

THE INTERNATIONAL COURT OF JUSTICE AND ARMED CONFLICT

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I. Introduction

¶ 1 Good afternoon. I will do my best to be as crisp as possible and to communicate my thoughts about the International Court of Justice (“ICJ”) and its role regarding use of force. I intend to cover the law relating to *when* force may be used, not *how* it should be used. So, in that sense my comments supplement what Dan Bethlehem has covered.¹

II. The International Court of Justice and Its Position on the Use of Force

¶ 2 Everyone agrees the ICJ is important. Its role is especially important when it comes to the use of force. Though it rarely makes a statement about the use of force, certainly a ruling about the use of force, when States submit to the ICJ’s jurisdiction and do it deliberately, they abide by what the ICJ tells them to do. It’s almost like night follows day. In addition to that, States and lawyers refer to ICJ rulings repeatedly as guides to their conduct. They don’t always follow the Court’s rulings, but they look at them and they consider them. If they find a decision lacking in logic and practicality, they make a judgment to that effect, and sometimes engage in conduct inconsistent with such a ruling. But that doesn’t mean states—and the U.S. in particular—don’t take those rulings seriously. So, when the ICJ speaks, each occasion is a great opportunity to influence those ends that are served potentially by an ICJ decision—peace, justice, and humanitarian rights.

¶ 3 The Court has in fact carved out a potentially significant role in the area of use of force in international security. I will go through informally a series of points that show where the ICJ has indicated through some ruling or some practice that it intends to keep itself in the game when it comes to use of force decisions.

¶ 4 First, the ICJ has insisted on the right to decide its own jurisdiction. That in itself gives the Court great power to become involved in these kinds of questions. Second, the Court has broadly construed treaties to assume power over use of force situations. The *Oil Platforms* case² is an example: the Court took a Friendship, Commerce, and Navigation treaty and found that even though this treaty did not address

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² *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803 (Dec. 12).

the issue of use of force directly—because the parties used the treaty to engage in commerce and be friends—the preliminary words of the treaty were enough of a ground to take jurisdiction. And this decision was made even though a separate treaty between Iran and the United States—the Agreement of Cooperation of 1959³—actually dealt with the use of force and reserved to each party the right to do whatever it needed to do in its national security interests. So, the Court has shown a willingness, and indeed maybe an eagerness, to construe treaties that are before it broadly to take jurisdiction over use of force issues.

¶ 5 Next, the Court in the *Nicaragua* case broadly construed the concept of customary international law to assume authority over use of force decisions—even where the states involved took reservations from a multi-lateral treaty covering the same area of the law that “customary law” covered.⁴ The Court also has broadly construed its advisory opinion jurisdiction, as it did in the *Nuclear Weapons* case,⁵ to take an active role in deciding the legality of possessing or using nuclear weapons. Furthermore, in the *Lockerbie* case the Court took jurisdiction to decide the legality of Security Council resolutions bearing upon international security as it did in 1998.⁶

¶ 6 In taking jurisdiction over these cases, the Court has disregarded or treated lightly doctrines limiting the ICJ’s power or discretion to avoid political questions.⁷ The Court has swept aside any indication in the earlier jurisprudence of the Permanent Court of International Justice, and in scholarly work, urging the Court to be reluctant to exercise jurisdiction in use of force cases.⁸

¶ 7 In the area of provisional measures, the Court has shown its willingness to assert itself, even in a use of force or security context, or at least to retain the right to assert itself.⁹ This is very significant not only because now provisional measures must be treated as mandatory rules, but because the Court has no tradition of applying the provisional measures doctrine in a manner similar and analogous to the way the U.S. or Britain applies preliminary injunctive law with strong emphasis on likelihood of success. The ICJ in the *Paraguay* case¹⁰ declined even to address the issue of likelihood of success. The language the Court used, and the way the Court went about issuing preliminary relief, explicitly avoided an evaluation of the meaning of the treaty at issue, causing the United States to feel that it could disregard the preliminary order.

¶ 8 The combined effect of these positions (and others) gives the Court a substantial set of opportunities to speak out on use of force issues. Keeping in mind that the Court, while now over fifty-years-old, has only relatively recently become activist on

³ Defense Agreement, Mar. 5, 1959, U.S.-Iran, T.I.A.S. No. 4189.

⁴ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

⁵ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 240 (July 8).

⁶ *Lockerbie (Libya v. U.K.)*, 1992 I.C.J. 3 (Apr. 14); *See Lockerbie (Libya v. U.S.)*, 1998 I.C.J. 115 (Feb. 27).

⁷ *See, e.g., Lockerbie*, 1992 I.C.J. at 3; *Military and Paramilitary Activities*, 1986 I.C.J. at 14.

