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The invasion of Iraq: a challenge to the Charter Prohibition of Violence in Inter-State Relations

Summary

Just before its armed invasion of Iraq, the US tried but failed to get the UN to sanction war on Iraq. Having failed in that effort, the US on 20 March 2003 invaded Iraq with the armed support of Australia, Britain and Spain. The invasion was greeted with world-wide condemnation and street protests. The US and its allies were unmoved. It was claimed that Iraq had weapons of mass destruction posing a threat to the world, and that, therefore, it was necessary to militarily overwhelm and disarm it. It was also claimed that President Saddam Hussein was a ruthless dictator, and that, therefore, there had to be a regime change in Iraq for the benefit of the Iraqi people. Thirdly, it was claimed that Iraq was linked to Al Qaeda, the elusive terrorist group that was thrust into the international limelight by its spectacular attacks in the US on 11 September 2001, and that, therefore, the war on Iraq was simply one phase of the wider war against international terrorism. This article examines the legality of the war on Iraq in the light of the reasons pleaded in its justification. This is done against the backdrop of the norm of *jus cogens* prohibiting the threat or use of force by states in their international relations as well as the law of international humanitarian law prohibiting certain means and methods in the conduct of war. The article also considers the ramifications of the war as well as the responsibility, under international law, of the leaders of the invading powers. It is the contention of this article that the war on Iraq breaches the law of the United Nations and violates international law. This transgression of the law, it is argued, engages the international responsibility of the invading powers and the major actors involved in the aggressive war. The article concludes that the war portends certain dangerous consequences regionally and internationally.

Die inval op Irak: ’n uitdaging vir die Handves op die Voorkoming van Geweld in Interstaatlike Verhoudinge

Kort voor die gewapende inval in Irak, het die VSA onsuksesvol gepoog om die sanksie van die VN vir die oorlog in Irak te verkry. Die VSA het Irak hierna op 20 Maart 2003 met die gewapende ondersteuning van Australië, Brittanje en Spanje binnegeval. Die aanval is met wêreldwye veroordeling en straatproteste begroet, waaraan die VSA en sy bondgenote hul egter nie gesteur het nie. As ’n rede vir die inval is aangevoer dat Irak oor wapens van massavernietiging beskik wat ’n gevaar vir die wêreld daarstel, en dat dit daarom noodsaaklik was om Irak militêr te oorweldig en te ontwapen. Daar is ook daarop gesteun dat President Saddam Hussein ’n roekelose diktator is, en dat ’n regimeverandering tot voordeel van die Irakese bevolking sal wees. Derdens is betoog dat Irak bande onderhou met Al Qaeda, die terroristegroep wat internasionale aandag op hulle gevestig het met die aanval in die VSA op 11 September 2001. Die argument was dus dat die oorlog in Irak bloot een fase van die wyer oorlog teen internasionale terrorisme uitmaak. Hierdie artikel ondersoek die

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regsgeldigheid van die oorlog in Irak in die lig van die redes wat as regverdiging daarvoor aangevoer is. Dit word gedoen teen die agtergrond van die norm van die *jus cogens* wat die gebruik van geweld deur state in hul internasionale verhoudinge verbied, sowel as die internasionale humanitêre reg waardeur sekere wyses en metodes van oorlogvoering verbied word. Die artikel ondersoek ook verdere uitvloeisels van die oorlog, sowel as die verantwoordelikheid, ingevolge die internasionale reg, van die leiers van invallende magte. Dit is die slotsom van hierdie artikel dat die oorlog in Irak 'n verbreking van die besluite van die Verenigde Nasies en die toepaslike internasionale reg daarstel. Hierdie regsoortreding, so word betoog, bring die internasionale verantwoordelikheid van die invallende magte en die hoof rolspelers wat betrokke is in die oorlog van agressie, in die spel. Die artikel kom tot die slotsom dat die oorlog bepaalde gevaarlike resultate op streeks- en internasionale vlak inhou.

1. Introduction

The old law of nations tolerated states' practice of violence in inter-state relations. However, the Charter of the United Nations bans the use of force by states in their international relations. But the prohibition has so far not resulted in a significant reduction of state violence in the international sphere. In fact, since the 1950s the world has witnessed many episodes in which states have unilaterally used force against the territorial integrity or political independence of other states.[1] The claim in each case has always been that the resort to force is consistent with Article 51 of the UN Charter. In each case the justification has either been anticipatory self-defence, 'vital national interests', or humanitarian intervention.

The recent war on Iraq is the latest of this long line of episodes constituting challenges to the international law prohibition against the use of force internationally by states. In the course of the year 2002 and during January

1 In 1956 Britain, France and Israel militarily attacked Egypt in what became known as the Suez Canal crisis. In 1962 the Soviet Union's transfer of some of its missiles to Cuba was considered by the US as a threat to the Americas and the world, provoking a US response in the form of a so-called 'defensive quarantine' of Cuba. In 1966 there began the US military intervention in South Vietnam, the action being presented by the former as 'assistance' to the latter 'in defending itself against armed attack from the communist North'. In 1967 Israel militarily attacked Egypt in what was claimed to be 'anticipatory' or 'pre-emptive' self-defence, provoking the Six-Day War. In 1968 the Soviet Union intervened militarily in Czechoslovakia claiming the action was undertaken 'to defend socialist gains' in that country. In 1971 India intervened militarily to compel Pakistan to relinquish its control of East Pakistan, which then became the independent state of Bangladesh. In 1976 an Israeli commando force raided Entebbe Airport and rescued Jewish passengers aboard an aircraft that had been hijacked and diverted to Uganda. In 1980 the US forcibly breached the territorial integrity of Iran when it sent troops to rescue (but unsuccessfully) US staff held hostage in the US Embassy in Teheran. In 1980 the Soviet Union invaded Afghanistan and overthrew the government of that country. In 1981, in what became known as the Osiraq Affair, Israel attacked Iraq by forcibly entering the country and destroying what was claimed to be a near-completed atomic reactor near Baghdad. In 1983 the US militarily intervened in Grenada to evacuate US nationals and 'to restore order' in that country; and in 1986 bombed Libya alleging that Libya supports terrorism. In 1990 Iraq invaded, occupied and purported to annex the neighbouring state of Kuwait.

and February of 2003, the United States and the United Kingdom made a concerted and sustained effort to pressurize the United Nations into authorizing the use of force against Iraq.[2] The two powers alleged that Iraq possessed weapons of mass destruction and was in breach of UN Security Council Resolution 1441 to disarm. They failed to get the necessary UN Security Council authorization for the war in the making.

At the time, a team of UN weapons inspectors was in Iraq. Its mission was to ascertain whether, indeed, that country had weapons of mass destruction as claimed by the US and Britain. The team was still in Iraq and had not come up with evidence in support of the allegation by those two powers. In the circumstances, it was felt by the international community that the inspectors needed to be given more time to complete their job. The UN Security Council could not possibly authorize the use of force against Iraq in the absence of evidence that Iraq had the prohibited weapons.[3] Having failed to prove that Iraq possessed weapons of mass destruction and to demonstrate to the World Body that force against Iraq was warranted, the US and Britain unilaterally decided to attack it.

On March 20, 2003 the US launched an armed invasion of Iraq with the armed support of Australia, Britain and Spain. The invasion was condemned world-wide. In many cities of the world, including in America, Britain, Spain and Australia, thousands of people marched in protests against the war. Earlier, on March 19, Mr. George Bush, the US President, claimed in a televised address that the UN had failed and had not lived up to expectations. He gave an explicit warning of the opening of hostilities against Iraq in the form of an ultimatum containing a conditional declaration of war. He declared that the US would bombard, invade and occupy Iraq at the moment of its choosing if the Iraqi President and his family did not flee from Iraq within 48 hours. But even before that limited time had expired, the US and Britain attacked by air, land and sea.

It was claimed, as the reason for attacking and invading Iraq, that Iraq had weapons of mass destruction posing a threat to the world and that, therefore, it was necessary to militarily overwhelm and disarm it. It was also claimed that the Iraqi President was a ruthless dictator, that he was guilty of gross human rights violations and that, therefore, there had to be a regime change in Iraq for the benefit of the Iraqi people. The invading powers in fact proclaimed and appointed themselves 'liberators' seeking only to 'liberate' the people of Iraq from what they claimed was a brutal and undemocratic regime. Mr. John Howard, the Australian Prime Minister, declared in a televised statement that his country was joining the US and Britain in what he

2 They had all along been preparing to wage a war on Iraq. For months they mounted a massive build-up of troops and war materiel across the Iaqi border in neighbouring Kuwait.

3 Many States voiced the opinion that even if Iraq had those weapons it could not be forcibly disarmed in the absence of a Security Council resolution explicitly authorizing recourse to force. In fact, there was a strong body of opinion that should the prohibited weapons be found in Iraq, all the UN needed to do would be to supervise their destruction *in situ*.

claimed, without any elaboration, to be 'a just war' against Iraq. Thirdly, it was claimed that Iraq was linked to Al Qaeda, the elusive terrorist group that was thrust into the international limelight following its spectacular attacks in the US on 11 September 2001.

