

THE RULES OF INTERNATIONAL LAW THAT REGULATE THE USE OF INTERSTATE FORCE

LT G. CONRADIE*

**

1. Introduction

Just as the most important norms governing the behaviour of individuals are embodied in domestic law, some norms governing the behaviour of states are embodied in international law. International law, however, operates in quite a different social context. The foundations of an overwhelming social consensus and of a central authority which endows its rules with sanction, are lacking. States are not subject to law; international law is not a law above states but one between them. This situation is so anomalous for a legal system that some professional lawyers deny the legal character of international law completely, claiming that it lacks the distinctive characteristic of effective sanctions.¹

However there are certain rules of conduct generally recognised by the various states themselves which serve as restraints against certain kinds of action. On this modest basis an author has defined international law as 'the body of rules and principles of action which are binding upon civilized states in their relations with one another'.²

2. Aim

International law covers a very large field, but in this work I shall concentrate on the rules governing the use of interstate force. It can be done best by considering three distinct eras, namely the era before the League of Nations, the League period and the Charter of the United Nations.

3. The law of the era before the League of nations

Before the League, international law was a decentralized system, states held themselves free to decide and act for themselves. The Classical system knew of certain principles regulating the recourse of forcible measures short of war, but the application was uncertain.³ In the nineteenth century governments viewed the threat and use of force as

legitimate exercises of a sovereign's will. The law of the period reflected the belief that war was a self justifying instrument of inducement. In the absence of a central organization to apply it, law governing the use of force was inevitably a weak law.⁴

Nineteenth-century international law did important limitations on the scope and degree of violence. Definite rights and obligations for belligerents and neutrals were established by new laws of neutrality. Series of multilateral conventions and codes were also drafted to prevent undue suffering among troops and civilians.⁵

Despite earlier efforts by jurists and moralists to distinguish between justice and injustice, international law had given up the attempt to regulate recourse to war. No distinction was made between just and unjust war.⁶

4. Measures of self-help under the classical system are divided into four main categories (legal): retorsion, reprisals, intervention and self-defence. These categories still remain today.

a) **Retorsion:** Although unfriendly it is within the legal powers of a state employing it and thus necessarily a legal measure even if it involves use of force in its application.

b) **Reprisals** is an institution with a long history and involves the seizing of property or persons by way of retaliation for wrong previously done to the state taking reprisals. 'It is probably the oldest and most primitive mechanism for the application of the law of armed conflicts.'

It certainly does not lend itself, in juridical terms, to any proposals for collective responsibility for the application of 'international humanitarian law'⁷ Measures of reprisals commonly used in the era before the League included embargo of offending states' ships found in ports and territorial

waters of the state claiming to have been wronged, seizure of its ships or property on the high seas and pacific blockade. The right to take forcible reprisals of this kind was open to grave abuse by strong against weak states. It was recognised from early times that, if they were to be valid, reprisals must satisfy certain conditions. The Navlina arbitration of 1928 laid down three conditions for legitimacy of reprisals. There must have been an illegal act on the part of the other state, they must be preceded by a request for redress of the wrong and the measure adopted must not be excessive (out of proportion to the provocation). Changes in the law severely curtailed the kinds of reprisals which may lawfully be taken today. Subject to that however, the principles laid down in the Navlina case may be accepted as regulating reprisals today.⁸

c) **Intervention:** The law of intervention suffered from the same defect as the law of reprisals in that its legality could always be put beyond criticism by simply calling it war. Nevertheless, intervention was recognised to be in principle contrary to international law, so that any act of intervention had to be justified as a legitimate case of reprisal, protection of nationals abroad or self-defence. Apart from a case of special treaty right, intervention wasn't so much a right as sanction against a wrong or threatened wrong. Theoretically the legality of intervention by states acting together had to be judged by the same tests as that of intervention by a single state, but politically and morally a distinction might sometimes be vital. There is support, for example, for the view that humanitarian intervention by a number of Powers to prevent a state from committing atrocities against its own subjects, was recognised by international law.

