

**UNIVERSITY OF NAIROBI**

**INSTITUTE OF DIPLOMACY AND  
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**“EFFICACIES OF ARTICLE 2(4) OF THE UN CHARTER  
IN REGULATING THE THREAT OR USE OF FORCE IN  
INTERNATIONAL RELATIONS; A CASE STUDY OF  
IRAQ-US WAR IN 2003”**

**BY**

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## DECLARATION

This project is my original work and it has not been presented anywhere for a degree in any other university.

Mung'ale, A. N: Signature:

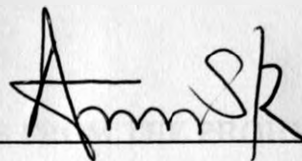


Date

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This project has been submitted for examination with my approval as University supervisor.

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Date

24.11.05

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## DEDICATION

This study is dedicated to my parents for the constant support they gave me, and for the sacrifices they made to see me through my studies.

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To you all, I say asante sana.

## ABSTRACT

The international legal system built in 1945 was founded under the essential proscription on the threat or use of force in international relations. This principle has been long recognized as part of customary international law and as a rule of *jus cogens* binding all States, is contained in Article 2(4) of the United Nation (UN) Charter and was reinforced by a system of collective security measures included in Chapter VII of the same Charter. Indeed, there is general conformity on the main principles that comprise the law on the use of force and its two recognized exceptions: the collective use of force by the Security Council and the individual or collective self-defense by member states.

States have not complied in every respect with the ban expressed in Article 2(4) of the UN Charter. The case study demonstrates how states fail to comply with the UN Charter in pursued of perceived national interests. The United States (US) and its allies justified their invasion of Iraq in 2003 as preemptive self-defense, Iraq's failure to comply with all or any of the existing 23 UN Security Council Resolutions and that Resolution 1441 justified use of force against Iraq. However, the use of force against Iraq was not justified under international law unless Iraq mounted a direct attack on the US; one of its allies requested the US's assistance; an attack by Iraq on the US or one of its allies was imminent and could be averted in no way other than by the use of force; or the United Nations Security Council authorized the use of force in clear terms. None of the above factors occurred to justify war Iraq in 2003. Therefore, the Iraq war in 2003 was illegal, breached Article 2(4) of UN Charter and had no justification in international law.

The study attempted to prove that despite lack of total compliance with Article 2(4) of the UN Charter in regulating use of force in international relations, the Article is effective in regulating resort to war in contemporary world despite breaches of the Article by some states. The Iraq-US war was illegal and breached Article 2(4) of the UN Charter.

## ABBREVIATIONS

US	United States.
UN	United Nations
UK	United Kingdom
UNSCOM	UN Special Commission on Iraq
UNMOVIC	United Nation Monitoring, Verification and Inspection Commission.
WMD	Weapons of Mass Destruction
IAEA	International Atomic Energy Agency
UNPROFOR	UN Protection Force (former Yugoslavia)
UNOSOM II	UN Operation in Somalia
UNTAET	UN Transitional Administration in East Timor
UNAMSIL	UN Mission in Sierra Leone
UNTAES	UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium



# INTRODUCTION

## 1.1. Background

After the devastation of Second World War, allied nations signed a solemn treaty giving effect to their determination “to save succeeding generation from the scourge of war and “to ensure that armed force shall not be used, save in the common interest”.<sup>1</sup> Article 2(4) of UN Charter gives substance to that determination by proclaiming that;

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.

They also committed themselves to “settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered”.<sup>2</sup>

Article 2(4) of the Charter is the primary embodiment of international law’s current attempt to restrain the threat or use of force in international relations. The rules and attitude to war have changed dramatically since the UN Charter was ratified. The liberty to venture into war and generally to employ inter-state force is obsolete.<sup>3</sup> The prohibition of the use of inter-state force, articulated in Article 2(4) of the UN Charter, has become an integral part of customary international law. It binds all states, whether or not Members of the UN. Therefore, the UN Charter supercedes the Covenant of the League of Nations and Kellogg-Briand Pact on resort to threat or use of force. The ultimate design of UN scheme was to make war impossible and illegal, impossible through a concert of the great powers functioning as the Security Council and illegal by condemning all use of force except that justified by the necessities of self-defense<sup>4</sup> and collective action under the auspices of UN.

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<sup>1</sup> United Nations Charter, Preamble.

<sup>2</sup> United Nations Charter, Article 2(3).

<sup>3</sup> Yoram Dinstein, *War, Aggression and Self- defense*, 3<sup>rd</sup> ed. (Cambridge: Grotius Publications ltd. 2001), p.87.

<sup>4</sup> William D. Rogers, *The Principles of Force, the Force of Principles. Right V. Might; International Law and the Use of Force*, 2<sup>nd</sup> ed. (New York: Council on Foreign Relations Press, 1991), p. 96.

The aspiration of the UN Charter to bring within the realm of law the ultimate political tensions and interests that had long been deemed beyond control by law,<sup>5</sup> have been questioned whether it is viable or desirable in an anarchical system. Force continues to permeate international relations. The incidences of inter-State force are so widespread that Franck contended that its proscription is totally eroded in world affairs, and that the Article 'mocks us from its grave'.<sup>6</sup>

Iraq-US war in 2003 posed a great challenge to efficacies of Article 2(4) of the UN Charter in regulating unilateral force in international relations. Extend of exceptions to the prohibition of Article 2(4) in regulating use of force and states compliance with international law when their national interests are at stake. The war also challenged the assumption that cooperation of the great powers through Security Council would maintain and enforce peace. It is argued that the war was illegal because it was not authorized by the Security Council and as Webster concluded, self-defense arises only when there is a 'necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.'<sup>7</sup> There was no indication of Iraq attacking US or its allies.

Murswiek argued that the Iraq-US war in 2003 established a precedent with far-reaching repercussions, if its standpoint becomes established as a new rule of international law, then the general ban on force will have been done away with in a practical sense.<sup>8</sup> However, Henkin contends that accused states using force universally justify their actions in legal terms<sup>9</sup> even when the justification is invalid; U.S. justified its invasion of Iraq in 2003 as legitimate preemptive self-defense meant to disarm Iraq of weapons of mass destruction. However, Iraq did not possess weapon of mass destruction.

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<sup>5</sup> Louis Henkin, *How Nations Behave Law and Foreign Policy* (New York; Council of Foreign Relations, 1968), p. 130.

<sup>6</sup> Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, A.J.I.L. 809, id., 835.

<sup>7</sup> See Sir Robert Jennings and Sir Arthur Watts, 1 *Oppenheim's International law*, 9<sup>th</sup> ed. (1992), pp. 420-427.

<sup>8</sup> <http://www/robincmiller.com/art-iraq/b58.htm>

<sup>9</sup> William D. Rogers, *The Principles of Force, The Force of Principles. Right v. Might; International Law and Use of Force* (New York: Council on Foreign Relations Press, 1991), p. 100.

The study attempts to examine whether the prohibition of the use of force against “the territorial integrity” of another state forbid only a use of force designed to deprive that state of territory, or does it also prohibit force that violates the territorial borders of that state, however temporarily and for whatever purpose? Does the prohibition of use of force against “the political independence” of another state outlaw only use of force that aims at ending that state’s political independence by annexing it or rendering it a puppet, or does it also prohibit force designed to coerce that state to follow a particular policy or take a particular decision? In what other circumstances would use or threat of force be “inconsistent with the purposes of the UN”?<sup>10</sup> What is the legality of the Iraq-US war in 2003 and its justification by US as preemptive self-defense? How effective is Article 2(4) and what can be done to make it more effective? Can we afford to live without Article 2(4) in 21<sup>st</sup> century?

## 1.2. Statement of the problem

States have been making recurrent attempts to make law to prevent or control the resort to war. The most earnest ones came after the First World War, in the Covenant of the League of Nations and the Kellogg-Briand Pact. Their fate is well known.<sup>11</sup> After the terrible Second World War, states were determined to try again and Article 2(4) of UN Charter was formulated to regulate threat or use of force in international relations. Article 2(4) of the UN Charter was to apply universally, Members were bound by it and they were to see to it that nonmembers also complied. It superseded the Covenant of the League Nations and Kellogg-Briand Pact treaties.<sup>12</sup> The ban extends to any form incompatible with the purposes of the UN Charter but valid only in the ways that are compatible with these aims. The ban does not leave any scope for unilateral actions; such actions are transformed into pure aggression except in exceptions: legitimate individual and collective self-defense, actions taken by the Security Council of the United Nations or authorized by it, humanitarian intervention, and peacekeeping enforcement.

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<sup>10</sup> Louis Henkin, *Use OF Force: Law and US Policy. Right v. Might; International Law and the Use of Force*, Op. Cit. pp. 39-40.

<sup>11</sup> Louis Henkin, *How Nations Behave Law and Foreign Policy*, Op. Cit. p. 128.

<sup>12</sup> United Nations, Article 103.

There is a great deal of disagreement about the meaning of this provision in regulating unilateral force, compliance and exceptions like Article 51. The US invasion of Iraq in 2003 without the mandate of UN Security Council challenged the efficacies and relevant of Article 2(4) in regulating unilateral force in international relations in relation to preemptive self-defense. The US invasion of Iraq was naked aggression against territorial integrity and political independence of Iraq despite Article 2(4) of the UN Charter. Henkin and other scholars contend that the Article is effective, even in the height of Cold War; the Article had an impact on the conduct of states<sup>13</sup> and Cold War remained cold. Therefore, US justification of its aggressive invasion of Iraq as preemptive self-defense aimed at disarming Iraq is illegal and does not invalidate the efficacies of Article 2(4).

The study attempts to examine the efficacies of Article 2(4) in regulating use of force in international relations. To what extent has the Article regulated unilateral force in international relations or the congruence between the legal norm of the Article and states compliance with the Article? The US justification of its invasion in Iraq demonstrates that all states recognize and accept the fundamental importance of the primary ban on resort to armed force, to what extent is this consensus matched by the agreement over precise scope of the ban or explicit exception of self-defense found in Article 51?<sup>14</sup>

### **1.3. Objectives of the study**

The primary objective of this study is to examine the efficacy of Article 2(4) of the UN Charter in regulating use of force in international relations with specific reference to second Iraq-US war in 2003. Arising from this are the following specific objectives:

1. To examine a background of the formulation of Article 2(4) of the UN Charter and how that has influenced its efficacy and relevance in regulating use of force in international relations. Case study of Iraq-US war in 2003.
2. To analyze the meaning and extent of exceptions to Article 2(4), with specific reference to Article 51, which US used to justify preemptive self-defense in order to disarm Iraq (weapons of mass destruction).

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<sup>13</sup> <http://search.epnet.com/login.aspx?>

<sup>14</sup> Martin Dixon, *International Law* (London: Blackstone Press ltd, 1990), p. 183.

3. To explore the extent to which other states comply with Article 2(4) in their international relations.

## 1.4. Justification

Unilateral use of force in international relations is a thorny issue. Attempts have been made to regulate use of unilateral force in international relations with greatest attempt being Article 2(4) of the UN Charter but states still use force to achieve their perceived interests. For example US and allies aggressively invaded Iraq without the mandate of UN, replaced the regime of Saddam Hussein and occupied it in the pretence of preemptive self-defense. The study attempts to examine the efficacies of Article 2(4) in regulating 'threats or use of force against the territorial integrity or political independence, or in any other manner inconsistent with the purposes of the United Nations'.<sup>15</sup> Unlike the restraints in the Covenant of the League of Nations and the provisions of Kellogg-Briand Pact, the UN Charter comprehensively attempted to regulate unilateral force in international relations except in exceptions against Article 2(4) but what extent has states complied with the Article?

The study will also examine how Article 2(4) has influenced policies and policy-makers of states towards 'threat or use of force' in international relations. There is no doubt that Iraq-US war in 2003 under preemptive self-defense challenged policy-makers to think on how to modify Article 2(4) and the organs of UN to effectively regulate unilateral force. With the development of technology and weapons of mass destructions, states have no choice but to regulate unilateral force in international relations. This study will provide necessary literature to that effect.

Efforts to control and minimize unilateral force in international relations have been given more attentions from scholars and statesmen/stateswomen<sup>16</sup> for along time. The Iraq-US war in 2003 shows how dangerous unilateral force can be in a global world with dangerous weapons. There is need to reform the UN Charter in order to create norms, institutions and mechanisms of regulating use of unilateral force in international relations.

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<sup>15</sup> United Nations, Article 2(4).

<sup>16</sup> Marton A. Kaplan and Nicholas DeB Katzenbach, *The Political Foundations of International Law* (New York: John Wiley, inc, 1961), p. 201.

The study is relevant for it will attempt to fill the gap in literature about efficacy of Article 2(4) with specific reference to Iraq-US war in 2003.

### **1.5. Definition of terms**

The term efficacy in this study means that states actually behave according to the legal norms; that Article 2(4) of UN Charter regulates their actions and the norms are actually applied and obeyed.<sup>17</sup>

There is extensive debate about the exact meaning of 'threat or use of force' but no general agreement among members regarding the kind of force referred to. One view hold that 'force' means 'armed force' and does not include political and economical pressure. It argues that this interpretation is reasonable, supported by the records of discussions at San Francisco and other provisions of the Charter like Articles 41, 46 and Preamble of the UN Charter. To them, broader interpretation would lead to practical difficulties in distinguishing between permissible and impermissible pressures.<sup>18</sup>

On the other hand the other view holds that there is no legal reason why 'force' should not be interpreted to include political and economical pressure except in specific cases, since the Charter does not make a sharp distinction between armed and other forms of forces. That from what could have been the intentions of the authors of the Charter, its provisions must be interpreted in the light of present needs and developments; and the political and economical coercion could be as great as threat to the political independence of states under present conditions as military force.<sup>19</sup> 'Threat or use of force' in this study mean 'armed force' not economical or political threats or forces.

### **1.6. Literature review**

The purpose of this literature review is to identify the gaps in the existing works on the theme of the efficacies of Article 2(4) of UN Charter in regulating unilateral force in international relations from its ratification to Iraq-US war in 2003. The study will attempt to bridge the gaps in the existing literature about the efficacies of Article 2(4).

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<sup>17</sup> Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1946), p. 39.

<sup>18</sup> Leland M. Goodrich, *Charter of the United Nations, Commentary and Documents* (New York: Colombia University Press, 1969), p. 48.

<sup>19</sup> *Ibid.* 48-49.

Most literature in Cold War era, which dealt with regulation of “armed force” contend that Article 2(4) was made ineffective by the ideologies pursued by the US and Soviet Union. The post-Cold War era is faced by issues such as proliferation of weapons of mass destruction, terrorism, intra-state conflict, humanitarian interventions and preemptive self-defense. The study reviews existing literature in relation to the changing pattern of relationships, emerging issues and challenges in post-Cold War era.

Among those who have made considerable contribution to the existing literature on Article 2(4) is Henkin. He argues that the Charter’s prohibition on unilateral force was to apply universally: members were bound by it; they were to see to it that nonmembers also complied.<sup>20</sup> Nations tried to bring within the realm of law those ultimate political tensions and interests and regulated them. The changing facts and faces of international law as well as emerging issues have not detracted the validity of the Charter but have reinforced its desirability. For instance, the argument based on the assumptions that the United Nations was to establish an effective international system of police based on cooperation of great powers to maintain peace failed. Second, the assumptions that that UN was to develop machinery for peaceful settlement of disputes in accordance with the law and justice, making self-help unnecessary and undesirable also failed. Despite these failures, the prohibitions on the use of force have survived these changes in UN.<sup>21</sup>

But many states began to look to their own defenses and build alliances like NATO within the exception for self-defense in Article 51 the UN Charter. After recognizing the mistaken assumptions and disappointed expectations about Security Council, states began to build up the influence and activity of the General Assembly. There were no suggestions that the law against force had failed or should be abolished or revised.<sup>22</sup> According to Henkin the Article is ‘good law’. Governments have been and will continue to treat it as law in determining their own policy or in reacting to the behaviors of other

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<sup>20</sup> Henkin, *How Nations behave law & Foreign Policy*, Op. Cit. p. 130.

<sup>21</sup> *Ibid.* 132.

<sup>22</sup> *Ibid.* 132.

states. That it is also desirable law because the weapons, the conflicts and the transformations of contemporary society reinforce its desirability.<sup>23</sup>

On the other hand, Franck attributes the ineffectiveness of Article 2(4) on predication of the precepts of the Article on false assumptions, that the wartime partnership of the big five would continue providing the means for policing the peace under the aegis of the United Nations.<sup>24</sup> He argues that the drafters of the Article addressed themselves to preventing conventional military aggression at the very moment in history when new forms of attack were making obsolete all prior notions of war and peace strategy. They focused on the past rather than the future and lacked ingenuity to understand the changing event in international system which resulted in drafting the Charter with exceptions and ambiguities that have eroded away its efficacies. He also blames the superpowers and other states, which succumbed to the temptation to settle score, to end disputes or pursue their national interest through the use of force<sup>25</sup> at the expense of Article 2(4) and left only words.

Franck contents that the prohibition was killed by the rising of wars of "national liberation", the rising threat of wars of total destruction and the increasing authoritarianism of regional systems dominated by a superpower.<sup>26</sup> All these factors point to the lack of congruence between the international legal norm of Article 2(4) and the perceived national interest of states especially the superpowers. It appears that there was a gap between the ability of a rule of UN Charter to have in it much control over the behaviors of states. The disparity between the norm and what it sought to establish and the practical goals the nations pursued in defense of their national interests killed its compliance. This literature is about how states behaved in Cold War era and the disparity between the ideals the norm seek to achieve and states practice. The Cold War era ended and post-Cold War is taking its shape, many issues have emerged which this studies will attempt to examine to fill the gap.

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<sup>23</sup> *Ibid.* 132.

<sup>24</sup> Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, A.J.I.L.809, id.,835.

<sup>25</sup> *Ibid.* 809.

<sup>26</sup> *Ibid.* 835.



In 1990, Iraq deigned to annex the entire territory of a sovereign neighboring State (Kuwait) by reviving flimsy historical claims.<sup>27</sup> The international community categorically rejected the transparent attempt by Iraq to circumvent Article 2(4) and the Security Council unanimously past Resolution 662. The Security Council decided that the 'annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void'.<sup>28</sup> The reaction of international community to Iraq invasion of Kuwait in 1990 brought to fore the role of UN Security Council and violation of Article 2(4) was corrected by use of mandated by the Security Council through Resolution 678.

Wallace analyzed the extent of the prohibition in Article 2(4). She contends that Article 2(4) is not concerned only with the outlawing of war; it does not distinguish between war and the use of force falling short of war, for example reprisal. The Articles embraces all threats of and acts of violence without destruction.<sup>29</sup> She argues that any unilateral 'threat or use of force' by a state other than in accordance with the exceptions provided for under the United Nations Charter is contrary to, and prohibited by contemporary international law. As far as Article 2(4) and the legal regime envisaged by the UN Charter is concerned, the prohibition is one aimed at outlawing 'armed force' and "gunboat diplomacy" in relations among states.<sup>30</sup>

Wallace also examines self-defense and argues that Article 51 does not cover anticipation of an armed attack. She claims that it is an aspect of customary international law because the justifications for anticipatory self-defense can be reconciled with the obligation on UN Member states to refrain from either "the threat or use of force". States which are threatened with the use of force may take appropriate anticipatory measures to repel such a threat if that particular state is the target of hostile activities of another state, has exhausted all alternative means of protection, the danger is imminent, and the defensive

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<sup>27</sup> Yoram Dinstein, *War, Aggression and Self- defense*, 3<sup>rd</sup> ed. Op. Cit. p. 84.

<sup>28</sup> Security Council Resolution 662, 45 R.D.S.C. 20, id. (1990).

<sup>29</sup> Rebecca M.M Wallace, *International Law*, 3<sup>rd</sup> ed. (London: Sweet Maxwell, 1997), p. 249.

<sup>30</sup> *Ibid.* 251-252.

measures are proportionate to the pending danger.<sup>31</sup> Although states have rights of self-defense, they are all times required by the UN Charter and customary international law to settle their disputes by peaceful means. Nothing is said about compliance of states and how effective the Article has been in ensuring regulation of force.

According to Akehurst modern rules against the use of force have been effective to some extent. The world has been relatively free from international wars despite the existence of acute political tensions which could almost certainly had led to war in previous ages. Only civil wars have occurred though with fear that it could escalate into international wars. However, he points out that it would be foolish to suggest that international law is the main cause of the infrequency of international wars, the destructiveness of modern war is a much more potent factor.<sup>32</sup>

He argues that the biggest defect in modern rules is often imprecision, yet practice has done little to reduce the imprecision. In moments of crisis or pursuing self interest, states may be tempted to exploit such uncertainties in the law, losing the sense of objectivity of the law and then believing that its doubtful interpretation which suits its interests is well-founded. He also pointed out that although organs of UN sought to strengthen and clarify breached rules, there is no consensus by states on what is legal or illegal act.<sup>33</sup> This study examines the effectiveness of Article 2(4) in Cold War period. It cannot adequately answer the major problem of this study principally because of the differences that have occurred in international system since the end of cold war to Iraq-US war in 2003.

Brownlie holds that the Charter represents a system of public order and is concerned with the questions of the allocation of powers in respect to the threat or use of force as an instrument of policy.<sup>34</sup> Force can only be used for common interest as indicated in the Preamble and Article one of the Charter. But the assumption that UN Charter is inimical to the use of force in general is far from the truth. He contends that;

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<sup>31</sup> *Ibid.* 254.

<sup>32</sup> Michael Akehurst, *A Modern Introduction to International Law*, 3<sup>rd</sup> ed. (London: George Allen and Unwin Ltd, 1977), pp. 247-248.

<sup>33</sup> *Ibid.* 248.

<sup>34</sup> Ian Brownlie, *The United Nations Charter and The use of Force*, *The Current Legal Resolutions of Force* (Dordrecht: Martinus Nijhoff publishers, 1986), p. 496.

The language of Article 2(4) emphasizes the general prohibition of action by individual states and no amount of inelegant casuistry can prove otherwise. Justifications for the use of force by individual states must, in the framework of the Charter, be specific and in a strict sense exceptional. Such a conception of public order is natural and is well suited to the era of missiles and nuclear weapons.<sup>35</sup>

The study points out the legality of use of force by individual states in certain circumstances, self defense and collective self defense in accordance with Article 51 of the Charter, defense of third states, and action authorized by the competent organ of a regional arrangement or urgency recognized as such for the purpose of chapter VII of the Charter.<sup>36</sup> However he moves a step further and analyzes the areas of acute controversy to Article 2(4). The issues such as self-defense in relation to humanitarian intervention, protection of nationals abroad as justification for the use of force, legality of anticipatory self-defense and whether aggression can be defined.

Brownlie points out three main issues, which he didn't analyze in his study but which are relevant to this study.

First, the appalling threat of nuclear warfare, a question which in reality is more of morality and common sense than it is one of law. The second is the tendency of states to invoke the law even at the expense of creating pseudo-presents, which an opponent might use for their own purposes. Third is the difficulty of applying the concepts of "armed attack" and the "use of force" to the complexities of irregular warfare and the incorporation of militias and partisan groups into the command structures of regular armed forces.<sup>37</sup>

This study will examine some of these strands in general, their impact on efficacies of Article 2(4) in relations to Iraq-US war in 2003 as well as doctrine of preemptive self-defense as outlined by president George Bush Junior.

Dixon evaluates both unilateral and collective use of force. He specifically focuses on international law and use of armed force but not measures that does not involve actual physical violence, such as "economic aggression" or destructive antigovernment propaganda because they don't fall within the general meaning of "force" as used in Article 2(4) of the UN Charter.<sup>38</sup> He claimed that states recognize and accept the fundamental importance of the primary ban on resort to force; however, the consensus is

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<sup>35</sup> *Ibid.* 496.

<sup>36</sup> *Ibid.* 496.

<sup>37</sup> *Ibid.* 502.

<sup>38</sup> Martin Dixon, *International Law*. Op. Cit. pp.180-181.

not matched by agreement over the precise scope of the ban or the explicit exception of self-defense found in Article 51.<sup>39</sup>

Dinstein reviewed Article 2(4) and its exceptions such as self defense, and collective security by UN Security Council, in which he explores the numerous aspect of their interrelationship, including possibilities that Article 2(4) contain an implied exception for humanitarian interventions.<sup>40</sup> He contends that Article 2(4) regulates use of force among inter-states and other provisions not Article 2(4) should authorize any interventions. The Article is effective in regulating use of 'armed force' despite breaches of the Article by some states without sanctions being enforced against them.