This paper examines the legality of the war on Iraq, and the legality of the means and methods deployed by the belligerents. These issues are considered in the context of the reasons pleaded in justification of the war, the international law prohibition against the use of force by states in the settlement of international disputes, and the fundamental principle forming the basis of international humanitarian law that parties to an armed conflict and their armed forces do not have an unlimited choice of methods and means of warfare. The final part of the paper discusses a prognosis of some of the likely ramifications of this war, and the question of liability for violation of international law.

2. Legality of recourse to war

One of the major advances in the progressive development of international law since the end of World War I, is the evolving norm aimed at the total outlawry of war in international life. Previously, a striking feature of inter-state relations was the constant appeal by states to 'the argument of force'. States frequently resorted to war[4] and to compulsory measures of self-help such as retortion, reprisal, pacific blockade, and armed intervention.

2.1 The old law of nations and freedom to resort to war

Obsessed with the pursuit of their real or imagined interests, states proved reluctant to submit major political issues with perceived enemies to procedures of peaceful settlement. Self-interpretation of legal obligations was practically uninhibited. Such laws and customs of war, as then existed under customary international law, merely purported to regulate the conduct of 'the game of war'. It is not that the international law of the time licensed wars as an always perfectly lawful means of settling disputes or of changing existing rights. The problem was that it allowed too ample a scope for the exercise of the right to resort to force, and resigned itself to treating war of any kind as legal. In the absence of a general condemnation of war and an effective international scrutiny of the reasons advanced by states for resorting to violence, states considered themselves as having a 'freedom to resort to war.'

The early law of nations did concede to states a right to go to war (*jus ad bellum*). However, that right was not identical with a licence to wage war. That no such licence existed is evidenced by the legal significance states

4 War was, and remains, the technical name for a struggle on an extensive scale between two or more states in which their armed forces are engaged in mutual acts of regulated violence, until one party defeats the other and imposes on it such terms of peace as the victor is willing to grant.

attached to the existence of a cause of war (*casus belli*). International law never defined the permissible causes of war. And because it did not do so, for centuries states remained the sole judge of what constituted a valid and sufficient cause of war. However, there soon developed a distinction between a 'just' and an 'unjust' war. The legal incidence of that distinction was that states had a privilege to wage a 'just', but not an 'unjust', war. A war of aggression was pre-eminently the archetypal unjust war.

That distinction marked the beginning of a partial prohibition of war. The characterization of a war as 'just' remained subjective. Nevertheless, classical international law did not grant a privilege to wage an 'unjust war'. The law regulated the recourse by states to compulsory measures such as armed reprisals. Under the Drago-Porter Agreement, 1902, for example, the parties committed themselves not to use force against a defaulting debtor state for the purpose of debt recovery. However, this was only a peripheral and piecemeal regulation of the use of force. International law still lacked specific rules prohibiting certain kinds of war, let alone war in general, until 1919.

2.2 From partial prohibition, to renunciation, of war

The first multilateral treaty to contain any significant prohibition on the use of force by states in their international relations was the Covenant of the League of Nations, 1919. The Covenant distinguished between 'legal' and 'illegal' war. Categories of 'legal war' included so-called 'duel-type war' and 'war to enforce a judicial decision'. However, although a legal war was permissible, the parties had to observe a three-months moratorium before exercising the right to wage war. An 'unjust war' fell under the category of illegal war and was thus impermissible. So-called 'revisionist war' and 'revolutionary war' were apparently also illegal under the Covenant. Since the Covenant applied only to members of the League of Nations, the right to war of non-members thereof survived in its pre-1919 form.

The development in the direction of prohibition against the use of force in the international relations of states was taken a step further by another multilateral treaty, the Kellogg-Briand Pact,[5] 1928. The Parties[6] to that treaty agree that the solution or settlement of all disputes and conflicts should 'never be sought except by pacific means'. They condemn 'recourse to war for the solution of international controversies'. They formally renounce war 'as an instrument of national policy in their relations with one another'. In other words, they agree not to have recourse to militarist and jingoistic policies in international relations. But the treaty maintained the right of states to go to war in 'legitimate self-defence' or against a violator thereof.

5 The full title of that anti-war instrument is the General Treaty for the Renunciation of War (also known as the Pact of Paris) and it came into effect in 1929.

6 Significantly, all the countries involved in the invasion of Iraq (Australia, Spain, the United Kingdom, and the United States) are parties to the Kellogg-Briand Pact. Iraq is also a party.

The Kellogg-Briand Pact failed to stop the many wars of aggression that followed the rise of dictatorship in Europe in the 1930s. But it formed the basis for the prosecution of the Nazis and Japanese war leaders in the Nuremberg and Tokyo trials respectively. Moreover, the treaty is still in force and the Parties thereto now number at least sixty-six.[7] The acceptance of this treaty by so many countries would suggest that prohibition against recourse to war is now a principle of customary international law.[8] Besides, it is probably the case that the renunciation of war under the Kellogg-Briand Pact has been subsumed by the UN Charter prohibition against 'the threat or use of force'[9] by states in their international relations.

2.3 Charter prohibition against violence

All Members of the United Nations assume an obligation under Article 2(3) of the Charter to settle their international disputes by peaceful means in such a manner that international peace and security are not endangered. They further assume an obligation under sub-Article (4) of the same Article to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. The prohibition against the threat or use of force is now recognized as the law universally binding on all states. It is not only part of the law of the United Nations, but also a principle of the law that governs the relations of all states, including non-members of the United Nations. It has become a customary rule of international law having the status of a norm of *jus cogens*, and as such binding upon all states without exception.

The prohibition is arguably all-embracing and general. It forbids resort to force even where such force is not against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. It seems to be the case that the intention of the framers of the Charter was directed at removing force as a means of settling international disputes. This is evident not only from the provisions of Article 2(3) and (4), but also from the Preamble whereby 'the peoples of the United Nations' express their determination "to ensure ... that armed forces shall not be used, save in the common interest."' Besides, the principle of effectiveness requires Article 2(4) to be read as prohibiting all threat or use of force unless the Charter in other provisions expressly permits its use.

Furthermore, in 1970 the United Nations General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United

7 For a list of Parties (64) as of January 1, 1980, see Sweeney *et al*. 1981:1235.
8 Shaw 1997:780.
9 The Charter's reference to 'the threat or use of force' avoids the technical difficulties that previously arose in connection with the meaning of the term 'war'. That phraseology clearly encompasses also the use of armed force short of war, and, arguably economic force as well. Any threat of aggressive use of force and any war of aggression are now beyond the realm of lawful action by states.

Nations.[10] One of the principles of the Charter embodied in this Declaration and declared to be among the basic principles of international law, is the prohibition against the threat or use of force by states in their international relations.

The Declaration makes a number of solemn proclamations. The threat or use of force constitutes a violation of international law and the UN Charter and is never to be employed as a means of settling international issues. A war of aggression constitutes a crime against the peace, for which there is responsibility under international law. Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or to solve international disputes, including territorial or frontier disputes. States have a duty to refrain from acts of reprisal involving the use of force. They must not use force to deprive peoples of their right to self-determination and independence. They must refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state and must not encourage the formation of armed bands for incursion into another state's territory.

However, it is trite law that the use of force is not illegal in all circumstances. The evolution of international law has not yet attained the stage where war and other categories of force have legally been eliminated altogether from the international sphere. Even if international law were to do so, paper outlawry is one thing, compliance with the new law would be another.

2.4 Exceptions to the prohibition against violence

The Charter's prohibition against force is applicable in international relations and not within domestic jurisdictions.[11] Even in the former sphere there are, under contemporary international law, permissive circumstances in which force may be used internationally by states. For, neither the UN Charter nor any other multipartite treaty bans the use of armed forces in self-defence or in the common interest. But the resort to force in these limited situations is subject to the control of the UN. There are three exceptions to Article 2(4) abolishing violence between states.

10 On one view, the Declaration contains an authentic interpretation of the relevant Charter provisions. On another view it is declaratory, or an authentic evidence, of existing customary law on the principles it proclaims. The weight of academic opinion would tend to suggest that although the principles therein enunciated constitute an important interpretation of the relevant Charter provisions, the Declaration is not legally binding (but of course is of great value politically and morally). The Declaration itself merely 'appeals to all States to be guided by these principles in their international conduct', thereby suggesting that those principles are simply desiderata for observance by all states in their international relations. See Rosenstock 1971:713, and Arangio-Ruiz 1979.

11 The Charter does not ban, for example, the use of force to suppress a domestic revolt, insurrection or insurgency. However, if a state were to carry out a brutal suppression of an internal uprising or in violation of the right to self-determination of the people involved in the uprising, it may be guilty of violating its human rights obligations under international law or of contravening other rules of international law.

2.4.1 Enforcement action under regional arrangements

One situation in which the use of force is permissible under international law is the case of enforcement action under regional arrangements or agencies.[12] However, regional arrangements for enforcement action do not operate in full regional autonomy. They are subject to the previous authorization and control of the Security Council. The law of the UN stipulates that regional enforcement action shall not be taken 'without the authorization of the Security Council'.

2.4.2 Enforcement action under the UN collective security system

Another situation in which the use of force is permissible is where such force is authorized by the Security Council in furtherance of its peace enforcement powers. The powers are exercisable where there is a threat to the peace, breach of the peace, or act of aggression.[13] The power of the UN Security Council to use force, in the context of collective security under Chapter VII of the Charter is distinct from the right of collective self-defence which may be exercised by two or more states acting in concert.

