Use of force and war

Use of force

Treaty on Non-use of Force in International Relations. Australian views.
Following is a statement by the Legal Adviser, Mr E Lauterpacht QC, in the Sixth Committee of the United Nations General Assembly on 22 November 1976:[79]

> Many will no doubt share the surprise of my delegation that, despite the recognition by the Assembly of the need for legal consideration of the matter, this resolution should have been adopted before examination of the item in this Committee. However, the resolution is a *fait accompli* and the instructions given to us now are to consider the legal implications of the item and to report to the Assembly as early as possible and before the end of this session. My delegation proposes, therefore, to comply with this instruction without prejudice to our freedom to comment further in writing, pursuant to the resolution, should we feel in the light of subsequent debate here that there is anything more that we can usefully add.
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> It is important to preface our analysis of the legal implications of the item by declaring in clear and unequivocal terms Australia's own commitment to the avoidance of the use of force in international relations and to the obligation to settle disputes by peaceful means. This is a restatement of political principle as well as of legal obligation. We reiterate, as the controlling element in the determination of relevant aspects of our foreign policy, our absolute and unqualified adherence to the terms of Article 2(4) of the Charter.
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> Perhaps the most convenient way of approaching the legal implications of the draft Treaty will be to scrutinise carefully the wording it employs.
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> At this stage in our work, it is not necessary to examine the preamble and we can pass straight to the operative provisions.
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> Article 1, paragraph 1, is divided into two sub-paragraphs. The first provides:
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> > 'The Contracting Parties shall strictly abide by their undertaking not to use in their mutual relations, or in their international relations in general, force or the threat of force against the territorial integrity and political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.'
>
> Those words resemble, but are not identical with, Article 2(4) of the Charter. The differences must be noted.
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> First, the proposal adds to the words of Article 2(4) of the Charter the phrase: 'The Contracting Parties shall strictly abide by their undertaking . . . '. So far as the Australian delegation is aware, it has

79. Text supplied by the Department of Foreign Affairs, Canberra.

never been suggested that the words of Article 2(4) of the Charter do not themselves constitute an undertaking by which Members are required strictly to abide. If there can be any doubt about the efficacy of the basic undertaking in Article 2(4), what additional legal merit can a fresh undertaking have? Surely the words of the reinforcement will have no greater value than the Charter. If the words of the Charter require reinforcement, then so will the words of the reinforcement. If the reinforcement does not, then the Charter does not. And if the reinforcement requires reinforcement, then what use is it unless accompanied by an infinity of recorded repetitions. The logic of the law is quite inescapable. Once an obligation has been clearly stated then, so far as it goes, it is a perfect obligation; there is no need for or value in mere restatement. There can be merit in restatement only if either (a) the original obligation has been eroded by time, disregard or change of circumstances, or (b) the apparent restatement of the obligation is in fact something more than a restatement and introduces either some new concept or amends the language or ideas associated with the old statement.

As to the first possibility (of erosion), it is clear beyond doubt that one principle of the Charter which remains as much in force today as it was when originally written is the prohibition of the use of force contained in Article 2(4). Its terms underlie the content of too many resolutions of the General Assembly and the Security Council to warrant repetition here.

The second possibility, that the proposed restatement involves something different from Article 2(4), requires closer scrutiny.

The first variation in language is replacement of the words 'shall refrain' by the words 'undertaking not to use'. In English there is probably no effective difference between these two expressions, but one is bound to ask why a change in language has been made.

The second variation is this: In Article 2(4) the Members undertake to refrain 'in their international relations' from the threat or use of force. In the new text they are asked to undertake 'not to use in their mutual relations, or in their international relations in general, force or the threat of force'. In substance there appears to be no operative difference between 'in their international relations'—a comprehensive expression—and the longer phrase 'in their mutual relations, or in their international relations in general', which simply is a more wordy way of spelling out the original obligation. The new words suggested do not in themselves appear to be objectionable. But again one is bound to ask for an explanation of the change in wording.

