

## **The Principle of Non-intervention at the United Nations: The Charter Framework and the Legal Debate**

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*The doctrine of non-intervention in domestic affairs is the logical corollary of the principle of sovereignty. Currently, it is the UN Charter that establishes and oversees this fundamental norm of state relations. This article aims to review the present status of the principle of non-intervention at the United Nations by examining the relevant provisions of the Charter and discussing the main notions that these provisions contain with an emphasis on their different interpretations. Analysing the contentions, the article argues that while the Charter framework is restrictive in the use of force and military intervention in state relations, it leaves a great deal of discretion to the Organisation for its actions of interference. It concludes that the UN Charter in this sense is indicative of international society's conviction that strict observation of the rule of non-intervention in state relations is essential for the maintenance of international peace and security.*

### **Introduction**

In international relations, the doctrine of non-intervention has been considered as the most significant means to cope with the "logic of anarchy" that lies at the heart of international politics, and thus becomes the main governing rule of state relations. Presently and at the universal level, it is principally the United Nations (UN) documents (the Charter and declaratory resolutions of the Assembly) that affirm and govern this preferred pattern of conduct in international relations.

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Although the emphasis in the UN Charter and in various related UN documents can be taken to indicate that there exists a consensus about the significance of the principle, there are controversies with respect to its interpretation and disagreements regarding the scope of behaviour that is proscribed by implication.

This article aims to provide an overview of the legal framework of the principle of non-intervention as stipulated by the UN Charter in particular and the contribution of the UN to the interpretation of this norm in general by reference to the prominent General Assembly declarations over the years. It argues that the UN Charter, which strictly prohibits the use of force and military intervention by one state to another, leaves substantial discretion for the Organisation's intervention in a states' domestic affairs, and thus reflects the concern with the maintenance of the norm of non-intervention in state relations as the basis of international order. The article examines the UN's doctrine of non-intervention by introducing the key provisions of the Charter and analyses the contentions regarding their interpretation. It then explores the exceptions to the rule of non-intervention as provided by the Charter and discusses the sources for authorising such interventions. The primary focus in the article is on the legal status and political prominence of the UN's support of the principle.

### **Relevant Provisions of the UN Charter**

The UN Charter does not explicitly spell out the principle of non-intervention as a rule governing relations between member states. It is rather implied in the statement of Principles of the United Nations (Article 2). For example, Article 2(1) roots the Organisation on the "principle of the sovereign equality of all its Members," and Article 2(3) calls for the peaceful settlement of international disputes. For the purposes of this article, however, the two most relevant provisions are Article 2(4) and Article 2(7). While the former lays down the general prohibition of the use of force - and in this respect can be said to govern the proscription of military intervention by states -, the latter establishes the UN jurisdiction in relation to the area of the discretion of sovereign states, and thus draws the boundaries for UN intervention itself.

#### **Article 2(4)**

Article 2(4) requires that states refrain in their international relations, from the threat or use of force. It represents the most explicit Charter provision against intervention with the use of force. Consequently, its interpretation constitutes the basis for discussion of unilateral military interventions. Article 2(4) reads as follows:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

As such, Article 2(4) stipulates a general prohibition of the use of force. More precisely, it extends the prohibition of force beyond war to include other types of unilateral use and threat of force. It therefore endows the prohibition of force as a general and authoritative principle.<sup>1</sup> The substantial majority of legal scholars attribute the norm contained in Article 2(4) a *jus cogens* character.<sup>2</sup> To begin with, by providing for a collective security system, the Charter limits the permissible basis for acts of self-help. Secondly, the Charter also stipulates in Article 2(6) that the Organisation will ensure the observation of its principles by non-Members "so far as may be necessary for the maintenance of international peace and security," implying that the UN may take measures against non-Members as well in response to their threat or use of force. Thus, the prohibition of the threat or use of force binds all states, members and non-members alike. Thirdly, in Article 35(2), non-Members are allowed to "bring to the attention of the Security Council or of the General Assembly any dispute" to which they are parties. Finally, Article 103 establishes the precedence of members' obligations under the UN Charter in the event of a conflict between the obligations of the Members under the Charter and under other international agreements. Hence, the Charter is instrumental in providing a framework for prohibiting force and elevating it to a *jus cogens* status.<sup>3</sup> Notwithstanding the consensus on the prominence of the norm of the prohibition of the use of force and its customary international law status, Article 2(4) raises questions of interpretation due to an absence of definition for the various notions stipulated in the article.