⁸ Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396, 1413 (1965).

⁹ *See, e.g., Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug. (Serb. & Mont.))*, 1993 I.C.J. 3 (Apr. 8); *Legality of Use of Force (Yug. (Serb. & Mont.) v. Belg.)*, 1999 I.C.J. 124 (June 2).

¹⁰ *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 426 (Apr. 9).

use of force questions, we should expect that in the next twenty-years we will see opinions that will deal with use of force questions that could have a major impact either in terms of articulating principles that are followed by states (and therefore a major impact in shaping the law on conduct of states), or undermining the Court's credibility and status by articulating principles that fail to serve well the practical and conceptual needs of international security.

¶ 9 Therefore, the important jurisdiction that the Court has carved out for itself, based on all the principles that I have just described, is neither good nor bad. Much depends on how the jurisdiction is used. The law on the use of force is in transition and it is unclear whether the ICJ will develop a set of rules that has a positive impact on the world. I find evidence that the Court has started off on the wrong foot and much must be done to improve the chances that the ICJ will play a constructive and meaningful role going forward.

¶ 10 First, the Court's basic approach to the use of force is flawed. International lawyers tend to take a "push button" approach in applying U.N. Charter rules. They look at Article 2.4,¹¹ and conclude that force may not be used without Security Council approval even to advance Charter purposes. They look at Article 51¹² and international lawyers in general and most international decisions that bear on this issue conclude that self-defense may be exercised only in response to an "attack", even though that provision states that nothing in the Charter should be read to limit that "inherent" right.¹³ The push-button approach then leads to the conclusion that, if a particular use of force does not satisfy one of those bases for using force, it's illegal.¹⁴ If it does, then it's legal.

¶ 11 This approach conflicts with the process we know rational human beings really go through when they decide whether to act in a certain manner. People do not appraise the wisdom of conduct by looking at each of the factors and doctrines relevant to that question in isolation. Rather, we consider what evidence there is that bears on whatever the criteria are that we believe should be looked at to determine propriety (including legality). And if on balance we conclude that a strong case exists for using force, we say it should be lawful. If on balance we conclude that it's a weak case on using force, we conclude that force should be prohibited. In this regard, if you look at Article 2.4 of the Charter,¹⁵ it isn't at all something that would justify anyone saying, "This is a clear prohibition on the use of force for any purpose whatsoever." The article is quite complex and parts of it are substantively significant. By that I mean parts of it

¹¹ See U.N. CHARTER art. 2, para. 4. Article 2(4) of the Charter requires all member states to "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." *Id.* An attack on a state "for the purpose of controlling the manner in which it treats some of its nationals, and specifically in order to force it to grant part of that territory broad autonomy, would appear encompassed by this prohibition." Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1 n. 7 (2000).

¹² U.N. CHARTER art. 51.

¹³ Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* 10-11 (1958).

¹⁴ *Id.*

¹⁵ U.N. CHARTER art. 2, para. 4.

signify a preference with a regard to values, and this of course has been anathema in most international law scholarship. The idea that you could use force more justifiably for purpose “A” as opposed to purpose “B” has been something, especially during the Cold War, that has been treated as inappropriate and wrong.

¶ 12 But Article 2.4 at one point refers to the purposes of the Charter as a relevant factor in evaluating the use of force.¹⁶ And we know what the Charter stands for, it’s not a mystery, it’s written there. The Charter stands for human rights. The Charter stands for equal treatment of women and men. The Charter stands for religious freedom. The Charter stands for states not being able to acquire other territory through the use of force. The Charter suggests specific moral and ethical principles, and those principles have in fact been developed in subsequent treaties.

¶ 13 I have argued that the Charter’s language supports the use of force approach of the United States, which is based in part on an early Abe Chayes’ article, in which he called for a “common lawyer” approach to the use of force, and which he wrote while he was Legal Adviser.¹⁷ I have been a big advocate of the early Abe Chayes, though Chayes changed his position after leaving office. I investigated whether other Legal Advisers advocated the “common lawyer” approach while in office, and found a few articles written while they were Legal Advisers advocating the same approach.¹⁸ But most Legal Advisers who served before me never speak up in favor of this approach once they leave office.

¶ 14 Kosovo created a major problem for international lawyers who supported the push-button approach. Those who favored intervening could not secure Security Council approval of a resolution saying that force could be used. Some Security Council resolutions demanded a cessation of the grotesque treatment of 800,000 Muslim Kosovars. But they did not authorize force. Nor could the U.S. justify the use of force on the basis of self-defense, collective or individual. We couldn’t call the flood of three-quarters of a million people coming into the territories of NATO allies an “attack”. They were just people trying to find safety. Finally, the U.S. could not contend on the basis of any respectable doctrine that a decision by NATO was the equivalent of a decision by the Security Council. Clearly it is not.

