

“Regulation of Political and Military Intervention Post World War II”

Greetings from the Executive Board!

This council, being a Historic Crisis Committee shall be simulated during 1956. **But before diving into the timeline**, it is imperative to understand a few concepts of International Law.

The examples used in this document also include events that occurred post 1956 in order to give the readers a clearer picture and understanding of International Law in a context that will be beneficial to the proceedings of this committee. However, during the council simulation, events that occurred post freeze date shall not be taken into consideration. **They have been used in this document only for understanding purposes.**

This document is in no way a whole round source of information, but rather a kick starter for your research.

The following concepts are fundamental in understanding the legal dynamics involved in armed conflicts:

International Law and the Use of Force

Law Governing the Use of Force

- **Jus ad bellum:** When can states use force? When may a state, for example, resort to self-defence? When may a state come to the defence of another state, if that state has been attacked? When may a state engage in Humanitarian Intervention because there's some sort of “trauma” occurring in another country? When can a state engage in the use of drone operations, if another state has consented the same? That's what this study guide aims to cover.
- **Jus in bello:** How can force be used?
For the purposes of this study guide, we shall not be elaborating upon the Jus in bello, which is also known as the Law of War or International Humanitarian Law, or the Law of Armed Conflict, which is regarding how states may fight when they are in the fight, irrespective of whether they're there legally or illegally. In other words, what are the rules of the

game? Who can they shoot at? What can they shoot at? What weapons may they use? How must detention be conducted, and so forth. This is a different body of law that comes from different treaties, which is very relevant to this agenda, but not exactly the subject of discussion we hope for.

Jus ad bellum

The mother of all rules is found in the United Nations Charter which sets forth the core of all rules on the use of force.

Article 2(4)

“Refrain...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.**”

Note: *Threat and use of force limited to States*

In 1945 what people thought about article 2(4) was limited to scenarios involving the invasion of other states, but today, we are worried about the later clause, because it means that, you may not use force consistent with International Law, unless there's an exception found in the UN Charter.

A closer look at this article makes us understand that not only is a state not allowed to use force, but also, not allowed to threaten to use force. It is a violation of the law to threaten to use unlawful force against another country. For example, a state may not say to another state, “Give us this territory, or we will invade and take that territory” – that would be unlawful. But a state could say, “If you invade that territory, we will come to the aid of the state that has been invaded in collective self – defence” – such a threat can be made, since it is lawful [shall be elaborated upon further]

It should be noted that this is a provision which appears in a treaty that governs reactions and interactions between states and so this rule is limited only to states. It has nothing to do with non – state actors or terrorist groups. So when a non – state actor attacks a state, it is not a violation of this rule, it becomes a crime, and that's how it will be treated.

The Exceptions to the Rule

- **Chapter VII Mandate**
Authorisation by the UNSC to use force consistent with the resolution mandate.
- **Self – Defence**
Use of force in self defence
- **Humanitarian Intervention** [not found within the framework of the UN Charter]

1. Chapter VII Mandate

Article 39

“The Security Council shall determine the existence of **any threat to peace, breach of the peace, or act of aggression** and...decide what measures shall be taken...to **maintain or to restore international peace and security.**”

Article 39 is the article which tells the Security Council when it can begin to handle a situation. The Security Council can address situations in three cases, when there is a threat to peace, breach of peace, or act of aggression. Since a “threat to the peace” is not defined anywhere, the answer to this question is that a **“threat to the peace” is whatever the Security Council says it is, as a matter of law.**

However, it should be noted that, whatever the security council authorises thereafter, may only be for the purposes of restoring international peace and security. The Security Council cannot authorise measures to punish a state unless it can articulate the connection between the action and trying to maintain peace and security. For example, the SC has authorised a tribunal to handle war crimes in the former Yugoslavia and another tribunal to handle war crimes in Rwanda.

Kuwait – UNSCR 660

(2nd August 1990)

“The Security Council...determining that there is a breach of peace by the Iraqi invasion of Kuwait...”

Having done that(article 39), the next step is article 41; wherein the Security Council decides on non – forceful measures, which may include:

interruption of economic relations, interruption of rail, sea, air, postal, telegraphic, radio and other means of communication, as well as severance of diplomatic relations.

Article 42

- The Security Council can decide that article 41 measure have been/ would be inadequate
- If so, may take military action
- Necessary to maintain or restore international peace and security.

