

## New Zealand and the Use of Force

For most of the five millennia of political history, societies have felt free to use force against other groups. The 'free market of war' continued from the early conquerors (Sargon, Cyrus, Alexander) to the modern (Cortez, Napoleon, Hitler).

'War' and 'aggression' were seen as neither lawful nor unlawful – simply a fact of life. The only constraint recognised was that of moral force derived from theological sources – the 'just war' theories in Hindu, Jewish, Buddhist, Greco-Roman, Christian and Islamic thought. These laid down criteria for when it was justifiable to resort to arms.

The early attempts to prevent war were essentially political – the shifting alliances and balance-of-power system in Europe from the 17th to the 19th centuries. But even then, there was no legal constraint.

The idea that 'war' and 'aggression' should be unlawful was introduced in the League of Nations Covenant in 1919. States were to settle their disputes by means of pacific settlement (conflict resolution) and judicial settlement (international courts). But although 'war' was circumscribed, it was not rendered totally illegal – a State could, after all efforts at settlement had failed, take up arms after three months notice. And the institutional means of enforcement were weak – the veto was available for all States; and providing military assistance to the victim State was optional.

The UN Charter of 1945, which remains the constitutional framework of international relations today, has significantly advanced matters. Strictly, no country today can resort to 'war'. The use of force is legally permissible only in two situations. A State may respond to armed attack in (individual or collective) self-defence; and the Security Council may authorise force to maintain or restore peace and security in three situations. These are in response to aggression or a breach of the peace; or if it judges a threat to peace exists. All other uses of force by a government internationally are contrary to the UN Charter, and illegal.

Some maintain that, under customary international law, the use of force may be wider than those treaty provisions. But most jurists agree that the use of force under customary international law is now confined to the extent to which it is reflected in the UN Charter.

The institutional means of enforcing this total proscription on the use of force are stronger than under the League, but still not strong enough to be completely effective. The right of veto held by the five permanent members of the Council (US, UK, France, Russia, China – the P-5) is a serious weakness of the UN. It prevents public action being taken both in a proactive and reactive sense as the political interests of the P-5 are almost always likely to be infringed through any action taken by the Council. So while a decision of the Council under the 'use of force' chapter (Chapter VII) is legally binding on all countries, there is considerable difficulty in reaching that point of agreement.

The continuing weaknesses of the UN Charter system are:

- (i) There remains scope for disagreement over interpretation of the Charter provisions, with no automatic recourse to judicial rulings, and no strong political disposition to seek them;
- (ii) There is no standing UN force that could respond quickly and effectively to aggression. And some countries continue to be reluctant to commit their own troops to UN peacekeeping – 'dying for your country' continues to be the ultimate patriotic act, rather than for humankind;
- (iii) It remains unresolved whether 'aggression' is simply a responsibility of a country (which cannot be taken to court) or an individual crime by its leaders (who might be). And whether, if it is a leadership crime, the Prosecutor of the International Criminal Court (ICC) should be one of the entities empowered to bring a prosecution (e. g. against a president or a prime minister).
- (iv) 'Aggression' still has no legally-binding definition, even though the General Assembly agreed on a non-binding definition in 1974.

The ICC statute, which entered into force in 2002, makes it an individual crime in international law to commit genocide, a war crime, or a crime against humanity. Each of these is defined in law. The statute

includes a fourth crime ('aggression') but this will not become operative until the parties agree on a definition and on the jurisdictional relationship between the Security Council and the ICC.

Notwithstanding the difficulties faced in reaching consensus within the Security Council, it is clear that a global society is emerging and international law is strengthening. Yet traditionally countries have tended to perceive international law as a thin fabric covering national sovereignty that can be cast off when circumstances require it. This needs to change. What is essential now is that every country abides strictly by international law today. No country has a perfect record in that respect – including Western countries and including New Zealand.

New Zealand should intensify its own efforts to ensure that it is abiding strictly by its international legal obligations. To that end, I believe that the following measures should be introduced, namely::

- (i) a Legal Memorandum should be tabled before the NZ Parliament, in advance of any deployment of NZ armed forces overseas, affirming the compatibility of such action with our obligations under international law, and in particular with the UN Charter.
- (ii) No NZ troop deployment overseas or use of NZ armed forces overseas (air, naval, ground) should be undertaken unless and until a government proposal to that effect
  - (a) is judged to be compatible with international law as in (i) above, and
  - (b) has the endorsement of Parliament.

Other background papers I have posted on this blog explore the legal merits of some of New Zealand's foreign policy commitments – past and present. The aim of these 'legal backgrounders' is not to imply that the specific legal judgements entered here are infallible, but rather to stress the possibility, and the critical importance, of countries making such legal judgements publicly transparent before any political decision to use armed force is taken.

The issues explored for their legal merits are:

Legal Backgrounders

1. NZ and Suez (1956)
2. NZ and Iraq (1990-2001; 2002-2008)
3. NZ and Afghanistan (2001-8)

***Disclaimer on the Legal Background Papers:***

The judgements entered in the legal backgrounders are solely the combined views of me and my Canterbury Law School and Green Party colleague, Dr. Chris Gallavin.

The Green Party has a specific policy in favour of strengthening international law and believes that New Zealand should generally respect its binding legal obligations. There naturally exists scope for different political judgements on sensitive issues such as those covered above. The legal judgements entered in these papers, however, are, in the opinion of the two authors, of self-evident force.