d) **Self-defence** applies to states no less than to individuals, and the legal content of the principle is clear, though application in a specific case may be difficult. In the nineteenth century there was a tendency, by widening the principle to cover "self-preservation" to give it a scope which is inadmissible. Properly understood, self-defence is a strictly limited right. The need to keep self-defence within strict limits has been demonstrated often in recent history,

for nearly every aggressive act is sought to be portrayed as an act of self-defence. The Nuremberg Tribunal set out the proper limits of the right clearly, saying that preventive action in foreign territory is only justified in case of 'an instant and overwhelming necessity for self-defence leaving no choice of means and no moment of deliberation.' A decision, however, may afterwards be reviewed by the law in the light of all the circumstances.⁹

5. The law of the League period

The League of Nations came into being under terms of the Treaty of Versailles. Its covenant represented mainly British and United States views on how to secure peace and collective security. Member states pledged to respect and preserve each other's political independence and territorial integrity against external aggression.¹⁰

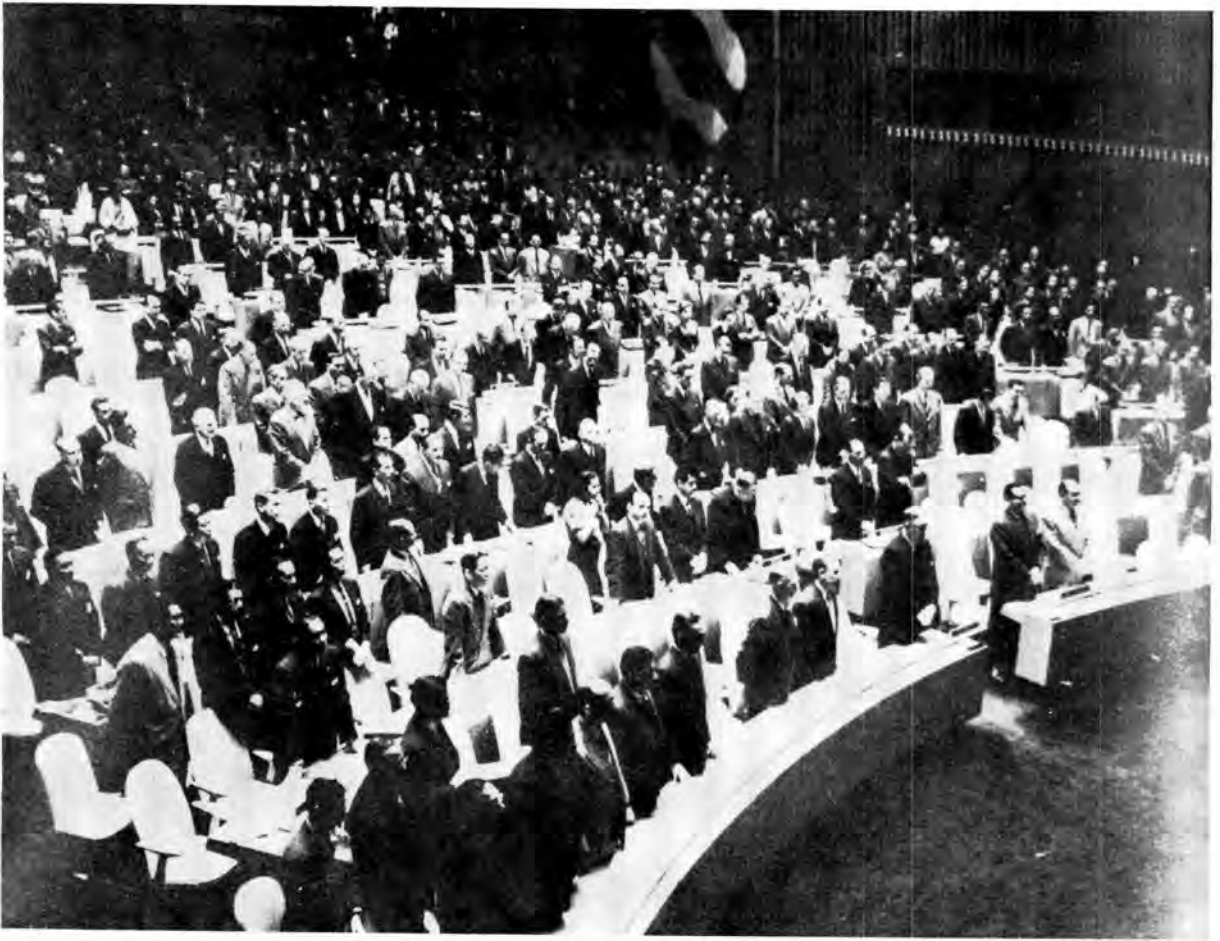
Its work in pursuing international co-operation on the lines developed in the nineteenth century didn't become fully appreciated until its political activities had failed in the mid-thirties.¹¹