UNSCR 678 (29/11/90)

“Authorises member states cooperating with...Kuwait, unless Iraq on or before January 15, 1991, fully implements...the foregoing resolutions, to use all necessary means to uphold and implement (SC Res.) 660 and all subsequent relevant resolutions and to restore international peace and security...”

If we try to remember the series of events thereafter, we recall that there was an extended air campaign and a very brief ground campaign and the Iraqis were pushed north, out of Kuwait and into Iraq. It was then determined by President Bush that when the Iraqis were out of Kuwait and when their (the Iraqis) military capability was significantly degraded, then International Peace and Security had been restored. This was the reason that the coalition did not further march into Baghdad.

2. Self – Defence

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...”

This article not only gave a right to individual self – defence, but also, collective self – defence, for example the basis of NATO, if you look at article 5 of the North Atlantic Treaty which specifically references Article 51 of the UN Charter.

It could be argued that NATO is a collective self-defence operation created in the aftermath of Article 51 of the UN Charter.

It should be noted that there have been controversies in the collective self – defence provision, for example, when the United States provided assistance to countries like El Salvador against the guerrillas in the 80s. In providing that assistance, they conducted some military operations against Nicaragua, which made Nicaragua take the United States to the ICJ.

The United States argued that they were engaging in collective self – defence against Nicaragua because Nicaragua was supporting guerrillas against Honduras and El Salvador. The ICJ then asked the United States to show the request from El Salvador and Honduras where they asked the United States to come to their defence. This led to a few phone calls, a request was then written and given to the United States, and was produced in the ICJ which rejected it.

The request should be prior to the use of military force in collective defence.

It should also be noted that a state can act in self or collective self - defence until the Security Council becomes what lawyers call “seized of the situation”, i.e. the Security Council takes control of the situation, although this has never happened due to political reasons (veto).

Criteria

The International Court of Justice stated that there are two criteria for the lawful use of self - defence:

- **Necessity:** It means that a state resorted to use of force in self – defence against an armed attack because there was nothing else that could be done. In other words, a state cannot resort to use of military force, if there exist some other means of resolving the situation.
- **Proportionality:** The use of force must be proportional. This is not the Jus in bello rule which deals with civilian casualties. [a state may not engage in a military operation if the likely civilian casualties are excessive relative to the anticipated military advantage]
In this context, civilian casualties are irrelevant. In this context, it implies that a state may do no more than what is required to defend itself. So if

there is a serious border incident, a state can definitely defend its borders, but this doesn't mean that it can invade and conquer the other country. In other words, the response must be sensible with regard to self – defence.

Immediacy [something that the ICJ has never addressed]

- Anticipatory
- Reactive

Under the regime of customary international law that developed long before the UN Charter was adopted, it was generally accepted that pre-emptive force was permissible in self – defence. There was, in other words, an accepted doctrine of anticipatory self – defence. The classic case that articulated this doctrine is the often cited **Caroline incident**.

[The Caroline affair (also known as the Caroline case) was a diplomatic crisis beginning in 1837 involving the United States, Britain, and the Canadian independence movement. It began in 1837 when William Lyon Mackenzie and other Canadian rebels, commanding the ship Caroline, fled to an island in the Niagara River, with support from nearby American citizens. British forces then boarded the ship, killed an American crew member in the fighting, and then burned the ship and sent it over Niagara Falls.

This action outraged the United States. In retaliation, a group of American and Canadian raiders attacked a British ship and destroyed it. There were several other attacks in 1838 between the British and Americans. The diplomatic crisis was defused by the negotiations that led to the Webster-Ashburton Treaty in 1842, where both the Americans and British admitted to wrongdoing.

In the aftermath, the incident led to the legal principle of the Caroline test. The principle states that the necessity for pre-emptive self-defence must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation", as formulated by Daniel Webster in his response to British claims that they attacked the Caroline in self-defence.]

Recommended reading: The Bush Doctrine

The main elements of the Bush Doctrine were delineated in a document, the *National Security Strategy of the United States*, published on September 17, 2002. This document is often cited as the definitive statement of the doctrine. It was updated in 2006 and is stated as follows:

“The security environment confronting the United States today is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate

and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction – and the 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. There are few greater threats than a terrorist attack with WMD.

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively in exercising our inherent right of self-defence. The United States will not resort to force in all cases to pre-empt emerging threats. Our preference is that non-military actions succeed. And no country should ever use pre-emption as a pretext for aggression.”

