

LAWS1023 SUMMARY NOTES

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Key:

- General importance
- Cases → principles/key parts of decision
- Legislation
- Readings/Key Points for Essays

For every question, begin by stating the sources of law the ICJ/judicial body may have recourse to per

ICJ Statute Article 38(1):

- International conventions
- Custom
- General legal principles
- As a subsidiary means judicial decisions & writings

12) THE USE OF FORCE

1. GENERAL PROHIBITION ON USE OF FORCE

To regulate force,

- 1st IL holds that there's a paramount obligation not to use force to settle disputes, with only limited exceptions.
- 2nd, IL has at its disposal a procedure allowing international community to use force against those using violence. → "Rules on the unilateral use of force" and the rules of "collective security".

History of the legality of war

- Theory of the "Just War" – "war the continuation of policy"
 - origins in ancient Greece and Rome
 - early Christian ideas
 - developed in Middle Ages
 - entailed notions of just cause and intention, right authority – Augustinian theory
- By 19th century – no limit on right to go to war

Early attempts to limit war

- Hague Peace Conferences of 1899 and 1907
- Convention for the Pacific Settlement of International Disputes (1899 and 1907)
 - States agreed "with a view to obviating as far as possible recourse to force in the relations between States ... to use their best efforts to ensure the pacific settlement of international differences"
- established the Permanent Court of Arbitration
- Third Hague Peace Conference not held
- League of Nations Covenant
 - "Cooling-off" period
 - Recourse to war limited in certain circumstances – Force short of war not restricted
- 1924 Geneva Protocol would have abolished general right to go to war – but not adopted
- Kellogg-Briand Pact (Pact of Paris) 1928
 - "The High Contracting Parties solemnly declare ... that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another"
 - Effect on armed force short of war?
 - Right of self-defence not affected
 - Effect of reference to "national policy"? – Still in force
 - Effectiveness? → Japanese invasion of Manchuria 1931 – Italian invasion of Abyssinia 1934; Second Japan-China war 1937; Second World War 1939

1.1 UN CHARTER & UNILATERAL USE OF FORCE

- Unilateral – when it occurs sans authorisation of a competent international org (eg UNSC) → means use of force can be unilateral even when involving more than 1 state.
- May be superseded, suspended or concurrently run w. collective use of force under mandate of collective security, or when use of force is authorised by competent org.

UN CHARTER

Art 1	<p>The Purposes of the United Nations are:</p> <ul style="list-style-type: none"> • 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; . . .
Art 2(3)	<p>All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.</p> <p>→ Art 2 (4) doesn't permit recovery of disputed territory, this should be settled by peaceful means as per Art 2 (3).</p>
Art 2(4)	<p>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.</p> <ul style="list-style-type: none"> • “a cornerstone of the United Nations Charter” – Armed Activities (DRC v Uganda) (2005) para. 148 • “in their international relations” – only inter-state (not intra-state) force is covered • “against ... any state” – universal application, not just between members • “force” is referred to rather than “war” – broader than the Kellogg-Briand Pact, covers both war and measures short of war • “... against the territorial integrity or political independence of any state” → restricts or enlarges scope of article (words added by Australia at San Francisco 1945 to protect smaller nations) <p>Some argue words should be read literally to allow force where territorial integrity or political independence not impinged ie territory not seized, state not brought under another state's political control, eg:</p> <ul style="list-style-type: none"> ○ where no territory permanently lost → Eg against another state's aircraft or ships only ○ to protect or rescue nationals abroad ○ humanitarian intervention <p>Others read the words as expanding scope of prohibition, to make it as comprehensive as possible</p> <ul style="list-style-type: none"> ○ words “epitomize the total of legal rights” of a state [Brownlie, 1963]

13) Implementation, Enforcement & Accountability

	<ul style="list-style-type: none"> ○ supported by travaux préparatoires of the UN Charter and words “or in any other manner” confirm wider interpretation → <u>This view is more widely regarded as correct, ie that art. 2 (4) is intended to prohibit all use of inter-state force except in self-defence under art. 51 or when authorised by the Security Council</u>
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PROHIBITION ON THE USE OF FORCE IS A PEREMPTORY NORM