The UN collective security system is in effect a universal and all-embracing defensive alliance under which the unlawful use of force by one or more states provokes, textually, the reaction of the rest of the members of the international community. The system imports the notion of a general interest of all states in the maintenance of peace, and the preservation of the territorial integrity and political independence of states, which have been the object of armed aggression.

The major limitation of the collective security system is that its operation requires the concurring votes of the five permanent members of the Security Council. Thus, as one author perceptively points out,[14] the system cannot, politically speaking, be applied against any of those five powers or any state supported by any of them.[15] The possibility that any of these powers, guilty of aggression or other illegal use of force, would vote in favour of enforcement action against itself is extremely remote. It seems, therefore, that the system of collective security under the UN was deliberately designed not to deal with delinquent use of force by any of the five permanent members of the Security Council or its protege. This is one of the reasons that have since prompted calls for reforms in the UN system.[16]

The practice of the UN attests to the fact that its collective security system is put into operation only where a major power is not directly involved, and almost exclusively where a Third World State is involved. In such cases the big powers would make great speeches about international law and the

12 Article 53, UN Charter.
13 Articles 24, 39-50, and 106, UN Charter.
14 K. Skubiszewski 1968:784-785.
15 For example, the US consistently supports Israel even in its stubborn refusal to submit its nuclear weapons activity to UN scrutiny.
16 Chebali 1988; Bertrand 1986; Betrand 1997.

binding character of Security Council resolutions. They would threaten force ostensibly to enforce the law of the UN and the claimed will of the 'international community'. The actions against North Korea, Afghanistan, and Iraq during the Gulf War are edifying examples. In the US-led invasion of Iraq the UN watched impotently as the invading powers bombarded and occupied Iraq in breach of the law of the UN and in defiance of international law.

2.4.3 Individual and collective self-defence

Under Article 51 of the Charter, force may be used in a situation of self-defence, individually or collectively, in the event of an armed attack. Force may be resorted to under such a circumstance without UN authorization. But once the armed response has been taken it must be immediately reported to the Security Council. Such use of force is permitted pending enforcement action by the Security Council. The armed response lasts "until the Security Council has taken measures necessary to [restore] international peace and security." Enforcement action by the Council supersedes the retaliatory armed response by the state-victim. The latter response cannot in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security. The design of the Charter apparently envisioned temporary or interim self-defence measures.

- Individual self-defence

The traditional justification for conceding to individual states the right of self-defence is that when the fundamental rights of the state, its most vital and paramount interests, have been infringed, the state is entitled to take protective measures on the grounds of self-preservation, self-help, necessity or preventive action.[17] States always contend that such interests are protected by law. But a violation of the law is patent in the case of the use of excessive force as in the case of a full-scale invasion of another state undertaken in purported self-defence. For, as the ICJ observed in the *Corfu Channel* case,[18] rejecting the British defence of self-protection or self-help, "Between independent States, respect for territorial sovereignty is an essential foundation of international relations."

The essentials of self-defence are clear. They were originally laid down by the American Secretary of State following the British destruction, in 1837, of an American vessel, the *Caroline*, in an American port.[19] In correspondence with Britain, the American Secretary of State, Mr. Daniel Webster, required

17 Giraud 1934:691; Dinh 1948:223; Bowett 1958; Brownlie 1961:183; Brownlie 1963; Delivanis 1971; Schwebel 1972: 411; Zourek 1975 :1; Schachter 1989:259.

18 (1949) ICJ Rep. 4.

19 The incident is referred to as the *Caroline* case. See, US Gvt 1851:261; Jennings 1938:82. British forces from Canada destroyed the *Caroline* which had been chartered by a group of insurgents fighting in Canada against the British Government. The mission of the vessel was to carry arms and other supplies to the insurgents. Following the British destruction of the vessel, America complained of the violation of its territorial supremacy.

the British Government to show that there existed, in the destruction of the Caroline, a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Mr. Webster also emphasized the principle of proportionality in the use of force.[20] The British Government did not dispute this formula put forward by the American Government. These principles of necessity and proportionality are at the heart of self-defence in international law and form part of customary international law.

A half-hearted and unconvincing attempt was made by the US, in the chamber of the UN Security Council and in official public statements, to suggest that Iraq was somehow linked to the elusive Al Qaeda terrorist organisation. It was an effort to lay the basis for the eventual justification of the invasion of Iraq on the grounds of 'a fight against international terrorism'. But all the US could come up with was a claim that a member of Al Qaeda had received medical treatment in Baghdad. The Al Qaeda members who carried out the September 11, 2001 attack in the US were reportedly nationals of Saudi Arabia and Egypt. If that attack provided a credible basis for the armed invasion of the countries of provenance of those individuals, Egypt and Saudi Arabia should have been invaded and not Iraq.

Another variant of the Al Qaeda argument is that following the September 11 attacks in New York and Washington, the US armed invasion and occupation of Iraq can be justified on the grounds of self-defence. However, this reasoning is far-fetched. The Article 51 exception to the prohibition against the use of force applies only if an armed attack has occurred. In other words, the state against which the measure of self-defence is taken must have actually carried out an armed attack. The beginning of such an attack by the aggressor is a condition precedent for resort to force in self-defence. In the instant case, Iraq had carried out no armed attack whatsoever against either the US, Britain, Australia or Spain to justify measures of self-defence, individual or collective, against Iraq.

Even if it were indisputable law that a state has a right of anticipatory or pre-emptive self-defence, the US invasion would still be impermissible. Iraq had done nothing that could reasonably be construed as indicative of an imminent attack on any of the invading powers. The claim that the alleged possession of weapons of mass destruction by Iraq constituted a threat to the US and the world at large is outlandish. No such weapons have been found. It is possible that Iraq never had them in the first place. This fact could not have been unknown to the US, Britain, the UN and its weapons inspectors. In fact, in the view of some commentators the US and Britain had the 'audacity' to invade Iraq precisely because they knew for a fact that that country had no weapons of mass destruction.

But even if Iraq had them, the responsibility to disarm it was that of the international community acting in concert within the framework of the UN, and not that of a self-appointed group of countries. Quite apart from the fact

20 Action taken in self-defence must not be unreasonable or excessive. The act, justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it.

that the element of necessity was lacking in the present case, the armed invasion and occupation by the US and Britain were measures far disproportionate to any alleged possible Iraqi threat. The UN Charter puts the burden of justification on a state that resorts to violence against another state or sends its armed forces into another state. The US and Britain failed to discharge that onus.

The armed attack on Iraq, even if it fell within Article 51, did not meet the strict requirements of necessity and proportionality which lie at the heart of the international law of self-defence and were emphasized by the ICJ in *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* [21] and in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (World Health Organization), Advisory Opinion*.[22] Furthermore, measures taken in the exercise of the right of self-defence under Article 51 must be immediately reported to the Security Council. If the US and Britain were credibly acting within Article 51, they would have given the required notice to the Council. But no such notice was ever given. In fact both countries completely sidelined the UN in this episode.

- Collective self-defence

Any action in self-defence under Article 51 is permissible only 'if an armed attack occurs'. Therefore, it would seem states may act in collective self-defence only when they have all actually been attacked, or at least if an attack on one threatens the right of the other states to be free from attack. Collective self-defence is actually the concerted exercise of the individual right of self-defence by two or more states. The exercise of the right of self-defence in concert is justified on the grounds of so-called 'inter-dependent securities' and 'threat to the security of the other State.'

State practice suggests that the right of collective self-defence goes further than the mere exercise of the right of individual self-defence in concert. A number of defensive alliances or treaties of mutual defence have been concluded by states stipulating that one party will militarily come to the aid of another if the latter has been attacked by a third party. Under mutual defence arrangements the parties agree that an attack on one will be considered as an attack on all, justifying the taking of collective self-defence measures against the aggressor. There has to be an armed attack before the mutual defence arrangement can be invoked. In the *Nicaragua* case the ICJ stated that under international law in force today, States do not have a right of collective armed response to acts which do not constitute an armed attack.

Widespread recourse to various defensive arrangements has tended to blur the necessary distinction between the right to collective self-defence under Article 51 of the Charter and the collective security system of the UN itself. There is, therefore, merit in the remark that 'collective self-defence' is an unfortunate *terminus technicus*.

21 ICJ Reports, 1986:14, 94, 103.
22 ICJ Reports, 1996, paragraph 41.

- The problem of so-called pre-emptive or interceptive self-defence

Two main problems plague the law of self-defence which now finds expression in Article 51 of the Charter. The first problem is that of 'facts', that is, the lack of a shared understanding by both sides of events and their meaning. The historical events (their character and their sequence or causal links, or even their occurrence) which allegedly led to exercise of the right of self-defence are often disputed. The second problem is that of the traditional issue of interpretation of the relevant norms. Article 51 has, therefore, given rise to two conflicting interpretations which one would call 'restrictive' and 'liberal'.