The third variation is that the Charter prohibits 'the threat or use of force'. The new proposal prohibits 'force or the threat of force'. Once again there is no substantive difference—but why is the change in wording necessary? It may be noted incidentally that the same variation does not occur in the French text. Both the Charter and the draft treaty use the phrase '*à la menace ou à l'emploi de la force*'.

These differences in the way in which the various translations reflect the authentic language of the Charter themselves indicate how important it is that the draft text be subjected to the closest scrutiny by those whose business it is to concern themselves with legal instruments.

In short, the first paragraph of Article I of the proposed draft possesses the following characteristics:

(1) It opens with an undertaking to comply with an existing and fully operative obligation.

(2) It expresses the operative undertaking in words which are similar to but not identical with the words of the original undertaking and contains no explanation of why the variation was thought necessary.

The second sub-paragraph of paragraph 1 of Article I gives rise to a different kind of question. It provides: 'They shall accordingly refrain from the use of armed forces involving any types of weapons, including nuclear or other types of weapons of mass destruction, on land, in the sea, in the air or in outer space, and shall not threaten such use.'

Our first comment is this: the sub-paragraph is expressed in terms indicating that its content follows logically as the consequence of the restatement in sub-paragraph 1 of the prohibition of recourse to force. However, it is evident that this content (whatever it may mean exactly—and it is far from clear) cannot be the only consequence of the prohibition of the use of force. One is, therefore, left asking why this set of consequences—which is not specified in the Charter—was introduced; and other consequences were not. This is a point to which I shall revert later.

A second comment relates to the substantive content of the proposed consequences. The provision refers to 'armed forces'. This may or may not be a mistranslation. It probably is not, because the French translation also speaks of '*forces armées*', in the plural. In that case, the whole structure of the proposal is distorted since 'armed forces', ie personnel, do not in grammatical terms 'involve' types of weapons. If, as may be the case, the intention was to speak of 'armed force' (in the singular) then what follows is so broad and general as to be either meaningless or so broad, in terms of a supposed restatement of Charter obligations, as to require the most careful consideration. Another possibility is that 'involving' is not the right verb. The French translation uses the expression '*dotées de*'.

We are, in effect, being told in the first sub-paragraph that Parties shall refrain from the use of force. Then in this sub-paragraph we are told they shall accordingly refrain from the use of armed force. By itself this proposition is entirely repetitious and therefore unnecessary. However, it is amplified by the additional qualification, namely, 'involving any types of weapons'. Clearly, if the use of force is prohibited, then the use of force involving any types of weapons,

must be prohibited—and there is, consequently, no need to insert this extra detail.

However, a further difficulty arises from the elaboration of the concept of 'any types of weapons' by the parenthetic phrase 'including nuclear and other types of weapons of mass destruction'. Again, if force is prohibited then the use of any forcible weapon is prohibited. But some may read into this additional phrase an attempt to secure a formal and absolute treaty prohibition of the use of nuclear or other types of weapons of mass destruction. If this is what is intended, it clearly goes beyond the present terms of the Charter. It will thus raise issues of great complexity and delicacy.

The fact that one cannot immediately rally to such a proposal does not in any way mean that one thereby dissents from the prohibition or limitation of the use of nuclear weapons or weapons of mass destruction. The proposal—though laudable in general terms—will require considerable thought and elaboration. Moreover, it will need to be related closely to other moves in the field of arms limitation and disarmament. Hence, the appearance in bald form of such a proposal in the context of the Soviet draft cannot be read as giving its proponent any moral superiority over those who, recalling the complex history of past negotiations on such matters, suggest that the solution is not so simple as it is here presented.