- Art 2(4) now regarded as a rule of *jus cogens* where no derogation is permitted – *Nicaragua vs US Case (1986 ICJ)*
 - whereby States resorting to force must overcome legal presumption that their conduct is illegal by proving legitimacy of their actions. If a state’s conduct is described as unlawful instead of just immoral/dangerous may suffer actions by UNSC &/ negative responses of states through sanctions, isolation (eg, Iraq was subjected after invading Kuwait)’
 - → general rejection of use of force means that even if not formally condemned, still can have massive consequences.

What is prohibited?

- Relevant UN Charter articles use different terms:
 - Art. 2(4) – prohibition of “the use of force” →
 - Art. 51 – self-defence against “an armed attack”
 - Art. 39 – Security Council may determine there has been a “threat to the peace, breach of the peace, or act of aggression”
- None of these terms is defined in the Charter
- Several UNGA resolutions aimed at clarifying scope of prohibition:
 - Declaration on Friendly Relations 1970 (Res 2625),
 - Definition of Aggression 1974 (Res 3314),
 - Declaration on the Non-Use of Force 1987 (Res 42/22)
- GA Resolutions are not (generally) legally binding
 - but may be evidence of customary international law these resolutions were adopted by consensus

Customary international law

- The prohibition in art. 2(4) is not only treaty (conventional) law but also CIL
- ICJ in Nicaragua case 1986 (para. 188)

Military & Paramilitary Activities in Nicaragua Case (Nicaragua v United States) [1986] ICJ Rep 14 (Nicaragua Case)

1979–right-wing Nicaraguan Somoza Gov overthrown by left-wing Sandinista Gov. 1981–US took range of measures against new Nicaraguan regime, incl. supporting Contra rebels (guerillas that were fighting to overthrow the new Sandinista Gov) said to violate Art 2(4) of UN Charter

Held: ICJ held it had jurisdiction (due to separate existence of customary and treaty norms, & inapplicability of the [Art 36\(2\)](#) reservation by the US excluding disputes concerning multilateral treaties)

- Principles on the use of force in the UN Charter correspond to CIL – (there exists opinio juris)
 - Note majority of the court didn't believe these principles should grant wider freedom of action than the UN Charter → decision based on belief that UN Charter and CIL here have coincided 100%
- The general rule prohibiting force allows for certain exceptions
 - The inherent R of self-defence in Art 51 of the UN Charter covers both collective and individual self-defence
- The Court expresses no view on the issue of the R of self-defence in situations where an armed attack has not yet occurred and where there is an imminent threat

Armed Attack

- In the case of individual self-defence the exercise of this right is subject to the state being a victim of an armed attack → armed attack must be understood as including not only action by regular armed forces across an international border, but also the sending by or behalf of a state of armed bands, groups, irregulars or mercenaries → [Sending by a state of armed bands to the territory of another state is an armed attack if the operation bc of its scale and effects would've been classified as an armed attack if carried out by regular forces](#)
- [Assistance to rebels in form of the provision of weapons or logistical or other support doesn't amount to armed attack](#) (but may amount to the threat or use of force, or to intervention in internal affairs of another state)
- There's no rule allowing the exercise of collective self-defence in the absence of a request by the state which regards itself as the victim of an armed attack, and a declaration by the attacked state

