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IS THE U.S. PRACTICE OF USING FORCE CHANGING INTERNATIONAL LAW?

BY MARCELO G. KOHEN

In a surprise opinion piece published in the *New York Times* ("How War Left the Law Behind," Nov. 21), Michael J. Glennon, a professor of law at the Fletcher School of Law and Diplomacy, argued that the U.N. Charter's prohibition of the use of force was no longer binding on states, given the practice of the United States and other states to violate it over the past couple of decades. Owing to this practice, Glennon wrote: "The United States is therefore correct: it would not be unlawful to attack Iraq, even without Security Council approval."

This is not only a radical assertion about international law, lacking as it does a solid foundation in legal reasoning, but if it is taken seriously in the United States, it could throw the world back to a world order of might is right with even fewer

constraints on the inclination of the United States to use its military power.

U.S. FORCE AND THE U.N. CHARTER

Almost since the founding of the United Nations, tension has existed, on one hand, between U.S. military power and its proclivity to use it, and, on the other, the U.N. Charter's prohibition on force, except in self-defense.

Over this period, many American presidents and Congresses have construed numerous controversial conflicts as constituting an "armed attack" on the United States, leading in many of these instances to a U.S. invocation of a right to resort to force in self-defense. While "armed attack" in the U.N. Charter means a sustained military attack on a state's borders, and "self-defense" means any necessary, immediate, and proportionate response to such an attack to expel it, the United States has broadened the concept of force-authorizing self-defense over the past several decades to include real or imagined attacks on its naval vessels (Gulf of Tonkin, 1965), medical students (Grenada, 1983), naval aviators (Libya, 1984), hemispheric interests (Nicaragua, 1980s), drug policies (Panama, 1989), and former presidents (Iraq, 1993), to list a few examples. In none of these cases did the United States suffer an "armed attack" under international law, nor did the United States seek or receive Security Council authorization to use force.

NO IMPLIED SECURITY COUNCIL AUTHORIZATION

Nor do the legal theories that have been advanced by the United States over the past decade, asserting indefinite or implied Security Council authorization to patrol no-fly zones in northern and southern Iraq and to bomb Iraqi targets, have any justification in U.N. Security Council resolutions over the same period. Resolution 687 (1991) declared a ceasefire in the 1991 Gulf War, thereby terminating the authorization to use force against Iraq provided by the Security Council in Resolution 678 (1990). Resolution 687 also established a new legal regime with respect to Iraq, including the peaceful demilitarization of that country's weapons of mass destruction. Security Council Resolution 1441, passed on Oct. 13, 2002, continues the effort to demilitarize Iraq, not to invade it. Thus, unless the Security Council specifically authorizes military action against Iraq in a later resolution, a U.S. invasion of Iraq would violate the U.N. Charter.

While there has been generally little opposition in the international community to the United States using limited force in northern and southern Iraq to enforce no-fly zones, there was substantial international criticism of the U.S. military campaigns in Vietnam, and of the Grenada, Libya, Nicaragua, and Panama campaigns in the 1980s, and there is substantial criticism and opposition internationally today of the current American threats to invade Iraq without Security Council authorization. Likewise, very few countries recognize the validity of U.S. and British assertions with respect to any implied Security Council authority to invade Iraq, and numerous U.N. member states have specifically stated that the United States must acquire Security Council authorization prior to attacking Iraq. Thus, overall, it appears that Mr. Glennon overstated the case when he argued in the *Times* that "It is hard to avoid the conclusion that the Charter provisions governing use of force are simply no longer regarded as binding international law."

In recent years, it is true that a supportive attitude on the part of the international community toward the American understanding of the use of force against terrorism can be discerned, and few states opposed the U.S. armed action in Afghanistan as being contrary to the obligations emanating from the Charter and general international law. In fact, while the Americans received considerable political support for the use of force in Afghanistan, from a legal point of view there was considerable ambiguity with respect to the American campaign in that country. This being the case, does this mean that the international community recognized the *legality* of the U.S. armed action in Afghanistan, or that it revealed any intent to acquiesce as a general rule to overriding the U.N. Charter and its prohibition on the use of force by states? In order to prove such acquiescence, there must be a "consistent and undeviating attitude," a "clear," "definite," and "unequivocal" course of action, showing "clearly and consistently evinced acceptance," to use the words of the International Court of Justice on different occasions.