The covenant changed the law considerably by:

- a) creating an obligation to settle disputes by pacific means and not to resort to war without first exhausting those means,
- b) establishing a central organization empowered to pass judgement on the observance of those obligations and to apply sanctions where necessary.

The Pact of Paris (Brand-Kellogg Pact) is very important. It declared the absolute illegality of war in pursuit of domestic policies and, having been concluded outside the League, it didn't perish with the League. Being consistent with the provisions of the Charter, it retains its full force today. The Pact didn't forbid recourse to war in self-defence.

Strictly speaking, the covenant and Pact of Paris were only binding upon the parties to them, but the general obligations contained in them reflected and recorded a fundamental change in customary law regarding the legality of war. These obligations had become part of general international law, binding on states whether parties to the covenant or Pact or not.



United Nations General Assembly, 7th session of the General Assembly October 1952.

The Nuremberg Tribunal pointed out the acceptance in the League period of the concept that aggressive war is an international crime.

The covenant and Pact didn't touch the right of self-defence. It didn't touch retorsion, reprisals or intervention not involving use of armed forces either. Their effect on reprisals and intervention taking the form of a recourse to armed force short of war was even less clear. It is very doubtful, however, whether reprisals and intervention involving armed force were any longer admissible during the League period, except as sanctions for violation of the covenant or Pact.¹²

Other critique concerning the League is that the wording of the clauses obliging collective action against transgressors was too vague. Also, members were free to act as they pleased unless Council reports were unanimous. While it is true that minor disputes between minor powers were successfully

settled, the League proved itself powerless to deal effectively with issues in which vital great power interests were at stake.¹³ The League stubbornly but futilely pursued general discussions about international order for most of its existence.

6. The law of the charter

The victorious powers in World War II met in San Francisco in 1945 and agreed to the United Nations charter. In some respects it is an improvement on the old League, but it doesn't curtail the sovereign power of some states and it doesn't satisfy the idealistic dream of some visionaries for a superstate. Its formally stated aims are quite similar to those of the League: to preserve international peace, to establish friendly relations among nations and to solve the economic and social problems of the world.¹⁴

The Security Council, or, failing that, the General Assembly, may investigate any

international dispute or situation likely to endanger peace and may recommend procedures for the settlement of the dispute or for remedying of the dangerous situation. If the Council thinks the dispute or situation already constitutes actual breach of peace, threat to peace or act of aggression, it may take measures necessary to enforce peace by decisions binding on member states, or by recommendations to members. Failing the Council, the General Assembly may do the same, but by process of recommendation only. A dispute or situation the continuance of which may endanger peace warrants an investigation. If there is a breach of peace or threat to the peace, enforcement action may legally be taken.

The fundamental law of the Charter is found in the twin principles stated in paras. 3 and 4 of Article 2, which have to be read in conjunction with the provisions of Article 33 and 37 concerning pacific settlement of disputes and with reservation of the right to self-defence.

Article 2(3) binds members to settle their international disputes by pacific means, and this obligation is further developed in Articles 33 and 37. They require the parties to any dispute which is likely to endanger the maintenance of peace, to seek peaceful solutions. If they fail to settle it peacefully, it is to be referred to the Security Council.¹⁵

Article 2(4) is the corner-stone of the Charter and reads:

'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 purpose of the United Nations'

Although it seems to be generally accepted that internal disturbances in a country may constitute a situation which the Council is entitled to investigate in the interests of preserving peace, it is clear that Article (2)4 doesn't limit a state's legal right to use armed force for the suppression of internal disturbances. The article also doesn't preclude a state from taking unilaterally economic or other reprisals not involving use of armed force in retaliation for a breach of international law by another state.