The third paragraph of Article I contains the agreement of the Parties 'not to assist, encourage or induce any States or group of States to use force or the threat of force in violation of the provisions of this Treaty'. This clearly makes sense as one of the logical consequences of the basic prohibition of the use of force. But it does not appear in the basic Charter obligation. One is again bound to ask why this consequence alone should be spelled out. Also one must ask why it is that this consequence is limited in its scope to 'States or groups of States'. The possibility exists—and we are all aware of it—that organisations which do not possess Statehood may be assisted, encouraged or induced by States to use force. There is no reason why Parties should be freer to assist, encourage and induce such organisations than they are to assist, encourage and induce States. By adopting language of the kind here proposed one would impliedly be licensing the use of subversive non-Statal elements as instruments for the use of force.

The third paragraph of Article I provides that 'No consideration may be adduced to justify resort to the threat or use of force in violation of the obligations assumed under this Treaty'. Again, these words do not appear in the Charter. Indeed, they clearly run counter to the Charter in failing to reflect the terms of the vitally important qualification of the prohibition of the use of force which appears in Article 51 of the Charter—that nothing impairs the inherent right of individual and collective self-defence.

It may be answered, in reply to this comment, that Article III of the

draft Treaty provides that 'Nothing in this Treaty shall affect the rights and obligations of States under the United Nations Charter', and that this imports the effect of Article 51 without the need to restate it. In that case, one may properly observe that if Article 51 of the Charter can operate without restatement of its content, so can Article 2(4). To put the point the other way round: if there is going to be some repetition of the Charter, there must be clear and comprehensive repetition of all associated parts of the Charter. And if there is going to be amendment of the Charter obligations in certain respects, then these changes and their precise scope must be identified and justified, so that they can be fully considered. So far there has been no such clear identification and justification.

Having thus reached the end of those comments on Article I it is hardly necessary to develop our point further by extending the same process to Article II, the only other apparently substantive Article in the draft Treaty. But in view of Australia's known interest in the question of peaceful settlement of disputes, we cannot entirely overlook a provision which reaffirms the basic Charter undertaking in Articles 2(3) and 33 to settle disputes by peaceful means. Naturally we applaud the sentiments (I emphasise 'the sentiments') which lead States to recognise and repeat in general terms their commitment to the peaceful settlement of disputes. But recognition and repetition of the general obligation by itself is not enough. We all know that, unless backed up by undertakings with more specific content, the general obligation is in real terms virtually without worth. To call for repetition of it at this stage in the history of the Charter may, indeed, even be retrogressive, if it tends to further the illusion that general platitudes on peaceful settlement have some value. In truth, they have no value; and we should not mislead ourselves and others into thinking that they have. Australia can properly speak on this subject. We have accepted the compulsory jurisdiction of the International Court of Justice in comprehensive and unrestricted terms. If the Soviet Government were to amend its draft so as to incorporate an immediately effective and binding undertaking to accept the jurisdiction of the International Court of Justice, or of a system of arbitration and conciliation, without the need for special agreement, we would recognise in such a step an indication of genuine progress. In the absence of such steps we do not regard ourselves as in the presence of a worthwhile proposal. Nonetheless, if it should be the intention of the present proposal on peaceful settlement thereby to initiate a constructive debate on the subject, we for our part are ready to draw upon the experience of various United Nations organs and specialised agencies and to join in a detailed consideration of those modes of dispute settlement which fall short of compulsory judicial determination but which, nevertheless, go further than the present vagueness and emptiness of Articles 2(3) and 33. Only in this way can we escape from the limitation of the present situation.

It is not necessary for me to pursue further now this analysis of the draft Treaty. But a few minutes ago I asked, in relation especially to sub-paragraph 2 of paragraph 1 of Article I, why it was that this one particular consequence of the prohibition of the use of force had been identified and so many others had been ignored. To appreciate the significance of this question, one must recall that the draft Treaty now before us has not been produced in a historical vacuum. Indeed the proposer of the Treaty reminds us of this. The Soviet explanatory memorandum (UN Doc A/31/243) recalls that 'the principle of the non-use of force is embodied in many important documents adopted by the United Nations in recent years'. It cites as examples the definition of aggression, the declarations on strengthening international security and on the principles of international law concerning friendly relations and co-operation among States in accordance with the United Nations Charter, and the General Assembly resolution on the non-use of force in international relations. But when one casts one's eye across these documents one finds that they do not limit themselves to the simple reassertion of the principle of the non-use of force in general terms. The development of this principle has now reached a level of some sophistication.