The Article of the UN Charter has become an integral part of customary international law. As such it binds all states, whether or not Members of the UN. In determining the tenor of customary international law, the Court relied *inter alia* on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN, unanimously adopted in 1970 by the UN General Assembly.<sup>41</sup> The Declaration, in its first Principle, reiterates the language of Article 2(4) of the Charter, except that the duty to refrain from the use of force is imposed on '[e]very state' instead of '[a]ll Members'.<sup>42</sup> This was done deliberately, on the ground that all states are now subject to the same rule.<sup>43</sup>

According to Henkin, US has not been a keen observer of Article 2(4) in international relations especially when its interests are at stake. It has used illegal force in various situations when pursuing its ideologies, propagating democracy, against terrorism, interventions and counter intervention and self-defense. His analysis ends with Reagan's regime with little account of George W. Bush Senior. A lot has happened since then and US has used force in various situations and justified them as legal or legitimate.

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<sup>39</sup> *Ibid.* 183.

<sup>40</sup> Yoram Dinstein, *War, Aggression and Self-defense* (Cambridge: Grotius Publications Ltd, 1988), p.87.

<sup>41</sup> General Assembly Resolution 2625 (xxv), 25 R.G.A. 121 (1970).

<sup>42</sup> *Ibid.* 122.

<sup>43</sup> R. Rosenstock, *The Declaration of Principles of International LAW Concerning Friendly Relations: A Survey*, 65 A.J.I.L. 713,717 (1971).

There is some scanty literature on the efficacies of Article 2(4) in regulating use of force, but not specifically with reference to the topic of this study. This study is relevant in this era, as the debate on how to amend the UN Charter takes a center stage.

## 1.7. Theoretical Framework

This study aims at evaluating the efficacies of Article 2(4) of the UN Charter in regulating use of force with reference to Iraq-US war in 2003. It will be informed by positivist theoretical framework, which holds that the binding quality of international law, its existence as “law” flows from the consent of states. A system of law based on the actual practice of states.<sup>44</sup> That international law is formed from the realities of international life rather than its desirability. International law flows from the will of the state because it is created by what actually goes on rather than some higher moral principles.

The major contribution of positivists to this study lies in the fact that Article 2(4) is the product of states and is based on the actual practice of states and illustrates either efficacies or practical limitations on the role of law in international relations when states comply or fail to comply with it. It has developed into customary international law because states acknowledge its existence and make use of its role in the regulation of their affairs.<sup>45</sup> International Court of Justice declared it in Nicaragua case as customary international law.

According to positivists, principles of international law are valid if they can be traced back to *pacta sunt servanda* of the system. *Pacta sunt servanda* declares that agreements must be carried out in good faith and upon which norms created by treaties and rules established by organs set up by international treaties, for instance, decisions of the International Court of Justice<sup>46</sup> become international legal norms. Dinstein contend that the current prohibition of the use of force, under customary international law is to be embedded in the Kellogg-Briand Pact and in UN Charter. That customary and conventional international law is not kept apart in ‘sealed compartments’, and there is a

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<sup>44</sup> Martin Dixon, *International Law*. Op. Cit. p. 11.

<sup>45</sup> S. K. Verma, *An Introduction to Public International Law* (New Delhi: Prentice-Hall of India, 1998), p.13.

<sup>46</sup> Malcolm N. Shaw, *International law*, 4<sup>th</sup> ed. (London: Cambridge University press, 1997), p. 41.

lot of cross-fertilization between them.<sup>47</sup> Article 2(4) has acquired that status for it is binding to even non-Members. Therefore, positivist framework is a model of great logical consistency which helps explain, particularly with regard to national legal systems, the proliferation of rules and the importance of validity which gives as it were a mystical seal of approval to the whole structured process.<sup>48</sup> It helps illustrate how the norm in Article 2(4) leads to modification and development of the Article in progression of norms forming a legal order in international relations. It also explain why states comply with the norm and those that breach it justify their actions using exceptions to the Article like US justified invasion of Iraq in 2003 as preemptive self-defense, Article 51.

The theory helps us understand the formulation and development of Article 2(4) into conventional and customary law and its influence on states' practice. UK and US justified their action in Iraq using Resolution 1441 of UN Security Council although most states and scholars contend that the war was illegal. No government whether they understand or misunderstand the *jus ad bellum* is prepared to hold the preposition that there are no legal restraints on the employment of inter-state force. The study seeks to understand the efficacies of Article 2(4) in regulating use of force with reference to Iraq-US war in 2003. The theory will help examining how the Article came into force, its efficacies and why states comply with the norm in their international relations.

## 1.8. Assumptions

The primary assumption is that Article 2(4) of UN Charter is effective despite the occurrence of some civil wars like Iraq-US war in 2003. The study attempts to examine the extent of efficacies of Article 2(4) in regulating use of force in international relations with specific reference to Iraq-US war. The study attempts to verify the following specific hypothesis.

1. Article 2(4) is effective in regulating the threat and use of force in international relations.
2. The Iraq-US war in 2003 was unjustifiable under Article 2(4) of the UN Charter.

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<sup>47</sup>Yoram Dinstein, *War, Aggression and Self- defense*. Op. Cit. p. 95.

<sup>48</sup> Shaw, *International law*, 4<sup>th</sup> ed. Op. Cit. 42.

3. The Iraq-US war in 2003 challenged states compliance with Article 2(4) of the UN Charter.

## **1.9. Research methodology**

The study will rely on primary, secondary and Internet sources of data. Most of the information will be obtained from secondary sources, namely books, journals, magazines, periodicals, and other relevant materials.

The primary data will be collected from the original documents like the UN Charter, resolutions of UN Security Council and General assembly, conventions, declarations, decisions of International Court of Justice and other relevant materials.

Internet data will be valuable. The methodology of writing will be descriptive, prescriptive and analytical methods.

## **2.0. Scope of the study**

The time frame for this study mainly covers the period between 1945 when the UN Charter was signed to 2003 during Iraq-US war. However, the study will examine importance of the Covenant of the League of Nations and the Kellogg-Briand Pact to the development of Article 2(4).

The study examines the efficacies of Article 2(4) in regulating threat and use of force with specific reference to Iraq-US war in 2003. It will focus on "armed force" not economic or political force that can be used by states. It will not focus on legally sanctioned armed force by the UN Security Council like Gulf war or by General Assembly under Uniting for Peace Resolution or interventions. The study will only focus on inter-state wars regulated by Article 2(4) not intra-state wars, Article 51 as used by US and allies to justify unilateral force in Iraq without UN mandate and states compliance with Article 2(4) with specific reference to 2003 Iraq-US war Iraq.

## **2.1. Chapter outline**

Chapter one: The introduction, statement of the problem, objective of the study, justification of the study, literature review, theoretical framework, hypothesis, methodology, scope and chapter outline.

Chapter two: The background of Article 2(4) of UN Charter. It examines the background of Article 2(4) and how it supersedes the Covenant of the League of Nations and the Kellogg-Briand Pact in regulating unilateral force.

Chapter three: Exceptions from the prohibition of use of force under Article 2(4) of UN Charter. Examines exceptions to Article 2(4) as follows; Article 51, individual, collective and pre-emptive self-defense, protection of nationals abroad, peacekeeping enforcement, Security Council peace enforcement, regional organizations and humanitarian intervention.

Chapter four: The legality of Iraq-US war in 2003; a case study. The justification and illegality of the Iraq-US war in 2003.

Chapter five: The states compliance with Article 2(4) of the UN Charter. It examines the extent to which states comply with Article 2(4) of the UN Charter.

Chapter six: The conclusion.



## CHAPTER TWO

### THE BACKGROUND OF ARTICLE 2(4) OF THE UN CHARTER

#### 2.2. Background

In the history of International relations, unilateral force has taken different forms and there have been various attempts to explain and regulate it. Just war was regarded as a legitimate use of force. According to St. Augustine, just war was designed to avenge injuries, which had been sustained and which 'the nation or city against which warlike action is to be directed had neglected either to punish wrongs committed by its own citizens or to restore what had been unjustly taken by it.'<sup>1</sup> With emergence of nation states, the right to use force was recognized as an inherent right of every independent sovereign state. International law did not place restraints on the use of force, but other factors other than legal could affect a state's resort to force and the use of force was a legitimate action for any state to adopt.<sup>2</sup>

The serious attempts to contain any significant prohibitions on the use of force by states, came with the ratification of the Covenant of the League of Nations in 1919 and Kellogg-Briand Pact in 1928, which referred to war exclusively. Prior to the signing of the treaties, states also engaged in fighting without becoming automatically involved in a state of war. Use of force, which did not constitute war, began to play a particularly important role once states accepted the principle that aggressive wars were prohibited. In 1928 through Kellogg-Briand Pact, states formally renounced war as an instrument of national policy in their relations with one another.<sup>3</sup>

The Second World War posed a challenge to states compliance with the prohibition contained in the he covenant of the League of Nations and Kellogg-Briand Pact treaties and the extent of the prohibition. The two instruments failed to stop the Second World War. The instruments could not prohibit states to abandon recourse to physical armed force whenever in their opinion peaceful means did not serve their immediate and

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<sup>1</sup> Rebecca M.M. Wallace, *International Law*, 3<sup>rd</sup> Ed. (London: Sweet Maxwell, 1977), p. 248.

<sup>2</sup> *Ibid.* 248.

<sup>3</sup> K. Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality. Manual of Public International Law* (London: Macmillan and ltd, 1968), p. 741.

egoistic interests. The UN Charter shifted the emphasis from prohibition of 'war' to banning of the 'threat or use of force'. The Charter of UN is the authoritative statement of the law on the use of force. It is the principal norm of international law of the last century<sup>4</sup> and relevant in contemporary international system.

In the Charter, the term 'force' is not defined. Some argue it is concerned only with the use of armed force. But "force" is a notion that is broader than the "armed force". Whether the UN Charter, by referring to "force" in Article 2(4), regulates the use of armed force only or comprises other manifestations of force still remain a matter of conflicting interpretations.<sup>5</sup> In 1970, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states recalled the "duty of states to refrain" from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state. In 1974 the General Assembly specified that "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". Economical coercion is deemed to be contrary to the UN's Charter, as interpreted in numerous resolutions and declarations. However, states use economic and political force to coerce other states; the Reagan administration imposed tough economic sanctions on Panama in 1988, which precipitated the collapse of Panama's lucrative banking industry.<sup>6</sup> The issue remains controversial.<sup>7</sup> In addition, on the legality of the threat or use of nuclear weapons, the court advised the General Assembly that a signaled intention to use force if certain events occur could constitute a threat under Article 2(4) where the envisaged use of force would itself be unlawful. But it also appeared to accept that the mere possession of nuclear weapons did not of itself constitute a threat.<sup>8</sup>

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<sup>4</sup> Louis Henkin, *Use of Force: Law and U.S. Policy. Right V. Might international Law and the Use of Force* (New York: Council on foreign relations press, 1991), p. 38.

<sup>5</sup> K. Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality. Manual of Public International Law. Op. Cit.* 741.

<sup>6</sup> David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order. Right V. Might international Law and the Use of Force*, op. cit. p.112.

<sup>7</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Ed. Op. Cit. p. 782

<sup>8</sup> *Ibid.* 783.

The twentieth century instruments mainly the League of Nations, Kellogg-Briand Pact and UN Charter brings to conclusion a historical development of international Law in outlawing war and prohibiting 'threat or use of force'. In the early law of nations states, states had a right to war (*jus ad bellum*), which was not identical with a license to wage war. Long before the creation of the League of Nations and the UN, states justified, or attempted to justify, their belligerency. US justified its aggressive attack of Iraq as preemptive defense, after its attempt to get the mandate of UN Security Council fail. Despite occurrence of wars in international systems, the twentieth-century instruments have had the effect of radically modifying the place of war in International Law. Article 2(4) abolished the traditional *jus ad bellum*. However the change in the Law has not eliminated war and other threat or use of force from international life. Outlawing is one thing but compliance with the new law has been a major problem.<sup>9</sup> Thus, states continue to resort to force whenever their national interests are at stake like Iraq-US war in 2003.

This Chapter examines the historical development of International Law against war, threat and use of force in International relations from the Covenant of the League of Nations to UN Charter and subsequent declarations. This will help in identify the gaps or the flaws that have been used by states since the ratification of UN Charter to justify unilateral force.

### **2.3. The Covenant of the League of Nations**

The First World War marked the end of the balance of power system and ushered in a new era. The new era was characterized by the efforts to rebuild international affairs upon the basis of a general international institution, which was authorized to oversee the conduct of the world community to ensure that aggression could not happen again. The creation of the League of Nations reflected a completely different attitude to the problems of unilateral force in the international order.<sup>10</sup>

The Covenant of the League of Nations made the first concerted effort to limit the right of states to resort to use of force and provided a forum to settle their disputes by peaceful

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<sup>9</sup> K. Skubiszewski. *Use of Force by States. Collective Security. Law of War and Neutrality. Manual of Public International Law.* Op. Cit. 742.

<sup>10</sup> Ian Brownlie, *International Law* (Oxford: Clarendon press, 1963), p. 28.

means. In Article 10, members of the League undertook 'to respect and preserve against external aggression, the territorial integrity and existing political independence of all members of the League'.<sup>11</sup> This was an abstract provision, which lent itself to more than one interpretation and states used it to justify their aggressions acts. Japan used military force in Manchuria in 1939 and no state of war existed. Article 10 had to be read in conjunction with and subject to, the more specific stipulations following it.<sup>12</sup>

Article 11 enunciated that any war or threat of war was a matter of concern to the entire League's Council.<sup>13</sup> Article 12 states that if any dispute likely to lead to rupture arose between members of the League; they were required to submit it to arbitration, judicial settlement or inquiry by the League's Council.<sup>14</sup> The award of the arbitrators or the judicial decision had to be rendered 'within reasonable time'. The council's report had to be arrived at not later than six months after the submission of the dispute.<sup>15</sup>

Article 13 specified which subject matters were 'generally suitable' for submission to either arbitration or judicial settlement. Members were obligated to carry out in good faith any arbitral award or judicial decision. They agreed not to resort to war against another member complying with the award or decision.<sup>16</sup>

According to Article 15, disputes between members, when not submitted to arbitration or judicial settlement, had to be brought before the council.<sup>17</sup> The role of the council was restricted to issuing recommendation as distinct from binding decisions. However, under paragraph 6 of the Article, if the council report was carried unanimously (excluding the parties to the dispute), Members consented 'not to go to war with any party to the dispute which complies with the recommendations of the report. If the council failed to reach a unanimous report (a part from the parties to the disputed), paragraph 7 reserved the right of members to take any action that they considered necessary for the maintenance of right

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<sup>11</sup> Covenant of the League of Nations, 1919, 1.

<sup>12</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> Ed. (London: Cambridge University Press, 2001), p. 75.

<sup>13</sup> Covenant of the League of Nations, Article 11, at 7.

<sup>14</sup> *Ibid.* 7-8 (original version), 25 (amended text).

<sup>15</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> Ed. Op. Cit. p. 75.

<sup>16</sup> Covenant of the League of Nations, 8, (Original version), 28-9(amendated text).

<sup>17</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> Ed. Op. Cit. 76.

and justice. Article 15 also enabled referral of the dispute from the council to the Assembly of the League, in which case it was the Assembly that was empowered to make recommendations. An Assembly report, if adopted by the votes of all the members of the council and a majority of the other members (again not counting the parties to the dispute), had the same force as a unanimous report of the council.<sup>18</sup> In addition Article 16 refrain states from resorting to war without following above procedure that would be deemed as 'an act of war against all other members of the League'.<sup>19</sup>

However, these limitations imposed by the Covenant of the League and a State's right to wage war did not totally abolish the war. They were confined only to the members of the League. Furthermore, it is highly doubtful whether under the Covenant, measures short of war, such as armed intervention or reprisals were permissible without first having recourse to pacific means of settlement of disputes.<sup>20</sup>

The League system did not prohibit war or the use of force, it did set up a procedure designed to restrict it to tolerable levels,<sup>21</sup> but war remain lawful. The Covenant had significant consequences; first, through Covenant of the League, the right of self-defense began to emerge more clearly as genuine legal exception to the procedural restraints on the right to resort to war. Secondly, the categories of force short of war, developed prior to the Covenant, began to appear more clearly as legal rights, rather than political justifications. Both of these developments could not have occurred without the primary restriction on a state's unlimited legal competence to go to war.<sup>22</sup>

Nevertheless, the system had some 'gaps' in its legal fences around the right of States to resort to war. The 'gaps' opened the legal road to war in the following circumstances; First, Article 15(7), kept intact the liberty to plunge into war. In the absence of unanimity in the Council or a proper majority in the Assembly, excluding the votes of parties to the dispute, the parties retained their freedom of action. Secondly, the Council (or the

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<sup>18</sup> Covenant of the League of Nations, 8.

<sup>19</sup> S. K. Verma, *An Introduction to Public International Law*, (New Delhi: Prentice-Hall of India Private Ltd, 1998), p. 368.

<sup>20</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Ed. Op. Cit. p. 780.

<sup>21</sup> Martin Dixon, *International Law*. Op. Cit 182.

<sup>22</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> Ed. Op. Cit. pp. 76-77.

Assembly) was incompetent to reach a recommendation if in its judgment the matter came within the domestic jurisdiction of a party to the dispute (Art 15 (8)). The parties preserved their freedom of action. Thus, an international war could be triggered by a dispute that was ostensibly non-international in character. Third, in Article 12, if the Council (or the Assembly) did not arrive at a recommendation within six months, or if either an arbitral award or a judicial decision was not delivered within reasonable time, the parties would be free to take any action that they deemed fit.

Fourth, in conformity with Article 12 no war could be undertaken within three months of the 'award', decision or recommendation. The upshot was that, after three months, war could be started against a state failing to comply with the 'award', decision or recommendation. Finally, all the limitations on the freedom of war applied to the relations between League Members *inter se*. The Covenant did not, and could not; curtail that freedom in the relations between non-Members (and Members and *a fortiori* between non-Members among themselves).<sup>23</sup> Article 17 provides that, in the event of a dispute between Members and non-Members or between non-Members, the non-Member(s) should be invited to accept the obligations of membership for the purpose of the dispute, and then the stipulations of Article 12 would apply. It goes without saying that non-Members had an option to accede to such an invitation or to decline it.<sup>24</sup>

Members realized the existence of the 'gaps' and made frantic efforts to close the 'gaps' in the Covenant. The Geneva Protocol on the Pacific Settlement of International Disputes, adopted by the Assembly of the League in 1924, was the first attempt to bridge the 'gaps' but never entered into force.<sup>25</sup> Since the protocol remained abortive, war did not become illegal in principle until the Kellogg-Briand Pact of 1928.

#### **2.4. The Kellogg-Briand Pact**

The League system did not prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable levels. It was a constant challenge of the inter-war years to close the 'gaps' in the Covenant in an effort to achieve the total prohibition of war in

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<sup>23</sup> *Ibid.* 77.

<sup>24</sup> *Geneva Protocol on the Pacific Settlement of International Disputes*, 1924, 2 Int. leg. 1378, 1379.

<sup>25</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Ed. Op. Cit. p. 780.

international law which resulted ultimately in the signing in 1928 of the General Treaty for the Renunciation of War. The parties to the treaty condemned recourse to war and agreed to renounce it as an instrument of national policy in their relations with one another.<sup>26</sup>

In the Preamble of the Treaty, the parties expressed their conviction that any signatory that would seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty. In Article I, the ban is explicit; the parties condemned recourse to war for the solution of international controversies' and renounced it 'as an instrument of national policy in their relations with one another'. In Article 11 they agreed that the settlement or solution of all disputes and conflicts should 'never be sought except by pacific means'.<sup>27</sup> The treaty was not terminated and become the basis of the trial of war crimes after the Second World War.

The Kellogg-Briand Pact prohibited all wars of aggression, which was its main advancement in comparison with the Covenant of the League. However, it did not abolish war as an institution, which was still regulated in its major aspects by the accepted rules of warfare. Theoretically, recourse to war was lawful under the Pact as a permissible means of self-help or self-defense. Under the Preamble of the Pact, any contracting parties, which hereafter seek to promote its national interests by resort to war, should be denied the benefits furnished by this Treaty. It appears from the phrase that permission for collective self-defense in response to an armed attack was granted to states. Although the topic of self-defense was not explicitly regulated in the Pact, its parameters were not set out. No competent body was established to determine whether a state employing force was acting in self-defense or in breach of the Pact.<sup>28</sup>

Secondly, the Pact did not restrict the competence of the League of Nations, and now the UN to take enforcement action by armed force. That made recourse to war legitimate,

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<sup>26</sup> General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact of Paris), 1928.

<sup>27</sup> S. K. Verma, *An Introduction to Public International Law* (New Delhi: Prentice-Hall of India Private Ltd, 1998), p. 368. Dinstein, *War, Aggression and Self-Defense*, p. 79.

<sup>28</sup> K. Skubiszewski, 'The Use of Force by States' in *Manual of Public International Law*, p. 744, H. Kelsen, *Principles of International Law*, 1<sup>st</sup> ed., 1952, p. 43 and Dinstein, *War, Aggression and Self-Defense*, p. 79.

primarily, under the aegis of the League of Nations. But the national policy formula gave rise to the interpretation that other wars-in pursuit of religious, ideological and similar (not strictly national) goals were also permitted. Kelsen argued that 'a war which is a reaction against a violation of international law and that means a war waged for the maintenance of international law like Gulf-War in 1991, is considered an instrument of international and not of national policy. Yet to the extent that war was undertaken in response to an ordinary violation of international law, the analysis could not be harmonized with the requirement in Article 2 of the Pact that the settlement of all disputes 'shall never be sought except by pacific means'.<sup>29</sup>

Third, war outside the span of the reciprocal relations of the contracting parties; that is, between signatories and non-signatories or against a signatory who had violated the Pact. The renunciation of war in Article 1 was circumscribed to the relations between contracting parties inter se. Therefore, the freedom of war was preserved as between contracting and non-contracting parties and among non-contracting parties.<sup>30</sup>

The limitation of the Pact is in the technical word 'war' that elicited much criticism in international legal literature. Apart from the fact that the term 'war' seemed ambiguous, the disturbing implication was that the use of force short of war and threats were left to the discretion of each State.<sup>31</sup> Brownlie holds that the best guide to the meaning of the Pact is to be found by recourse to the subsequent practice of the parties. That the subsequent practice of parties to the Kellogg-Briand Pact leaves little room for doubt that it was understood to prohibit any subsequent use of armed force.<sup>32</sup> For example the conflict between Soviet Union and China in 1929, the two states did not seek to justify their action by pointing to the absence of a formal state of war. Many treaties concluded subsequently to the Pact by parties to it and purporting to reaffirm its obligations refer to aggression, invasion and acts of force without a declaration of war. The findings of the

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<sup>29</sup> Dinstein, *War, Aggression and Self-Defense*, cp. cit. P. 80.

<sup>30</sup> C. H. M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law; 81 R. C. A. D. I. 455, 471-4 (1952)

<sup>31</sup> Ian Brownlie, *International Law and the Use of Force by States*. Op. Cit. pp. 87-88.

<sup>32</sup> *Ibid.* 88.



Nuremberg Tribunal made the assumption that the phrase in the Pact has no limiting effect.<sup>33</sup>

Threat of force is not accounted for by the Pact. Brownlie contend that when a threat is followed by a military occupation which is unopposed as a result of the threat and the hopelessness of resistance it is possible to suggest with some plausibility that a resort to force has occurred and that the Pact applies unless the term 'war' is given a restrictive meaning". The *travaux préparatoires* indicate that the inclusion of threats was not contemplated as no mention is made of them. Without a firm conclusion on the given evidence, he suggests that subsequent practices on the subject and those threats to resort to force as an instrument of national policy are prohibited by the Pact.<sup>34</sup>

The Pact represented a step forward in comparison to the Covenant of the League, but it had some defects; first, the issue of self-defense was not clearly addressed in the text; second, no agreed upon limits were set on the legality of war as an instrument of international policy; third, the prohibition of war did not embrace the entire international community; fourth, forcible measures short of war were eliminated from consideration;<sup>35</sup> fifth, failure to provide for collective enforcement of its obligations; sixth, absence of a duty under the Pact to submit disputes between its signatories to a binding settlement.<sup>36</sup>

Despite the defects of the General Treaty for the Renunciation of War, it stands together with the UN Charter as one of the two major sources of the norm limiting resort to force by states. The Charter improves on the Pact by being more explicit in references to 'threat or use of force' and self-defense.

## **2.5. The Charter of the United Nations**

The *jus ad bellum* of today is not simply a product of the UN Charter. There was a web of customary and treaty law, which regulated the unilateral use of force by, states. The Charter simply ushered in a completely new era based on the previous development of the Covenant of the League of Nations and Kellogg-Briand Pact. Before the ratification

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<sup>33</sup> *Ibid.* 89.

<sup>34</sup> S. K. Verma, *An Introduction to public International Law*, Op. Cit. p. 368. Dinstein, *War, aggression and Self-defense*. Op. Cit. 80.

<sup>35</sup> Dinstein, *War, Aggression and Self-Defense*, Op. Cit. P. 80.