Article 51 reserves to members their right of individual or collective self-defence, but this right is confined to limits. Any exercise of the right of self-defence is made subject to the judgement and control of the Council. If the veto is used to prevent the Council from intervening, power of judgement and control can be transferred to the Assembly under the Uniting for Peace Resolution.

The precise scope of the right of self-defence under the law of the Charter is the subject of controversy. Some writers believe that today Article 51 is the exclusive source of the authority to have recourse to self-defence, so that any threat or use of force not falling exactly within its term is automatically a violation of Article 2(4). The other view is that the opening words of Article 51 "nothing in the present Charter shall impair the inherent right of individual or collective self-defence" show a clear intention not to impair the inherent right of states to use force in self-defence, ie. the right of self-defence doesn't originate in the Charter, but is an independent right rooted in general international law.

The drafting of the Charter thus leaves the scope of the right to resort to force in self-defence in some uncertainty. What can be said with confidence is that under the Charter a minimum condition of resort to armed force in self-defence is 'an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment for deliberation.'¹⁶

It is further clear that acts of self-defence must be strictly limited to the needs of defence.

More difficult is the question of the kinds of action to which it is permissible to react by forcible measures of self-protection. In the Corfu Channel case the court drew a sharp distinction between forcible affirmation of legal rights against an expected unlawful attempt to prevent their exercise and forcible redress for rights already violated, the first is accepted as legitimate, the second condemned as illegal. This doesn't mean that a state may resort to force whenever another state threatens to violate its rights, for in its second pronouncement the Court said that respect for territorial sovereignty is essential.

It is only exceptionally that a state is entitled, either by treaty or by custom, to exercise a

right in or through another state's territory. An exercise of rights of passage through territorial waters etc. seems to be within the principle admitted by the Court (Corfu Channel case), but the dispatch of troops to another state's territory to prevent an unlawful expropriation of the property of nationals is outside the principle and is forbidden by Article 2(4) of the Charter.

Throughout its existence the United Nations has shown itself very critical of any forcible action initiated against another state, whatever the pretext, and has been against attempts either to take advantage of the right of self-defence or to claim other measures of self-help. In general the United Nations as a whole has shown itself strongly attached to the law of the Charter regarding the use of force.

However, it's lack of interest in seeing that justice prevails in the settlement of disputes has been disturbing to many.¹⁷

7. Conclusion

Rules of international law governing the use of force by states changed a lot during the past fifty years as community sought to organize itself for collective maintenance of peace and pacific settlement of disputes, but 'Peace is a

coin which has two sides — one is the accordance of the use of force and the other is the creation of conditions of justice. In the long run you cannot expect one without the other.'¹⁸

* Lt G. Conradie is attached to the Military Academy Saldanha.

** This article is one of the deserving entries for the Service Paper Contest for Junior Officers 1980 and was honourably mentioned.

Bibliography

- Brierly J. L.: *The Law of Nations*, Sixth edition, Oxford, 1963
Frankel J.: *International Relations*, Second edition, Oxford University Press, 1976
Holsti R. J.: *International Politics*, Second edition, Prentice-Hall International, London, 1974
International Affairs, Vol 48 No 1, January 1972

Footnotes:

1. Frankel J.: *International Relations*, p. 146
2. Ibele O. H.: *Political Science An Introduction*, p. 536
3. Brierly J. L.: *The Law of Nations*, p. 397.
4. Holsti R. J.: *International Politics*, p. 408
5. *Ibid*, p. 408
6. Brierly J. L.: *The Law of Nations*, p. 395
7. *International Affairs*, p. 49: Draper, G. J. A. D.; *International Law and Armed Conflicts*
8. Brierly J. L.: *The Law of Nations*, pp 339—401
9. Brierly J. L.: *The Law of Nations*, pp. 402—407
10. Ibele O. H.: *Political Science, An Introduction*, p. 540
11. Frankel J.: *International Relations*, p. 153
12. Brierly J. L.: *The Law of Nations*, p 411
13. Ibele, O. H.: *Political Science, An Introduction*, p. 540
14. *Ibid*, p. 541
15. Brierly J. L.: *The Law of Nations*, pp. 413—414
16. Brierly J. L.: *The Law of Nations*, pp. 415—420
17. Brierly J. L.: *The Law of Nations*, pp. 421—432