Traditionally, the U.K. and Israel share much the same legal approach as the United States on the use of force. The radical innovation in this field is that, with the Kosovo crisis, and furthermore after the terrorist attacks of Sept. 11, some American allies who had been generally reluctant to adopt broad interpretations of legal uses of force (France, for example), ended up bowing to the American stance. The new threat of the use of force against Iraq by the present American administration, however, is reversing this tendency. Among the permanent members of the Security Council, only the British government supports the American view. A considerable number of states belonging to all regions of the world, including close allies, such as France and Germany, are opposed to a unilateral resort to force against Iraq.

NO CONSENSUS TO ABOLISH PROHIBITION ON FORCE

The main issue at stake here is nothing less than the whole perspective of international law. Can such a fundamental norm as the prohibition of the use of force be modified by the kind of state practice demonstrated, for example, by the United States in recent decades? In order to affirm that it can, it needs to be demonstrated that a large and representative majority of states agree with the American practice over these

years. Viewed overall, it is clear that there is no consensus within the international community to follow the Americans in abolishing the prohibition on force as matter of practice or policy.

Furthermore, there are many possible reasons why states may neglect to condemn actual or threatened illegal uses of force by the United States, and these reasons may not necessarily be founded on legal considerations. Even in cases where there is a lack of condemnation of an illegal use of force by the international community, it would be difficult to argue that this situation is tantamount to a change either in existing rules or in their interpretation. States may decide not to oppose a breach of international law; this doesn't necessarily mean, however, they believe the wrongdoer behaved in a proper manner, or even less, that the illegal conduct led to a change in the existing rules. Also, while some states have not opposed the exercise of American military power in recent years, few if any of these states have expressed support for the legal or political implications of abandoning the prohibition on force.

The broad American interpretation of U.N. Charter Article 51, in seeking to enlarge the permissible scope of self-defense, is tantamount to curtailing at the same time both the Charter's prohibition on force and the authority of the Security Council to authorize it. In short, adoption of the American interpretation of self-defense would lead ultimately to the consecration of the supremacy of power over law.

One should also recall what the Nuremberg International Military Tribunal stated in this respect half-a-century ago: "Whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." A look at state practice since then shows that such practices do little more than defy the ordinary meaning of the related norms, and are contrary to their object and purpose. They have failed to be generally accepted and remain unilateral, in spite of some *ad hoc* circumstantial instances.

Glennon's view of the Charter's prohibition on force is not new. In fact, it has been declared dead many times since 1945. (See, Thomas M. Franck, "Who Killed Article 2(4)?," 64 *AJIL* 809 (1970)). Despite all the violations, Article 2(4) nevertheless is alive, including for the reasons given by the International Court of Justice in its celebrated paragraph 186 in its judgment on the merits in the *Nicaragua* case (1986):

> If a state acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

Another probably stronger reason is the fact that the prohibition on the use of force embodied in the U.N. Charter is still considered by the international community as the highest achievement in international law after the catastrophe of 1939-1945. To produce a change in the content of a peremptory norm of international law is not an easy task. In order to effect such a change, one needs more than a simple absence of criticism with regard to some violations of the relevant rule. As stated by Article 53 of the Vienna Convention on the Law of Treaties:

> A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

At this stage, it is difficult to deny the *ius cogens* character of the rule embodied in Article 2(4), with its exception recognized in Article 51. Even taking into account some differences of opinion in the international community, it is difficult to assert that a new peremptory rule recognizing an enlargement of the notion of self-defense or any new exception to the general prohibition of the threat or use of force in international relations has emerged. Or even less, Glennon's assertion that the general prohibition of the use of force does not exist any more, and that the United States would be justified —by virtue for the most part of its historical record of violating the prohibition—to invade Iraq without Security Council authorization.

Marcelo Kohen, a member of the editorial board of *World Editorial & International Law,* is a professor of international law at the Graduate Institute of International Studies in Geneva, Switzerland.