One may with advantage look in particular at the most detailed of these documents—the one which embodies virtually all the elaborations of the principle of the non-use of force included in other resolutions. This is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)). This secured so wide a degree of acceptance in 1970 that it was adopted without a vote. In the section of this Resolution which proclaims the principle of the non-use of force in the basic language of Article 2(4) of the Charter, we find a statement of the consequences of this principle. This contains the following points: a war of aggression is a crime against the peace giving rise to international responsibility; States have a duty to refrain from propaganda for wars of aggression; force must not be used to violate international boundaries or lines of demarcation, or as a means of solving territorial and frontier disputes; States must refrain from reprisals involving the use of force; they must refrain also from the use of force depriving people of their right to self-determination; nor may States organise irregular forces to enter the territory of other States or participate in acts of civil strife or terrorist activities in another State; State territory shall not be the object of military occupation resulting from the use of force, nor may territory be acquired as a result of the use of force; and, finally, nothing in these points is to be construed as enlarging or diminishing the scope of the Charter provisions concerning cases in which the use of force is lawful.

This is a significant indication of items which in the relatively recent

past have been associated by the General Assembly with the restatement of the principle of the non-use of force. Nor should we forget the preambular paragraph in the resolution on the non-use of force adopted on Soviet initiative in 1972 (General Assembly Resolution 2936 (XXVII)) which reaffirms, in accordance with Article 51 of the Charter, the inalienable right of States to self-defence against armed attack.

It is not enough to ask ourselves why these items have been omitted from the present proposed restatement of the principle—a restatement which, in the opinion of the sponsors, is sufficiently important to warrant incorporation in a new, formal, separate treaty undertaking. We must also ask ourselves whether any such treaty restatement which fails to incorporate these items of elaboration is consistent with the achievement by the international community of the consensus reflected in the 1970 Declaration on Principles concerning Friendly Relations among States. Does not the highly selective approach adopted in the proposed draft Treaty cast doubt on the continuing relevance and force of the items which have been the subject of a measure of progressive development and codification in earlier texts? We are bound, in other words, to consider the distinct possibility that against the background of previous General Assembly treatment of this subject, which has spelt out the consequences of the obligation not to use force, the present simplified and abbreviated proposal is a retrogressive rather than a progressive step.

Finally, Mr Chairman, in asking itself what to make of the present initiative, my delegation has looked again at Resolution 2936 (XXVII) on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons. This is the text which, in substantive content, comes closest to Article I of the proposal now before us. We note that it was the outcome of a Soviet initiative in 1972, and was adopted by only 73 votes, with 9 voting against and 46 abstaining. We ask ourselves what has happened between 1972 and 1976 to render inadequate an initiative which only four years ago was considered by its sponsors as sufficient to meet the concern expressed then and repeated now 'that the use of force in various forms is still occurring in violation of the Charter'. If a treaty is required now, why was it not required in 1972? And if a treaty was not required or could not realistically be proposed in 1972, why is it required or why can it be realistically proposed today?

We note, in this connection, that of the two operative paragraphs of the 1972 resolution, the second 'recommends that the Security Council should take, as soon as possible, appropriate measures for the full implementation of the declaration of the General Assembly'. This was the method proposed by the Soviet Union and accepted by 76 members of this Assembly in 1972 as the appropriate means of fully implementing the declaration then adopted. We ask why it is

that the sponsor of that initiative should have done nothing in the past four years to pursue the implementation of its own initiative by the Security Council; and instead have returned to the Assembly with a watered-down version of a fundamental commitment.