¶ 15 NATO nonetheless went ahead and stopped the monstrous treatment of the Kosovars. NATO did so, moreover, without giving any legal rationale for its conduct. NATO couldn’t simply create a new category for using force legitimately based on what NATO claimed was lawful. Furthermore, the doctrine of humanitarian intervention had not been accepted broadly as an independent basis for using force in Kosovo. What we were left with was a series of factors that taken together made an overwhelming case for intervening in Kosovo, though no single factor taken alone could have justified the

¹⁶ *Id.*

¹⁷ Chayes, *supra* note 8, at 1396.

¹⁸ *See, e.g.,* Sofaer, *supra* note 11.

action. I went through those factors in an article in the Stanford International Law Journal.¹⁹

¶ 16 First, the Security Council had acted under Chapter 7 of the Charter, and had found that the situation in Kosovo posed a threat to international peace and security. Under the push-button approach, the fact that the Council had found a threat to international peace and security is not merely an insufficient ground in itself for using force, it is worth nothing. Under the push button approach one couldn't consider that action even as a factor to weigh with all the other factors to determine whether to use force.

¶ 17 The same thing was true of other factors that clearly motivated NATO's action. While the doctrine of humanitarian intervention could not be relied upon as an independently acceptable basis for action, the fact is that the humanitarian crisis was triggered by conduct that violated several widely accepted norms incorporated into treaties. These include probably the Genocide Convention,²⁰ certainly the Laws of War,²¹ the Geneva Convention,²² and some other provisions that established that the Yugoslav government was violating international law.

¶ 18 Another factor was that the NATO states unanimously considered the situation a threat to the stability of Europe. Several U.N. Security Council resolutions relating to Yugoslavia had found that Yugoslavia had already violated international law and was violating international law within its territory in its treatment of Muslims. An International Criminal Court had been created, which had jurisdiction over international crimes committed by officials of the Yugoslav government. Thus, even though the Security Council had not authorized the use of force,²³ very strong moral and legal case existed for its use.

¶ 19 Now, what happened? International lawyers in general concluded that what NATO did in Kosovo was illegal by accepted principles, but that it was necessary and morally justifiable. It was necessary and moral, but nonetheless illegal! Most international lawyers concluded that Kosovo should be treated as a particular situation, limited to its special facts. I would be satisfied with that rationale, as long as I could cite what was done in Kosovo in future cases if the same factors once again appeared in another situation. This would represent the common lawyer technique in determining the propriety of using force. This is a process where you're not going to blind yourself to a factor just because it alone does not establish authority to act.

¹⁹ *Id.* at 11-13.

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

²¹ Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 ("Hague Convention").

²² See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; see generally Theodore Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT'L L. 348 (1987).

²³ U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/25704 (1993).

¶ 20 The same limited approach is applied under Article 51.²⁴ The greatest evil of all evils, Professor Louis Henkin wrote in an article based on a debate at the New York City Bar Association,²⁵ is using force, even in self-defense. In the *Nicaragua* case,²⁶ the ICJ interpreted an attack in a way that significantly narrowed the inherent right of self-defense. Anything short of a full-fledged attack, such as providing arms, strategic advice or tactical assistance to a country that was trying to overthrow a government of another country, cannot be considered an attack under Article 51 for purposes of collective self-defense. That served the Soviet Union's purposes very well. They were assisting communist groups and governments around the world in trying to undermine elected governments. So long as they did not engage in an all-out attack, the U.S. and other allies could not use force to counter their efforts.

¶ 21 Under long-accepted traditional principles, what rule should be applied when you have a lesser attack? Well, it would seem that if you have a lesser attack you can only respond in a lesser way; you can only respond with lesser, proportionate measures, individually or collectively. But in *Nicaragua*, the Court created a new category of attacks that denied the collective use of force. It also purported to establish formalistic requirements of notice of requests for cooperative defense that no one had ever heard of,²⁷ and limited collective self-defense to military action on the territory of the state that had been attacked.²⁸

¶ 22 In retrospect, several writers and the former President of the Court, Stephen Schwebel, have concluded that the authority of the *Nicaragua* decision is questionable.²⁹ I agree. That decision certainly has not facilitated the defense of sovereign states or the respectability of international law.

¶ 23 The threat of terrorism has led the U.N. Security Council, at least, to interpret self-defense in a manner that is far more robust than the ICJ's approach. Security Council resolutions adopted after 9/11 did not explicitly authorize the use of force in Afghanistan. But they do say that the U.S. is justified in exercising self-defense, and call on all states to act to assure that the Taliban regime will perform its obligations under

²⁴ U.N. Charter art. 51.