The 'restrictive' interpretation asserts as follows. Article 51 read together with Article 2(4) now specifies the scope and limitations of self-defence. Thus a state may act in individual self-defence only if an armed attack occurs against it. The enabling formula of Article 51 cannot be interpreted in such a way as to rob Article 2(4) of its essential significance. It cannot be so interpreted as to allow states to be the sole and final arbiters of whether force should be used. The Charter introduced a new approach to self-defence. That Charter law of self-defence offers protection against the illegal use of force, not against other violations of law. Under the Charter, there is no room for self-defence even if the most fundamental and vital interests of the state have been endangered or violated in a manner which does not constitute an armed attack. Consequently, any preventive, anticipatory or pre-emptive use of force prior to the occurrence of an armed attack cannot be regarded as action in self-defence.[23]

The 'liberal' interpretation is equally compelling and runs thus. Article 51 provides that "Nothing in the present Charter shall impair the inherent right" of self-defence by states. The phraseology 'inherent right' and 'nothing ... shall impair' clearly shows that the draftsman did not bring about, or intend to bring about, a change in the law. The exercise of the right of self-defence 'if an armed attack occurs' (retaliatory self-defence) is only one instance or hypothesis (and the only one the Charter decided to regulate) in which that right may be invoked. There are a number of other situations the existence of which give a state the right under customary international law to resort offensively to armed force in preventive, anticipatory or pre-emptive or interceptive self-defence.

The division of scholarly opinion on this matter is quite intense. The nagging question is whether a state must permit another the advantages of military build-up, surprise attack, and total offence, against which there may be no defence especially in this day and age of weapons of mass destruction. Some scholars argue that the solution to this problem lies in the law of disarmament. Others argue that no state can be expected to await an initial attack which, in the present state of armaments, may well destroy that state's capacity for further resistance and so jeopardize its very existence.[24] In the *Nicaragua* case the ICJ accepted the view that Article 51 preserves

23 Skubiszewski, *op. cit.*:767.
24 Bowett, *op. cit.*:118 *et seq.*

the customary right of self-defence.[25] This lends judicial support to the claim that the right of anticipatory self-defence remains part of customary international law.

But perhaps the correct legal position is probably that which was articulated by Sir Humphrey Waldock, one time President of the ICJ, in a 1952 lecture delivered at the Hague Academy of International Law:[26]

> The Charter prohibits the use of force except in self-defence. The Charter obliges Members to submit to the Council or Assembly any dispute dangerous to peace which they cannot settle. Members have therefore an imperative duty to invoke the jurisdiction of the United Nations whenever a grave menace to their security develops carrying the probability of armed attack. But if the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow. If an armed attack is imminent within the strict doctrine of the Caroline, then it would seem to bring the case within Article 51. To read Article 51 otherwise is to protect the aggressor's right to the first stroke.

2.5 Regime-change invasion as humanitarian intervention

There was much talk about regime change as justification for the armed attack against Iraq. Action to effect 'regime change' is sometimes exercised by some states on the basis of a purported 'right of humanitarian intervention'. It is claimed by some that such intervention is an unwritten or implied exception to Article 2(4) prohibiting the use of force.[27] The existence of this claimed 'right' or justification is very much in doubt. There are only two forms of permissible humanitarian intervention: (i) humanitarian aid or assistance, and (ii) humanitarian intervention undertaken within the context of collective security by either the UN or a regional agency.

An example of the latter form of intervention is the NATO intervention in Kosovo, a province of former Yugoslavia, to save lives and secure political autonomy for Kosovo. That intervention eventually led to the adoption by the UN Security Council of resolution 1244 (1999) of 10 June 1999. By that resolution the Council decided to establish the United Nations Interim Administration Mission in Kosovo (UNMIK) with an overall mandate to secure 'substantial autonomy and self-government' for Kosovo within the former Yugoslavia. But the Government of Kosovo is not answerable to Belgrade.

25 The Court observed that: "Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence 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."

26 Whiteman 1963:986.

27 Frank and Rodley 1973:275.

In fact there seems to be every indication that Kosovo might, at the end of UNMIK, emerge as a sovereign independent state. According to the June 26, 2003 Report of the UN Secretary-General on UNMIK (S/2003/675) the Assembly of Kosovo endorsed on 15 May "a controversial resolution on the liberation war of the people of Kosovo for freedom and independence." The Kosovo case is probably the first time ever, since the creation of the UN that humanitarian intervention in the context of collective security would have resulted in self-government or independence for the entity in whose favour the intervention was undertaken. The international law implication would be that humanitarian intervention could, with the blessing of the UN, lead to the impairment of the territorial integrity of a sovereign independent state. Such a development would render extremely suspect the question of humanitarian intervention in general as some might see in it a new internationally sanctioned mode of 'decolonization'.

While humanitarian intervention under the auspices of the UN or a regional agency seems permissible, humanitarian intervention by an individual state is unacceptable under contemporary international law. The principle of non-intervention by states is part of customary international law. The territorial integrity and independence of states must be respected. Acts by a state involving the use of force constituting a breach of the principle of non-intervention will also constitute a breach of Article 2(4). Humanitarian intervention by a power to protect the lives of persons within a particular state may have been permissible in pre-Charter law. It is sometimes still pleaded by a delinquent state to justify its doubtful conduct. The familiar line of argument is that humanitarian intervention by a state in an extreme situation is necessary to save large numbers of lives in circumstances of gross oppression by a state of its citizens, or that it is necessary to restore democracy. Thus Britain justified its intervention to secure a so-called safe haven in northern Iraq after the Gulf War on the grounds of humanitarian intervention in an extreme case. The US justified its intervention in Panama in December 1989 on the ground of restoration of democracy. In both instances the international community refrained from adopting a condemnatory stand. But that benign attitude did not proceed from a conviction that those acts were legal.[28]

'Humanitarian intervention' by a state is impermissible because it is irreconcilable with Article 2(4), which lays down a norm of *jus cogens*. Moreover, such intervention is apt to be used to justify interference by more forceful states into the territories of weaker ones. The jurisprudence of the ICJ is emphatic in its rejection of intervention by one state in another state. In the *Corfu Channel Case (Merits)* the Court rejected Britain's alleged right of intervention. The Court regarded Britain's alleged right of intervention "as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is ... less admissible [because] from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself. ... Between independent States,

28 Schachter 1984:645; Gray 2000:26-44, 74-77.

respect for territorial sovereignty is an essential foundation of international relations."

In the *Nicaragua* case the Court stated that it could not contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system. With regard more specifically to the alleged violations of human rights relied on by the US, the Court considered that the use of force by the US could not be the appropriate method to monitor or ensure respect for such rights, normally provided for in the applicable conventions. The Court went on to observe that in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited. The court noted that this principle is valid for all States without exception.

It follows from these pronouncements that the armed invasion and occupation of Iraq for purposes of effecting a regime change in that country was also illegal. Two big powers, supported by two other developed states carried out a devastating armed attack on a third world state using the latest weapons technology. Thousands of Iraqis were killed or maimed. The entire country was destroyed. The Iraqi government was overthrown by foreign powers. Millions of people now find their lives totally disrupted and they face an uncertain future. This havoc can hardly be described by such a gentle term as 'intervention'.

It would, therefore, appear that none of the reasons pleaded by the US for attacking, invading and occupying Iraq is valid in the eyes of international law. There was an unprincipled and illegal use of force against a sovereign independent State. The US and Britain are permanent members of the UN Security Council. They unsuccessfully tried to get the UN to authorize their planned invasion of Iraq. They were caught by the cynicism of the UN collective security system of which they were architects. France stated it would veto any attempt by Britain and the US to force the UN to authorize war on Iraq. Faced with the prospect of a humiliating defeat by France in the Security Council, Britain and the US withdrew their much talked-about resolution aimed at forcing a vote authorizing war on Iraq. Both powers then decided unilaterally to invade Iraq.

The fact that they tried (but failed) to get UN authorization for war on Iraq is proof positive that they knew that any such action outside the UN would be a breach of the Charter and illegal. They cannot, therefore, claim that their unlawful use of force, and excessive force at that, is justified. Nor is it morally right for them to engage in the game of legal hair-splitting for action by them that would seem indistinguishable from premeditated mass murder[29] and wanton destruction. If the US nursed a grudge against the Iraqi President, it was not entitled to use armed force against Iraq. The UN Charter imposes an obligation on states to settle their disputes by peaceful means.

29 At the UN the Representative of Iraq accused the US and Britain of attempting to 'exterminate' Iraqis. The alleged Anglo-American war of genocide in Iraq was

3. Legality of the means and methods of war used

Despite the peremptory norm prohibiting recourse to the threat or use of force in inter-state relations, war has not been eliminated in international life. It has, therefore, been found necessary to subject war to legal regulation. International law regulates not only the 'right' to go to war (*jus ad bellum*), but also the conduct of hostilities in regions and theatres of war (*jus in bello*). The parts of international law which deal with the relations of states at war (law of war) and with the relations between the belligerents and neutrals (law of neutrality) constitute vast bodies of customary and treaty rules, supplemented by many usages from an impressive state practice. These constitute what is sometimes referred to as the 'laws and customs of war' or the 'law of armed conflict', but the terminology that has now gained currency is 'international humanitarian law'.[30]

3.1 General principles regulating armed conflict

The rules of international humanitarian law set the limits within which the force required to overpower the enemy may be used. They are binding on the parties when war breaks out between them. They regulate the relations between belligerents and non-belligerents. They set the principles governing the treatment of individuals in the course of war. In the absence of such rules, the barbarism and brutality of war would know no bounds. The essential purpose of these rules is to reduce or to limit, for humanitarian reasons, the suffering of individuals and to circumscribe the area within which the savagery of armed conflict is permissible. Unfortunately, these rules are always one war behind, and are frequently and extensively violated by belligerents. Still, without them the general brutality of warfare, especially in this day and age of very advanced weapons of mass destruction, would be completely unchecked.