<sup>36</sup> Dixon, *International Law*. Op. Cit. P. 183.

of the UN Charter, the right of states to use armed force was regulated by a mix of customary and treaty law. There was no general prohibition on the use of force by customary law, although the Kellogg-Briand Pact did stipulate a ban on the right to resort to war. By 1945, self-defense had emerged as an exception to conditions for its lawful exercise.<sup>37</sup>

When the Charter of the UN was drafted in San Francisco in 1945, one of its aims was redressing the shortcomings of the Covenant of the League of Nations and Kellogg-Briand Pact. Article 2(4) is the pivot on which the present day *jus ad bellum* is hinged.<sup>38</sup>

The Article proclaims;

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.<sup>39</sup>

Article 2(4) moves beyond Kellogg-Briand Pact, it avoids the term 'war' and uses 'threat or use of force'. 'Use of force' in international relations includes war, but the prohibition transcends war and covers also forcible measures short of war.<sup>40</sup> The 'threat or use of force' abolished in Article 2(4) applies only in the international relations' of Members as well as non-Members as stipulated in Article 2(6) not domestic conflicts. The choice of concepts, 'threat or use of force' was most innovative on the part of the framers of the Charter. The concepts are comprehensive than war. War had a technical (but imprecise) sense in international law and states often engaged in hostilities while denying that they are technically in a state of war, the hostility could range from minor border incidents to extensive military operations.<sup>41</sup> The restrictive and technical interpretation of 'war' and 'resort to war' was used by Japan against China in Manchurian conflict of 1931 and the undeclared war of 1937 and no state of war existed.<sup>42</sup>

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<sup>37</sup> Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> Ed., Op. Cit. P. 80.

<sup>38</sup> Charter of the United Nations, 1945, Article 2 (4).

<sup>39</sup> 6 U. N. C. I. O. Documents 335.

<sup>40</sup> Michael Akehurst, *A Modern Introduction to International Law*, 3<sup>rd</sup> ed. (London: George Allen and Unwin Ltd, 1977), p. 240.

<sup>41</sup> *Ibid.* 240.

<sup>42</sup> K. Skubiszewski. Use of Force by States. Collective Security. Law of War and Neutrality, in *Manual of Public International Law*. Op. Cit. p. 743.

The Article prohibit the 'threat or use of force' in international relations. The extent and meaning of force stated in Article 2(4) has raised controversies among scholars. The expression 'force' is not preceded by the adjective 'armed' in Article 2(4) but in Preamble, Article 41 and 46. The issue is whether 'force' in Article 2(4) transcend 'armed force' to political and economic coercion or not. Brazil's proposal during the drafting of the Article that states should be required to refrain from "economic measures" was rejected.<sup>43</sup> It is not clear whether this was because it was intended not to prohibit economic force or because the term 'force' in the Article was thought sufficient to cover it without specific mention. Goodrich, Hambo and Simons contend that;

It seems reasonable to conclude that while various forms of economic and political coercion may be treated as threats to the peace, as contrary to certain of the declared purposes and principle of the Organization, or as violating agreements entered into or recognized principles of international law, they are not to be regarded as coming necessarily under the prohibition of Article 2(4), which is to be understood as directed against the use of armed force.<sup>44</sup>

Article 2(4) should be read as a whole within the context of the UN Charter. Force contrary to 'the purposes of the UN' is also prohibited. Any threat or use of force by a state, other than in accordance with the exceptions provided for under the UN Charter, is contrary to, and prohibited by contemporary international law.<sup>45</sup> The western states held that 'force' was limited to armed or physical force as stated in *travaux préparatoires*. While several Latin Americas states, Africans, Asian states and Eastern bloc argues that the purpose of Article 2(4) was, *inter alia*, to protect the political independence of states and that this could be just as readily imperiled by economic and political pressure as by armed force. States should not be bound by the *travaux préparatoires* of 1940's. However, the nature of specific acts included in the text and the facts that such matters as coercion by other means are dealt with elsewhere in the text provide support for the view that a restrictive interpretation of the scope of the term 'force' is called for.<sup>46</sup>

The term 'force' understood to imply armed force, is not necessarily restricted to the military forces, border security forces, irregular forces and even police forces. The use of

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<sup>43</sup> Leland M. Goodrich, Edward Hambro and Anne Patricia Simons, *Charter of The United Nations Commentary and Documents*, 3<sup>rd</sup> ed., (New York: Columbia University Press, 1969), p. 49.

<sup>44</sup> J. W. Singh, *Use of Force Under International Law*, (New Delhi: Harnam Publications, 1984), pp. 212-13.

<sup>45</sup> Rebecca M. M. Wallace, *International Law*, 3<sup>rd</sup> ed. Op. Cit. p. 251.

<sup>46</sup> Louis Henkin, the Report of the Death of Article 2(4) are Greatly Exaggerated 65 A.J.I.L. 544 (1971).

force may be direct or indirect. Besides the conventional weapons, force would include bacteriological, biological and chemical devices, such as poison gas and nerve gas. It includes nuclear and thermonuclear weapons.<sup>47</sup>

Article 2(4) was supplemented by the 1970 General Assembly Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>48</sup> The Resolution is only a resolution and therefore not legally binding on Members. But it is regarded as representing the consensus of the international community on the legal interpretation to be given to the principles enunciated in the UN Charter.<sup>49</sup> In *Nicaragua* case, the International Court of Justice denied that American economic sanctions against *Nicaragua* constituted 'a breach of the customary-law principle of non-intervention'.<sup>50</sup> Therefore, when studied in context, the term 'force' in Article 2(4) must demote 'armed' or 'military force'. Economic or Political pressure does not come within the purview of the Article, unless coupled with the use or at least the threat of force. Wallace claims that as far as Article 2(4) and the legal regime envisaged by the UN Charter is concerned, the prohibition is one aimed at outlawing armed force and "gunboat diplomacy" in relations between states.<sup>51</sup>

Article 2(4) also prohibits 'threat' by states. The prohibition goes beyond actual recourse to force, whether or not reaching the level of war and interdicts mere threats of force. The ultimatum issued by France and the United Kingdom to Egypt and Israel in 1956 demanding a ceasefire within 12 hours was a "threat of force". Kissinger's threat of using force against the Arab oil countries in case of further oil price hike raises the question of the legality of such threat under Article 2(4).<sup>52</sup>

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<sup>47</sup> *Ibid.* 249-250.

<sup>48</sup> G. A. Resolution 2625 (XXV), October 24, 1970-see also Resolution on the Definition of Aggression 1974, G. A. Resolution 3314 (XXIX); 69 A.J.I.L. 480 (1975).

<sup>49</sup> Rebecca M. M. Wallace, *International Law*, 3<sup>rd</sup> ed. Op. Cit. p. 250.

<sup>50</sup> Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. Op. Cit. P. 81. And Wallace, *International Law*, 3<sup>rd</sup> ed. Op. cit. Pp. 251-52.

<sup>51</sup> *Ibid.* 81, Singh, *Use of Force under International Law*, 1984, p. 213 and Harris, *Case and Materials on International Law*, 5<sup>th</sup> ed. 1998, p. 864.

<sup>52</sup> Advisory Opinion on Legality of the Treaty or use of Nuclear weapons, 1996, 35 I. L. M. 809, 823 (1996) and R. Sadurska, 'Threats of Force; 82 A. J. I. L. 239, 24 / (1988)

The question whether a "signaled intention to use" nuclear weapons (or other kinds of force) or the possession of nuclear weapons is a threat of force contrary to Article 2(4). In 1996 the International Court of Justice in its Advisory Opinion on the Legality of the threat or use of Nuclear Weapons, stated that;

The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal-for whatever reason-the threat to use such force will likewise be illegal.<sup>53</sup>

It implies that for a threat of force to be illegal, the force itself must be unlawful. If a state declares its readiness to use force in conformity with the Charter, that is not as illegal 'threat' but a legitimate warning and reminder. A threat of force is viewed as 'a form of coercion'. Any threat of force, not in compliance with the Charter, is unlawful.<sup>54</sup>

On the other hand, the Court appeared to accept that the mere possession of nuclear weapons did not of itself constitute a threat. However, it noted that a policy of nuclear deterrence functioned on the basis of the credibility of the possibility of resorting to those weapons in certain circumstances. It was stated that whether this amounted to a threat depended upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a state or against the purposes of the UN. If the projected use of the weapons was intended as a means of defense then there should be a consequential and necessary breach of the principles of necessity and proportionality, this would suggest that a threat contrary to Article 2(4) existed.<sup>55</sup>

There are a lot of debates about the meaning of the phrase 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'. The debate is whether these words should be interpreted restrictively, so as to permit force that would not contravene the clause or as reinforcing the prohibition. According to permissive view, if the use of force does not result in the loss or permanent occupation of territory, if it does not compromise the targeted state's ability to take independent decisions and if it is not contrary to UN purposes, it is not unlawful. For example, use of force, which is designed to rescue nationals by means of a

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<sup>53</sup> ICJ Reports, 1996, paras. 47-8; 35 ILM, pp. 1996, pp.809, 823.

<sup>54</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> ed; Op. Cit. 783.

<sup>55</sup> Dixon, *International Law*. Op. Cit. P. 184.

swift surgical strike, like Israel's action at Entebbe airport in 1976, is not unlawful. It is not intended to be, and does not result in compromising of territorial integrity or political independence. In addition, use of force to protest the human rights of non-nationals, as may have been the case with India invasion of East Pakistan in 1971 would not be unlawful because it is not contrary to the purposes of the UN Charter.<sup>56</sup> However, the US invasion of Iraq to liberate Iraqis from grip of dictatorship of Saddam Hussein is illegal, because they occupied Iraq and displaced the regime on very questionable ground.

The position is supported by Bowett<sup>57</sup> and Stone. Stone contends that the structure of Article 2(4) does not produce an unqualified prohibition of the resort to force, as it would have if the draftsmen had stopped at the words "threat or use of force". Akehurst hold that Article 2(4) is badly drafted, in so far as it prohibits threat or use of force only 'against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations'. It is only force of certain specific kinds that is proscribed. Therefore, Article 2(4) cannot be interpreted as diminishing a state's pre-Charter rights because there is no express statement to that effect. The right to use force for certain 'non-aggressive' purposes existed before the Charter, and the limited use of force for certain purposes must still be valid.<sup>58</sup>

Article 2(4) may be badly drafted, in so far as it prohibits the threat or use of force only 'against the territorial integrity or political independence of any state'. However, there is also 'in any other manner inconsistent with the purposes of the United Nations'. The purposes of the UN are spelt out in Article 1 of the Charter, include respect for the principle of equal rights and self-determination and respect for human rights, but the overriding purpose of the UN remains as '(T)o maintain international peace and security', and solving both potential and actual conflict by peaceful means. Article 2(4) should be broadly interpreted and it should be interpreted as totally prohibiting the threat or use of

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<sup>56</sup> *Ibid.* 185, J. Stone, *Aggression and War Order* (London: 1958 pp. 43, 95. And Michael Akehurst, *A modern Introduction to International Law*, 3<sup>rd</sup> ed. (London: George Allen and Unwin Ltd, 1977), p. 240

<sup>57</sup> Bowett, *Self-Defense in International Law*, 1958, p. 207.

<sup>58</sup> Akehurst, *A Modern Introduction to International Law* 3<sup>rd</sup> ed. OP. Cit. P. 240-41 and Bert V. A Roling, *The Ban on The use of Force and The U. N. Charter. The current Legal Regulation of The use of Forces* (Martimus: Nijhoff publishers, 1986), pp. 5-6.

force apart from the provisions of the Charter, which are exceptions to the principle.<sup>59</sup> Het's position is that once the right of self-defense under Article 51 is conceded, the words of Article 2(4) can no longer be regarded as an absolute prohibition on a resort to force; that once the prohibition has been modified to that extent, the way is open for recognition of other situations in which compelling national interests may justify the use of armed force consistent with Article 2(4).<sup>60</sup> These views should not be entertained when interpreting Article 2(4). Although it does not allow a state to resort to threat or force in every circumstance but permits its use in various situations. Moreover, in so far as the permissive interpretation places the distinction between lawful and unlawful force on the subjective intention or aim of the acting state, it may go too far. If the use of force is to be regulated at all, it must be on the basis of objective legal criteria.

On the other hand, Brownlie and Kelsen contend that the effect of Article 2(4) is to prohibit totally a state's right to use force, unless some specific exceptions are made by the Charter itself. The right of self-defense under Article 51 and action against ex-enemy states (Article 107) are the only permissible exceptions to the general ban in Article 2(4). As to the above disputed phrase in Article 2(4), it is argued that they were not intended to qualify the obligation but merely to describe the totality of a state's rights under international law. The final words of Article 2(4) prohibiting use of force against the purposes of the UN were not intended to allow force to achieve those purposes but, rather, as a safety net to ensure that force could never be used against non-state entities, such as colonies and protectorates. In a nutshell, Article 2(4) prohibits all force, for all purposes, unless a specific provision says otherwise.<sup>61</sup>

The analysis of *the travaux préparatoires* of the San Francisco Conference, which drew up the Charter, confirms that these phrases were inserted in preliminary drafts of Article 2(4) in order to strengthen the obligation rather than weaken it. The clause is neither intended as a qualification nor intended to be restrictive but to give specific guarantees to

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<sup>59</sup> Rebecca M. M. Wallace, *International Law*, 3<sup>rd</sup> ed. Op. Cit. p. 250.

<sup>60</sup> Dixon, *International Law* Op. Cit. P. 185. Brownlie, *International Law and the Use of Force by States*, 1963, and Kelsen, *The Law Nations*, 1950.

<sup>61</sup> Ian Brownlie, *International Law and the Use of Force by States*. Op. Cit. p. 267. And Dixon, *International Law*, Op. Cit. p. 185.

small states. Furthermore, in several examples of the use of force since ratification of the UN Charter indicates that, only Israel after the Entebbe raid relied primarily on the permissive view of Article 2(4). In most cases such as the invasions of the Dominican Republic (1965) and Granada (1983), the bombing of Iraqi nuclear Reactor in 1981, the Indian invasion of East Pakistan in 1971 and the Tanzania inversion of Uganda in 1976, the states relied on alleged exceptions to the general principle rather than interpreting it narrowly. While these exceptions might be widely drawn, this is very different from claim that the primary obligation is itself inherently flexible.<sup>62</sup> The US and its allies claimed that their attack on Iraq was preemptive self-defense measures. However, there was no imminence of an attack on US or its allies by Iraq and the force used in Iraq was not necessary and proportionate to the threat.

In general, the consensus among the international community, as evidenced by consideration of actual instances of the use of force, is that Article 2(4) is not to be interpreted in the way claimed by protagonists of the permissive view. This is supported in the drafting history of the provision, the general purposes of the Charter, and the supplementary declarations like the 1970 General Assembly Declaration on Principles of international Law Concerning Friendly Relations and Cooperation among States and decisions of International Court of Justice like the Corfu Channel Case about Operation Retail in which the Court rejected it as defense. Indeed, it would be strange if the Charter were to repeat the mistakes of the Covenant of the League of Nations and the Kellogg-Briand Pact by providing loopholes based on an artificial and self-serving interpretation of Article 2(4).

## **2.6. Self-Defense**

The concept of self-defense as a legal right has no meaning unless there is a corresponding general duty to refrain from the use of force. This general ban was achieved in some measure under the Kellogg-Briand Pact and taken further by the Charter. Although claims of 'self-defense' dates back in 1837, self-defense as an "inherent right" dates back only to the time that war generally become unlawful.<sup>63</sup>

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<sup>62</sup> Dixon, *International Law*. OP. Cit. P. 186.

<sup>63</sup> Charter of the United Nations, 1945, Article 51.



In the UN Charter, the right of self-defense is enshrined in Article 51, which proclaims;

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measure taken by members in the exercise of this right of self-defense 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 and security.<sup>64</sup>

Controversy surrounds the precise extent of the right of self-defense enshrined in the Article. One view holds that Article 51 in conjunction with Article 2(4) now specifies the scope and limitations of the doctrine. Self-defense can only be resorted to "if an armed attack occurs, and in no other circumstances."<sup>65</sup> The views maintain that the opening phrase in Article 51 specifying that nothing in the present Charter shall impair the inherent right of self-defense over and above the specific provisions of Article 51 refers only to the situation where an armed attack has occurred.<sup>66</sup> They gain support and strength from *travaux préparatoires* of the use of force in legitimate self-defense. The international Court of Justice in the Nicaragua Case established that the right of self-defense exists as an inherent right under customary international law as well as under the UN Charter.<sup>67</sup>

There are controversies regarding a right to anticipatory or pre-emptive self-defense. The concept of anticipatory self-defense is of particular relevance in the light of modern weaponry, states can launch an attack with tremendous speed that may allow the target state little time to react to the armed assault before its successful conclusion, particularly if that state is geographically small.<sup>68</sup> States have employed pre-emptive strikes in self-defense. The right of self-defense was claimed by Israel against its Arab neighbors in June 1967, when the Arab states launched a fierce campaign against Israel, whose ships were denied the right of passage through the Suez Canal. However, the right could not be

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<sup>64</sup> Ian Brownlie, *International Law*, Op. Cit. pp. 112-13, K. Skubiszewski, 'Use of Force, Op. Cit. pp. 765-8 and H. Kelsen, *The Law of the United Nations*, London, 1950, p. 914.

<sup>65</sup> Bowett, *Self-Defense*, pp. 185-6; J. Stone, *Aggression and World Order*, (London, pp. 43, 95-6., and Brierly, *The Law of Nations*, 6<sup>th</sup> ed, (Oxford: 1963), pp. 417-18.

<sup>66</sup> Shaw, *International Law*, Op. Cit. P. 788.

<sup>67</sup> Bowett, *Self-Defense*, pp. 118-92, Brownlie, *International Law*, p. 275, L. Henkin, *How Nations Behave*, 2<sup>nd</sup> ed. (New York, 1979), pp. 141-5.

<sup>68</sup> SC Res. 487 (1981), SCOR, 36<sup>th</sup> yr., Resolutions and Decisions. p. 10. For Security Council Debate, see Doc. S/PV. 2280, June 12, 1981, reprinted in 20 ILM 965 (1981). Verma, *Public International Law*. Op. Cit. pp. 372-73.

justified under Article 51, which grants the right of self-defense to a state only "if an armed attack occurs". On the other hand, Israel attack on an Iraqi nuclear reactor in 1981 was not justified. But Israel justified its conduct on the ground of anticipatory self-defense as the reactor could be used to manufacture weapons that could be used against Israel. The Security Council condemned the action. The action of Israel did not show any imminent threat of an armed attack against Israel and the matter was not brought before the Security Council in any form before Israel took that action.<sup>69</sup>

Anticipatory self-defense involves fine calculations of the various moves by the other party. An early preemptive attack may be construed to be an aggression.<sup>70</sup> The nature of international system leaves states to determine by themselves an anticipatory self-defense where an armed attack is foreseeable, imminent and unavoidable so that the evidential problems and temptations of the former concept are avoided without demanding threatened states to make the choice between violating international law and suffering the actual assault.<sup>71</sup>

The question of necessity and proportionality are at the heart of self-defense. The Court established in *Nicaragua* Case that 'self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. The state contemplating attacking on the basis of self-defense should determine necessity and proportionally, but subject to international community considerations as a whole and specifically by Security Council under terms of Article 51.<sup>72</sup>

Despite controversy and disagreement over the scope of the right of self-defense, there is a general agreement on the right of states to resort to force to repel any armed attack. The existence of the right of self-defense under general customary international law denotes that it is conferred on every state. Customary international law forbids use of inter-state

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<sup>69</sup> Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> Ed. Op. Cit. p. 190.

<sup>70</sup> Shaw, *International Law*, Op. Cit. P. 791.

<sup>71</sup> Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> Ed. Op. Cit. p. 190.

<sup>72</sup> *Ibid.* 87.

force by all states, whether or not they are Members of UN. Therefore, States are entitled to the right of self-defense under existing customary international law.

## 2.7. Conclusion

Article 2(4) was a milestone in the development of international law prohibiting use of unilateral force against other states in international relations. The Article superseded all other previous attempts to prohibit war in international system. It supersedes the Covenant of the League of Nations and Kellogg-Briand Pact in terms of technicalities and its comprehensiveness, which addresses 'threat or use of force in international relations against territorial integrity or political independence' rather than war alone.

The Article has acquired customary law status. The Prohibition of the use of inter-state force is applicable to members of the United Nations and non-Members too. The Recourse to force by a non-Member state is dealt with in Article 2(6). Generally, the liberty to venture into war and employ inter-state force is obsolete. Thus the prohibition as articulated in Article 2(4) of the Charter has become an integral part of customary international law and it binds all states. The International Court of Justice in the *Nicaragua Case* authoritatively canvassed this customary status.<sup>73</sup>

Article 2(4) is no longer 'mocking us from its grave' rather it is effective and relevant regulating threats and use of force until a new or modification of the Article is put in place. The relevance of the Article was explicit in the successful reaction by international community to the Iraq invasion of Kuwait in 1990 and the recent Iraq-US war. The frequent assaults upon Article 2(4) by states has hardly turned affected and invalidated the legality expressed in the Article. The two incidences have proved that the legal validity of the Article is universally conceded and the entire international community opposes any violation of its structures.

The Article has exceptions but the focus of this study is on Article 51. Though marred by controversies, Article 51 is one of the exceptions to Article 2(4). The Article grants states the right of self-defense in the event of armed attack. Customary international law grants

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<sup>73</sup> T. M. Franck, 'Who killed Article 2 (4)? Or: Changing Norms Governing the use of Force by states; 64. A. J. I. L. 809, id., 835 (1970)

states right to use force in circumstances failing short of armed attack. However, whatever the rights states enjoy with respect to the use of force, the United Nations Charter and customary international law requires states to settle their disputes by peaceful means. The Iraq-US war in 2003 would have been avoided if only US gave peaceful means priority and more time.

## CHAPTER THREE

### EXCEPTIONS TO THE PROHIBITION OF THE USE OF FORCE UNDER ARTICLE 2(4) OF THE UN CHARTER

#### 2.8. Background

The Charter of UN adopted in 1945, outlawed 'aggressive war' and prohibited any use of force or threat thereof. It covered both war and non-war armed conflicts.<sup>1</sup> The Charter deals with the use of force by states in several provisions. The basic rule is in Article 2(4) that prohibits 'the threat or use of force' instead of 'war' or 'resort to war'. The Charter avoids the technical difficulties, which arose under the previous instruments in connection with the meaning of the term 'war'.<sup>2</sup>

Article 2(4) is acclaimed to constitute the universally binding law on states and not exclusively on the members of the organization. The principle contained in the Article has become a customary rule of international law and as such is binding upon all states in the world community.<sup>3</sup> Numerous declarations by states, the interpretations which they adopt when problems regarding the use of force arise, and the explanations which they submit whenever accused of unlawful employment of force bear witness to the acceptance of the view that Article 2(4), besides being part of the law of the UN, is a principle of the law that governs the regulation of threat or use of force in international relations.<sup>4</sup>

The question which constantly arises is whether Article 2(4) embodies a general prohibition to take any initiative in the use of force? The Article does not speak of any use of force but such use as is made 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes' of the

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<sup>1</sup> S. K. Verma, *An Introduction to Public International Law* (New Delhi: Prentice-Hall of India Private Ltd, 1998), p. 369.

<sup>2</sup> K. Skubiszewski, *Use of Force by States, Collective Security. Law of War and Neutrality. Manual of Public international Law* (London: Macmillan, 1968), p. 745.

<sup>3</sup> Malcolm N. Shaw, *International Law* 4<sup>th</sup> ed. (Cambridge University press, 1997), p. 781. K. Skubiszewski, 'Use of Force', p. 745 and L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law Cases and Materials*, 3<sup>rd</sup> ed., St Paul, 1993, p. 893. And Y. Dinstein, *War, Aggression and Self-Defense*, 1<sup>st</sup> ed. (Cambridge University Press, 1988), p. 86.

<sup>4</sup> K. Skubiszewski, *Use of Force by States, Collective Security. Law of War and Neutrality in Manual of Public international Law*, Op. Cit. p.745.

organization. Force contrary to 'the purposes of the UN' as spelt out in Article 1 is also prohibited.<sup>5</sup> But the overriding purpose of the UN remains;

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.<sup>6</sup>

Can states resort to force if they do not aim at anybody's territorial integrity or political independence and do not otherwise violate the purposes of the UN? Some states tend to adopt an interpretation which allows for some initiative in the use of force by individual governments, and their views find support by a number of writers, nevertheless the prohibition of Article 2(4) should be construed as all-embracing and general.<sup>7</sup>

The ban on force is an 'absolute all-inclusive prohibition', as was stated by the US delegate at San Francisco.<sup>8</sup> The threat or use of force was banned in all circumstances except for those provided for in chapter VII, Article 51, Article 53 and in other provisions such as Articles 106 and 107 which have since become obsolete. Secondly only military force was proscribed and third, only threat or use of force in inter-state relations was banned.<sup>9</sup> The modifications in the law after 1919 aimed at eliminating war and other manifestations of force from international life. Therefore, it will be contradictory to read into the Charter authorization to employ force in situations, which the Charter itself has not unequivocally accepted from the principle enunciated in Article 2(4).<sup>10</sup>

In the Preamble to the UN Charter the parties undertake 'to ensure that armed force shall not be used, save in the common interest' and to the obligation of members to settle peacefully their international dispute (Article 2(3)). The intentions of the framers of the UN Charter, though not clearly expressed, were directed at removing force as a means of settling all international disputes, and, therefore, the ban equally covers situations where territory or independence are not at stake. Also, the principle of effectiveness requires

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<sup>5</sup> Rebecca M. M. Wallace, *International Law*, 3ed Ed. (London, sweet and Maxwell, 1997), pp. 249-50.