²⁵ Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 573 (1997); see Abraham D. Sofaer, *International Law and the Use of Force*, NAT'L INT. 57, 62 (1988) (citing examples of U.S. military action to protect itself and its allies from perceived attacks); Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 283 (1991) (stating that the United States used force in Panama due to, among other things, physical attacks against U.S. soldiers and civilians).

²⁶ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, para. 19 (Jun. 27) (U.S. argument that Nicaragua supported guerrillas in El Salvador).

²⁷ See *id.* at paras. 36, 215, 254, 279.

²⁸ See *id.* at para. 195.

²⁹ Stephen M. Schwebel, *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, 27 N.Y.U. J. INT'L L. & POL. 731 (1995).

international law.³⁰ Resolution 1373 details, like a statute, the obligations of states vis-à-vis terrorists that operate within their borders.³¹

¶ 24 Many, if not most international lawyers, have reacted to the need to use force in self-defense and in the defense of humanitarian rights by seeking to preserve what they consider the purity of international law. Tom Franck, whom I admire greatly, wrote a little piece in *Foreign Affairs* entitled “Break It, Don’t Fake It.”³² In other words, break international law if you have to, go ahead, but don’t fake it, don’t make up international law to justify your conduct. It would be like people in the 1930’s dealing with Constitutional issues in the U.S. saying “Don’t make up new constitutional law, it’s going to mess up our Constitution. Just break the Constitution, violate the Constitution, with no explanation, and that way we will keep the purity of this rigid Constitution that the pre-New Deal Supreme Court was insisting on applying. Everything will be fine someday when we all return to the purity of the intended words.”

¶ 25 Well, the international legal system should not be immune to the development of moral, workable rules dealing with humanity’s problems going forward. The international lawyers who contend that the military actions in Kosovo and Afghanistan were illegal based their position on their understanding of the purpose of the Charter. How they got that understanding is difficult to understand. Why did the League of Nations collapse? Why did we have that horrendous Second World War? Because we did not use force against the Nazis when we still had an opportunity to stop them. To think that Harry Truman and Franklin Roosevelt and all the other great statesmen that participated in drafting the Charter would have favored narrow interpretations of use of force doctrine in the Charter is baseless. Read what they have written, look at what they did, and you know what kind of people they were.³³ They were determined to bring about freedom, to advance the protection of human rights, to seek to establish justice in the world.

¶ 26 Lawyers, as Dean Acheson said, are not noted for their capacity to make strategic judgments.³⁴ While the use of the criminal law is a proper part of any effort to end international crimes, states have to use force to stop people determined to engage in terrorism or major violations of human rights. The same is true of monsters like Milosevic.³⁵ Criminal prosecution is fine, but to be effective one must sometimes bomb and destroy military factions, in order to save the non-combatants at risk—such as the 800,000 human beings who were being pushed out of Kosovo and treated as cattle as they were driven away from their homes.

³⁰ *Id.*

³¹ U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/RES 1373 (2001).

³² Thomas M. Franck, *Sidelined in Kosovo? Break It, Don't Fake It*, 78 FOREIGN AFF. 116 (1999).

³³ See HARRY S. TRUMAN, THE AUTOBIOGRAPHY OF HARRY S. TRUMAN (Robert H. Ferrell ed., Colorado Associated University Press 1980).

³⁴ See, e.g., John R. Crook, *Dean Acheson and International Law*, 95 AM. SOC’Y INT’L L. PROC. 118 (2001).

³⁵ Slobodan Milosevic, former President, former Yugoslavia.

¶ 27 The bias against the use of force explains many of the most damaging practices and policies of the United Nations over the last decade. The threats, the rhetoric, not followed up by force, have led people, led states, led evil leaders to feel that they can do horrible things to human beings with impunity. Measured uses of force applied early can have a tremendously positive effect on the world and may well be far more morally justifiable than measures like the economic sanctions in Iraq, where hundreds of thousands of people suffered because of Saddam Hussein.

¶ 28 The use of force in Rwanda would have prevented the single most monstrous act of disregard of human suffering that has happened since the Cambodian mass murders. President Clinton went to Africa and apologized to the African people for what he had failed to do. Allowing those people to die without using force to protect them was disgraceful, even though it was clear that acting without Security Council approval to stop that genocide would have violated the Charter.

¶ 29 I will end with this comment. Humanitarian law and the defense of human rights are bound up with the rules governing the use of force. The ICJ's reluctance to embrace human rights stems ultimately from the same moral neutrality in interpreting international law that underlies its use of force attitudes. The use of force is necessary sometimes to preserve life and human rights. So long as some states' area is controlled by thugs, force must be given its proper position in law if human rights are to be taken seriously and made a universal reality.