The law of armed conflict has undergone a process of partial codification, in particular in the form of The Hague and Geneva Conventions. The subject is, therefore, generally presented as consisting of two branches, the Law of The Hague and the Law of Geneva. The Law of The Hague[31] establishes the rights and obligations of belligerents in the conduct of military operations,

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of course a hyperbolical claim. But it was expressive of a certain perception that the invading powers were carrying out 'mass murder' in Iraq.

30 It is that part of international law, comprising customary and treaty law of war, applicable in times of armed conflict, whether of an international or non-international character. This law seeks to protect persons who are not or no longer taking part in armed hostilities. It also seeks to restrict the methods and means of warfare employed by the belligerents. Its function is the humanization of the conduct of war and to limit, as far as possible, the suffering and destruction caused by war.

31 Based on the Hague Conventions of 1899 and 1907. The most significant of these is the Convention of 1907 Respecting the Laws and Customs of War on Land, to which is annexed the Hague Regulations. These now form part of customary international law. They deal with the status of belligerents, the conduct of hostilities, the prohibition of weapons 'calculated to cause unnecessary suffering', the termination of hostilities, and the rules governing military occupation. Article 22 of the Regulations proclaims the basic principle that 'the right of belligerents

and places limitations on the means that may be used to injure and subdue the enemy. The Law of Geneva,[32] on the other hand, aims to protect civilians not involved in the hostilities, persons *hors de combat* and combatants who are no longer engaged in the conflict. In fact, however, the two branches are not completely divorced from each other. The effect of some of the rules of the Law of The Hague is to protect victims of armed conflicts, while the effect of some of the rules of the Law of Geneva is to restrict the action that belligerents can take during hostilities. The two 1977 Additional Protocols to the 1949 Geneva Conventions have further blurred the distinction between the Law of The Hague and the Law of Geneva.

The rules of international humanitarian law aim at the humanization of warfare by determining the permissible forms, areas and objects of the exercise of physical pressure by belligerents against one another. They impose, like other rules of international law, limitations on the sovereignty of belligerent states and the pursuit of the strategic object of war, which is the imposition of the victor's will on the vanquished. They reflect a continuous tug-of-war between the standard of civilization and the necessities of war.[33]

The belligerents must conform to the laws and customs of war. The so-called 'demands of military necessity' do not release them from the duty to respect that law. The principle of humanity, and the principle of the protection of civilians and other non-combatants must be respected. Even in the so-called un-regulated cases the belligerents are not free to do what they please. It is provided in the Law of Geneva that in cases not covered by its provisions or other international agreements, or in the case of denunciation of these agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. Indeed, the cardinal principles contained in the texts constituting the fabric of international humanitarian law are, in the words of the ICJ in the *Nuclear Weapons* case, 'intransgressible principles of international customary law'.

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to adopt means of injuring the enemy is not unlimited'. Accordingly, a number of treaties have since been adopted so as to limit or proscribe the use of weapons of mass destruction or calculated to cause unnecessary suffering: the 1925 Geneva Protocol prohibiting the use in war of poisonous gases and bacteriological means of warfare, the 1967 Nuclear Weapon Partial Test Ban, the 1968 Nuclear Weapons Non-Proliferation Treaty, the 1972 Biological Weapons Convention, the 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, the 1980 Convention on Certain Conventional Weapons, the 1993 Chemical Weapons Convention, the 1995 Protocol Relating to Blinding Laser Weapons, and the 1997 Anti-Personnel Landmine Ban Convention.

32 This law comprises the four Geneva Conventions of 1949, supplemented in 1977 by two Additional Protocals. Convention I & II seek to ameliorate the conditions, respectively, of the wounded and sick in armed forces in the field, and of the wounded, sick, and shipwrecked members of armed forces at sea. Coventions III & IV deal, respectively, with the treatment of prisoners of war, and with the protection of civilian persons in time of war. Additional Protocols I & II relate to the protection of victims, respectively, of international armed conflicts, and non-international armed conflicts.

33 Schwarzenberger 1976:160.

The composition and structure of the armed forces of the belligerent states are primarily matters for regulation under municipal law. But international law determines the categories of persons who carry arms and make use of them and remain protected. The regular forces are army, navy and air force in both their combatant and non-combatant elements. But such forces also include militia and volunteer corps forming part of the regular forces, as well as so-called 'commando' and airborne units operating behind enemy lines. While espionage (nowadays euphemistically referred to also as 'human intelligence') is not unlawful during war, it may be punished by death. In fact, Protocol I to the Geneva Conventions stipulates that spies and mercenaries are not entitled to the status of prisoner of war.

It is well to state these points. The US and Britain frequently made mention of their intelligence officers in Baghdad and other Iraqi cities, and also of their airborne units landing in parts of Iraq. They also frequently referred to Iraqi militia combatants as if they did not form part of the Iraqi defence forces and, therefore, deserving of protection under international humanitarian law. The protected status of the regular forces does not depend on the enemy's recognition of the government to which those forces profess allegiance. In any event, the law of armed conflicts protects, under certain circumstances, even irregular forces (including militia and volunteer corps not part of the regular forces) and organized resistance movements.[34]

One of the fundamental rules in international humanitarian law in armed conflict is that the parties to the conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. The law prohibits the use of weapons or methods of warfare that cause unnecessary losses or excessive suffering. It is unlawful to use certain types of weapons. It is also unlawful to injure the enemy even through the instrumentality of weapons that are otherwise lawful. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[35] the ICJ declared that "states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets" and that "it is prohibited to cause unnecessary suffering to combatants ...[and] to use weapons causing them such harm or uselessly aggravating their suffering."

The ICJ emphasized that in examining the legality of any particular situation the principles regulating the resort to force, including the right to self-defence, need to be coupled with the requirement to consider also the norms governing the means and methods of warfare itself. Hence, the types of weapons used and the way in which they are used are also part of the equation in analysing the legitimacy of any use of force in international law.

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34 The members must have an organized command structure and a fixed distinctive sign recognizable at a distance. They must also bear arms openly and conduct their operations in accordance with the laws and customs of war. Even in the case of a *levee en masse* (a spontaneous movement of citizens who, in the face of an approaching enemy, take up arms to resist the invading army) the persons have a protected status provided they too bear arms openly and respect the rules of the law of armed conflict.

35 ICJ Reports, 1996, paragraph 78.

3.2 Impermissible means (tactics and weapons) of armed conflict

Certain tactics may not be deployed in war. One such prohibited tactic is the treacherous character of some strategems such as the improper use of a flag of truce, the UN or national flag, the military insignia or uniform of the enemy, and UN or Red Cross/Crescent badges.

Furthermore, the use of weapons calculated to kill indiscriminately and to cause unnecessary suffering is generally prohibited. Such weapons neither conform to the principle of humanity nor distinguish between combatants and civilians.

In this regard technological progress and contemporary military inventions have raised the important question of the legality of nuclear and thermonuclear weapons, now the most devastating methods of doing harm to the enemy.[36] In 1993 the World Health Organization adopted a resolution which requested an advisory opinion from the ICJ on the legality of the use of nuclear weapons in the following terms: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"[37]

Thirty-five states made written statements on the question. The statements revealed a cleavage between developed and developing states. Twenty-six states, Third World countries, argued that the request for an advisory opinion was admissible and that the ICJ ought to respond to the question posed. The developed countries, including the US and Britain, were against admissibility. They argued that the WHO acted *ultra vires* its constitutional mandate. They also argued, in the alternative, that the Court should use its discretion not to respond, and that should the Court decide to consider the merits of the case it should determine that the use of nuclear weapons is not illegal *per se*. Their basic contention was that the question by the WHO was a political one, that nuclear weapons are essential for deterrence and thus for security, that the opinion of the Court would neither be enforceable nor have any practical effect on the policies of the nuclear-weapons states, and that an opinion would interfere with on-going disarmament negotiations.

36 In fact, some journalists covering the war (eg, John Pilger) reported that the US deployed a form of nuclear weapons that 'contaminates everything and everyone', and that each round of such weapons fired by US tanks contains 4,500 grams of solid uranium, whose particles, breathed or ingested, can cause cancer. It would not be erring on the side of caution to dismiss these claims. The US has used weapons of mass destruction. It used the atomic bomb against Japan. It used napalm and other defoliants against Vietnam. It has only now emerged from a new study conducted by scientists that the US military sprayed roughly 1.8 million more gallons of dioxin-containing herbicides like Agent Orange in Vietnam than had been previously estimated. Millions of Vietnamese people were sprayed directly with this chemical or came in contact with herbicides in recently sprayed areas, See website: http://news.yahoo/vietnam_war.

37 Resolution WHA 46.40, 14 May 1993.

The Court ruled that the WHO was duly authorized in accordance with the UN Charter to request advisory opinions from the Court and that the political motivation or implications of the question asked did not deprive it of its legal character. However, after examining the constitution and practice of the WHO the Court came to the conclusion that the WHO had never regarded the issue of the legality of nuclear weapons as a matter with which it had to concern itself and that the WHO resolution, though procedurally correct, was not *intra vires* the organization. The Court did not feel able to conclude that nuclear weapons were explicitly or implicitly prohibited.