Non-Intervention

- The customary principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference
- Principle of non-intervention forbids states from intervening directly or indirectly in internal/external affairs of others (such as choice of a political, economic, social and cultural system and formulation of foreign policy)
- Coercion is obvious when force is used, but can also be found in intervention involving indirect forms of support for subversive or terrorist armed attacks within another state
- [Laying of mines by the US in Nicaraguan ports, and certain attacks in Nicaraguan ports, were infringements of the prohibition on the use of force; US military manoeuvres near the Nicaraguan borders not a threat or use of force contrary to the prohibition](#)
- US also committed a breach of the prohibition on the use of force by assistance to the Contra rebels in Nicaragua through arming and training contras; this is not the case with respect to all support the US gave them (mere supply of funds, while an act of intervention, not a use of force)
- Was the US exercising right of collective self-defence by going to the aid of El Salvador, Honduras or Costa Rica? No, these states were not subject to armed attacks (nor did states at relevant time declare

themselves attacked and made requests for assistance), and even if US acting in self-defence its response was not necessary or proportionate

T. Franck – Who killed Art (2)(4) (1970)

- Art 2(4) short lived due to UNSC's shortfalls → it's reliance on assent of 9 members to act, including affirmative votes of big 5 has inhibited capacity to discharge its responsibility as UN's key PK organ, such that Chapter VII was overrun by use of exceptions of Art 51, 51 & 53 which transformed the system and reduced capacity of UN framework
- Art 51 – seems limited, but its simplicity is misleading given, the increasing resort to self-defence highlighting the failure of UN enforcement machinery. → also very hard to determine when both parties are saying they're using force in 'self-defence'
- Further key issue is that nature of warfare is changing bypassing the 'simplicity' of self-defence in the Charter. Either is a war of agitation, infiltration & subversion through proxy through national liberation movements or nuclear wars.
- The ambiguity of Art 2 (4) has meant it has been taken advantage of to enlarge the exceptions to the point of virtually repealing the rule itself
- Role of regional organisations also significant, whereby Art 52 & 53 have been taken to legitimise use of force by regional orgs in their collective self-interest.
- "prohibition against use of force eroded beyond recognition by:
 - 1, the rise of wars of 'national liberation';
 - 2, the rising threat of wars of total destruction;
 - 3, the increasing authoritarianism of regional systems dominated by a super-Power. These three factors may, however, be traced back to a single circumstance: the lack of congruence between the international legal norm of Article 2(4) and the perceived national interest of states, especially the super-Powers.

L. Henkin, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated'

- Shouldn't judge vitality of the law by just looking at its failures. Need to recognise that Art 2(4) has still succeeded and deterred violation, with deterrence being hard to measure. Also note traditional war is far less frequent now – this is what it was primarily intended for.
- Attributing lack of war to other factors like changing nature of war, greater territorial stability, changes in national interests, etc... → but must note law can reflect such dispositions to behaviour like this → states no longer feel as if they can jump to war straight away.
- Note that pre-emptive war by 'anticipatory self-defense' has been hypothesised by many professors but few govts, with the 'regional loophole' mentioned above not fatal as was said.
- There is no suggestion that Art 2 (4) has strayed from national interest since its creation. Need citizens, policy-makers, national societies, transnational and international bodies to be reminded that this law is indeed in the national interest of all nations; that a decision to initiate force always involves a preference for one national interest over another; that in the cost-accounting of national interest a decision to go to war grossly depreciates the tangible cost to the citizen—in life, in welfare, in aspiration—and usually prefers the immediate and short-sighted to the longer, deeper national interest.

What happens now? The UN after Iraq – Who Killed Art 2(4) Again?

13) Implementation, Enforcement & Accountability

- All that has changed since last article is that we now have on offer proposed models for interstate relations that seem even worse than the dilapidated system to which, by 1970, state misbehavior had reduced the postwar world.
- While a few government lawyers still go through the motions of asserting that the invasion of Iraq was justified by our inherent right of self-defense, or represented a collective measure authorized by the Security Council under Chapter VII of the Charter, the leaders of America no longer much bother with such legal niceties. Instead, they boldly proclaim a new policy that openly repudiates the Article 2(4) obligation. What is remarkable is that once- obligatory efforts by the aggressor to make a serious effort to stretch law to legitimate state action have given way to a drive to repeal law altogether, replacing it with a principle derived from the Athenians at Melos: 'the strong do what they can and the weak suffer what they must'.