Mr Chairman, I am far from saying that the content of Article 2(4) of the Charter needs restatement. I am also far from saying that if the principle of the non-use of force needs restatement, such restatement should take the form now proposed to us. But I am quite clear that if the present proposal is to be dealt with properly it can only be on the basis that it is exposed in this Committee to the closest legal scrutiny with a view to determining the impact of the draft Treaty upon the basic obligations of the Charter to the extent that they may be affected by existing General Assembly resolutions. Frankly, Mr Chairman, I could wish that while recognising the paramount importance of the principle of the non-use of force, we would collectively have the courage to say that there are more pressing and valuable ways in which the Assembly can use its time than by sterile re-examination of concepts which, in their present expression, are quite adequate. There is nothing wrong with the stated content or legally operative force of the prohibition of recourse to force. The only thing that is missing is a universal political inclination fully to honour that prohibition. Simply talking about it at an advanced level of superficiality will get us nowhere. But if it is to be talked about, better that it be talked about by lawyers, as a matter of legal obligation, than elsewhere. That is why my delegation supports the proposal that if consideration of this item is resumed in the General Assembly, the matter should be dealt with in this Committee.

Use of force

Intervention. Indonesia's actions in Timor.

The Foreign Minister, Mr Peacock, made the following statement in an address to the United Nations Association in Melbourne, 21 May 1976:[80]

> . . . Indonesia's military intervention was the last in a most unhappy chain of events. Nevertheless, it is outside intervention which is the most unfortunate feature of the current situation. The Australian Government cannot condone this resort to force. It has made its position clear both inside and outside the United Nations. It has registered its opposition with the Indonesians themselves, and at the highest level. We did so before the events of 7 December and have done so on many occasions since then. . . .

Use of force

Weapons, types of. Tear gas and herbicides. UN resolution on.

On 19 August 1977 the Minister representing the Minister for Foreign Affairs was asked upon notice in the Senate the following questions:

(1) Was Australia one of the three member nations of the United

80. Text supplied by the Department of Foreign Affairs, Canberra.

Nations to vote against the United Nations General Assembly Resolution 2603 A(XXIV) of 16 December 1969, which extended the Geneva Protocol to tear gas and herbicides; if so why?

(2) Does the Australian Government still maintain this attitude; if so why, and under what circumstances would the Government change this attitude?

The Foreign Minister on 13 September 1977 provided the following answers:[81]

(1) Yes. Australia took the position (with the United States and the United Kingdom) that the use of non-lethal harassing agents, herbicides and defoliants did not contravene the Geneva Protocol. Australia believed that the resolution formulated an interpretation of the Protocol not shared by all parties to it; and that it was for parties to the Protocol to interpret its scope and application, not the General Assembly. Australia, Portugal and the United States voted against the Resolution; the NATO countries, Thailand, Malaysia and the Philippines, among others, abstained.

(2) Since 1969 no further draft resolutions on this point of interpretation have been placed before the United Nations General Assembly, nor have successive Australian Governments since then reviewed the position reflected in our vote at the 24th General Assembly. The issue is not under consideration at present. The Government would review the question if circumstances arose in which it considered that appropriate.

Use of force

Weapons, types of. Prohibition of biological weapons. Convention on. Ratification of. Crimes (Biological Weapons) Act 1976.

The Crimes (Biological Weapons) Act 1976[82] was assented to 28 February 1977. The purpose of the Act was explained by the Attorney-General, Mr. Ellicott, in his second reading speech on the related Bill, delivered on 18 November 1976 in the House of Representatives. He said in part:[83]

In this Bill provision is made for Australian ratification of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological—Biological—and Toxin Weapons and on their Destruction.[84] A copy of the convention is contained in the Schedule to the Bill. The Geneva Protocol of 1925—for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare[85]—to which Australia became a party on 22 January 1930, prohibits only the use in war of gases and biological methods of warfare. It does not prohibit the

81. S Deb 1977, vol 74, 756.
82. No 11 of 1977 (Cth). As of 31 July 1978 sections 4-6, 8-13 had not yet commenced operation.
83. HR Deb 1976, vol 102, 2861-2.
84. Entry into force in Australia, 5 October 1977: Aust TS 1977, No 231.
85. 94 LNTS 65.

development, production, stockpiling, acquisition or retention of such biological weapons.