It does seem therefore that the possession of nuclear weapons and their use in extremis and in strict accordance with the criteria governing the right to self-defence are not prohibited under international law.[38]

3.3 Impermissible methods of injuring the enemy

One way in which international law tries to constrain the conduct of military operations in a humanitarian fashion are the restrictions it places on the modes of injuring the enemy even when using weapons that are perfectly lawful. The basic rules on international humanitarian law in armed conflict, as contained in the Law of Geneva, are clear.

For example, persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions.

During the invasion of Iraq the invading forces subjected captured Iraqi prisoners of war to degrading treatment by showing their capture on television. When Iraq retaliated by also showing on television captured American soldiers the US hypocritically complained about the violation of the Geneva Conventions. But, like Amnesty International pointed out, the US was on shaky moral grounds as its own hands were not clean. The US had violated the law in its treatment of Afghan prisoners captured during the 2002 war in Afghanistan. It had violated the law in attacking and invading Iraq. It could not now be appealing to the same law it had trampled upon.

Belligerents must at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons should be attacked. Attacks should be directed solely against military objects.[39] A military objective is an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

38 Shaw 1997:814.

39 Nowadays however few are the objects which are not considered as such by the belligerents. Some belligerents tend to deny the status of civilian to civilian workforce engaged in work that contribute to the war effort and consider them as legitimate military targets.

It is, thus, impermissible to attack or kill civilians, including war reporters,[40] combatants who have surrendered, and persons *hors de combat*. It is also impermissible to carry out wanton destruction of property, including cultural property, edifices devoted to religion, art, science and charity, and water, electricity and communication facilities. Pillage is forbidden. Also forbidden is the attack or bombardment of towns, villages, dwellings, or buildings that are undefended. Hospitals are impermissible targets as long as they are used for their appointed purpose.

More often than not belligerents ignore many of these prohibitions. In the invasion and occupation of Iraq by the US and Britain the Iraqi capital was subjected throughout to massive saturation aerial bombardment apparently for the purpose of doing maximum damage and terrorizing the adversary and his civilian population. At least one hospital in a Baghdad suburb was alleged to have been bombed. Press reports spoke of sustained and indiscriminate bombings resulting in the deaths and maiming of hundreds of non-combatants, the targeting and killing of journalists and the destruction of dwellings and property.

From the outset of the invasion the US and Britain launched what they called 'decapitation air strikes'. These were apparently aimed at the physical elimination of the entire Iraqi political leadership. Following on the heels of this initial bombing campaign was another phase of heavy and sustained aerial bombardment of Baghdad. This saturation bombing was code-named operation 'shock and awe'. Its aim appeared to be to reduce the city to rubble, terrorize the population, induce the disaffection of the Iraqi people, and secure the surrender of Iraqi forces. This particular campaign was superseded by massive so-called 'precision bombings'. But 'precision bombings' depend on accurate intelligence on intended targets and presuppose that the factor of human error has been eliminated. The Americans and the British did not always shine in these matters.

This aspect of the conduct of air warfare was actually a blitz bombing aimed at destroying targeted military,[41] and seemingly non-military, objects. Press reports indicated that the objects included ministerial office buildings, homes of government ministers, TV and radio stations, telephone and other

40 The legal protection of war journalists has now been complicated by the current US practice of 'embedding' and 'containing' reporters. The reporters are integrated with the troops. They wear combat uniforms and carry weapons. They move along with the troops. However, they are under oath not to report, without prior clrearance, troop deployment or other activities of the armed forces. What this means is that those journalists become in effect propaganda journalists giving only a sanitized version of the war. In fact the US so succeeded in sanitizing the invasion of Iraq that most Americans remained ignorant of what was actually going on. Thus press freedom and truth became some of the casualties of the war on Iraq.

41 In this age of total war it appears difficult to define negatively what is not a military target. For example, civilian work forces in the manufacture of war material may be considered quasi-combatants and therefore targets as important as the armed forces proper. From this perspective it would seem the idea of 'innocent civilians' is unreal.

telecommunication infrastructure, electricity and water facilities, and market places. The British even declared the city of Basra with a population of 600,000 people a so-called military target. And aerial bombardments were clearly directed at civilian morale as well. The standard argument is that in modern warfare civilian morale may become a true military objective.

The US routinely dismissed these unrestricted killings and destructions as 'collateral damage' 'due to human error, unavoidable in any war'. The US military made indiscriminate use of its monopoly of air warfare as a disruptive influence on the relevance of several restrictions imposed on the belligerents by the law of armed conflicts. It may, therefore, be doubted whether the prohibitions of that law have any meaning at all if they can in fact be circumvented by the unfettered employment of air power.

4. Ramifications of the war

The consequences of the invasion of Iraq may turn out to be more far-reaching than had been anticipated by any of the invading States. Iraq bore the full brunt of the war and, of course, is its first casualty. But the war is likely to have regional and international ramifications as well.

4.1 For the Iraqis

For the Iraqis the consequences of this war are enormous. Quite apart from the thousands of people killed, the physical destruction of their country, and the disruption in their lives, there is the psychological stigma of shame and humiliation as a defeated people and an occupied country. The self-worth of the people has been seriously bruised and their national pride damaged.

After four weeks of hostilities the invasion of Iraq ended with the utter defeat and complete overrun of that country (*debellatio*). One immediate matter concerned the belligerent occupation of the country. Under the Law of The Hague the belligerent has various rights over enemy property and other economic interests when he succeeds in occupying enemy territory. Invasion always precedes occupation. Enemy territory is said to be under belligerent or military occupation when it is taken possession of temporarily in time of war. Legally, however, the territory is regarded as under occupation only when the legitimate authority has actually passed into the hands of the occupant who sets up his own administration. From that moment the occupant becomes duty-bound under international law to "take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[42]

But until then, the invading power has no legal duty to restore law and order in the territory. The capture of each Iraqi town by US and British forces was systematically followed by widespread breakdown of law and order. Shops, offices and private homes were looted. Banks and public treasuries

42 Article 43, Hague Regulations.

were robbed. In some instances the looted money was, either defaced, torn or burnt. Museums and archives were plundered, occasioning loss of artefacts and other rare collections going as far back as the time of Ancient Babylon. The US and British occupying forces turned a blind eye. Since the war was still on and legitimate authority had not yet passed into their hands they were in strict law not obliged to do anything about the generalised disorder in the various cities they took possession of.

Belligerent occupation is only a temporary administrator of the territory in question.[43] It follows that the territory cannot be annexed, dismembered, turned into a dependent state, or its legal position permanently affected. This being the case the fear expressed in some quarters that defeated Iraq would become an Anglo-American dependency might be far-fetched, which of course does not mean that the Anglo-American-installed new Iraqi government might not be a puppet government. The Iraqi Kurds, co-belligerents on the side of the US and Britain, might discover to their utter surprise that notwithstanding the Kosovo precedent international law stands in the way of their ambition to declare a secessionist Kurdish state in northern Iraq with the benediction of those powers.

The Hague Regulations provide that for the duration of the occupation the belligerent becomes administrator and usufructuary of those immovables of the enemy state dedicated to purposes other than religion, charity, education, arts and science.[44] He cannot appropriate or dispose of any immovables that are public property. Thus the US and Britain, the state-administrators, cannot appropriate the Iraqi oil fields. It is generally believed in some quarters that the war on Iraq was dictated primarily by American and British greed for oil and their ambition to control a major source of the world's oil supply. This claim finds some support in the American Government's gaucherie of awarding lucrative oil and construction contracts to American companies even before war started.

But there would seem to be no international law basis for any appropriation of Iraqi oil by America and its allies. The occupant may of course requisition immovable property, but only for local military purposes and in any case the requisition must be paid for. Nor can Iraqi oil be appropriate as war reparation since Iraq is not guilty of aggressive war. Nor again can Iraqi oil be considered as war booty. War booty can be appropriated irrespective of whether or not it can be used for the needs of the military operations. But in the terminology of the law of armed conflict 'war booty' refers to only public enemy property that a belligerent finds or captures on the battlefield. There were press reports of a claimed American intention to sell Iraqi oil to pay for the invasion and the *post bellum* reconstruction of Iraq. The legality of such

43 The US appointed a retired American General, Jay Garner, to govern Iraq. Garner has since been replaced by another American. The problem is that the law sets no duration for the belligerent occupier's 'temporary administration'. In the case of Germany, following its defeat in WW II, such occupation by the Allied Powers lasted for about forty years.

44 Articles 55 and 56.

action might be doubted, as it would smack of war reparations imposed by the victorious aggressor on the victim of the aggression.

The role of the occupation of the territory of the vanquished by the victor has changed somewhat from what it used to be. Before the twentieth century it served purposes of a strictly military nature. Nowadays it serves predominantly political and economic aims. The Law of The Hague provides for the occupant collection of the regular taxes, for simple requisitions, and for confiscation of property undertaken within the limits of the law. But belligerent occupants often resort to measures that affect more deeply the economic life of occupied countries,[45] thereby violating the Law of The Hague and general principles deducible therefrom, prohibiting enrichment by the occupant.