Declaration on Friendly Relations 1970 (GA Res 2625)

- Principle 1, "The principle that States 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"
- Duty to refrain from:
 - "the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."
 - "organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State"
 - "organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts ... involve a threat or use of force"
- Declaration reflects customary international law: Nicaragua v US (1986) paras. 188, 191; Armed Activities (2005) paras. 162, 300

Resolution on the Definition of Aggression 1974 (GA Res 3314)

- "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 United Nations, as set out in this Definition" (art.1) threatens political independence and territorial integrity.
- "Any of the following acts ... qualify as an act of aggression" (art. 3):
 - invasion, attack, occupation, annexation, bombardment, or blockade of another state by armed forces allowing territory to be used for perpetrating aggression against a third state
- "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [the above acts], or its substantial involvement therein"
- [see Definition for full list – not exhaustive]

13) Implementation, Enforcement & Accountability

- The Resolution has been picked up and referred to as the basis for individual criminal responsibility for the crime of aggression in Article 8 bis of the Statute of the ICC (inserted in June 2010 at the Kampala review conference)
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- Reflects customary international law: Nicaragua v US (1986) para. 195; Armed Activities (2005) para. 146

Declaration on the Non-Use of Force 1987 (Res 42/22)

- The principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance.
- No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

WHAT IS THE USE OF FORCE AND THE THREAT OF FORCE?

USE OF FORCE	THREAT OF FORCE
<ul style="list-style-type: none"> • The use, by one state against another, of armed force (not political or economic pressure) – including: • Direct armed force – eg invasion, missile attack, laying mines – Indirect armed force – eg: sending “armed bands” into another state’s territory – Nicaragua (1986), paras. 195, 247 • “actively extending military, logistic, economic and financial support to irregular forces” – Armed Activities 2005 (DRC v Uganda) paras. 161-165 • providing weapons, logistical or other support to armed insurgents in another state – Nicaragua (1986), paras. 195, 205, 247, 251 • but not “mere supply of funds” to irregular forces – Nicaragua (1986), para. 228 	<ul style="list-style-type: none"> • Where use of force would be illegal, then threat is too – Nuclear Weapons case (para. 47): <ul style="list-style-type: none"> ◦ Eg an ultimatum – threat to attack a state if it does not comply with a demand • US military manoeuvres near the Nicaraguan border were held not to constitute a threat of force (Nicaragua case (Merits) para. 227) • But eg UK argued Iraqi artillery and tanks pointed at Kuwait 1994 were a threat

CLASSIFYING CONFLICT

- Int. conflict subject to IL rules on UoF whereas internal conflicts aren't.
- Principles on UoF can also be distinguished from IHL → regulates conduct of hostilities. Also need to distinguish btw the UoF & other law enforcement activities
 - ie, **Guyana v Suriname, Arbitral Award, 17 September 2007** – determination of whether intimidating approach of 2 navy vessels at an oil drilling rig licensed by Guyana was a

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'reasonable & proportionate law enforcement' measure or threat of military action. While it was recognised that force could be used in law enforcement activities here the action was more closer to threat of military action & 'thus constituted a threat of the UoF contravening Law of the Sea Convention, the UN Charter and general international law

EXCEPTIONS TO ARTICLE 2(4)

- Exceptions to the prohibition
- Self-defence under art. 51

Art 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 UN, until the UNSC 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 & security.
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- Collective security under Chapter VII

1. SELF-DEFENCE

2.1 INDIVIDUAL SELF-DEFENCE

- One contemporary definition of self-defence: The right of a state to "defend itself against an attack, to repel the attackers and expel them from its territory" (Oppenheim 1996, 417- 418)
- **Art. 51 UN Charter:** (only can invoke R on a temporary basis until UNSC can act)
 - 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 UNSC 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 only express exception in the charter to prohibition on unilateral use of military force w/o UN authorisation
 - Reference to the "inherent right" of self-defence – taken to refer to CIL