The present Convention which is designed to fill this gap was the outcome of difficult and complex negotiations at the 26-nation Conference of the Committee on Disarmament in Geneva and in the United Nations General Assembly. Resolution 2826 (XXVI) of the United Nations General Assembly, commending the Convention to Governments, was co-sponsored by 40 countries—including Australia—and was adopted by 110—including Australia—to nil. The Convention which was opened for signature on 10 April 1972 has been signed by over 112 countries including Australia and so far 48 of these have ratified it. The Convention is now in force and the three depository States, the United States, the United Kingdom and the Union of Soviet Socialist Republics, are actively encouraging all signature nations to proceed to ratification.

The objective of the Convention is to eliminate biological weapons. The Convention marks a new and significant step in the field of disarmament as the first measure aimed at eliminating an entire class of weapons. It will not only prohibit the production of biological weapons but also will oblige States parties to destroy any existing stocks. It should however be noted that the Convention and indeed the Bill now under consideration do not inhibit the use of bacteriological—biological—agents and toxins for prophylactic protective or other peaceful purposes.

The Convention is directed primarily towards the obligations of States, but each State which is a party to the Convention is obliged to take measures to prohibit and prevent persons apart from States from engaging in the activities forbidden by the Convention 'within the territories of such state, under its jurisdiction or under its control anywhere'. Since Australia at present has no statutory provision corresponding to that obligation, this Bill has been introduced to satisfy the requirements of the Convention. The main purposes of the Bill are to approve the ratification by Australia of the Convention as provided for in clause 7 and to implement the obligations that Australia will assume under the Convention. The Bill also provides for necessary procedures for forfeiture and seizure, and for expert analysis of any item or substance that may be subject to the provisions of the Bill.

Article IV of the Convention provides that each State party shall take any measures necessary to prohibit and prevent the development, production, acquisition or retention of any of the items or substances referred to in Article I. As the English text of the Convention is set out in the Schedule to the Bill, I need not detail the provisions of Article I or indeed the other requirements of the Convention. It is, I think, sufficient to say that clause 8 of the Bill creates in Australia offences that give effect to Article IV of the Convention and provides penalties that take into account the grave nature of those offences.

Clause 9 provides for the forfeiture and seizure of substances or articles developed in contravention of clause 8. Clause 10 contains necessary procedural provisions for the conduct of prosecutions for offences against the Act. All offences under the Act are made indictable offences and no proceedings are to be taken for an offence without the consent of the Attorney-General or his agent.

Clause 11 ensures that state courts shall have jurisdiction with respect to these offences in accordance with the Judiciary Act 1903, but except in the case of trials on indictment for offences committed in a state which, by section 80 of the Constitution, must be heard in the state where the offence is committed, this clause permits the state courts to exercise jurisdiction without regard to the limitations imposed by the Judiciary Act as to locality of the offence. Clause 12 of the Bill recognises the need, with respect to the type of offence to be created by this legislation, for specialist evidence as to the analysis and examination of substances. The Bill alone authorises the making of regulations specifying procedures to be followed in the storage and disposal of articles produced in contravention of the Act and in providing an opportunity for any person charged with an offence to have a sample of a substance for independent analysis.

Honourable members should also note that the Bill is expressed to have a wide area of operation. It extends to every external territory, as well as to the states and internal territories, as dealt with in clause 4. It will apply to acts done by Australian citizens outside Australia and the external territories, as dealt with in clause 5. Clause 6 provides that the act binds the Crown in right of the Commonwealth or of a state.

I will conclude by saying that this Bill represents Australia's participation in the first significant step by nations toward international disarmament and I commend the Bill to the House.