### **The Notion of 'Force'**

The prohibition of force in Article 2(4) comprises both the threat and the use of force. However, the language of Article 2(4) neither defines nor qualifies the term 'force.' The prevailing view is that the notion of 'force' in Article 2(4) does not extend to all kind of force, such as political and economic coercion, but

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<sup>1</sup> Louis Henkin, "Use of Force: Law and US Policy," in *Right v. Might, International Law and the Use of Force*, New York, Council on Foreign Relations Press, 1991, p. 38.

<sup>2</sup> See for example, Malcolm N. Shaw, *International Law*, Cambridge, Grotius Publications Limited, 1991, p. 686; Antonio Cassese, *International Law in a Divided World*, New York, Oxford University Press, 1994, p. 141; Edip Çelik, *Milletlerarası Hukuk*, (International Law), Istanbul, Filiz Kitabevi, 1982, p. 410.

<sup>3</sup> Belatchew Asrat, *Prohibition of Force Under The UN Charter: A Study of Article 2(4)*, Uppsala, Sweden, Iustus Förlag, 1991, pp. 51-52.

signifies solely armed force.<sup>4</sup> The General Assembly *Declaration on the Principles of International Law*, which is considered to be the key interpretation of the main principles of the UN Charter, confirms this reading of force. In its interpretation of the principle of refraining from the threat or use of force in international relations, the Declaration only refers to military force. It deals with other types of coercion in the context of the general principle of non-intervention in matters within the domestic jurisdiction of a state.<sup>5</sup> Thus, it can be inferred that what General Assembly was implying by its use of the term 'force' in Article 2(4) was specifically limited to armed force. In addition, the ICJ supports this narrow conception of force in the *Nicaragua* case, as it refers to this resolution for determining the scope of the prohibition of force in customary international law.<sup>6</sup>

Yet, the term provokes further questions with respect to the uses of 'indirect' force. Included in the notion of "indirect force," are one state's allowing its territory to be used by troops of another country for fighting a third state and/or providing arms to insurgents in another country.<sup>7</sup> Although legal scholarship generally tends to consider this problem within the framework of defining 'intervention,' it is also relevant within the scope of Article 2(4). In this respect, the *Declaration on the Principles of International Law* provided specifications regarding the prohibition of the use of indirect force in its section dealing with the prohibition of force more generally:

"Every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state. Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

The ICJ in its *Nicaragua* judgment of 1986, reiterates the *Declaration on Principles of International Law*, reaffirming that the above formulation of indirect

<sup>4</sup>*Ibid.*, p. 40; Bruno Simma, *The Charter of the United Nations, A Commentary*, Oxford, Oxford University Press, 1994, p. 112; Oscar Schachter, *International Law in Theory and Practice*, Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1991, p. 111; Hüseyin Pazarıcı, *Uluslararası Hukuk Dersleri*, IV. Kitap (Lectures in International Law, Volume IV), Ankara, Turhan Kitabevi, 2000, p. 114.

<sup>5</sup>GA Res. 2625 (XXV), 24 October 1970.

<sup>6</sup>*ICJ Reports* (1986), para. 191.

<sup>7</sup>Simma, *The Charter of the United Nations*, p. 113; Pazarıcı, *Uluslararası Hukuk Dersleri*, p. 114.

force is within the scope of Article 2(4).<sup>8</sup> As a result, the notion of "indirect force" is also included in the prohibition of the use or threat of force.

### **Threat of Force**

Legal opinions have given far less consideration to what is meant by the "threat of force" than to the use of actual force. Brownlie describes the "threat of force" as "an express or implied promise by a Government of a resort to force conditional on non-acceptance of certain demands of that Government."<sup>9</sup> Another author notes that the relevant feature of threat as a form of coercion is not so much the kind of force applied, but rather the purpose and outcome of the threat: a genuine reduction in the range of choices otherwise available to states.<sup>10</sup>

The *Declaration on Principles of International Law* acknowledges 'threat' as an instrument of coercion, by declaring that "the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force." Therefore, Article 2(4) includes the threat of force, which may possibly result in violation of a particular state's territorial integrity and political independence. However, since most threats of force have generally been justified on the basis of the right of self-defence, there seems to be a higher degree of tolerance towards the threat than the actual use of force in state practice.<sup>11</sup> This tolerance results from the general recognition of the difficulty to prove coercive intent in an international system characterised by power disparities and the consequent dominant and subordinate relationships between states. Notwithstanding, scholars agree that an open and direct threat of force to compel another state to give up territory or yield considerable political concessions is to be considered unlawful under Article 2(4).<sup>12</sup>

### **The Frame of "International Relations"**

Article 2(4) prohibits the threat or use of force in international relations between states. Hence, the proscription does not include the domestic use of force.<sup>13</sup> In other words, the provisions of Article 2(4) do not deprive states of their right to take measures to maintain order within their own jurisdictions.

