the SG, although the actual operations are directed by the national military commanders.
 - The planning, preparation and management is carried out by the PKO Department , headed by the Deputy SG, while the operational direction of the armed contingents is reserved to the Special Representative of the SG or the Force Commander, both under the direct orders of the SG.
- Numbers:
 - During the Cold War, 13 PMOs were established with a mandate limited to monitoring cease-fires or intervening between the warring parties to create the conditions for peacekeeping.
 - After the "cold war", the number of PMOs has increased both quantitatively and qualitatively. As of July 1, 2018, 56 PMOs had concluded, while the UN had another 15 PMOs deployed and active on four continents . Moreover, the PMOs developed since the end of the "cold war" are no longer limited to peacekeeping: their mandates have expanded, as they also pursue conflict prevention, peace enforcement and, above all, peacebuilding.

➤ Basic Principles:

- 1st) the creation, establishment and maintenance of the armed contingents constituting each PKO are subject to the **prior consent of the State concerned**. This distinguishes them from the coercive sanctions of Article 42 of the Charter. The consent of the other parties involved must also be sought. Problems have arisen in cases of withdrawal of prior consent.
- 2nd) **impartiality**. Impartiality means that each PKO must carry out its mandate without favoring or harming the interests of any of the parties to the conflict. But impartiality should not mean neutrality: the PKO should intervene with force when there are violations of a peace agreement, or of the norms and principles that, according to its mandate, the PKO is obliged to enforce, especially in the field of human rights and international humanitarian law.
- 3rd) **non-use of armed force**. During the "cold war", PKOs were always prohibited from using force, except in cases of self-defense. After the end of the "cold war", it has been observed in practice that the military components of PKO continue to be authorized to use armed force in legitimate self-defense, although the SC, acting within the framework of Chapter VII, has extended this authorization also to the legitimate defense of the civilian components of the various PKOs, as well as to the defense of their mandate. In most cases, authorization for the use of force has been made directly in favor of the PKOs.

In these cases, mixed peace-keeping and peace-enforcement operations are considered to have been established, i.e. peacekeeping operations authorized to use force when such use is deemed necessary to carry out their mandate.



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