<sup>6</sup> United Nation Charter, Art. 1(1).

<sup>7</sup> *Ibid.* 745.

<sup>8</sup> See UNCIO, VI, at 355.

<sup>9</sup> Antonio Cassese, *International Law* (New York: Oxford University Press, 2001), p. 101.

<sup>10</sup> *Ibid.* 745.

Article 2(4) to be read as prohibiting all threat or use of force unless the Charter, in other provisions, expressly permits its use.<sup>11</sup>

Article 2(4) goes beyond actual recourse to force, whether or not reaching the level of war, and interdicts mere threats of force. The Article forbids use or threat of force against the territorial integrity and political independence of States. The dual idioms, when standing alone, may invite a rigid interpretation blunting the edge of Article 2(4).<sup>12</sup> The restrictive interpretation is not persuasive and dangerous consequences are likely to flow from a restrictive reading of the Article 2(4). If the injunction against resort to force in international relations is confined to specific situations affecting only the territorial integrity and the political independence of States, a legion of loopholes will inevitably be left open.<sup>13</sup>

In emphasizing the reference to the territorial integrity and political independence of States, the restrictive construction of Article 2(4) fails to give proper account to the conjunctive phrase 'or in any other manner inconsistent with the Purposes of the UN'. According to Dinstein, these words form the centre of gravity of Article 2(4), because they create 'a residual "catch-all" provision'.<sup>14</sup> The *travaux préparatoires* of the Charter indicate that the expressions 'territorial integrity' and 'political independence' had not originally been included in the text and were added later for 'particular emphasis', there being no intention to restrict the all-embracing prohibition of force inconsistent with the Purposes of the UN.<sup>15</sup>

The first purpose of the UN is enshrined in Article 1(1) of the Charter. The Preamble of the Charter expounds the *raison d'être* of the Organization in enunciating the determination 'to save succeeding generations from the scourge of war'.<sup>16</sup> Moreover,

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<sup>11</sup> *Ibid.* 746.

<sup>12</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3rd Ed (London: Cambridge University Press, 2001), p. 81.

<sup>13</sup> Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (1958), p. 43.

<sup>14</sup> Y. Dinstein, *War, Aggression and Self-Defense*, 3rd Ed. Op. Cit. p. 82. M. Lachs, 'The Development and General Trends of International Law in Our Time', 169 R.C.A.D.I 9, 162 (1980).

<sup>15</sup> Dinstein, *War, Aggression and Self-Defense*, 3rd Ed. Op. Cit. p. 82.

<sup>16</sup> Charter of the United Nations, Preamble.

Article 2(4) is 'inseparable' from Article 2(3), and the two paragraphs should be read together. Therefore, the correct interpretation of Article 2(4) is that any use of inter-state force by Member or non-Member States for whatever reason is banned, unless explicitly allowed by the Charter.<sup>17</sup>

The sweeping injunction against recourse to inter-State force, under Article 2(4), is subject to exceptions. The exceptions from the rule of Article 2(4) are to be found in the Articles relating to employment of force by the Organization itself (Articles 24, 39-50, 51, and 106); by regional institutions and under regional arrangements (Articles 53); and by individual states acting either in self-defense (Articles 51), chapter six and half under peacekeeping and humanitarian intervention or under the exceptional and now virtually obsolete rule of Article 107. However, even in those rare situations where the Charter does not deprive individual states of the power to resort to force, it remains subject to the control of the UN and, occasionally, regional agencies. There is in the Charter not only a ban on the threat or use of force but also an attempt to centralize the competence to employ force in international relations.<sup>18</sup>

## **2.9. Peacekeeping enforcement**

The UN Charter does not have any specific provision using the word peace making or 'peacekeeping' operations or measures. But they are the natural coronary of the Charter provisions on the maintenance of international peace and security. Chapters VI and VII of the Charter, together provide the legal basis for such operations. At the initial stages, these operations were fraught with controversy, and in the case of ONUC (Congo), the Soviet Union contended that only the Security Council is empowered to send forces under Chapter VII of the Charter, and they are violative of Article 11(2) and 12 of the Charter. However, in the *Certain Expenses Case*, their constitutionality was confirmed and they were found to be in accordance with the purposes of the UN to maintain international peace and security. They have been increasingly resorted by the UN in the recent years and the members are required to contribute towards the peacekeeping operations. These operations are also in addition to enforcement action and they are

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<sup>17</sup> J. Mrazek, *Prohibition of the Use and Threat of Force: Self-Defense and Self-Help in International Law*, 27 C.Y.I.L. 81, 90 (1989).

<sup>18</sup> K. Skubiszewski, *Use of Force by States, Collective Security. Law of War and Neutrality in Manual of Public international Law*, Op. Cit. p.746.



mainly anti-escalation devices or policing competence of the UN. They are carried out mainly where the tensions are running high in a particular region or where the law and order situation has broken down in the state, for example, the United Nation Protection Force in Bosnia-Herzegovina to protect the civilian population (UNPROFOR).<sup>19</sup>

Peacekeeping is unique in that it fits neither the classical pattern of peaceful settlement nor the model of collective security. Peacekeeping techniques have been applied both to disputes between states and to internal situations threatening civil war. It may be compared with collective security only in the respect that each may involve the deployment of military forces. Its objective is not to defeat an aggressor but to prevent fighting, act as a buffer, keep order or maintain a cease-fire. Peacekeeping forces are generally instructed to use their weapons in self-defense; their mission is to keep the peace using measures short of armed force. Their effectiveness is determined by neutrality and impartiality regarding the adversaries. In addition, they must be present with the consent of the disputing parties, or at least the consent of one of them and the toleration of the other.<sup>20</sup>

Since the 1950s, dozens of UN forces have been set up (principally by the Security Council but exceptionally by the General Assembly) for 'peacekeeping' purposes. The original idea of peacekeeping was primarily that of creating a *Cordon Sanitaire*, setting opponents apart and preventing bloodshed.<sup>21</sup> But especially after the end of the 'Cold War', peacekeeping operations have gradually become more multidimensional.<sup>22</sup> An extreme example is that of UNAMSIL (United Nations Missions in Sierra Leone) whose mandate was revised in February 2000 to provide security at key locations and installations, as well as to facilitate the free flow of people, goods and humanitarian assistance, and to assist local law enforcement authorities.<sup>23</sup>

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<sup>19</sup> S. K. Verma, *An Introduction to Public International Law*. Op. Cit. pp. 454-55.

<sup>20</sup> A. LeRoy Bennett, *International Organizations: Principles & Issues* 5<sup>th</sup> ed. (Englewood Cliffs: Prentice Hall inc, 1991), p. 140.

<sup>21</sup> E. Jiménez de Aréchaga, '*International Law in the Past Third of a Century*', 159 R.C.A.D.I. 1, 130 (1978).

<sup>22</sup> W. J. Durch, 'Keeping the Peace: Policies and Lessons of the 1990s', *UN Peacekeeping, American Politics, and the Uncivil Wars of the 1990s* 1, 3-4 (W. J. Durch ed., 1996).

<sup>23</sup> Security Council Resolution 1289, Doc. S/ RES / 1289 at 3(2000).

The use of military force by the UN for enforcement purposes derives its legality from Chapter VII of the UN Charter, 'action with respect to threats to the peace, breaches of the peace and acts of aggression'. A Chapter VII operation, in contrast to a Chapter VI operation, may therefore be authorized to use force beyond self-defense for enforcement purposes. This understanding was confirmed by the International Court of Justice (ICJ) in July 1962 when it ruled that, while the UN has an inherent capacity to establish, assume command over and employ military forces, these may only exercise 'belligerent rights' when authorized to do so by the Security Council acting under Chapter VII.<sup>24</sup> This ruling suggests that the use of force by a Chapter VI peacekeeping operation beyond self-defense is illegal under the UN Charter.<sup>25</sup> Unfortunately the Security Council resolutions which envisage the use of force never specifically mention it. Usually they mandate a mission simply to use 'all necessary means' to accomplish its mandate. Hence they refrain from specifying in advance the appropriate level of force to be used.<sup>26</sup>

The situation has been complicated since the end of Cold War by the tendency of the Security Council to afford Chapter VII mandates to what have been perceived essentially as peacekeeping operations. This strategy has been used to reinforce the right to use force in self-defense like UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES). This is a misuse of the UN Charter, since peace-keepers already have the right of self-defense under their Chapter VI authorization. Secondly, missions originally deployed under Chapter VI but experiencing difficulties, acquire revised mandates authorized under chapter VII, allegedly to strengthen their right of self-defense. Like the mandate given to UNPROFOR in Bosnia once it began to experience difficulties within the local parties. Finally, peacekeeping operations have acquired Chapter VII mandates to permit them to conduct peace enforcement, for example UNOSOM II, UNTAET and UNAMSIL.<sup>27</sup>

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<sup>24</sup> International Court of Justice, *Certain expenses of the United Nations (Article 17, Para. 1), Advisory Opinion of 20 July 1962, Reports of Judgments, Advisory Opinions and Orders* (International Court of Justice: The Hague, 1962), p. 177.

<sup>25</sup> Trevor Findlay, *The Use of Force in UN Peace Operations* (New York: Oxford University press, 2002), p. 8.

<sup>26</sup> C. Warbrick, *Current developments: public international law*, *International and Comparative Law Quarterly*, vol. 43 (Oct. 1994), P. 947.

<sup>27</sup> Trevor Findlay, *The Use of Force in UN Peace Operations*. Op. Cit. pp. 8-9.

UN peacekeeping is distinguished from enforcement by Collective enforcement by the norm constraining peacekeepers from using force except in self-defense. In self-defense, force may be used as a last resort. It is to be used proportionately, to achieve the objective of ending the immediate threat and prevent, as far as possible, loss of life or serious injury. Force should not be initiated, except possibly after continuous harassment, when it may become necessary to restore a situation so that the UN can fulfill its responsibilities.<sup>28</sup>

In essence, peacekeeping forces are not designed for combat. Nevertheless, it has always been understood that they are entitled to defend themselves. This specific right to self-defense, applicable to peacekeeping forces, must not be confused with the much broader right of self-defense vested in States (see *supra*, ch. 7-9). A peacekeeping force's exercise of self-defense is more akin to a military unit's self-defense, in the context of on-the-spot reaction (see *supra*, ch.8, A (a), (i)). It is noteworthy that the Security Council occasionally refers to 'armed attacks' against United Nations personnel.<sup>29</sup>

The Security Council has granted some peacekeeping forces permission to use force in circumstances going beyond self-defense. In Bosnia-Herzegovina, UNPROFOR (United Nations Protection Force) was explicitly authorized in Resolution 836 (1993), 'acting in self-defense, to take the necessary means, including the use of force, in reply to bombardments against the safe areas' (free from hostile acts) established by the Council, as well as to protect freedom of movement and humanitarian convoys.<sup>30</sup> Clearly, the notion of self-defense has been expanded to cover also defense of the mandate of UNPROFOR.<sup>31</sup>

### 3.0. Self-defense

The right of self-defense is engendered by, and embedded in, the fundamental right of states to survival. The essence of self-defense is self-help: under certain conditions set by

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<sup>28</sup> *Ibid.* 14.

<sup>29</sup> See Security Council Resolution 837, 48 R.D.S.C. 83, id. (1993). Y. Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. Op. Cit. p. 267.

<sup>30</sup> Security Council Resolution 837, 48 R.D.S.C. 13, 14 (1993).

<sup>31</sup> See K. E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping Operations & the use of force', 27 D J.I.L.P.239, 256-73 (1998-9).

international law, a state acting unilaterally perhaps in association with other countries – may respond with lawful force. The reliance on self-help, as a remedy available to states when their rights are violated, is and always has been one of the hallmarks of international law.<sup>32</sup>

Some scholars regard the concepts of self help and self-defense as a species subordinate to the genus of self-help.<sup>33</sup> According Verma, self-defense or self-help is well-recognized under international law and Article 51 of the Charter.<sup>34</sup> Dinstein contend that the proper approach is to view self-defense as a species subordinate to the genus of self-help. Self-defense is a permissible form of 'armed self-help'.<sup>35</sup> Skubiszewski argues that it is possible to draw a distinction between self-defense and other uses of force and to define the requirements which must be met by the state which purports to act in self-defense.<sup>36</sup>

The legal notion of self-defense has its roots in interpersonal relations, and has been sanctified in domestic legal systems since time immemorial. Writers sought to apply this concept to inter-state relations, particularly in connection with the just war doctrine.<sup>37</sup> But self-defense emerged as a right of signal importance in international law when the universal liberty to go to war was eliminated. Indeed, on the eve of the renunciation of war, the need for regulating the law of self-defense became manifest. The evolution of the idea of self-defense in international goes 'hand in hand' with the prohibition of aggression.<sup>38</sup>

The right of self-defense is expressed in Article 51 of the UN Charter, which proclaims;

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the

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<sup>32</sup> H. K.elsen, *General Theory of Law and State* 339 (1945)

<sup>33</sup> T. R. Krift, *Self-Defense and Self-Help: The Israeli Raid on Entebbe*, 4 B.J.I.L. 43, 55-6 (1977-8).

<sup>34</sup> S. K. Verma, *An Introduction to Public International Law* (New Delhi: Prentice-Hall of India Private Ltd, 1998), p. 371.

<sup>35</sup> Report of the International Law Commission, 32<sup>nd</sup> Session, [1980] II (2) I.L.C. YBK 1, 54.

<sup>36</sup> K. Skubiszewski, *Use of Force by States, Collective Security. Law of War and Neutrality. Manual of Public international Law*, Op. Cit. p.765.

<sup>37</sup> M. A. Weightman, *Self-Defense in International Law*, 37 Vir. L.R. 1095, 1099-1102 (1951).

<sup>38</sup> Report of the International Law Commission; supra note 7, at 52.

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 and security.<sup>39</sup>

The provision of Article 51 has to be read in conjunction with Article 2(4) of the Charter.<sup>40</sup> Article 2(4) promulgates the general obligation to refrain from the use of inter-state force. Article 51 introduces an exception to this norm by allowing Member states to employ force in self-defense in the event of an armed attack.<sup>41</sup>

There is extensive controversy as to the precise extent of the right of self-defense in the light of Article 51. On one hand, it is argued that Article 51 in conjunction with Article 2(4) specifies the scope and limitations of the doctrine. In other words, self-defense can be resorted to 'if an armed attack occurs', and in no other circumstances.<sup>42</sup> There are other writers also who maintain that the opening phrase in Article 51 specifying that 'nothing in the present Charter shall impair the inherent right of self-defense means that there does exist in customary international law a right of self-defense over and above the specific provisions of Article 51, which refer only to the situation where an armed attack has occurred.'<sup>43</sup> This view is somewhat strengthened by the *travaux préparatoires* of the Charter, which seem to underlie the validity of the use of force in legitimate self-defence.<sup>44</sup> Some states and some scholars have regarded Article 51 as merely elaborating one kind of self-defense in the context of the primary responsibility of the Security Council for international peace and the enforcement techniques available under the Charter.

The International Court of Justice in the *Nicaragua* case<sup>45</sup> clearly established that the right of self-defense exists as an inherent right under customary international law as well as under the UN Charter. It was stressed that;

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<sup>39</sup> Charter of the United Nations, 1945, 9 Int. Leg. 327, 346.

<sup>40</sup> L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations* 342-4 (3<sup>rd</sup> ed., 1969).

<sup>41</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. Op. Cit. p. 161.

<sup>42</sup> See Brownlie, *International Law*, pp. 112-13 and 254. See also Skubiszewski, 'Use of Force', pp. 765-8 and H. Kelsen, *The Law of the United Nations*, London, 1950, p. 914.

<sup>43</sup> See Bowett, *Self-Defence*, pp. 185-6; J. Stone, *Aggression and World Order*, pp. 43, 95-6. Also J. Brierly, *The Law of Nations*, 6<sup>th</sup> ed, Oxford, 1963, 417-18 and D. P. O'Connell. *International Law*, 2<sup>nd</sup> ed, London, 1970, vol. I, p. 317.

<sup>44</sup> See 6 UNCIO, Documents, where it is noted that 'the use of arms in legitimate self-defense remains admitted and unimpaired'.

<sup>45</sup> ICJ Reports, 1986, pp. 14, 94; 76 ILR, pp. 349-428.

Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defense and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. It cannot, therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law.

According to the Court, the framers of the Charter acknowledged that self-defense was a preexisting right of a customary nature, which they desired to preserve.

Article 51 addresses only the right of self-defense of UN Member States and are subjects of duty set out in Article 2(4), to refrain from the use of force. The existence of the right of self-defense under general customary international law denotes that it is conferred on every state. Customary international law forbids the use of inter-state force by all states, whether or not they are UN Members. Thus, any state (even if not a UN Member) is entitled to the right of self-defense under existing customary international law. Both the general prohibition of the use of inter-state force and the exception to it (the right of self-defense) are part and parcel of customary international law, as well as the law of the Charter.<sup>46</sup>

The concept of anticipatory self-defense is of particular relevance in the light of modern weaponry that can launch an attack with tremendous speed that may allow the target state little time to react to the armed assault before its successful conclusion, particularly if that state is geographically small.<sup>47</sup> Under the UN system the following instances may be indicative of anticipatory self-defense; the US (and OAS) blockade against Cuba during the 1962 missile crisis, Israel's attack on its Arabs neighbors in 1967, and Israel's raid on the Iraqi nuclear reactor in 1981.<sup>48</sup> In Israel's raid on the Iraq nuclear reactor, the UN system categorically condemned and denied both the legality and legitimacy of recourse to anticipatory self-defense in principle but rather they did not believe that Iraq's nuclear attack on Israel was neither probable nor imminent. They were right in subjecting to a high standard of probity any evidence adduced to support a claim to use force in anticipation of rather than as a response to, an armed attack.<sup>49</sup>

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<sup>46</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. (Cambridge university press, 2001), p. 165.

<sup>47</sup> Malcolm N. Shaw, *International Law* 4<sup>th</sup> ed. Op. Cit. 789.

<sup>48</sup> Thomas M. Franck, *Recourse to Force: State Action against Treaties and Armed Attacks* (Cambridge University press, 2002), p. 99.

<sup>49</sup> *Ibid.* 108.

Article 51 permits self-defense solely when an 'armed attack' occurs. Some commentators believe that customary international law does the same; the more common opinion is that the customary right of self-defense is also accorded to states as a preventive measure.<sup>50</sup> However, the concepts of necessity and proportionality are at the heart of self-defense in international law. The Court in the *Nicaragua* case<sup>51</sup> stated that there was a 'specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it. It was emphasized that the submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. It is the state contemplating such action that determine what is necessary and proportionate but is subject to consideration by the international community as a whole and more specifically by the Security Council under the terms of Article 51.'<sup>52</sup>

Article 51 stipulates that states have the right of 'individual or collective self-defense'. In collective self-defense the armed attack against a state will invite the help of another state which in fact is not the subject of any attack or there is no threat to its security. The other state may help the victim of the attack under a treaty or invitation. They together or individually take such action as they deem necessary to restore peace and security. Collective self-defense generally takes the form of regional organizations.<sup>53</sup>

The treaties of mutual defense must be regarded as the expression of the members' view on the meaning of Article 51. The right of collective self-defense authorizes states to come to each other's assistance when one of them is the object of an armed attack and the Organization has not yet taken its own measures. In particular, the right of collective self-defense comprises the right to conclude defensive alliances and to make international arrangements for defensive purposes. Thus, terms like 'collective defense' or 'defense of

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<sup>50</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. Op. Cit. p. 165.

<sup>51</sup> ICJ Reports, 1986, pp. 14, 94 and 103; 76ILR, pp. 349, 428 and 437.

<sup>52</sup> See D. Grieg, 'Self-Defense and the Security Council: What Does Article 51 Require?' 40 ICLQ, 1991, P. 366.

<sup>53</sup> S. K. Verma, *An Introduction to Public International Law*. Op. Cit. p. 374.

another state' better correspond to what now constitutes the meaning of collective self-defense by virtue of Article 51.<sup>54</sup>

For instance, the invasion of Kuwait by Iraq on 2 August 1990 raised the issue of collective self-defense in the context of the response of the states allied in the coalition to end that conquest and occupation. The Kuwaiti government in exile appealed for assistance from other states.<sup>55</sup> Although the armed action taken as from 16 January 1991 was taken pursuant to UN Security Council resolutions, it is indeed arguable that the right to collective self-defense is also relevant in this context.<sup>56</sup> Resolution 661 affirmed 'the inherent right of individual and collective self-defense, in accordance with Article 51 of the Charter'. The dozen resolutions during that war reflected a consensus about the existence of the inherent right of collective self-defense.<sup>57</sup>

Despite controversy and disagreement over the scope of the right of self-defense, there is an indisputable core and that is, the competence of states to resort to force in order to repel an attack. This is what remains of the right to go to war in the law which pre-dated the Charter and preserved in Article 51.<sup>58</sup>

### 3.1. Protection of nationals abroad

Since the adoption of the UN Charter, protection of national abroad has become rather more controversial because of 'territorial integrity and political independence' of the target state is infringed. Under Article 51, one would deny that no 'armed attack' could occur against individuals abroad within the meaning of that provision since it is the state itself that must be under attack, not specific persons outside the jurisdiction,<sup>59</sup> while another interpretation of the Article deny that 'an armed attack' could occur against individuals abroad within the meaning of that provision since it is the state itself that must be under attack, not specific persons outside the jurisdiction.<sup>60</sup>

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<sup>54</sup> K. Skubiszewski, *Use of Force by States, Collective Security. Law of War and Neutrality in Manual of Public international Law*, Op. Cit. p.769.

<sup>55</sup> *Keesings Record of World Events*, pp. 37631 *et seq.* (1990).

<sup>56</sup> Shaw, *International Law* 4<sup>th</sup> ed. Op. Cit. p. 795.

<sup>57</sup> William R. Slomanson, *Fundamental Perspectives on International law* 3<sup>rd</sup> ed. (California: West Thomson learning, 2000), p. 448.

<sup>58</sup> Richard K. Gardiner, *International Law* (London: Pearson Education Ltd, 2003), p.245.

<sup>59</sup> Malcolm N. Shaw, *International Law* 4<sup>th</sup> ed. (Cambridge University press, 1997), p. 792.

<sup>60</sup> M. Whiteman, *Digest of International Law*, Washington, 1968, vol. V, p. 475.



Higgins argues that there has been tendency to assume that there is a right of protecting nationals abroad and it is undoubtedly an issue of self-defense, and the conditions of the Caroline are met, such action must be legal. To Higgins, that answer is facile, beg the vital question of whether 'self-defense does in fact apply to civilian nationals abroad but it ignores the issue of whether, in the terms of Article 2(4), it is 'inconsistent with the purposes of the UN'. The first purpose of the UN, stated in Article 1, is '...to take effective collective measures for the prevention and removal of threats to the peace'. However, if the problem becomes very acute in the recourse to the UN in hope of instigating collective measures may involve a time lag which is both vital and tragic to the persons involved. To intervene forcefully on their behalf cannot be deemed an intentional attempt to impair territorial integrity or political independence; but although such action may well be legal under Article 2(4), and is certainly not an aggression under Article 39, it may well give rise to a 'threat to the peace' under that Article. It would appear to belong to that category of acts which may be generally legal but which may be deemed impermissible in any given case. But no blanket approval can be given to this practice; it may sadly open to abuse.<sup>61</sup>

Some states affirm the existence of a rule permitting the use of force in self-defense to protect nationals abroad; others deny that such a principle operates in international law. There are states whose views are not fully formed or coherent on this issue. On balance and considering the opposing principles of saving the threatened lives of nationals and the preservation of the territorial integrity of states, it would seem preferable to accept the validity of the rule in carefully restricted situations consistent with the conditions laid down in the Caroline case.<sup>62</sup>

According to Verma, the right was not specifically endorsed in the *Entebbe Incident* of 1976, in which Israel used armed force to free the Jewish passengers of an Air France airliner, taken as hostages after the plane was hijacked to Entebbe airport in Uganda by two German and two Arab passport holders. The transport aircraft and soldiers flown by

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<sup>61</sup> Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London: Oxford University press, 1969), p. 220.

<sup>62</sup> Shaw, *International Law* 4<sup>th</sup> ed. Op. Cit. p. 793.