In particular the occupant often engages in economic spoliation under the thin disguise of carrying out regular and lawful administration. Instances of such spoliation include the exploitation of natural resources, the fixing of a rate of exchange which undervalues the local currency and overvalues the occupant's own currency (thus adding to the occupant's purchasing power), the imposition of excess and excessive occupation costs resulting in inflationary policies, and the use of banking practices to disguise the unlawful taking of goods from the occupied country.[46]

4.2 At the international level

At the international level, the consequences of this war are likely to be far-reaching. First of all the war has dealt a serious blow to Arab honour and self-esteem. The Arab League might become one of the casualties of the war. Already Libya has reportedly withdrawn its membership of that Organization, giving as the reason for its withdrawal the Organization's failure 'to give an appropriate response' to the Anglo-American attack against Iraq. One likely effect of the war might be the emergence, as the Egyptian President warned, of 'a hundred Osmana Bin Laden'; in other words, a rise in acts of terrorism especially against American and British nationals and interests. Indeed, Iraq, unlike before the war, has now become a rich Al Qaeda hunting ground. Thus, it may well be the case that by waging an illegal war against Iraq the US President, George Bush, and British PM Tony Blair, have unwittingly exposed the citizens and interests of their respective countries to terrorist reprisals at some future date.

Moreover, the political consequences for these two leaders may well turn out to be dire. For, since no weapons of mass destruction have been found in Iraq, the claimed leitmotiv of the war, Bush and Blair could face political demise on account of their concerted and consistent lies on this matter to their constituents and the world at large. As more and more evidence has emerged that Bush and Blair deliberately lied, each has tried to shift the blame to his country's intelligence agency. The idea of impeaching Bush is already being floated and there have been calls in Britain for Blair to resign.

45 For example, belligerent occupations during WW II.
46 Cf. Skubiszewski, *op. cit.*:835.

The US and Britain expended a huge amount of money on the war, and an equally huge amount of money will be spent on the reconstruction of Iraq. This might entail the availability of less resource from those quarters for Africa's development needs, especially within the framework of the New Partnership for African Development (NEPAD).

The US and Britain violated international law. They resorted to pristine 'gunboat diplomacy' to enforce their 'doctrine' of changing 'unpleasant' regimes. This delinquent behaviour by two big powers is a serious blow to the African Union, which actively espouses the principle of condemnation of unconstitutional changes of government, and the principle of respect for democracy and the rule of law. If the US and British military can be used to overthrow the government of a sovereign independent state, however undemocratic and despotic that government is said to be, why may not the military of a given country overthrow the government thereof, or that of a neighbour, on the same or similar allegations? The US and Britain having flouted the law in the most egregious manner, why may other states not do likewise, including non-respect for the rule of law? And what moral right would either of these countries have to lecture other states about the sanctity of treaties, about international law, and about respect for the rule of law and for human rights? One casualty of the war on Iraq is certainly the moral standing of the US and Britain in world affairs. To many, the lectures by Bush and Blair on the need for democracy, and respect for human rights and the rule of law in Zimbabwe now sound hollow and biased.

Regarding international relations, one is likely to witness, in the long term, and as a direct consequence of the war on Iraq, the resurgence of unilateralism and increased reliance on regionalism at the expense of the United Nations. Disarmament efforts might be affected detrimentally. The level of global armament might rise. The refusal by North Korea to halt its nuclear weapons programme should occasion no surprise. The Middle East might become even more volatile and unstable.

Faith in the UN has been seriously shaken as a result of its failure or inability to stand up to what many consider as 'the American and British bullies'. The UN failed in its most fundamental mission to prevent war and ensure peace. This failure will be counted amongst its most spectacular. Some (for example Iraq) blamed Kofi Annan, the UN Secretary General, for alleged inaction[47] and failure to condemn the war. If the US and Britain twisted his arm, it is said, then he should have resigned rather than condone a flagrant breach of the UN Charter.

Apocalyptic predictions include the view that the armed invasion of Iraq portends the beginning of the end for the UN in the same way as the attack on Ethiopia by Italy in 1936 signalled the eventual demise of the League of Nations. Other views, equally unrealistic, call for the transfer of the UN headquarters from the US to a neutral and less imperious country. Another claim is that the unlawful conduct of the US and Britain in launching an

47 The genocide in Rwanda was also partly blamed on Koffi Annan's inaction.

illegal war against a sovereign independent state will have the effect of rendering the UN increasingly irrelevant in world and inter-state affairs.

More realistically, however, are views that the UN needs to be meaningfully reformed, especially regarding the Security Council. Calls for UN reform are not new.[48] Proposals that have been floated include the elimination of the veto and the consequential abolition of 'Big Five' status; or, in the alternative, the maintenance of the veto, but that power being vested not in specific individual countries but in the regions of the world.

Currently, there are, in the practice of the UN, four regions of the world, namely Africa, the Americas, Asia and Pacific, and Europe. Africa is the only region in which there is no state with a veto power in the Security Council. Europe disproportionately has three states (Britain, France, Russia) with veto powers in that organ, an indication of the domination of victorious Europe at the San Francisco founding conference of the UN. The regions can be reconfigured to yield say six or seven. Each region would designate two states to sit, on a rotational basis of say three months, in the Security Council. An arrangement along these lines would eliminate the distinction between permanent and non-permanent members. But there could be retained the requirement that any decision on a non-procedural matter has to be by the affirmative vote of all the Council members.

4.3 Liability for violation of international law

A final matter to dispose of relates to the question of liability for violation of international law: violation of the law of the United Nations and violation of international humanitarian law. Some commentators have wondered aloud in the press about the possibility of Mr. Bush and Mr. Blair being prosecuted for waging an illegal war of aggression. They have also wondered whether the US, Australia, Britain and Spain may be held responsible for certain violations of the laws and customs of war, quite apart from the individual liability of members of their armed forces for war crimes, if any, committed by them.

A fundamental principle of international law is that whenever one state commits an internationally wrongful act against another state, international responsibility is established between the two. The armed invasion of Iraq by the US and Britain and the presence of an uninvited occupation force in that country is a gross violation of the most fundamental principles of international law and of the UN Charter. These principles are unambiguous. A state must not use force against the territorial integrity and political independence of another state. A state must not intervene by force in the internal affairs of another state. All states must respect the principle of equal rights and self-determination of principles. All governments must respect fundamental principles of human rights. States must settle international disputes by peaceful means. These principles provide the framework for international order.

48 Chebali 1988; Bertrand 1986; Bertrand 1997:145-154.

Iraq, a Member of the UN, was bombarded and invaded by armed forces from the US, Britain, Australia and Spain. Its government was overthrown by force of arms. Its leaders have either been killed, forced underground or into exile. Its people have been killed and maimed in thousands. Its property and infrastructure have been destroyed. Its territory has been occupied. Neither international law nor the law of the UN Charter gives any state the right to take military action in another country or to replace its government because it disagrees with the policies or performance of the existing government. No law authorizes a state to invade another, posing as liberator. The Nuremberg and Tokyo Tribunals confirm the view that a war of aggression, or in violation of an international treaty is illegal. The Tribunals also held that the acts of "planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties" are international crimes engaging the individual responsibility of those committing the act,[49] including the financiers and businesses that aided and abetted these crimes.

An effective system of collective security must provide safeguards against aggression. Otherwise norms such as the one abolishing the use of violence internationally would be no more than a pious fraud. Action by a state legitimately defending itself against attack by another is not aggression. But if a state attacks the territorial integrity or political independence of another state without proper legal justification or in breach of treaty obligations, it is clearly guilty of aggression, whatever difficulties there may be in the way of arriving at an acceptable and legally binding definition of 'aggression'.

It would seem to be the case that the US, Britain, Australia and Spain have flouted international law and ought to be responsible for the loss or damage in Iraq resulting from their unlawful act. This responsibility results in the duty to make reparation as was emphasized by Judge Huber in the *Spanish Zone of Morocco* claim.[50] In the *Chorzow Factory* case,[51] the Permanent Court of International Justice authoritatively stated that it is a principle of international law that every breach of an engagement involves an obligation to make reparation.[52]

All breaches of international obligations are internationally wrongful acts and may give rise to international crimes. It would seem an international crime is clearly committed in the case of breach by a state of any of its

49 See, Principle VI, Principles of International Law Recognized in the Charter of the International Tribunal and in the Judgement of the Tribunal, drawn up by the International Law Commission in 1950; Principle 2 of the United Nations Declaration of 15 December 1978, on the Preparation of Societies for Life in Peace.

50 2 UN Reports of International Arbitration Awards, (1923):615, 641.

51 PCIJ, Series A, no.17, 1928:29.

52 However, it is still highly controversial whether the responsibility of a state is limited to the obligation to compensate, or whether the responsibility can also be criminalized. Legal scholars concede that imposing penal sanctions on states is in principle possible, and could be of some use politically and morally. But they doubt the legal value of the concept of state criminal responsibility and fear that the concept could bring about instability. See, Brownlie 1963:150-154; Marek 1978-79:460; Gilbert 1990:345.

obligations towards the international community as a whole (obligations *erga omnes*),[53] as in the instant case of aggressive war on Iraq in violation of the rule of jus cogens prohibiting the use of force by states in international relations. Besides, the Law of The Hague provides that if a belligerent state violates any rules of the laws of war, that state is to pay compensation, and to be responsible for all acts committed by persons forming part of its armed forces.[54]

The US, Australia, Britain and Spain may therefore be held criminally responsible for planning and waging a war of aggression in defiance of international law. They can also be held responsible for any acts in violation of the laws of war committed by their military personnel. Contemporary international law has circumvented the problem of the state as an abstract entity difficult to sanction criminally. It imposes criminal responsibility directly on individuals. In this way guilty individuals are prevented from sheltering behind the abstract concept of the state. Already, in 1945 the Nuremberg Tribunal observed that "crimes against international law are committed by men, not by abstract entities" and that "only by punishing individuals who commit such crimes can the provisions of international law be enforced."