Recommended link:

www.cfr.org/content/publications/attachments/highlight/03spring_arend.pdf

3. Humanitarian Intervention [not to be confused with R2P]

The term “Humanitarian Intervention” is found in no International Law treaty at all. However, one could argue that there exists state practice which shows that states have now accepted that there is a legal right to engage in Humanitarian Intervention, in certain, very limited circumstances.

Prior Cases

- **UNSC Approval**
 - a. Somalia: UNITAF & UNOSOM II (92 & 93)
 - b. Sudan: UNMIS (05 & 06 – following global condemnation for inaction)
 - c. Libya, Odyssey Dawn, Unified Protector (11)
- **Ex-Post Facto Praise**
 - a. Liberia: ECOWAS (91 & 92)
 - b. Sierra Leone: ECOWAS (97)
- **No approval**
 - Federal Republic of Yugoslavia (99)
- **Criticism for lack of action**
 - a. Rwanda (94), UN 1998 Independent Inquiry condemns UNSC, Secretariat, and states for failure to act.
 - b. Darfur (03 – 10), wide condemnation for lack of forceful response.

The question now, is not whether there is a right of humanitarian intervention, the question is when does that right mature? Do states have to wait till a genocide is on – going? Can states intervene when they think that genocide is about to be launched?

Responsibility to Protect [R2P]

R2P is not a legal concept; it creates no legal change as it is embedded within the existing international law order. R2P is 'best understood as a reaffirmation and codification of already existing norms' and as a political concept having political effects.

The Responsibility to Protect doctrine (R2P) is not a new practice of international customary law, it has grounding in international law. This can be shown through an analysis of international humanitarian and human rights law. It shows that states have responsibilities, duties and obligations in international law to prevent and protect their citizens from harm. It also shows that R2P as a concept, does not add anything new to existing international customary norms on war crimes, crimes against humanity, genocide and ethnic cleansing. R2P reinforces these duties by declaring them and it is not distinctive in any way from the responsibilities already inherent in the Charter of the United Nations, the International Court of Justice Statute, the Geneva Conventions, and Vienna Convention on the Law of Treaties, the Nuremberg Charter, The Hague Conventions or any other international customary norm in international law related to humanitarian or human rights law. The legal status of R2P is limited to the crime of genocide and war crimes, on the other hand crimes against humanity and ethnic cleansing must also be clearly identified within these two frameworks and not be separated from them. It also shows that the justification for intervention into a state is limited to war crimes under the Nuremberg, Hague and Geneva Conventions, and genocide is limited to the Genocide Convention.

Recommended reading: How does R2P differ from Humanitarian Intervention?

Controversial Case Studies

1. 9/11 and Afghanistan

Self – Defence was previously limited to armed attacks by states, but UNSCR 1368 & 1373 talked about the “inherent right of self – defence”, also after the operations had begun, the Security Council continued to pass resolutions reaffirming the earlier resolutions that had referred to the right of self-defence, leading to the authorisation of the use of article 51 against non – state actors.

An absolute prohibition of the use of defensive force against non-State actors finds solid support in the jurisprudence of the International Court of Justice (ICJ). Two post-9/11 cases are directly on point. In the 2004 advisory opinion in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ plainly stated that Article 51 applies “in the case of an armed attack by one State against another State.” The Court then determined that Article 51 did not excuse Israel’s security barrier on the Palestinian territories, in part because Israel did not claim that it had been victimized by another State. A similar logic appears in the 2005 Armed Activities case between Uganda and the Democratic Republic of the Congo (DRC). The Court found that “there [was] no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.” In other words, any attack was “non-attributable to the DRC.” The Court then determined that “the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not present.”

State Sponsors and Armed Attack

- 2. Nicaragua (1986):** “The sending by or on behalf of a state of armed bands...or its substantial involvement therein.”

The standard for treating the actions of a non – state actor as the actions of a state was set forth in the Nicaragua case, where it was stated that if a state sends extremists or insurgents against another state, or if they

are substantially involved, then the actions of the terrorists/insurgents can be treated as if they were the actions of the state. Hence it can trigger a response in self – defence against the state itself and not just the terrorists/insurgents. This is known as the effective control test, which says that the state must have effective control over the group. It does not suffice if a state is merely providing weapons or logistical support.

3. **Afghanistan (2001) – extremely controversial:** “The attacks have been made possible by the decision of the Taliban...to allow...Afghanistan...to be used...as a base of operation.” (*SC notif.*)