Israel to Entebbe were without the knowledge and consent of Uganda and use of force led to the death of the hijackers and extensive damage to the Ugandan aircrafts and airport. The Israel action was clearly not justifiable under the international law.<sup>63</sup> However, some states supported Israel's view that it was acting lawfully in protecting its nationals abroad, where the local state concerned was aiding the hijackers, but others adopted the approach that Israel had committed aggression against Uganda or used excessive force.<sup>64</sup>

The US has recently justified armed action in other states on the grounds partly of the protection of American citizens abroad. This was the ground on which it invaded Grenada in 1984 and one of the four grounds put forward for the intervention in Panama in December 1989. However, in both cases the level of threat against the US citizens was such as to raise serious questions concerning the satisfaction of the requirement of proportionality.<sup>65</sup>

Dinstein argues that even if the use of force on behalf of nationals abroad cannot be given open-ended approval as an exercise of self-defense, there are several exceptional features serving to legitimize the Entebbe raid. That the Israel rescue mission in Entebbe airport in 1976 fulfilled the three conditions listed by Sir Humphrey;<sup>66</sup>

Force may be used in self-defense against threats to one's nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one's nationals; (b) there is, effectively, no other way to forestall imminent further attacks on one's nationals; (c) the force employed is proportionate to the threat.

Therefore, Israel was entitled under Article 51 to use counter-force in self-defense, securing the release of its captive nationals in Uganda. However, as exercise of the right of self-defense, the protection of nationals abroad must not be confused with 'humanitarian intervention'. The rationale of self-defense, exercised in response to an armed attack against individuals abroad, is founded on the nexus of nationality; it is inapplicable when the human rights of non-nationals are deprived.<sup>67</sup>

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<sup>63</sup> Verma, *An Introduction to Public International Law*, Op. Cit. p.373.

<sup>64</sup> Shaw, *International Law* 4<sup>th</sup> ed. Op. Cit. p. 792.

<sup>65</sup> *Ibid.* 792.

<sup>66</sup> HC Debs., vol. 227, col. 658: 64 BYIL, 1993, p. 732.

<sup>67</sup> See A. Jeffery, 'The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions', 30 I.C.L.Q. 717, 725 (1981).

### 3.2. Peace-enforcement by the UN Security Council

Under the UN collective security system as originally envisaged, the Security Council was to be the organ through which international peace and security was to be maintained. It was given specific powers in Chapter VII of the Charter to act on behalf of all states, even if this meant using force itself. Unfortunately, this is not how the system has worked out in practice.<sup>68</sup>

Collective Security postulates the institutionalization of the lawful use of force in the international community.<sup>69</sup> Collective security shares with collective self-defense the fundamental premise that recourse to force against aggression can be made by those who are not the immediate and direct victims. Collective security operates on the strength of an authoritative decision made by an organ of the international community.<sup>70</sup> In Article 24 Member states 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.<sup>71</sup>

Article 39 gives the Security Council the mandate to 'maintain or restore international peace and security'.<sup>72</sup> The Charter also endows the Security Council with a whole array of powers, enabling it to maintain or restore international peace and security. The fulcrum of Article 39 is the determination by the Council of the existence of a threat to the peace, a breach of peace or an act of aggression. Once that determination is made, 'the door is automatically opened to enforcement measures of a non-military or military kind'.<sup>73</sup> The determination is binding on Member States, even if the Council subsequently proceeds to adopt a mere recommendation for action.

Article 41 authorizes the Security Council to put into operation measures not involving the use of force, such as complete or partial interruption of economic relations, cutting off communication and severance of diplomatic relations. The list of measures enumerated in

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<sup>68</sup> Martin Dixon, *International Law*. Op. Cit. p. 195.

<sup>69</sup> See G. Schwarzenberger and E.D. Brown, *A Manual of International Law* 153 (6<sup>th</sup> ed., 1976).

<sup>70</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. Op. Cit. p. 246.

<sup>71</sup> Charter of United Nations 1945.

<sup>72</sup> Charter of United Nations 1945.

<sup>73</sup> I. Osterdahl, *Threat to the peace: The Interpretation by the Security Council of Article 39 of the UN Charter* 28 (1998).

Article 41 is not exhaustive, but none of the steps taken under this provision of the Charter involves the use of force.<sup>74</sup>

Conceptually, Article 41 may be viewed as an outgrowth of the Covenant of the League of Nations. The framers of the Charter were not content with non-forcible sanctions. A far-reaching forward was made in Article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Under Article 42, the Council may exert force, either on a limited or on a comprehensive scale.<sup>75</sup>

The scope of the discretion granted to the Security Council, in discharging its duties within the ambit of the Charter, is very wide. By virtue of Article 51, individual or collective self-defense is permitted only in response to an armed attack. Conversely, consonant with Article 39 collective security can be brought into action whenever the Security Council determines that there exists a threat to the peace, a breach of the peace, or an act of aggression. They are empowered to employ force in the name of collective security, and the degree of latitude bestowed upon it by the Charter is well-nigh unlimited. The Council may wield force to counter any type of aggression, not necessarily amounting to an armed attack and it may even respond to a mere threat to the peace.<sup>76</sup>

In exercising collective security, the Security Council is but just free to decide whether and how to use force, but it is also at liberty to determine when to do so and against whom. Since the Charter seems to give it a *carte blanche* in evaluating any given situation, the Council may initiate a preventive war in anticipation of a future breach of the peace, a privilege that the Charter withholds from any individual state or group of

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<sup>74</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. Op. Cit p. 249.

<sup>75</sup> *Ibid.* 250.

<sup>76</sup> *Ibid.* 250.

states acting alone.<sup>77</sup> It also authorizes use of force in conjunction with self-defense under Article 51, after states have reported situations in which they have exercised their preserved right.<sup>78</sup> Force is used as exception to Article 2(4).

### 3.3. Regional organizations enforcement

The right of states to make regional arrangements to deal with matters of international peace and security is protected by the UN Charter in Article 52(1), provides;

Nothing in the present Charter the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Article 52(2), however, charges members of regional organizations with making 'every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.' Action taken via regional organizations will only be legitimate if it is consistent with the purposes and principles of the UN Charter, and does not amount to 'enforcement action' unless this has been authorized by the Security Council. On the other hand, the Security Council must, under Article 54, be kept fully informed at all times 'of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.'<sup>79</sup>

In the 1960s the US and most of the Latin America countries tried to place an extensive interpretation on the powers of the Organization of American states (OAS) and of other regional agencies. In this context, Article 53 of the Charter, which provides that 'no enforcement action shall be taken by regional agencies without the authorization of the Security Council', constituted a serious obstacle, which the USA and its allies tried to overcome in a number of ways.<sup>80</sup> Frank argues that Articles 52 and 53 of the Charter have been interpreted to legitimize the use of force by regional organizations in their collective self-interest, and specifically, the role and primacy of regional organizations in settling disputes between their members. These exceptions to Article 2(4) and their

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<sup>77</sup> *Ibid.* 250.

<sup>78</sup> Richard K. Gardiner, *International Law*. Op. Cit. p. 249.

<sup>79</sup> Rebecca M. M. Wallace, *International Law*, 3ed Ed. Op. Cit. p. 261.

<sup>80</sup> Michael Akehurst, *A Modern Introduction to International Law* 3<sup>rd</sup> ed. (London: George Allen and Unwin Ltd, 1977), p. 246.

application in practice have been blamed for the violence against the Article. Their activities have been effectively beyond the reach of the law of the larger community, especially if they happen to be led by one of the super-powers. The regional organizations have too often become instruments of violence, eroding the Article 2(4) injunction.<sup>81</sup>

Regional organizations have played a vital role in the maintenance of international peace and security. For instance, in the crisis of former Yugoslavia, the UN Security Council Resolution 787 authorized states 'acting nationally or through regional agencies' to use appropriate measures to enforce the UN economic sanctions against Serbia and Montenegro. NATO also played a significant part in the crisis and was specifically charged with the task of enforcing the no-fly zone over Bosnia in support of UN Security Council resolution 816. The council deliberately delegated the maintenance of international peace and security to a regional organization.<sup>82</sup>

Under Article 53 of the UN Charter, the Security Council may utilize regional organizations, such as the OAS and AU, for 'enforcement action'. However, it is clearly stated in Article 53 that 'no enforcement shall be taken under regional arrangements or by regional agencies without the authorization of the security council'. This does not impair measures of collective self-defense by regional organizations but it does ensure that they cannot take punitive action against a state, even if within their sphere of influence, without community approval through the Council.<sup>83</sup>

The crux of the issue is that regional organizations cannot employ armed force in or against a state without its consent, unless it amounts to lawful self-defense. All other action is a violation of Article 2(4) on either the permissive or restrictive interpretation. Indeed, during the UN debates on the Dominican Republic and Grenada cases, the right of organizations to take this coercive action was not generally admitted.<sup>84</sup>

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<sup>81</sup> Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*. 64 A.J.I.L. 882 (1970).

<sup>82</sup> Rebecca M. M. Wallace, *International Law*, 3ed Ed. Op. Cit. p. 262.

<sup>83</sup> Martin Dixon, *International Law*. Op. Cit. p. 198.

<sup>84</sup> *Ibid.* 199.

### 3.4. Humanitarian intervention

Although humanitarian intervention is said to have existed since the time immoral, its status in international law is still a matter of great controversy today.<sup>85</sup> Humanitarian intervention inherently contradicts the normative values of state sovereignty, non-intervention and the non-use of force, hence bound to rise, as it has, a legal controversy. Its legality has received considerable attention and engendered even more intellectual debates but continues to defy conclusive determination.<sup>86</sup> The controversy continues to take on greater proportions with the continuous shift of international affairs from the nation-state centered perspective to the one in which the protection of human rights as a matter of international concern is increasingly emphasized.<sup>87</sup>

The UN Charter upholds the doctrine of state sovereignty and its corollary, the concept of non-intervention.<sup>88</sup> On the other hand, Article 2(4) prohibits use of force. Thus to some writers, Articles 2(4) and 2(7) of the Charter preclude any intervention not expressly provided for under the Charter, and this exclusion applies to humanitarian intervention.<sup>89</sup> They rightly argue that the Charter also does not expressly provide for the right or duty of humanitarian intervention.<sup>90</sup>

However, other commentators have argued that humanitarian intervention can be supported under the Charter if it is progressively interpreted. The progressive interpretation rests on the basic argument that humanitarian intervention, apart from seeking to secure respect for human rights, which is a principle purpose of the UN, does not in principle threaten the independence or the territorial integrity of the country concerned.<sup>91</sup> It is only the use of force that threatens the territorial integrity and political

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<sup>85</sup> JPL. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter* (1979) 4 *California Western International Law Journal* 203.

<sup>86</sup> K. Daniel & Musungu, SF 'The African Union and the Question of Humanitarian Intervention: A New Dawn?' (2002) 1 *African Journal of International and Comparative Law* 83.

<sup>87</sup> Kithure Kindiki, *Humanitarian Intervention and State Sovereignty in Africa: The Changing Paradigms in International Law*. Occasional Paper Series vol. 1 No. 3 2003. (Eldoret: Moi University press, 2003), p. 11.

<sup>88</sup> See, for instance, Articles 2(1) and 2(7) of the UN Charter.

<sup>89</sup> For example, see Charney (1999) 1234.

<sup>90</sup> Kithure Kindiki, *Humanitarian Intervention and State Sovereignty in Africa: The Changing Paradigms in International Law*. Occasional Paper Series vol. 1 No. 3 2003. Op. Cit. p. 12.

<sup>91</sup> See Moore (1969) 205 262; Kufuor (1993) 525 540 ('... It is clearly open to argument that humanitarian intervention does not threaten 'territorial integrity or political independence' [of states]').

independence of a state that is outlawed under Article 2(4) of the Charter. Moore uses this argument to suggest that a threat of widespread loss of human lives would seem to be the clearest justification of humanitarian intervention on the basis of the UN.<sup>92</sup>

Under the doctrine of humanitarian intervention, it has been argued that intervention in order to protect the lives of persons situated within a particular state and not necessarily nationals of the intervening state is permissible in strictly defined situations.<sup>93</sup> This has some support in pre-Charter law and it may very well have been the case that in the last century such intervention was accepted under international law. However, it is difficult to reconcile today with Article 2(4) of the UN Charter unless one adopts a rather artificial definition of the 'territorial integrity' criterion in order to permit temporary violations. Practice is also generally unfavorable to the concept, because it has been used to justify interventions by more forceful, states into the territories of weaker states.<sup>94</sup> It is alleged that a state may use force in the territory of another state in order to protect the human rights of individuals in that state. This is alleged to be a general right to intervene for humanitarian purposes, as where a government is systematically murdering whole sections of the population.<sup>95</sup>

Protagonists of humanitarian intervention support its use for the prevention of serious violations of basic human rights, normally the right to life. The demise of the Cold War witnessed an increase in the number of civil wars. Media images of human suffering in Somalia, Rwanda, Haiti and the former Yugoslavia have ensured that humanitarian crises have been pushed to the forefront of the international agenda. The doctrine of humanitarian intervention as a consequence undergone substantial revision in recent years, with the UN accorded a prominent role.<sup>96</sup> Thus, in view of the prohibition on the use of force under Article 2(4) of the Charter, any foreign armed intervention in claimed protection of human rights within another country would require, as specifically allowed

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<sup>92</sup> See Moore (1969) 264.

<sup>93</sup> Shaw, *International Law* 4<sup>th</sup> ed. Op. Cit. p. 802.

<sup>94</sup> Michael B. Akehurst, 'Humanitarian Intervention' in *Intervention in World politics*, p. 95.

<sup>95</sup> *Ibid.* 192.

<sup>96</sup> Rebecca M. M. Wallace, *International Law*. 3ed Ed. Op. Cit. p. 256. Ian Brownlie, *International Law and the Non-Use of Force* (1963).



under Article 2(7) itself, the prior legal authorization of a UN Security Council Resolution to that effect under Chapter VII of the Charter.<sup>97</sup>

The international community has demonstrated its willingness to use humanitarian concerns as a basis for intervention into what are essentially civil war conflicts. Alleviation of human suffering seems to be taking precedence over the principle of state sovereignty. However, the international response to humanitarian crises in the 1990 has been inconsistent and considerable criticism has been directed at operations by the UN intervention in any future crisis will require Security Council authorization.<sup>98</sup>

In 1986 in the *Nicaragua* case, the ICJ emphasized that the conduct of states is an important indicator of *opinio juris*.<sup>99</sup> The Court articulated that, 'there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliation or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.' The Court also stated that either the states taking action or other states in a position to react to the act must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.<sup>100</sup> The conduct of intervening states and that of the rest of the world supports the view that there exists the necessary *opinio juris* for humanitarian intervention is an exception to Article 2(4).

Many states claim that humanitarian intervention constitutes an exception to the prohibition on the use of force. However a 1973 study on humanitarian interventions found "that most have occurred in situations where the humanitarian motive is at best balanced, if not outweighed, by a desire reinforce socio-political and economic instruments of the status quo. Thus 'humanitarian intervention' is often used as cover for a breach of Article 2(4).

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<sup>97</sup> Edward McWhinney, *The United Nations and a New World Order for a New Millennium: Self-determination, State Succession, and Humanitarian Intervention* (The Hague: Kluwer Law International, 2000), p. 33.

<sup>98</sup> Rebecca M. M. Wallace, *International Law*, 3ed Ed. Op. Cit p. 259.

<sup>99</sup> Kithure Kindiki, *Humanitarian Intervention and State Sovereignty in Africa: The Changing Paradigms in International Law*. Occasional Paper Series vol. 1 No. 3 2003. Op. Cit. p. 39.

<sup>100</sup> *Nicaragua* case, para.242 (cited in note 20) (*italics added*). And (1986) ICJ Rep 77.

### 3.5. Conclusion

Threat or use of force is prohibited in international relation by Article 2(4) of the UN Charter and customary international law and it constitutes a crime against peace. Admittedly, to date, the prohibition has not had a profound impact on the actual conduct of states. States continue to wage war and pay lip service to the cause of peace and particularly Article 2(4).

War can be eradicated in international relation by establishing effective measures of collective security. The 'harnessing' of force to international procedures of law and order is the real challenge of contemporary world.<sup>101</sup> Unfortunately, the lackluster performance of the UN Security Council has instigated widespread disappointment and dissatisfaction. The binding enforcement mechanism of the UN embedded in Article 42 of the Charter has not been activated despite the end off the 'Cold War'.<sup>102</sup>

As long as the Charter's scheme of collective security fails to function adequately, States are left to their own devices when confronted with an unlawful use of force. Self-defense and other exceptions to Article 2(4) have been resorted to and sometimes abused on national interests.

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<sup>101</sup> R. Y. Jennings, 'General Course on Principles of International Law', 121 R. C. A. I. 323,584 (1967).

<sup>102</sup> Secretary-General, An Agenda for Peace, 31 I. L. M... 956, 966 (1992).

## CHAPTER FOUR

### THE LEGALITY OF IRAQ-US WAR IN 2003; A CASE STUDY

#### 3.6. Background

On September 11th, 2001, many witnessed a terrifying episode, which altered the international relations and shifted dramatically the American approach against terrorism and its relations with its alleged enemies. Despite the lack of connection between the September 11<sup>th</sup> 2001 attacks in US and Iraq, the context of the Iraq-US confrontation was transformed. The debate rose about Iraqi weaponry, its continuous defiance of Security Council Resolutions, as well as about its probable involvement in terrorists' activities.<sup>1</sup>

On 12 September 2002, President Bush brought his case against Iraq to the UN General Assembly and challenged the UN to take action against Baghdad for failing to disarm: 'We will work with the UN Security Council for the necessary resolutions,'<sup>2</sup> but he warned that he would act alone if the UN failed to cooperate.<sup>3</sup> However, America was virtually alone, never has so many of its allies been so resolutely opposed to its policies; its manners provoked public opposition, resentment and mistrust.

A year after Operation '*Desert Fox*', the Security Council convened under Resolution 1284<sup>4</sup> and replaced UNSCOM by the creation of a new arms monitoring body called the UN Monitoring, Verification and Inspection Commission (UNMOVIC), headed by Hans Blix. However, Iraq rejected the new weapons inspections proposals and continued its policy to refuse inspections inside its territory. US included Iraq as part of the 'axis of evil', alongside North Korea and Iran,<sup>5</sup> and addressing the UN about the case for war against Iraq, President Bush obtained authorization of both Houses of Congress to employ

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<sup>1</sup> The new policy to terrorism was manifest in the US intervention in Afghanistan in 2001 where under self-defense attacked both Al Qaeda forces and the Taliban regime that supported them.

<sup>2</sup> Remarks by the President in Address to the United Nations General Assembly New York, September 12, 2002, available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>

<sup>3</sup> See, Michael J. Glennon, "*Why the Security Council Failed*", *Foreign Affairs*, May/June 2003.

<sup>4</sup> *The Arrogant Empire*", supra 94 at 24.

<sup>5</sup> S/RES/1284 (1999) of 17 December 1999

force to defend the national security of the US against the threat posed by Iraq as well as to enforce all relevant UN Security Council resolutions regarding Iraq.<sup>6</sup>

In Britain, an effort to strengthen the case for the use of force against Iraq was devised, the British Government published a dossier that claimed *inter alia* that Iraq continued to produce chemical and biological agents, developing missiles with a range of 750 miles-capable of attacking British troops in Cyprus and was seeking nuclear materials from Africa.<sup>7</sup>

Subsequently, in November 2002, the UN Security Council unanimously passed Resolution 1441, which found Iraq in 'material breach' of prior resolutions, set up a new inspections regime, and warned Iraq of 'serious consequences' if it did not comply. Iraq accepted the terms of the resolution and UNMOVIC resumed its operations on 27 November 2002. Thereafter, on January 27th, February 14th and March 7th, 2003, the inspectors returned to the Security Council to report that they had discovered no evidence of WMD in Iraq. The Director-General of the IAEA, Mr. ElBaradei, detailed that after three months of intrusive inspections, the Agency had found no evidence or plausible indication of the revival of a nuclear weapons programme in Iraq; he added that there was no indication that Iraq had attempted to import uranium since 1990 or that it had attempted to import aluminum tubes for use in centrifuge enrichment.<sup>8</sup> A critical debate that followed these briefings highlighted the main divergent views on how to proceed with disarming Iraq of banned weapons. On the one hand, France, Russia and China said that the time had not come for military action; they pressed for more time and strengthened inspections, aimed at Iraq's peaceful disarmament. On the other, the US, the UK and Spain insisted that Iraq had not made the strategic decision to comply and that recent disarmament measures had occurred only as a result of the imminent threat of military force.<sup>9</sup> The US Secretary of State, Colin Powell claimed that "Iraq was still

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<sup>6</sup> The President's State of the Union Address, The United States Capitol, Washington, D.C., available at <http://www.whitehouse.gov/stateoftheunion/2002/index.html>

<sup>7</sup> "Iraq's Weapons of Mass Destruction - The assessment of the British Government", 24 September 2002, Available at <http://www.pm.gov.uk/output/page271.asp>.

<sup>8</sup> S/PV.4692 SC 4692nd Meeting of 27 January 2003; S/PV.4707 SC 4707th Meeting of 14 February 2003; and S/PV.4714 SC 4714th Meeting of 7 March 2003.

<sup>9</sup> S/PV.4714 SC 4714th Meeting of 7 March 2003.

refusing to offer immediate, active and unconditional cooperation; [as a consequence] the consequences of Saddam Hussein's continued refusal to disarm would be very, very real."<sup>10</sup>

In this context, the UK, Spain and US pressed for a new resolution authorizing military action against Iraq, but were deterred by France, Russia and China announcing they would veto any subsequent resolution authorizing the use of force against Saddam; once again, "in the face of a serious threat to international peace and stability, the Security Council fatally deadlocked."<sup>11</sup>

On March 17, the UK's ambassador to the UN stressed that the diplomatic process on Iraq was over;<sup>12</sup> and President Bush set an ultimatum to Saddam and his sons to leave Iraq within 48 hours or face war.<sup>13</sup> The UN inspectors were evacuated immediately and during the evening of 19 March 2003, the US President Bush and the UK Prime Minister Blair announced the commencing of the military Operation 'Iraqi Freedom' to overthrow Saddam Hussein, free Iraqi people and disarm Iraq of WMD. The beginning of the armed conflict provoked a torrent of criticism from world leaders, including those of France, Russia and China;<sup>14</sup> in addition, massive public demonstrations against the use of force across the world and a deep academic debate on the legality of such actions flourished.

The armed conflict was initially conducted under striking aerial bombardments against military objectives across Iraq and then was followed by land warfare. By mid April the US forces reached Baghdad and surprisingly straightforward took control over the capital. The hostilities ended on 2 May 2003, after President Bush formally announced the conclusion of the operation in Iraq.<sup>15</sup> A few days later the Security Council revoked the economic sanctions imposed on Iraq since 1990.<sup>16</sup>

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<sup>10</sup> S/PV.4714 SC 4714th Meeting of 7 March 2003.

<sup>11</sup> "Why the Security Council Failed", supra 97.

<sup>12</sup> "Why the Security Council Failed", supra 97.

<sup>13</sup> Global Message, "*All the decades of deceit and cruelty have now reached an end*", President George W. Bush, March 17, 2003, available at [www.whitehouse.gov/news/releases/2003/03/iraq/20030317-10.html](http://www.whitehouse.gov/news/releases/2003/03/iraq/20030317-10.html).

<sup>14</sup> "*War draws condemnation*", *The BBC News*, available at [news.bbc.co.uk/1/hi/world/middle\\_east](http://news.bbc.co.uk/1/hi/world/middle_east).

<sup>15</sup> Remarks by the President from the USS Abraham Lincoln, At Sea off the Coast of San Diego, California, available at <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html>

<sup>16</sup> S/RES/1483 of 22 May 2003.

Both the US and Great Britain contended that they had sufficient legal authority to use force against Iraq pursuant to Security Council resolutions adopted in 1990 and 1991. But President Bush also contended that, given the "nature and type of threat posed by Iraq," the U.S. had a legal right to use force "in the exercise of its inherent right of self defense, recognized in Article 51 of the UN Charter." But the US had not previously been attacked by Iraq, that contention raised questions about the permissible scope of the preemptive use of force under international law.

Since the end of Gulf war in 1990-91, Iraqi regime had been effectively contained by the US and had not posed a threat to the region's peace and security. Nevertheless, the George W. Bush administration decided that one of its major foreign policy goals was to remove the Iraqi regime by force because it poses a potential threat, though the administration did not make it clear as to what threat it referred to. At first, the administration signaled its intention to do so on the legally questionable proposition of 'preventive unilateral' military action, as stated by Bush in a speech at West Point on 1 June 2002. The unilateralism changed, and United Nations Security Council approval was sought and obtained on 8 November 2002, in a unanimous resolution 1441 that implies use of force if Iraq fails to materially comply with the new weapons inspection regime.<sup>17</sup>

Thus, a new basis was established for use of force against Iraq, to enforce disarmament, but not to effectuate a 'regime change.' Resolution 1441 does not address 'regime change' or what the Hussein regime did to its people, or to Kuwait, or Iran. The resolution addresses Iraq's eventual 'material breach' in connection with the weapons of mass destruction inspections. The question of the legitimacy of the use of force, whether multilaterally or unilaterally is an issue, as is the goal of 'regime change.'<sup>18</sup>

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<sup>17</sup> Security Council Resolution 1441, UN SCOR, 57th session, 4,464th meeting, UN Doc. S/Res/1441 - 2002-. This resolution was supported by the US, Britain, Russian Federation, France, China, Bulgaria, Cameroon, Colombia, Guinea, Ireland, Mauritius, Mexico, Norway, Singapore and Syria.