It would thus appear that the aggressor-countries could be held liable to make reparation for the internationally wrongful act of waging an illegal war. Additionally, the leaders of those countries may individually be held criminally responsible.

The problem here is that a head of state or head of government is not amenable to municipal or foreign courts.[55] The doctrine of sovereign immunity is a major procedural obstacle (although this did not prevent the international criminal tribunal for Sierra Leone from indicting President Taylor of Liberia for crimes against humanity). Further, Messrs Bush, Blair, Howard, and Gonzales would not be justiciable before any of the existing international criminal tribunals. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, established in 1993 and 1994

53 As distinct from obligations of a state vis-à-vis another state in the field of diplomatic protection.

54 Article 3, Hague Convention IV of 1907.

55 In the *Democratic Republic of the Congo v. Belgium*, the ICJ ruled in its judgement delivered on 14 February 2002, that Belgium could not issue a warrant for the arrest of the incumbent DRC Foreign Minister, Mr. Ndombasi, because under customary international law foreign ministers, prime ministers and heads of state are immune from arrest by foreign courts for war crimes and crimes against humanity while in office. However, whether a foreign court may exercise universal jurisdiction in the case of crime of aggression is unclear. But it does seem, as the indictment of President Taylor by the international criminal tribunal for Sierra Leone shows, that an international criminal tribunal may lawfully indict an incumbent head of state. A warrant of arrest cannot lawfully be issued against the incumbent head of state and he cannot of course be arrested. But the indictment hangs on his head like a Sword of Damocles, serving notice that he would be eventually arrested and prosecuted when he leaves office.

respectively, are *ad hoc* arrangements with limited competence *ratione materiae*, *loci* and *tempore*.[56]

The subject-matter jurisdiction of the recently established permanent International Criminal Court includes genocide, war crimes, crimes against humanity, and aggression. But 'aggression' is not defined. Unable to agree on a satisfactory legal definition of that term the plenipotentiaries of the Rome Conference that adopted in 1998 the Statute of the International Criminal Court, left the word undefined. One practical consequence of that lacuna in the Rome Statute is that aggression (however understood) remains beyond the reach of international criminal law. Furthermore, as a result of the 'principle' of complementarity enshrined in the Statute[57] national criminal courts have primacy over the International Criminal Court. The latter can only embark on a prosecution where the State having jurisdiction is either unwilling or unable to genuinely carry out the prosecution.

Moreover, the US is not party to the Rome Statute.[58] What this means is that even if it can be shown that some members of its armed forces committed serious violations of the laws and customs of war, they cannot be prosecuted in the ICC, in the face of a US unwillingness to prosecute. Some would doubt that such military offenders could all be vigorously prosecuted domestically, although there are a few instances in which the US has prosecuted some of its soldiers guilty of violating the laws of war.

Under Article 39 of the Charter "the existence of any threat to the peace, breach of the peace, or act of aggression" triggers certain permissible UN responses, including the taking of enforcement measures in accordance with Articles 41 and 42, to maintain or restore international peace and security. The problem here is that it is the Security Council (the composition of which includes the US and Britain as permanent members) that determines the existence of an act of aggression etc., makes recommendations, and decides on the enforcement measures to be taken. It needs no gazing into the crystal ball to see that had any attempt been made to invoke Chapter VII against those powers, it would have been thwarted by a cynical use of the veto. As earlier observed, it seems clear that the UN collective security system was deliberately designed not to apply to the permanent members of the Security Council.

56 The jurisdiction of the former is confined to specified crimes committed after 1 January 1991 in the territory of what was then Yugoslavia; and the jurisdiction of the latter is limited to specified acts committed between 1 January and 31 December 1994 within Rwanda or by Rwandese citizens in neighbouring countries.

57 Paragraph 10 of the preamble and articles 1 and 17.

58 Australia, Britain and Spain are parties to the Rome Statute but they each made a declaration upon ratification. The Australian declaration, for example, reads in part: "Australia further declares its understanding that the offences in Articles 6, 7 and 8 [genocide, crimes against humanity, war crimes] will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law."

The overall conclusion that imposes itself is that as a matter of law it seems that the invading powers and their leaders are liable, but that in practice that liability is futile.

5. Conclusion

Why did the US and Britain take such an awful risk of sowing the seeds of a potential destabilization of world order? The various views that have been expressed on this matter may be captured in what I call the 'oil theory', the 'taint of illegitimacy theory', and the 'affront theory'. The 'oil theory', has it that the US desperately needs Middle East oil for its strategic reserves and for the sustenance of so-called 'the American way of life'. Of all the oil producing countries of that region Iraq, because of its highly authoritarian regime, was the most vulnerable to Anglo-American demonization to prepare a moral justification for an eventual military action against that country. The 'taint of illegitimacy' theory, has it that George W. Bush acceded to the White House through 'rigged' or at least disputed elections. His presidency suffers from the 'taint of illegitimacy'. He is unable to deliver domestically and this, coupled with the legitimacy issue, prompted him to seek to divert domestic attention and to prove that he is 'tough'. In order to achieve these aims he resorts to warmongering and to foreign war as an instrument of national policy.

The 'affront theory', has it that the US and Britain felt insulted by the government of a Third World State defeating all their combined efforts, for nearly fifteen years, to overthrow it by violent means. During that period both countries allegedly made several covert attempts to procure the overthrow of or to assassinate Saddam Hussein. Mr. Bush and Mr. Blair publicly gave aid and comfort to a grouping of Iraqis in exile calling itself the 'Iraqi Opposition'. They publicly committed their respective governments to a policy of regime change in Iraq. The US and Britain could not, without serious loss of face and national pride, retreat from their much-advertised commitment to forcibly remove Saddam Hussein from power and put someone else in power amenable to them.

But I would hypothesize that the war on Iraq was waged to forestall a perceived developing imbalance in the power equation in the Middle East where Israel is the dominant and unchecked nuclear power. I would also hypothesize that Britain's armed support to the US was dictated by Blair's almost desperate need for US support concerning the Falklands, Northern Ireland, and Gibraltar questions. Gibraltar is also the reason why Spain, anxious not to be outwitted by Britain's currying for US support, decided to throw in its lot with the US. In that way, a grateful US will at least maintain benevolent neutrality in Spain's quarrel with Britain over Gibraltar. Australia's support for the US appears to be simply a gesture of appreciation for continuing American protection in the South Pacific. Such protection is seen as vital especially now that North Korea has reportedly gone nuclear.

Whether the invasion of Iraq is regarded by the invading powers as a retaliatory war, a war of self-defence, a war of just intervention, or a war against terrorism, the fact remains that it was an illegal war. It was illegal on

the same bases as the US intervention in Vietnam was arguably illegal.[59] The real possibility now created by the US and Britain of states easily resorting to violence in international relations is likely to contribute to the relativity and insecurity of the totality of rights enjoyed by each state under international law, including the state's right to its territorial integrity and independence.

Article 2(4) of the Charter is a tool for conflict regulation. It is predicated on eliminating force from the arsenal of lawful means of action in the international plane. It excludes forcible response by states to international disputes. Under the Charter the state can no longer use forcible measures based exclusively on justifications as understood by itself, because when left alone state practice leads to abuse and violence in international relations. States seeking the protection of their interests have a duty under the Charter to submit to peaceful procedures of settlement.

Moreover, the solution of the problem of the prospective victim of an imminent attack by an aggressor lies in measures of disarmament and denuclearization of the world. The short-lived League of Nations did devote some of its work to problems of disarmament. This 'unfinished business' devolved on the UN. It is a task that has acquired special and urgent importance in view of the development of nuclear and thermonuclear weapons, and the increasing risk of nuclear proliferation. It is therefore imperative to strive for disarmament as one of the basic means for maintenance of international peace and security. The answer to threats of nuclear proliferation does not lie in waging aggressive war against weak states suspected of having ambitions to acquire such weapons. The answer lies in general disarmament, including global denuclearization.

59 Following the American intervention in Vietnam the 'Lawyers Committee on American Policy Towards Vietnam' argued that "the unilateral military intervention of the United States in Vietnam violates the Charter of the United Nations", that that country's military presence in Vietnam 'violates the Geneva Accords of 1954', and that "the intensity and destructiveness of United States warfare in Vietnam is contrary to international law." See, New York Times, Jan. 15, 1967:E9; Collins 1970:378. On January 6, 1980, the American UN Representative, Amb. McHenry took the floor in the UN Security Council to make his Government's contribution on the draft resolution concerning Afghanistan following the Soviet invasion of that country. The US characterized the Soviet intervention as a "blatant act of aggression [which] not only breaches the peace and violates international law, but threatens the viability of the fundamental principles that underlie the United nations Charter." It may be doubted in what significant ways the Soviet invasion of Afghanistan differed from the US invasion of Iraq.

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