<sup>18</sup> Kenneth M. Block, *The Threatening Storm: The Case for Invading Iraq*, 2002.

### **3.7. Legal Justifications of the use of force**

The Charter of the United Nations has governed the use of force by states since 1945. The Preamble to the Charter leaves no question as to the UN's fundamental purpose: "to save succeeding generations from the scourge of war." The delegates that gathered in San Francisco in the closing days of World War Two envisioned a system of collective security that would operate "to maintain international peace and security." In this system, members of the international community would consider an attack on one state to be an attack upon all, and would cooperate to remove threats to the peace and suppress acts of aggression. Thus, Article 2(3) and 2(4) of the UN Charter provides that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." It further provides that "[a]ll 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." In this manner, the UN Charter deprives states of any right they may have to use military force to resolve international disputes, subject to two main exceptions.<sup>19</sup>

### **3.8. The peace enforcement by the UN Security Council**

The collective use of force by the UN has been established as an institutional exception whereby the Security Council, acting on behalf of the UN under its powers conferred in Chapter VII of the Charter, executes its primary responsibility for the maintenance of international peace and security.<sup>20</sup> For that purpose, Article 39 of the Charter empowers the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations, or decide what measures shall be taken to maintain or restore international peace and security. Moreover, within the context of Article 39, the Security Council can use its power to deal with actual or even imminent threats. The allusion to "threat to the peace" reveals that the Security Council

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<sup>19</sup> By Paul Schott Stevens, Andru E. Wall & Ata Dinlenc, *The Just Demands of Peace and security: International Law and the Case Against Iraq*. The Federalist Society for Law and Public Policy Studies. pp. 1-2.

<sup>20</sup> See Article 24 of the Charter.

can use a preemptive action to enforce the regime of collective security created by the Charter.<sup>21</sup>

Resolution 1441 of November 2002 was a carefully crafted, compromise, and from the American perspective, for example, several of its formulations and references to previous resolutions could well furnish a foundation for military action against Saddam even if no further enabling resolution was adopted. The reference to Resolution 687, which established the ceasefire and disarmament regime following the 1991 Gulf War, was deemed particularly significant, as it was with the Council's finding that Iraq had been in "material breach" of its obligations under that resolution. Among other provisions noted in Resolution 1441 were the Council's "deploring" Iraq's failure to comply with its commitments with regard to terrorism, ending the repression of its civilian population, providing needed access to humanitarian organizations and accounting for Kuwaiti and third country nationals wrongfully detained. Though the resolution contemplated further meetings by the Security Council, it also referred to the "final opportunity" which it was granting Iraq to comply with its disarmament obligations, and the "serious consequences" which Iraq would face if it continued to violate its obligations. The assumption of the US and UK co-sponsors of the resolution was that the inspection regime would not be dragged out indefinitely; and their conclusion, was that Iraq had in fact committed a "further material breach" of its obligations.<sup>22</sup>

The claim put forward by the UK emphasized that UN Security Council Resolution 1441 recognizes that Iraq was in continuous 'material breach' of UN Security Council Resolutions, most important was resolution 687, because Iraq had not fully complied with its obligations to disarm under that resolution. As a consequence, resolution 1441 'revived' the authority to use force under resolution 678.<sup>23</sup> It follows that in resolution 678 the Security Council authorized force against Iraq, to eject it from Kuwait and to restore peace and security in the area. Then, Resolution 687, which set out the ceasefire conditions after Operation 'Desert Storm', imposed continuing obligations on Iraq to

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<sup>21</sup> Rabinder Singh QC and Alison Macdonald, *Legality of use of force against Iraq*. London WC1R 5LN. 10 September, 2002. pp.14-15.

<sup>22</sup> <http://www.ajiac.org.au/review/2003/284/legal-iraq.htm>

<sup>23</sup> *Attorney general: war is legal*, The Guardian, March 17, 2003.



eliminate its weapons of mass destruction in order to restore international peace and security in the area. Hence, 'Resolution 687 suspended but did not terminate the authority to use force under resolution 678'.<sup>24</sup>

To claim that UN Security Council Resolution 1441 recognizes that Iraq had remained in 'material breach' of the disarmament provisions of Resolutions from 687 (1991) to 1441 (2002), and as a consequence the authority to use force under UN Security Council Resolution 678 was automatically revived by the suspension of the cease-fire in UN Security Council Resolution 687, seems untenable since it was clear from the debates preceding the adoption of UN Security Council Resolution 1441 that the purpose of the Security Council was not to authorize individual member states to enforce any material breach of those resolutions, but conversely the intention was that any response was to come from the Security Council.<sup>25</sup> Resolution 687 does not afford for a right of unilateral intervention that vests upon a breach by Iraq nor is it silent on the issue of authority to enforce its provisions.<sup>26</sup> Conversely, the final paragraph of UN Security Council Resolution 687 expressly endows that the Security Council remains seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure peace and security to the area. This means that Resolution 678 was revoked by Resolution 687 and that the Security Council holds the power to resolve how to deal with Iraq not individual member states acting unilaterally.<sup>27</sup>

In addition, it is commonly considered that Security Council authorizations of force are only for limited and specific purposes.<sup>28</sup> Thus, the authorization to use force comprised in UN Security Council Resolution 678 was concluded with the adoption of UN Security Council Resolution 687. Resolution 678 was cited as the legal basis for the air strikes of January 1993 and then was repeated in justifying the threatened enforcement of UN Security Council Resolution 687 in 1998; but in both cases the argument has been widely

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<sup>24</sup> "Attorney general: war is legal", *The Guardian*, March 17, 2003.

<sup>25</sup> The claim by the UK, the US and Australia to enforce SC resolutions follows from practice in Kosovo (1999) and Iraq (1993 and 1998).

<sup>26</sup> The claim by the UK, the US and Australia to enforce SC resolutions follows from practice in Kosovo (1999) and Iraq (1993 and 1998).

<sup>27</sup> Matthew Happold, *The Guardian*, March 17, 2003.

<sup>28</sup> S/PV.6483, SC 3858th Meeting of 2 March 1998.

rejected. Another flaw rests in including UN Security Council Resolution 687 in the group of 'subsequent resolutions' mentioned by UN Security Council Resolution 678. It's important to recall that the use of force authorized in UN Security Council Resolution 678 comprised military action to expel Iraq from Kuwait and then remedy the main breach of international peace and security. In other words, UN Security Council Resolution 678 was clearly talking about resolutions adopted in-between 660 and 678. Therefore, UN Security Council Resolution 678 cannot be applied as the legal justification for threats or uses of force subsequent to the formal ceasefire in UN Security Council Resolution 687, since UN Security Council Resolution 678 is no longer effective and because it is implausible that such stipulation was intended to authorize force after the liberation of Kuwait for an indefinite period until Iraq complied with obligations that were not yet in existence.<sup>29</sup>

Only a clear resolution instructing the use of force can permit military action to be undertaken under the collective security umbrella. Any claim of unilateral interpretation or a right of enforcement fails "for the simple fact that if the Council wanted to authorize the use of force it will do so using clearly accepted language".<sup>30</sup> It is irrefutable that the only authorization given by the Council to use force was that in UN Security Council Resolution 678; a permission that is no longer in force. The collective security system is still dependent on Security Council authorization to use force. As a result, the claim put forward by the UK and Australia lacks a lucid legal foundation under international law.

On the other hand acts of aggression, such as the US invasion of Iraq in 2003, should be suppressed and force used only as a last and unavoidable resort by Security Council. Chapter VI of the UN Charter, "Pacific Settlement of Disputes, 'requires countries to first of all, seek a resolution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.' The U.S. ignored the role of IAEA and asked the UN Security Council to support execution of Bush's policy of a potentially nuclear "preemptive" war, as if that Council could endorse a war of aggression. The Security Council lacks

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<sup>29</sup> McLain, *supra* 113 at 251.

<sup>30</sup> White, *supra* 7 at 10.

the legal authority to grant such permission. The Security Council, by affirmative vote or by acquiescence to U.S. policy, cannot abrogate its own mandate. No collective action by the 15 permanent and temporary members of the Security Council can lawfully violate the Charter which is the sole source of their collective authority.<sup>31</sup>

Saddam Hussein was a tyrant. His regime carried out violation of human rights against its own people. He potentially posed a threat to some of the states in the region. But there was no imminent threat to the US from Iraq. North Korea poses more of a clear and present danger to the US than Iraq because it declared 'nuclear weapons state' status. There was no evidence that Iraq had nuclear weapons. Neither Iraq declared war on the US nor was the US's claim of a direct link between Al-Qaeda and Saddam credible.<sup>32</sup> The invasion was illegal because the UN Charter requires that the exercise of military force for collective or self-defense must be done within the confines of specific legal norms. The UN can exercise the right of collective self-defense only after a threat to international peace is determined. On the other hand the US could exercise its right to self-defence, legitimately, if it was faced with a clear danger of an act of aggression by Iraq.<sup>33</sup>

It is clear from resolution 687 (1991) that it is the Security Council, and not individual Member States, that were to take further steps as may be required. This is entirely consistent with the prohibition on the use of force under Article 2(4) of the UN Charter, and the provision that enforcement action is to be taken 'by the Security Council' under Article 42 of the Charter. Eleven years later, resolution 1441(2002) was passed by the Security Council to address the issue of weapons of mass destruction, which was the principal justification for the invasion. The passage of that resolution and the fact that the US sought and failed to gain Security Council authorization for the use of force in Iraq

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<sup>31</sup> <http://reuters.com/newsArticle.jhtml?type=topNews&storyID=2670665>.

<sup>32</sup> W. Andy Knight, *The Crisis of Relevance at the UN*  
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<sup>33</sup> W. Andy Knight, *The Crisis of Relevance at the UN*  
e://A:\The%20crisis%20of%20relevance%20at%20the%20un%20-520eXPRESSnEWS%20-520University%2

following resolution 1441 (2002), in fact imply that the United States implicitly accepted that further authorization of the Security Council was required for the use of force.<sup>34</sup>

Resolution 1441 (2002) specifically decided (in operative paragraph 1) that Iraq was in material breach of its obligations under resolution 687 (1991), granted Iraq a final opportunity to comply and set up the enhanced inspection regime (in operative paragraph 2). It did not authorize the use of force by individual Member States. That is why the United States and United Kingdom sought a further resolution. In that resolution, the Security Council decided to remain seized of the matter and to take such further steps as may be required for the implementation of resolution 1441 (2002) and to secure peace and security in the area. The US cannot ignore that resolution and return to the earlier resolutions 687, 678 and 660 to justify its own use of force against Iraq.<sup>35</sup>

In the existing Security Council resolutions on Iraq, there is no authorization of the use of force by Member States relating to weapons of mass destruction, or, for that matter, relating to regime change. The argument used by the US does not stand and the attack on Iraq constituted an unlawful use of force under international law. Members of the 'coalition of the willing' which aided or assisted in the invasion of Iraq could also be held responsible under international law.<sup>36</sup> Article 16 of the International Law Commission's Articles on State Responsibility recognize that 'a state which aids or assist another State in the commission of an internationally wrongful act is internationally responsible for doing so if it does so with knowledge of the circumstances of the internationally wrongful act and the act would be internationally wrongful if committed by that State.'<sup>37</sup>

### 3.9. Anticipatory Self-Defense

The foundational rule on the prohibition to the use of force comprised in Article 2(4) of the UN Charter has been framed with various exceptions, but the main exceptions are the

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<sup>34</sup> Duncan E. J. Currie, *Preventive War and International Law after Iraq*. [http://www.globelaw.com/Iraq/Preventive\\_war\\_after\\_iraq-htm//Toc41379597](http://www.globelaw.com/Iraq/Preventive_war_after_iraq-htm//Toc41379597).

<sup>35</sup> Duncan E. J. Currie, *Preventive War and International Law after Iraq*. [http://www.globelaw.com/Iraq/Preventive\\_war\\_after\\_iraq-htm//Toc41379597](http://www.globelaw.com/Iraq/Preventive_war_after_iraq-htm//Toc41379597).

<sup>36</sup> <http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html>

<sup>37</sup> Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (18 January 2002). At <http://www.un.org/documents> (accessed 8 May 2003). See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, 148 ff.

use of force under the authority of the UN as established in Chapter VII of the Charter, and the right of individual or collective self-defense embraced in Article 51 of the Charter. Article 51 acknowledges that the exercise of the inherent right of self-defense will be lawful if an armed attack occurs against a Member of the UN, state practice and *opinio juris* illustrate that its exercise can be lawful even under a situation to be considered as equivalent to an armed attack,<sup>38</sup> in other words, as a preventive measure taken in 'anticipation' of an armed attack, and not simply in response to an attack that has actually happened.<sup>39</sup> Therefore, whenever a direct and overwhelming threat occurs against a State, the victim is not expected to wait until the attack has actually started; here comes into play the doctrine of anticipatory self-defense that has been long recognized as part of customary international law.<sup>40</sup>

Thus, in both theory and practice the preemptive use of force have a home in current international law; but its boundaries are not wholly determinate. Its clearest legal foundation is in Chapter VII of the UN Charter. Under Article 39 the Security Council has the authority to determine the existence not only of breaches of the peace or acts of aggression that have already occurred but also of threats to the peace; and under Article 42 it has the authority to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." These authorities clearly seem to encompass the possibility of the preemptive use of force. As a consequence, the preemptive use of force by the United States against Iraq or any other sovereign nation pursuant to an appropriate authorization by the Security Council would seem to be consonant with international law. Less clear is whether international law currently allows the preemptive use of force by a nation or group of nations without Security Council authorization. That would seem to be permissible only if Article 51 is not read literally but expansively to preserve as lawful the use of force in self-defense as traditionally allowed in customary international law. As noted, the construction of Article 51 remains a matter of debate. But so construed, Article 51 would not preclude the preemptive use of force by the U.S. against Iraq or other sovereign nations. To be lawful, however, such

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<sup>38</sup> See Dinstein, *supra* 10 at 162.

<sup>39</sup> Bothe, Michael, "Terrorism and the Legality of Pre-emptive Force", *EJIL* (2003), Vol. 14 No. 2, 227-240.

<sup>40</sup> Dinstein, *supra* 10 at 165-166.

uses of force would need to meet the traditional requirements of necessity and proportionality.<sup>41</sup>

If customary international law governing the preemptive use of force does remain valid, a primary difficulty still remains of determining what situations meet the test of necessity. The requirement is most easily met when an armed attack is clearly imminent, as in the case of the Arab-Israeli War of 1967. But beyond such obvious situations, the judgment of necessity becomes increasingly subjective; and there is at present no consensus either in theory or practice about whether the possession or development of weapons of mass destruction by Iraq justifies the preemptive use of force against it. Most analysts recognize that if overwhelmingly lethal weaponry is possessed by a nation willing to use that weaponry directly or through surrogates, some kind of anticipatory self-defense may be a matter of national survival; and many contend that international law ought, if it does not already do so, to allow for the preemptive use of force in that situation. But many states and analysts are decidedly reluctant to legitimate the preemptive use of force even in that situation on the grounds the justification can easily be abused. Moreover, it remains a fact that the international community judged Israel's destruction of Iraq's nuclear reactor site in 1981 to be an aggressive act rather than an act of self-defense. An attack on Iraq, not authorized by the Security Council, has given the international community a renewed opportunity to determine whether traditional international law regarding preemption still applies or whether it ought to be reformulated.<sup>42</sup>

To determine whether an attack is imminent, the magnitude of the threat and the means by which it would materialize in violence are significant factors "and mean that the concept of imminence will vary from case to case."<sup>43</sup> It is indisputable that the world and its societies have gone through a dramatic evolution in the development of new technologies; as a result, the international scenario has been shocked by crisis such as the Gulf Conflict where the uncertainty of the potential use of nuclear, chemical and

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<sup>41</sup> David M. Ackerman and Legislative Attorney, CRS Report for Congress. *International Law and the Preemptive Use of Force against Iraq*. Order Code RS21314. March 17, 2003.

<sup>42</sup> The Bush Administration contends that "we must adapt the concept of imminent threat to the capabilities and objectives of ... rogue states and terrorists." See White House, *The National Security Strategy of the United States of America* (Sept. 2002), at 15.

<sup>43</sup> *Ibid* 37.

biological weapons with its perplexing consequences has been constant. The imminence requirement is extremely problematic in the WMD context because such weapons have great potential to be used without ever revealing any evidence that an attack is imminent.<sup>44</sup>

Therefore, even though the right of anticipatory self-defense remains polemic, it has been adopted as a lawful exception to the proscription on the use of force under customary international law.<sup>45</sup> State practice and *opinio juris* confirms that the right of self-defense in the Charter era continues to include a right to use force to avert imminent armed attack. Three instances may be indicative of State recognition of a right of anticipatory self-defense: the US quarantine against Cuba in the 1962 missile crisis, the 1967 conflict between Israel and the Arab States, and the Israel's raid on the Iraqi nuclear reactor in 1981. However, it must be said that the legal argument claimed by the US to justify its use of force against Iraq goes faraway and "proposes to adapt this concept to new perceived threats in a way that would constitute an unacceptable expansion of the right of anticipatory self-defense."<sup>46</sup>

The evidence about the level and nature of threat presented by Iraq to other countries was not clear. The US Government did not make clear the extent of the risk posed by Iraq and lack of effective alternative to the use of force. The lack of any effective alternative to force was difficult to demonstrate because Iraq offered to negotiate with the weapons inspectorate. It is clear from the above discussion of the law of self-defense that the capacity to attack, combined with an unspecified intention to do so in the future, was not sufficiently pressing to justify the pre-emptive use of force. The threat must at least be imminent. However, the degree of proximity required must also be proportionate to the severity of the threat. A threat to use very serious weapons – nuclear weapons being the obvious example – *could* justify an earlier use of defensive force than might be justified in the case of a less serious threat.

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<sup>44</sup> McLain, *supra* 113 at 282.

<sup>45</sup> Bothe, *supra* 136 at 227.

However, the existence of the threat, regardless of how serious that threat may be, must still be supported by credible evidence. Such evidence was made available by US and its allies.

#### 4.0. Collective self-defense

Article 51 preserves the right of *collective* self-defense. In the *Nicaragua* case, the ICJ stated that: 'it is the State which has been the subject of an armed attack which must form and declare the view that it has been attacked. There is no rule of customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation. Where collective self-defense is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack' (para. 195). In order to justify the use of force against Iraq on the basis of collective self-defense with the United States, there must first be credible evidence that Iraq had carried out, or intended to carry out, an armed attack on the United States or another of the United Kingdom's allies. The UK and US Governments did not give convincing evidence to show that Iraq carried out the terrorist attacks on 11 September 2001. It appears that those attacks were carried out by Al-Qaeda, an international terrorist organization with support and funds supplied from a number of countries and with particularly close links to the Taliban regime in Afghanistan, which was used as the basis for the military action taken by the US, the UK and others in that country.<sup>47</sup>

Further, even if it could be shown that Iraq had funded or otherwise assisted Al-Qaeda, this does not necessarily justify the use of force in self-defense. According to the ICJ in the *Nicaragua* case, 'the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defense of course does not remove the need for this. There is no proof that Iraq has provided 'weapons or logistical or other support' to Al-Qaeda. Such support would not, in any event, amount to an armed attack. Unless Iraqi involvement in the September 11 terrorist attacks could meet the higher standard set out in the *Nicaragua* case, namely something *more* than the provision of weapons, logistical or other support,

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<sup>47</sup> Rabinder Singh QC and Alison Macdonald, *Legality of use of force against Iraq*. London WC1R 5LN. 10 September, 2002. pp.14-15.



it cannot be considered that the attacks of September 11 in themselves justify the use of force against Iraq.<sup>48</sup>

#### 4.1. Legality of the use of force against Iraq in 2003

There was no legal basis to affirm that an implied authorization by the Security Council exists when the will and intention of that organ is manifestly against the use of force. In this perspective, the absence of clear authorization to use force by the Security Council and the unaccepted postulates of the Bush Doctrine results in an evident illegal military action by the US and its allies against Iraq.

The last and probably more enigmatic issue is related to the integrity and credibility of the Security Council and the international legal system after the crisis; the question arise on how much the system has been affected by the unilateral and illegal use of force by the coalition forces? The first repercussion relies on the role of the Security Council to effectively deal with a crisis of this kind. The UK and US perspective emphasizes the inability of the Security Council founded under the Charter and its practice reveals the complexity to exercise its role effectively since the application of law and justice has been selective and inconsistent, depending on the political configuration of the Security Council on any given issue.<sup>49</sup>

The 2003 war between Iraq and US reveals the urgent necessity to bring up to date the structure and functioning of the Security Council. It is vital to confront the circumstances and step ahead of the challenge. The first issue to consider is the renovation on the Council's attitude towards its primary responsibilities. The application of law by the Security Council has been markedly selective through out its history. It is time to deal indistinctly with every breach to the peace or act of aggression and propose resolutions and measures accord with the Charter and international law; but this aim can only be achieved if every permanent member upholds its implicit obligation to contribute to the

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<sup>48</sup> Ibid. 14-15.

<sup>49</sup> See Johnstone, I., *Treaty Interpretation: The Authority of Interpretative Communities*, (1991) 12 Michigan JIL at 381.

maintenance of international peace and security, 'rather than each being primarily concerned with threats to its peace'.<sup>50</sup>

Briefly stated, it is clear from Article 2(4), Article 42 and Article 51 of the UN Charter that Member States are to refrain from the threat or use of force against the territorial integrity or political independence of any State. Force may only be used if specifically approved by the Security Council or proportionate force may be used in self-defense when a threat is imminent. In the latter case, in the words of the Nuremberg Tribunal, "preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation'".<sup>51</sup>

Therefore, Iraq-US war in 2003 was illegal. Saddam Hussein was a tyrant. His regime carried out violation of human rights against its own people. He potentially posed a threat to some of the states in the region. But there was no imminent threat to the US from Iraq. No evidence that Iraq had nuclear weapons. Iraq had not declared war on the US. Nor was the US's claim of a direct link between Al-Qaeda and Saddam credible.

#### **4.2. Conclusion**

The truth is that the US openly professed its desire to achieve a proactive regime change in Iraq. Therefore, the war was not the result of a failure of diplomacy; not even a consequence of a flawed international law; neither a precautionary war against WMD or terrorism; nor about the liberation of the Iraqi people. Conversely, it appears to be the result of an unlimited policy whereby the US had decided to launch invasions against every potential enemy state across the globe. They breached international law and attempted to change the legal order governing the use of force in international relations. However, Article 2(4) remains valid and effective. It's the basis on which US and its allies were accused of breaching international law.

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<sup>50</sup> White, *supra* 191 at 2.

<sup>51</sup> Duncan E. J. Currie, *Preventive War and International Law after Iraq*.  
[http://www.globelaw.com/Iraq/Preventive\\_war\\_after\\_iraq-htm//Toc41379597](http://www.globelaw.com/Iraq/Preventive_war_after_iraq-htm//Toc41379597)

## CHAPTER FIVE

### THE STATES COMPLIANCE WITH ARTICLE 2(4) OF THE UN CHARTER

#### 4.3. Background

The adoption of the UN Charter ushered in a new era in international relations. Before the UN Charter, states were authorized to resort to force to impose their terms of settlement, unless they had entered into treaties requiring self-restraint on the matter. States were authorized to enforce, even militarily, their rights without previously endeavoring to seek a peaceful solution of their differences. The change in technology and other factors in international relations forced states to develop peaceful means for settling their disputes. States had gradually forged some institutions or mechanisms, available to those willing to resolve their disagreements peacefully. The establishment of the UN and introduction of a general ban on the threat or use of force changed international relations. States revitalized and strengthened the traditional means for settling disputes and in addition established innovative and flexible mechanisms for preventing disputes or, more generally, inducing compliance with international law.<sup>1</sup>

Hand in hand with the general ban on the threat or use of force, a general obligation to settle legal or political disputes peacefully evolved under the impulse of Articles 2(3) and 33 of the UN Charter. In addition, states have increasingly resorted to traditional means of settling disputes and even strengthened them by turning them into standing or at least compulsory institutions, for instance, states have more and more established permanent or semi-permanent judicial bodies. On the other hand, the principal political bodies of the UN, the Security Council and the General Assembly, have handled disputes or situations likely to jeopardize peace.<sup>2</sup>

States have realized that in many areas dispute settlement should be replaced by the establishment of mechanisms designed to monitor compliance with international legal standards on a permanent basis, and prevent or deter as much as possible deviation from

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<sup>1</sup> Antonio Cassese, *International Law* (New York: Oxford University press, 2001), pp. 212-13.

<sup>2</sup> *Ibid.* 216.

those standards. Instead of setting up bodies calculated to act after a breach of international rules has allegedly occurred, mechanisms have been established aimed at forestalling possible infringements and inducing compliance with international law.<sup>3</sup>

The Charter was drafted in the closing days of the worst and most devastating war the world had ever experienced. Its overarching purpose was to ensure that history do not repeat itself. The ambition of 1945 effort was to impose a rule of law on the use of force. The ultimate design of the UN scheme was to make war impossible and illegal, impossible, through a concert of the great powers functioning as the Security Council; illegal, by condemning all use of force except that justified by the necessities of self-defense.<sup>4</sup>

The ratification of the Charter of UN was seen as a proclamation of a new era in the history of humankind, one in which every member of the community of nations renounced the use of force in the conduct of its relations with others. Law was perceived as an instrument for the achievement of humankind's highest aspiration, the permanent peace of nations. The UN Charter superceded the Covenant of the League of Nations and the provisions of the Kellogg-Briand Pact, the prohibition on unilateral force was to apply universally, members were bound by it and they were to see to it that non-Members also complied.<sup>5</sup>

The UN Charter declared purposes and prescribed norms, and it laid down a blueprint for an organization that would pursue those purposes and enforce those norms. After sixty years, the organization is different from that contemplated in 1945; the Security Council has not been effective in enforcing the principles of the Charter outlawing the use of force, and efforts to have the General Assembly substitute for the Security Council have not been successful. The people of the world expected more from the UN in Iraq-US conflict in 2003. But the resistance and abandonment of international law and the Charter guidelines by US and allies has been shown to be a precarious way to uphold the primary

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<sup>3</sup> *Ibid.* 216-17.

<sup>4</sup> William D. Rogers, *The Principles of Force, The Force of Principles. Right V. Might: International Law and the Use of Force*, 2<sup>nd</sup> ed. (New York: A council of Foreign Relations Press, 1991), p. 96.

<sup>5</sup> Louis Henkin, *How Nations Behave Law and Foreign Policy* (New York: Council of Foreign relations, 1968), P. 130.

role of the UN as the principle agency of war prevention in the world community. The quality of the Security Council debate, as well as the inadequacy of resolution 1441 as a framework for war/peace decisions,<sup>6</sup> suggested the ineffectiveness of the UN Security Council. But no responsible state, has suggested that the failures of the organization vitiated the agreement and nullified or modified the Charter's norms.<sup>7</sup> The Charter remains the authoritative statement of the law on the use of force.

The Charter reflected universal agreement, which justified grievances and a sincere concern for 'national security' or other 'vital interests' would not warrant any nation's initiating war. Peace was the paramount value. The Charter and the organization were also dedicated to realizing other values such as self-determination, respect for human rights, economic and social development, justice and a just international order. These purposes could not justify the use of force between states to achieve them but pursued by other peaceful means stated in Article 2(3). The purposes of the UN could not be achieved by war.<sup>8</sup>

Article 2(4) has been long recognized as part of customary international law and as a rule of *jus cogens* binding all States and was reinforced by a system of collective security measures included in Chapter VII of the same Charter. Indeed, there is general conformity on the main principles that comprise the law on the use of force and its two recognized exceptions: the collective use of force by the UN and the individual or collective self-defense by member states. The other exceptions have found more emphasis in the Charter.

History shows that the ideals set in 1945 were not to be easily realized. The world has not rid itself of the threat of war or the use of force by one nation against another. Expenditures in weapons by states continue apace. Instruments of violence have become<sup>9</sup> increasingly devastating in the sixty years of the Charter. On the other hand, war has been

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<sup>6</sup> Richard Falk, *Challenging the United Nations*. March 19, 2003.

e://A:\Richard%20Falk,%20Challenging%20the20UN.htm

<sup>7</sup> *Ibid.* 137-139.

<sup>8</sup> Louis Henkin, *Use of Force: Law and U.S. Policy. Right V. Might: International Law and the Use of Force*, 2<sup>nd</sup> ed. (New York: A council of Foreign Relations Press, 1991), pp. 38-39.

<sup>9</sup> *Ibid.* 96.

a common feature of the postwar landscape. Cold War was characterized by proxy wars and new world order characterized by intra-state conflicts. Post-Cold War era is characterized by ethnic and nationalist conflicts that flared up in all regions of the world. Between 1988 and 1994, the Security Council adopted more resolutions by than ever before, with the major upsurge occurring in August 1990 following the Iraqi invasion of Kuwait. The use of force pursuant to Chapter VII of the Charter was also authorized to deal with threats to international peace and security arising out of the conflicts in former Yugoslavia, Somalia and Rwanda.<sup>10</sup>

There is no doubt that all states recognize and accept the fundamental importance of the primary ban on resort to force. For example, in every example of the use of force in recent years, the states using violence have acknowledged that international law raises a presumption that force is unlawful.<sup>11</sup> US and UK justified war in Iraq as self-defense after it emerged that the Security Council could not give a mandate to disarm Iraq by using all necessary means. Henkin points out that accused states using force universally justify their actions in legal terms as legitimate self-defense. States do not behave as though there were no law.<sup>12</sup> Unfortunately, however, this consensus<sup>12</sup> is not matched by agreement over the precise scope of the ban, or of the explicit exceptions.

During the Charter honeymoon, the efficacy of the UN Charter that sought 'to suppress the chaotic and dangerous aspirations of governments' by 'legal rules and restraints' was questioned. Six decades later, that skepticism is still rampant, more so after the Iraq-US war in 2003. The international community found itself in a critical juncture. The guarantees of international peace and security and the determination to avoid the scourge of war put in place following World War II was undermined and even imperiled by the use of military force under the doctrine of 'preventive war' and the invasion of Iraq. It is critical that member States following the attack on Iraq re-acknowledge their commitment to avoiding war and to the principles and purposes of the United Nations Charter, in order that the role of the rule of law in avoiding future wars could prevail. The

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<sup>10</sup> Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 5<sup>th</sup> ed. (London: Sweet & Maxwell, 2001), p. 40.

<sup>11</sup> Martin Dixon, *International Law* (London: Blackstone press Ltd, 1990), p. 183.

<sup>12</sup> Henkin, *How Nations Behave Law and Foreign Policy*. Op. Cit. p. 139.

doubt on the efficacy of law in deterring, preventing, or terminating the use of force and whether its prescriptions are relevant and material to the policies of nations today need to be removed.<sup>13</sup>

In discussing state compliance with international law, that is, how to make international law more effective, Stone raised two main questions which are concealed in 'how can states comply with international law'? The first is concerned with how actual state conduct conforms to prescribe existing rules of international law. The second question is concerned with how the existing rules of international law must be changed, abolished or supplemented so as to make an effective basis for an international community with the stability and other qualities desired. However, there is a middle ground between these two questions which is expressed through the dubieties of interpretation.<sup>14</sup>

The states compliance should be viewed in line with the existing legal norm of Article 2(4) as it is. It should be seen in its earthy deference at many points to the harsh facts of power, with its ominous silences in face of some of the greatest challenges to peace and order and even survival, and with its postures still, over wide areas, of palliation to the grievous wrongs and cruelties of war.<sup>15</sup>

Compliance must first be pressed for where there is law. But the inducement of compliance presupposes a preliminary step in inducing submission at any rate in all those situations when either fact or applicable law is in doubt. These requirement must be concretized into a prescription *inter partes*; it is not clear from which party compliance demands, act or omission. Each may sincerely applaud the principle of compliance, yet compliance may be no further forward.<sup>16</sup>

States compliance with Article 2(4) has faced many skepticism, many scholars and statesmen have expressed doubt in its effectiveness. The skeptics do not comprehend a

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<sup>13</sup> Louis Henkin, *Use of Force: Law and U.S. Policy. Right V. Might: International Law and the Use of Force*, 2<sup>nd</sup> ed. Op. Cit. p. 37.

<sup>14</sup> Julius Stone, *Of Law and Nations Between Power Politics and Human Hopes* (New York: William S. Hein & Co., Inc, 1974), p. 220.

<sup>15</sup> *Ibid.* 220.

<sup>16</sup> *Ibid.* 221.

situation where the legal rules in Article 2(4) can restrain and subordinate states to an international juridical regime, limiting their possibilities for aggression and injury. Sovereign nations cannot be expected to give up the power to vindicate ultimate interests as they see them, by force if necessary. Some who originally thought the law would work because it would be enforced by the dominant powers through the Security Council of the UN changed their views when the Cold War destroyed illusions of great power cooperation to maintain peace and even involved them in actual hostilities in Korea.<sup>17</sup>

The norm against the unilateral national use of force has survived, despite common misimpressions to the contrary, the norm has been largely observed.<sup>18</sup> With the exceptions of Korea, the brief Arab-Israel hostilities in 1956 and 1967 and the flurry between India and Pakistan over Kashmir in September 1965, nations have not engaged in 'war,' in full and sustained hostilities, even in circumstances in which in the past the use of force might have been expected. The period after Second World War has not been analogues to the conquests and wars that followed the First World War like the Japanese conquest of Manchuria, Italy's aggression in Ethiopia, Hitler's invasion of Poland, Japan's attack at Pearl Harbor, the long Gran Chaco war.<sup>19</sup> Despite acute hostility, the law against unilateral force has been observed among the big powers and the most significant fact about the Cold War is that it remained cold. Thus, society of nations achieved a new level of evolution, establishing the foundations of international order.<sup>20</sup>

Within a brief period of 1963-65 the world saw increased Arab threats against Israel, Greece and Turkey close to war over Cyprus, Indonesia asserting a right to attack 'colonialism in Malaysia, India and china in dispute over borders, India and Pakistan actually if briefly at war, the beginning of US involvement in Vietnam. Perhaps the significant fact is not that these threats occurred but that they did not result in war, and that even actual war between India and Pakistan over the long-festering problem of Kashmir was probably not wholly intended, did not become 'all-out' war, and was soon terminated. Henkin asserts that although the possibility of international war or violence

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<sup>17</sup> Henkin, *How Nations Behave Law and Foreign Policy*. Op. Cit. p. 134.

<sup>18</sup> *Ibid.* 134.

<sup>19</sup> Henkin, *How Nations Behave Law and Foreign Policy*. Op. Cit. p. 135.

<sup>20</sup> *Ibid.* 135.



could not be discounted, the expectation of violence no longer underlies every political calculation of every nation. Nations knew that even in issues in which their stakes are very high, they are limited to peaceful settlement or peaceful 'non-settlement' of their disputes for instance Kashmir and Cyprus.<sup>21</sup>

Rogers contends that two aspects of the contemporary situation, distinguish our own age from experience before the Charter. The first is that no war has been fought among any of the industrialized powers: Europe, North America and Japan have been at peace with each other since 1945. The second is that the US and the Soviet Union, the two nations capable of conducting another world war, have held back. Though each superpower has often deployed its armed forces with palpably coercive intent and has used those forces in combat on a number of occasions since 1945, neither has done so against the other or against a professed ally of the other. The US fought against the communist states of North Korea and Vietnam, instigated the 1961 invasion of Cuba, and provided weapons and logistic support to anticommunist insurgencies in Afghanistan, Angola, Nicaragua and Cambodia. On the other hand, the Soviet Union used its own troops in Czechoslovakia, Hungary and Afghanistan and aided the forces of violence elsewhere. But it has not since 1945 attacked or supported an attack on a democracy. Nor has the US been a party to the use of force against any member of the Warsaw Pact.<sup>22</sup>

Roger argues that the Charter has not achieved eradication of war as a 'scourge of mankind.' But World War III has not occurred. This has been a supreme achievement of the community of nations. The past six decades has been a reign of peace among the world powers, standing in remarkable contrast to the awesome devastation of the wars of the industrial powers that punctuated the years from the middle of the nineteenth century to the middle of the twentieth.<sup>23</sup>

In Cold War nuclear war was deterred by consequences so unthinkable that to speak of the influence of law in deterring it is supererogatory. Developing powers hesitated before

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<sup>21</sup> *Ibid.* 136.

<sup>22</sup> William D. Rogers, *The Principles of Force, the Force of Principles. Right v. Might: International Law and the Use of Force.* Op. Cit. pp. 97-98.

<sup>23</sup> *Ibid.* 98.

the terrible consequences of modern war even if no nuclear weapons come into play. They also feared possible involvement of the big powers and consequent escalation to nuclear war. Some nations were saved from the sin of aggression by the inadequacy of their arms and the fear of failure. There was no war initiated by the strong against the weak, by nuclear powers against others whom they could annihilate without fear of significant retaliation. In any event, whatever the reasons, the fact is that the law against the unilateral use of force was observed. The law of the Charter has been widely accepted by governments and the authority of the UN and world opinion is behind Article 2(4) and it can be claimed that the world has avoided major war since 1945.<sup>24</sup> Where violations of the norm have occurred, the threats or uses of force have been limited, indirect and conditional, so that the risks and uncertainties made possible some rational balancing of cost and advantage.

Franck argues that small-scale warfare takes the form of rural and urban hit-and-run operations by small bands of fighters, sometimes not in uniform and often lightly armed. The Yugoslavia support of indigenous communist insurgents in Greece was evident. China also gave significant support to indigenous communist insurgents in Laos, Burma and South Vietnam and by Cuba in Venezuela, Bolivia and Colombia. This small-scale internal wars, gave the problem new dimension. The nature of such support ranged from military supplies and training of recruits to money and radio propaganda. But since the Charter speaks only of a right to defend against an armed attack, the international community is left to ponder what principles govern the right to retort in instances of lesser trespass. Insofar as one state merely encouraged guerrilla movements within another, an 'armed attack,' at least in the conventional sense, cannot be said to have taken place. The more subtle and indirect the encouragement, the more tenuous becomes the analogy to an 'armed attack.' However, Article 51 does not, recognize the existence of these newer modes of aggression, or attempt to deal with the new problems of characterization which they create for international law.<sup>25</sup>

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<sup>24</sup> Henkin, *How Nations Behave Law and Foreign Policy*. Op. Cit. p. 135.

<sup>25</sup> Thomas M. Franck, *Who Killed Article 2 (4)? Or: Changing Norms Governing the Use of Force by States*. 64 A.J.I.L vol. 812 (1970).

A rule of law which permits a state to use force whenever it thinks it has been attacked is not much of a rule. If the use of force is to be permitted in self-defense by way of exception to the general prohibition of Article 2(4), there must be some machinery for determining whether that exception applies in particular instances. Although the Charter provides no mandatory machinery to determine when and at whose instigation an armed attack has occurred, some *ad hoc* machinery has been tried.<sup>26</sup> In the absence of some universally credible fact-determination procedures, the effort to establish whether a use of force is illegal under Article 2(4) or legal under Article 51 is stymied by contradictory allegations of fact by the parties to the dispute and their allies. It is as if the law was to leave to the two drivers in motor vehicle collusion the sole responsibility for apportioning liability, helped only by the unruly crowd gathered around them at the scene of the accident.<sup>27</sup>

There is nothing in the UN Charter or in the machinery of the international system which limits the nation's right to determine for itself when an act of aggression has occurred, or whether the regime calling for help is, in fact, the legitimate government. The Security Council could, but in practice is virtually precluded by its voting rules from making such a determination. The super-powers could simply disregard the findings of international peace-observation groups like in Lebanon and Vietnam cases putting in question the utility of such *ad hoc* fact-finding procedures. This is another great vulnerability of the norm established by Articles 2(4) and 51. If the grievous threats to world peace are to appear hereafter in the guise of civil wars or wars involving partitioned states with rival regimes, then Article 51 by itself is likely to be of very little use in distinguishing individual or collective self-defense from aggression.<sup>28</sup>

Franck contends that ambiguities and complexities lurk behind the misleading simple rule of Article 2(4) prohibiting the use of force in international relations. The carefully delimiting exceptions to Article 2(4) contribute to its infective. The changing circumstances of international relations, of the way nations perceive their self-interest, of

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<sup>26</sup> *Ibid.* 816.

<sup>27</sup> *Ibid.* 817.

<sup>28</sup> *Ibid.* 818.

strategy and tactics, end of Cold War and terrorism have combined to take advantage of these latent ambiguities, enlarging the exceptions to the point of virtually repealing the rule itself.<sup>29</sup>

Articles 52 and 53 of the Charter have been interpreted to legitimate the use of force by regional organizations in their collective self-interest, and specifically the role and primacy of regional organizations in settling disputes between their members. The regional organizations permitted by these Articles have developed tight codes of loyalty and have not hesitated to enforce them against members suspected of deviation. Their activities have been effectively beyond the reach of the law of the larger community, especially if they happen to be led by one of the super-powers. Intended to supplement the UN peacekeeping system, the regional organizations have too often instead become instruments of violence, eroding Article 2(4) injunction.<sup>30</sup>

The Charter itself represents a compromise between universal and regional international systems, between structured relations among states taking place in one loose, all-encompassing organization and on the other hand, the norms applied in and between a number of tightly knit, relatively homogeneous groupings based frequently on contiguity, history and shared self-interest. This compromise was not easy to conceive nor has it been simple to apply, and the resultant balance has historically been an uneasy and shifting one.<sup>31</sup> The interests superficially predominant in the world organization, particularly in the General Assembly, are frequently not the same as the interests predominant in the regional grouping. Great-power dominance has been, on the whole, more complete in certain regional groupings are more amenable to *realpolitik* and secret diplomacy.

At San Francisco, a compromise was made between regionalism and universalism. Article 52 of the Charter provides that members of regional agencies 'should make every effort to achieve peaceful settlement of local disputes through such agencies or

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<sup>29</sup> *Ibid.* 822.

<sup>30</sup> *Ibid.* 822.

<sup>31</sup> L. Miller, *Regional Organization and the Regulation of Internal Conflict*, 19 *World Politics* 582 (July, 1967).

arrangements before referring to the Security Council.' A regional organization may act by means short of force to preserve the peace without having to await an outbreak of armed hostility, but it may engage in enforcement action only after obtaining a fiat from the Security Council (Article 53). An individual state or group of states may use force defensively prior to Security Council approval, but only to respond to an armed attack (Article 51). However, the three Articles have melded to produce an increasingly frequently asserted right of regional organizations to take the law into their own hands, to act militarily without Security Council approval even in the absence of an actual armed attack, and to exclude the UN from jurisdiction over disputes in which one member of a regional organization is being forcibly purged of ideological non-conformity by the rest.<sup>32</sup>

With time the originally intended interpretation of Articles 52 and 53 acquired new meaning. The subsequent policies pursued by the US played a major role in reversing the originally intended interpretation at San Francisco in 1945. Its policies favored the primacy of regional pacific settlement. For example 'peaceful settlement' was gradually extended in US practice to include such endeavors as the 'peaceful' inversion of Guatemala covertly organized by the CIA,<sup>33</sup> the 'peaceful' deployment of naval forces to blockade Cuba,<sup>34</sup> and the 'peaceful' occupation of the Dominican republic.<sup>35</sup> Such 'peaceful' enterprises have had a major role in undermining Article 2(4). If the Cuban blockade was a peaceful quarantine, and the Dominican invasion a humanitarian intervention, what uses of force then remain prohibited by Article 2(4).<sup>36</sup>

Both the US and Soviet Union transformed their respective regional organizations into instruments facilitating the threat or use of violence in advancing their regional interests. Under the guise of Articles 51, 52 and 53, both super powers established norms of conduct within their regional organizations which effectively undermined Article 2(4).

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<sup>32</sup>Thomas M. Franck, *Who Killed Article 2 (4)? Or: Changing Norms Governing the Use of Force by States*. 64 A.J.I.L. vol. 824 (1970).

<sup>33</sup> Ambassador Lodge (USA). UN Security Council, 9<sup>th</sup> Year, Official Records, 675<sup>th</sup> meeting 29 (1954).

<sup>34</sup> 1963 Proceedings, American Society of International Law 10 at 12.

<sup>35</sup> President Johnson, Statement of May 2, 52 Dept. of State Bulletin 744 at 747 (1965).

<sup>36</sup> Thomas M. Franck, *Who Killed Article 2 (4)? Or: Changing Norms Governing the Use of Force by States*. 64 A.J.I.L. vol. 826 (1970).

Nations within those regions were subjected not to the rights of sovereign equality but to a duty to conform. All this was a long way from the solemn obligation of Article 2(4).<sup>37</sup>

According to Franck, Article 2(4) has been eroded beyond recognition, principally by the rise of wars of 'national liberation', the deterrence and regionalism by super powers. The failure of the prohibition against force is tantamount to the inability of any rule of the Article in itself to have much control over the behavior of states. The national self-interest, particularly the national self-interest of the super-powers, has usually won out over treaty obligations. What killed Article 2(4) was the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defense of their national interest.<sup>38</sup>

According to Henkin, the death certificate is premature, Article 2(4) lives, although its condition is grave indeed, its maladies are not necessarily terminal. The purpose of Article 2(4) was to establish a norm of national behavior and to help deter violation of it. It has indeed been a norm of behavior and has deterred violations. Expectations of international violence no longer underlie every political calculation of every nation, and war plans lay buried deep in national files. Even where force is used like US invasion of Iraq in 2003, that fact that force was unlawful cannot be left out of account and limits the scope, the weapons, the duration and the purposes for which force is used.<sup>39</sup>

In the 1990-91 Gulf conflict, the collective action taken under the aegis of the UN was hailed as a vindication of international law and of the principle of collective security. At the same time, it has also been perceived by many as still another example of the dominant role of power and national self-interest in international relations. It is time when law and power happily converged. But the promise of a new world order based on the rule of law still seems far features. The promise of a new world order based on the rule of law still seems far from fulfillment, but there was renewed hope that the UN Charter will be taken seriously as an instrument of collective responsibility.<sup>40</sup>

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<sup>37</sup> *Ibid.* 835.

<sup>38</sup> *Ibid.* 837.

<sup>39</sup> Louis Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 A.J.I.L. 544 (1971).

<sup>40</sup> Oscar Schachter, *United Nations Law in the Gulf Conflict*, A.J.I.L. 452 (1991).

On August 2, 1990, Iraq invaded Kuwait and annexed it. The Security Council acted with unanimity to condemn the invasion. It referred expressly to Articles 39 and 40 of the Charter, bringing the matter under chapter VII and the power of the Council to impose mandatory measures. The resolution demanded the immediate and unconditional withdrawal of Iraqi forces.<sup>41</sup> It also called both countries to begin 'intensive negotiations' to resolve their differences. However, the Council did not condemn the invasion as a violation of Article 2(4) and an act of aggression. The Council Resolution 660 determined only that a breach of the peace had occurred. Even the second Resolution adopted four days after the first, did not explicitly refer to Article 2(4) or aggression, but referred to the right of self-defense as applicable in response to the Iraqi attack and also imposed sanctions under Article 41. Yet the Article was breached.<sup>42</sup>

The experience of the gulf conflict underlined two legal grounds for collective security. It showed a high sense of unanimity among great powers. The council adopted non-forcible sanctions of a binding character and it could authorize military measures. The Gulf episode also indicated that Council action was not required where collective self-defense could provide the legal basis for measures. This was evidence that Article 2(4) is not 'mocking us from grave' but legally binding and states are ready to use it to restore peace, justice and security in international order.

The first crisis in which intervention was based on humanitarian concerns was the UN relief operation in Northern Iraq following the Gulf War in 1990/91. Reports about mass deaths of Kurdish refugees a day fleeing Iraqi troops and a growing concern in international political circles that that was largely a man-made disaster prompted the UN Security Council to pass Resolution 688.<sup>43</sup> The resolution condemned the repression of the Iraqi civilian population and insisted that Iraq allow immediate access by international humanitarian organizations to those in need of help. There was contention among scholars and UN circles that that operation did not establish a legal precedent for future humanitarian interventions, largely due to the unique events that preceded it. The

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<sup>41</sup> SC Res. 660 (Aug. 2, 1990), *reprinted in* 29 ILM 1325 (1990).

<sup>42</sup> Oscar Schachter, *United Nations Law in the Gulf Conflict*, A.J.I.L. 453 (1991).

<sup>43</sup> U.N.S.C. Res. 688, 30 I.L.M. 858 (1991).

Security Council authorized military support to ensure humanitarian relief to civilians for the first time. Resolution 688 created a link between human suffering with threats to international peace and security, forming a new rationale for forcible humanitarian intervention.<sup>44</sup>

The demise of the Cold War witnessed an increase in the number of civil wars. Media images of human suffering in Somalia, Rwanda, Haiti and the former Yugoslavia have ensured that humanitarian crises have been pushed to the forefront of the international agenda.<sup>45</sup> In Yugoslavia, UN member states initially saw the crisis as an internal matter which fell within Article 2(7) of the Charter and were reluctant to authorize the use of military force to provide humanitarian aid. Leading many to conclude that far from establishing a legal basis for humanitarian interventions, the crisis affirmed the inviolability of the principles of sovereignty and non-interference as far as human suffering was concerned.<sup>46</sup>

In 1992, Somalia was in an anarchical state caused by two years of drought and the overthrow of government, placed particular emphasis on humanitarian considerations by international community. It became apparent that military action was required to ensure safe delivery of humanitarian supplies, many of which had been confiscated by the warring factions. UN Security Council Resolution 794 authorized Member States to use 'all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia' and became the first UN resolution to explicitly authorize a massive military intervention into a sovereign state without a request from the host government.<sup>47</sup>

Article 2(7) of UN Charter eschews UN intervention 'in matters essentially within the domestic jurisdiction of any state.' However, this principle does 'not prejudice the application of enforcement measures under Chapter VII.' The UN Security Council relied on its Chapter VII powers, for example, to establish the *ad hoc* International Criminal

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<sup>44</sup> Resolution 688 states that the flow of refugees, 'threatens international peace and security, reflecting the language of Charter VII'.

<sup>45</sup> Rebecca M. M. Wallace, *International Law*, 3<sup>rd</sup> ed. (London: Sweet and Maxwell, 1997), p. 257.

<sup>46</sup> *Ibid.* 258.

<sup>47</sup> *Ibid.* 258-59.



Tribunals for the former Yugoslavia and Rwanda. Because Article 39 authorizes the Council to 'decide what measures shall be taken to maintain or restore peace and security,' it authorized this form of non-military intervention to address the atrocities perpetrated within those arenas by forces within those countries.<sup>48</sup>

Chapter VII of the UN gives the Security Council broad powers to intervene when there are threats to peace, like the Somalia case, although the Charter contains potentially conflicting norms. Members are expected to avoid the use of force because it threatens peace, while at the same time not acquiesce in ongoing human rights atrocities. The Charter's expressed expectations is that Members pledge 'to take joint and separate action' in cooperation with the UN for the achievement of its humanitarian purposes. They must therefore promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'<sup>49</sup> These provisions have been abused when powerful state unilaterally acts in a way not condoned by the international community. But generally states have been complying with the international law.

In 2003 Iraq war, there was no evidence that Iraq was a threat, much less an imminent threat to its neighbors or to the US. Initially, the Bush Administration claimed that Iraq might possess or was on a path to produce nuclear weapons. The IAEA inspections demonstrated that Iraq did not possess WMD. With regard to biological and chemical weapons, again, no evidence was presented that Iraq had such weapons. The Bush Administration did not demonstrated any link between Al Qaeda and Iraq and there was no evidence of a link between Iraq and the 9/11 attacks.<sup>50</sup>

War against Iraq was illegal, unjustified, unnecessary and immoral. International law and the United Nations Charter permits force to be employed in only two circumstances: self-defense or with a Security Council authorization when there is a threat to international

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<sup>48</sup> William R. Slomanson, *Fundamental Perspectives on International Law* 3<sup>RD</sup> ed. (California: West Thomson learning, 2000), p. 462.

<sup>49</sup> Humanitarian purposes: Article 55(c) Action pledges: Article 56.

<sup>50</sup> Statement of the Center for Constitutional rights in Support of City Council Resolution 549 and in Opposition to the War with Iraq. February 26, 2003. New York.

peace and security. No one can seriously argue that a war with Iraq can be justified as self-defense. The U.S. was hardly facing an armed attack by Iraq. Nor does any UN Security Council resolution authorize the use of force against Iraq. Yet, the Bush Administration claimed the right to attack Iraq without such legal authority. The war against Iraq in 2003 was an act of aggression and constituted a war crime under international law.<sup>51</sup>

In both theory and practice the preemptive use of force appears to have a home in current international law; but its boundaries are not wholly determinate. Its clearest legal foundation is in Chapter VII of the UN Charter. Under Article 39 the Security Council has the authority to determine the existence not only of breaches of the peace or acts of aggression that have already occurred but also of threats to the peace; and under Article 42 it has the authority to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.' These authorities clearly seem to encompass the possibility of the preemptive use of force. As a consequence, the preemptive use of force by the United States against Iraq or any other sovereign nation pursuant to an appropriate authorization by the Security Council would seem to be consonant with international law.

It is not clear whether international law currently allows the preemptive use of force by a nation or group of nations without Security Council authorization. That would seem to be permissible only if Article 51 is not read literally but expansively to preserve as lawful the use of force in self-defense as traditionally allowed in customary international law. As noted, the construction of Article 51 remains a matter of debate. But so construed, Article 51 would not preclude the preemptive use of force by the U.S. against Iraq or other sovereign nations. To be lawful, however, such uses of force would need to meet the traditional requirements of necessity and proportionality.

If customary international law governing the preemptive use of force does remain valid, a primary difficulty still remains of determining what situations meet the test of necessity.

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<sup>51</sup>Statement of the Center for Constitutional rights in Support of City Council Resolution 549 and in Opposition to the War with Iraq. February 26, 2003. New York.

As illustrated in the examples listed above, that requirement is most easily met when an armed attack is clearly imminent, as in the case of the Arab-Israeli War of 1967. But beyond such obvious situations, as Chayes argued, the judgment of necessity becomes increasingly subjective; and there is at present no consensus either in theory or practice about whether the possession or development of weapons of mass destruction by a rogue state justifies the preemptive use of force. Most analysts recognize that if overwhelmingly lethal weaponry is possessed by a nation willing to use that weaponry directly or through surrogates, some kind of anticipatory self-defense may be a matter of national survival; and many contend that international law ought, if it does not already do so, to allow for the preemptive use of force in that situation.<sup>52</sup> But many states and analysts are decidedly reluctant to legitimate the preemptive use of force even in that situation on the grounds that justification can easily be abused. Moreover, it remains a fact that the international community judged Israel's destruction of Iraq's nuclear reactor site in 1981 to be an aggressive act rather than an act of self-defense. An attack on Iraq done in the name of preemptive self-defense apart from authorization by the Security Council, gave the international community a renewed opportunity to determine whether traditional international law regarding preemption still applies or whether it ought to be reformulated.

Apart from breaches of international law by some states like US invasion of Iraq, states generally comply with international law. The Article is legally valid, developed into customary international law and therefore not 'mocking us from its grave'.

#### **4.4 Conclusion**

To what extent and under what conditions, has resort to force been effectively removed from the decision of individual states, or of the blocs, and put into a workable constitutional framework of UN Charter, determines the effectiveness of Article 2(4). Like all constitutions, the Charter has been effective to the extent to which it is in accordance with the realities of politics or to which it is adaptable to them. It also

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<sup>52</sup> The Bush Administration contends that "we must adapt the concept of imminent threat to the capabilities and objectives of ... rogue states and terrorists." See White House, *The National Security Strategy of the United States of America* (Sept. 2002), at 15.

influences those realities to the extent that it represents to participants an alternative preferable to other possibilities. The Charter has not eradicated use of force in international relations but a deep change with respect to the use of force has occurred.<sup>53</sup>

The superpower justified attack on Iraq as preemptive self-defense and even attempted to get the UN mandate to attack Iraq in 2003. Meaning Article 2(4) influence any decision by states when contemplating unilateral use of force and thus illegal.

Franck argued that when the framers of the Article 2(4) were contemplating on how to ban use of force in international system, new factors such as internal conflicts, national liberation movements and regionalism were emerging and have been used by states to kill article 2(4) of the UN Charter. The UN may not play the role contemplated by its founders, and the reasons for its effectiveness may not have been foreseen. But that is immaterial and largely irrelevant, if, in fact, the UN can be made to work.<sup>54</sup>

The Charter prohibitions on the unilateral use of force have not been wholly effective and this state of affairs may well continue. But the prohibitions reflect much more than wishful thinking and few states would seriously try to modify them in their interests. In fact many see in these prohibitions an overriding community policy for preventing total disaster, and many assert a common interest within the international community in opposing minor breaches of the peace where the risk of more general nuclear conflict is substantial. Although the risk of general war in some cases may be so slight that participants can risk forcible intervention to secure particular objectives, there is virtually no way to state those conditions in doctrinal terms so long as the community remains decentralized and only partly organized.

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<sup>53</sup> Marton A. Kaplan and Nicholas DeB Katzenbach, *The Political Foundations of International Law* (New York: John Wiley and Sons, Inc, 1961), p. 216.

<sup>54</sup> *Ibid.* 217.

## CHAPTER SIX

### CONCLUSION

The Charter was drafted in the closing days of the worst and most devastating war the world had ever experienced. Its overarching purpose was to ensure that history do not repeat itself. The ambition of 1945 effort was to impose a rule of law on the use of force. The ultimate design of the UN scheme was to make war impossible and illegal and impossible, through a concert of the great powers functioning as the Security Council; illegal, by condemning all use of force except that justified by the necessities of self-defense.<sup>1</sup>

The ratification of the UN Charter was seen as a proclamation of a new era in the history of humankind, one in which every Members of the community of nations renounced the use of force in the conduct of its relations with others. Law was perceived as an instrument for the achievement of humankind's highest aspiration, the permanent peace of nations. The UN Charter superceded the Covenant of the League of Nations and the provisions of the Kellogg-Briand Pact, the prohibition on unilateral force was to apply universally, members were bound by it and they were to see to it that non-Members also complied.<sup>2</sup>

The UN Charter declared purposes and prescribed norms, and it laid down a blueprint for an organization that would pursue those purposes and enforce those norms. After sixty years, the organization is different from what was contemplated in 1945; the Security Council has not been effective in enforcing the principles of the Charter such as outlawing the use of force apart from few instances like during Gulf war, and efforts to have the General Assembly substitute for the Security Council have not been successful. But no responsible state, has suggested that the failures of the organization vitiated the agreement and nullified or modified the Charter's norms.<sup>3</sup> The Charter remains the authoritative statement of the law on use of force.

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<sup>1</sup> William D. Rogers, *The Principles of Force, The Force of Principles. Right V. Might: International Law and the Use of Force*, 2<sup>nd</sup> ed. (New York: A council of Foreign Relations Press, 1991), p. 96.

<sup>2</sup> Louis Henkin, *How Nations Behave Law and Foreign Policy* (New York: Council of Foreign relations, 1968), P. 130.

<sup>3</sup> *Ibid.* 137-139.

The Charter reflected universal agreement, which justified grievances and a sincere concern for 'national security' or other 'vital interests' and would not warrant any nation's initiating war. Peace was the paramount value. The Charter and the organization are also dedicated to realizing other values such as self-determination, respect for human rights, economic and social development, justice and a just international order. These purposes could not justify the use of force between states to achieve them but pursued by other peaceful means. The purposes of the UN could not be achieved by war.<sup>4</sup>

Article 2(4) has been long recognized as part of customary international law and as a rule of *jus cogens* binding all States and was reinforced by a system of collective security measures included in Chapter VII of the same Charter. Indeed, there is general conformity on the main principles that comprise the law on the use of force and recognized exceptions: the collective enforcement of peace, self-defense by Member States, humanitarian intervention, regional peace enforcement, peacekeeping enforcement and protection of national abroad.

History shows that the ideals set in 1945 were not to be easily realized. The world has not rid itself of the threat of war or the use of force by one nation against another. Expenditures in weapons by states continue apace. Instruments of violence have become<sup>5</sup> increasingly devastating in the sixty years since the Charter. On the other hand, war has been a common feature of the postwar landscape. Cold War was characterized by proxy wars and new world order characterized by intra-state conflicts. In short, the Charter has not achieved eradication of war as a 'scourge of mankind'.

There is no doubt that all states recognize and accept the fundamental importance of the primary ban on resort to force. For example, in every example of the use of force in recent years, the states using violence have acknowledged that international law raises a presumption that force is unlawful.<sup>6</sup> Henkin points out that accused states using force universally justify their actions in legal terms as legitimate self-defense. The US and

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<sup>4</sup> Louis Henkin, *Use of Force: Law and U.S. Policy. Right V. Might International Law and the Use of Force*, 2<sup>nd</sup> ed. (New York: A Council of Foreign Relations Press, 1991), pp. 38-39.

<sup>5</sup> *Ibid.* 96.

<sup>6</sup> Martin Dixon, *International Law* (London: Blackstone Press Ltd, 1990), p. 183.

allies expanded anticipatory self-defense to justify invasion of Iraq in 2003. States do not behave as though there were no law.<sup>7</sup> Unfortunately, however, this consensus is not matched by agreement over the precise scope of the ban, or of the explicit exceptions.

During the honeymoon of the UN Charter, the efficacy of the Charter that sought 'to suppress the chaotic and dangerous aspirations of governments' by 'legal rules and restraints' was questioned. Six decades later that skepticism is still rampant, more so after the Iraq-US war in 2003. The international community finds itself at a critical juncture. The guarantees of international peace and security and the determination to avoid the scourge of war put in place following World War II have been undermined and even imperiled by the use of military force under the doctrine of 'preemptive self-defense' by the US invasion of Iraq and Israel in 1967 and 1981. It is critical that Member States following the attack on Iraq re-acknowledge their commitment to avoid war and to the principles and purposes of the United Nations Charter, in order that the role of the rule of law in avoiding future wars may prevail. The doubt on the efficacy of law in deterring, preventing, or terminating the use of force and whether its prescriptions are relevant and material to the policies of nations today need to be removed.<sup>8</sup>

No one can seriously argue that the US invasion of Iraq was justified as anticipatory self-defense. The US was hardly facing an armed attack by Iraq. There was no UN resolution authorizing the use of force against Iraq. Yet, the Bush Administration claimed the right to attack Iraq without such legal authority. The attack against Iraq was an act of aggression and constituted war crime under international law.<sup>9</sup> Despite this unfortunate war, Henkin contend that the law of the Charter remains 'good law'. Courts would apply it; governments generally treat it as law in determining their own policy or in reacting to the behavior of others. It is desirable law, its desirability emphatically reinforced by the weapons and conflicts and transformations of contemporary society. Nevertheless, the

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<sup>7</sup> Henkin, *How Nations Behave Law and Foreign Policy*. Op. Cit. p. 134.

<sup>8</sup> Louis Henkin, *Use of Force: Law and U.S. Policy. Right V. Might: International Law and the Use of Force*, 2<sup>nd</sup> ed. Op. Cit. p. 37.

<sup>9</sup> Statement of the Center for Constitutional Rights in Support of City Council Resolution 549 and in Opposition to the War with Iraq, Center for Constitutional Rights, New York. [Http:// www.ccr-ny.org](http://www.ccr-ny.org)

question remains whether this law has 'worked,' whether it has been generally observed, what its influence has been on the policies and behavior of governments.<sup>10</sup>

According to Reisman, armed enforcement measures are unilateral and since it is up to the state which applies coercion to judge whether the objectives for which it is used are consistent with the values of human dignity and self-determination of peoples, any use of force may be justified. Schachter pointed out that 'since the UN Charter was ratified, no state has invaded or used force against another state without providing a legal justification.'<sup>11</sup> US justified its invasion of Iraq as preemptive self-defense. This testifies to the authority of international law as a whole and the said principle in particular, but, on the other hand, it draws attention to the need of looking for ways to heighten the effectiveness of this principle and to preclude its possible misinterpretation into the opposite.<sup>12</sup>

Human civilization develops by restricting the use of force in international relations, which is reflected both in the rules of international morality and international law. The human attitude towards the use of force has been progressing from moral condemnation of the use of force in the works of progressive-minded thinkers of the past to partial legal limitation of the use of force in the Covenant of the League of Nations and to its full prohibition in the UN Charter. Even in the pre-nuclear era, international violence had become too burdensome for humanity. The more interdependent states become, the stronger is the 'boomerang effect' of the use of force in international relations. Today, unrestrictive interpretations of the right to use of force may jeopardize human civilization, which is why international law should work for the continued restriction of even licit uses of force. Henkin contend that states have come to agree on the legal principle of banning the use of force so as to add the influence of law to other means of

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<sup>10</sup> *Ibid.* 134.

<sup>11</sup> O. Schachter, 'The Nature and Process of Legal Development in the International Society,' in *Structure and Process of International Law* (1983), P. 756.

<sup>12</sup> R. A. Müllerson, *The Principle of Non-Threat and Non-Use of Force in the Modern World. The Non-Use of Force in International Law* (Dordrecht: Martinus Nijhoff publishers. 1989), p. 31.



preventing war. It would be a tragedy if the states were to allow force to re-establish itself as the basis of state interest which is understood by each state in its own way.<sup>13</sup>

Strict observance of the principle of refraining from the threat or use of force has become an imperative of the nuclear and space age. But its significance is far greater. The Delhi Declaration speaks of a nuclear and violence-free world. The nuclear deterrence policy-based world, unreliable and fragile, hanging between death and survival, is to be replaced by a world where the use of force would be offset not by a threat of retaliation, but by reliable economic, political, international law, moral and psychological guarantees. The principle itself and especially the measures to raise its effectiveness play a major part in the transition from the nuclear to the post-nuclear world. The threat to international peace and security is not born of the differences in the social and political systems of participants in international relations. It is largely the result of some powers' attempts to establish uniformity in the system of states after their own pattern.<sup>14</sup>

The restriction of Article 2(4) is important not only for the protection of the sovereignty but to observe these prohibitions is in the interest of even those states which are ready to interfere in the affairs of other states or to use force in international relations. In the modern interdependent world the prohibition against force by state A against State B protects not only the interests of state B, but also those of state A, and not only because of reciprocity, but also because this prohibition is an obstacle to foreign policy adventures inconsistent with the interests of either nations.<sup>15</sup>

Transmittal letter dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change addressed to the Secretary-General offers the United Nations a unique opportunity to refashion and renew the institutions. The Panel emphasized the interconnectedness of contemporary threats to security. Issues such as terrorism, civil wars or extreme poverty should not be dealt with in isolation. The implications of this interconnectedness are profound and the strategies to deal with them

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<sup>13</sup> Louis Henkin, 'International Law and the Behavior of Nations,' *Recueil des cours*, CXI (1965), p. 276.

<sup>14</sup> R. A. Müllerson, *The Principle of Non-Threat and Non-Use of Force in the Modern World. The Non-Use of Force in International Law*, Op. Cit. p. 37.

<sup>15</sup> *Ibid.* 38.

must be comprehensive. Our institutions must overcome their narrow preoccupations and learn to work across issues in a concerted fashion.<sup>16</sup>

In 1945, the spirit of international purpose lasted only months and was eroded by Cold War. emerged again through 1990-91 Gulf war and died because of divisions over the United States-led war in Iraq in 2003. The attacks of 11 September 2001 revealed that States, as well as collective security institutions, have failed to keep pace with changes in the nature of threats. The technological revolution has radically changed the worlds of communication, information-processing, health and transportation has eroded borders, altered migration and allowed individuals the world over to share information at a speed inconceivable two decades ago. Such changes have brought many benefits but also great potential for harm. Smaller numbers of people are able to inflict greater and greater amounts of damage, without the support of any State. A new threat, transnational organized crime, undermines the rule of law within and across borders. Technologies designed to improve daily life can be transformed into instruments of aggression. Many have yet to fully understand the impact of these changes, but they herald a fundamentally different security climate, one whose unique opportunities for cooperation are matched by an unprecedented scope for destruction.

The framers of the Charter of the United Nations recognized that force may be necessary for the “prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace”. Military force, legally and properly applied, is a vital component of any workable system of collective security, whether defined in the traditional narrow sense or more broadly as the panel would prefer. But few contemporary policy issues cause more difficulty, or involve higher stakes, than the principles concerning its use and application to individual cases.

The maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both legal and legitimate. One of these elements being satisfied without the other will always

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<sup>16</sup> Transmittal letter dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change addressed to the Secretary-General.

weaken the international legal order and thereby put both States and human security at greater risk. Therefore, the effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy; their being made on solid evidentiary grounds and for the right reasons, morally as well as legally.

If the Security Council is to win the respect it must have as the primary body in the collective security system, it is critical that its most important and influential decisions, those with large-scale life-and-death impact, be better made, better substantiated and better communicated. In particular, in deciding whether or not to authorize the use of force, the Council should adopt and systematically address a set of agreed guidelines, going directly not to whether force *can* legally be used but whether, as a matter of good conscience and good sense, it should be. When US clearly demonstrated its willingness to invade Iraq on its own and declare the UN 'irrelevant', the UN Security Council responded timidly with its own opportunistic compromise in the form Resolution 1441, seeking to preserve their relevance by imposing some conditions on the authorization to make war, but never quite saying so. The US government illegally retained the option that Iraq was warned in 1441 of 'serious consequences' in the event of 'material breach,' and that that language provided a sufficient mandate to wage war against Iraq.<sup>17</sup>

The guidelines proposed by the panel were not to produce agreed conclusions with pushbutton predictability. The point of adopting them is not to guarantee that the objectively best outcome will always prevail. It is rather to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; to maximize international support for whatever the Security Council decides; and to minimize the possibility of individual Member States bypassing the Security Council.<sup>18</sup>

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<sup>17</sup> Richard Falk, *Challenging the United Nations*, March 19, 2003. e//A: Richard%20Falk,%20Challenging%20the%20UN. htm

<sup>18</sup> Transmittal letter dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change addressed to the Secretary-General.

In short, the peoples of the world are entitled to expect more from the UN. The reliance on leading governments to resist an abandonment of international law and the Charter guidelines by US and allies in 2003 by invading Iraq has been shown to be a precarious way to uphold the primary role of the UN as the principal agency prevention of war in the world community. The quality of the Security Council debates, as well as the inadequacy of 1441 as a framework for war/peace decisions, suggests the importance of giving the peoples of the world a more democratic voice on the global state than what is now provided by governmental representation. One major lesson to be learned from the Iraq-US war in 2003 is the need for global democracy that conceives of the global rule of law as a vital source of restraint for the well being of the peoples of the world, and prepares to mount a civil struggle on behalf of such a law-governed world.

The strident (and successful) reaction by the international community to the IRAQ invasion of Kuwait in 1990 impelled some of those who believed in the 'death' of Article 2(4) to at least tone down their 'rejectionist' approach.<sup>19</sup> In any event, an assault upon Article 2(4), predicated on provision of the Charter into a dead letter. As pointed out by L. Henkin, in a response to Franck, the persistence of inter-state force need not suggest the disappearance of the legal norm expressed in Article 2(4).<sup>20</sup> The criminal codes of all States are constantly trampled underfoot by countless criminals, yet the unimpaired legal validity of these codes is universally conceded.<sup>21</sup>

If it could be proved that Article 2(4) is generally ignored by states, no rule of customary international law might conceivably be germinated by this supposedly barren clause. The question whether Article 2(4) is brazenly disregarded in international relations is, therefore, of immense import. Nevertheless, in providing an answer to the question, the uppermost consideration should be that in spite of the frequent roar of guns, states involved in armed conflicts uniformly profess their fidelity to Article 2(4).<sup>22</sup>

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<sup>19</sup> A. C. Arend, *International Law and the Recourse to Force: A Shift in the Paradigms*, 27 S.J.I.L. 1,27-8, 35-6 (1990-1).

<sup>20</sup> L. Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 A.J.I.L. 544, 547 (1971).

<sup>21</sup> Y. Dinstein, *War, Aggression and Self-Defense*, 3rd Ed. Op. Cit. p. 88.

<sup>22</sup> General Assembly Resolution 42/22, 42(1) R. G. A. 287, 288 (1987).

When resorting to force in 2003, US invoke the right of preemptive self-defense. It misrepresented the law and applied incorrect legal terminology to label its action. Although the US and allies misrepresented and tailored facts to justify the invasion of Iraq, they were not prepared to endorse the proposition that there are no legal restraints whatever on the employment of inter-state force. No state has ever suggested that violations of Article 2(4) have opened the door to free use of force<sup>23</sup> nor 'mocking us from its grave'. When US was accused of unilateral use of force in Iraq, it contested such accusations and falsely justified its move as self-defense or it had mandated from UN Security Council based on Resolution 1441 and the previous Resolutions of Gulf War in 1990/91. The plea that Article 2(4) is dead has never been put forward by any government.<sup>24</sup>

In a nut-shell, the discrepancy between what states say and what they do may be due to pragmatic reasons, militating in favor of a choice of the line of least exposure to censure.<sup>25</sup> According to Dinstein, disinclination to challenge the validity of a legal norm has a salutary effect in that it shows that the norm is accepted, if only reluctantly, as the rule. Above all there is a common denominator between those who try to take advantage of the refinements of the law, and those who rigorously abide by it to letter and spirit. They all share a belief in the authority of the law<sup>26</sup> making it effective in anarchical international community where compliance with international is based on good faith by states.

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<sup>23</sup> O. Schachter, *In Defense of International Rules on the Use of Force*, 53 U.C.L.R. 113, 131 (1986).

<sup>24</sup> Dinstein, *War, Aggression and Self-Defense*, 3rd Ed. Op. Cit. p. 90.

<sup>25</sup> T. Meron, *The Geneva Conventions as Customary Law*, 81 A.J.I.L. 348, 369 (1987).

<sup>26</sup> Dinstein, *War, Aggression and Self-Defense*, 3rd Ed. Op. Cit. p. 90.

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