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<sup>8</sup>While describing the arming and training of the Contras by the United States as acts amounting to the threat or use of force, the Court did not characterize the mere supply of funds to them as use of force. The Court, however, stated that supplying funds constituted an act of intervention in the internal affairs. *ICJ Reports* (1986), para. 228.

<sup>9</sup>Jan Brownlie, *International Law and the Use of Force by States*, London, Oxford University Press, 1963, p. 364.

<sup>10</sup>Romano Sadurska, "Threats of Force," *American Journal of International Law*, Vol. 82, No.2 (1988), p. 242.

<sup>11</sup>Simma, *The Charter of the United Nations*, p. 118.

<sup>12</sup>Schachter, *International Law*, p. 111; Sadurska, "Threats of Force," p. 239.

<sup>13</sup>Shaw, *International Law*, p. 720.

Accordingly, states may resort to force in suppressing riots and insurrections, and may use it to punish dissenters without breaching Article 2(4).<sup>14</sup> More specifically, the very framework of international relations implies that the provision does not apply to civil wars.<sup>15</sup> This reflects the general agreement that internal conflicts are beyond the realm of international law, since the latter is meant to govern the relations between states. Nevertheless, the case ceases to be exclusively a matter of internal affairs, if the internal use of force is condemned and declared to constitute a threat to international peace and security by the UN.<sup>16</sup> The UN has increasingly come to accept internal disorders as potential "threats to international peace and security," and thus matters of international concern. However, such characterization by the UN and its resultant involvement in internal conflicts is a subject that should be assessed in the context of Article 2(7) which pertains to the Organisation's intervention in matters within domestic jurisdiction, and thus is beyond the confines of Article 2(4). What is relevant in regard to Article 2(4) is the question of whether a state's use of force and its intervention in a civil conflict in another state violate the general prohibition on the use of force or not.

According to traditional doctrine in international law, the stance of outside powers with respect to a civil conflict must depend on the scale of the conflict. If the conflict is characterised as having a status of 'rebellion,' then the government in power is still considered to be legal and it can suppress the rebellion according to its domestic regulations. Therefore, external assistance to the government upon request is permitted, but aid to the rebels is prohibited. In this sense, intervention in favour and at the request of the government does not contravene Article 2(4).<sup>17</sup> If, on the other hand, the rebel forces have taken control of a sufficient area of the territory and have obtained formal recognition of a status of 'belligerency,' external states must observe a position of 'neutrality,' as they would in any other international conflict. Thus, traditional legal doctrine permits third party interventions in a civil war only to assist the legitimate government, but prohibits giving support to the rebels.<sup>18</sup> The difficulty arises, however, from the lack of objective criteria regarding how outside governments recognize internal disturbances. In general, international law proves to be limited in determining the status of an internal strife. Consequently,

<sup>14</sup>*Ibid.*, 688; Cassese, *International Law in a Divided World*, p. 137.

<sup>15</sup>Simina, *The Charter of the United Nations*, p. 116.

<sup>16</sup>Asrat, *Prohibition of Force Under The UN Charter*, pp. 70-71.

<sup>17</sup>Hans Kelsen, *The Law of the United Nations*, London, Stevens & Sons Limited, 1951, p. 934.

<sup>18</sup>Hersch Lauterpacht, L. Oppenheim, *International Law: A Treatise, Vol. I – Peace*, London, Longmans, Green & Co., 1955 p. 305. For a detailed analysis of international law of internal war, see Richard A. Falk, *Legal Order in a Violent World*, Princeton, Princeton University Press, 1968, pp.117-127; Rosalyn Higgins, "International Law and Civil Conflict" in Evan Luard, *The International Regulation of Civil War*, New York, New York University Press 1972, pp. 170-171; and Ali L. Karaosmanoğlu, *İç Çatışmaların Çözümü ve Uluslararası Örgütler (The Resolution of Internal Conflicts and the International Organisations)*, İstanbul, Boğaziçi Üniversitesi, 1981, pp. 15-20.

the fact that external states have a considerable amount of discretion has resulted in the portrayal of civil conflicts largely according to political convenience.

Within the UN framework, there have been various attempts to lay down a set of rules concerning the rights and duties of states with respect to internal conflict. In 1949, the *Essentials of Peace* Resolution called on all nations to "refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any state, and fomenting civil strife and subverting the will of the people in any state."<sup>19</sup> In 1950, a further resolution condemned intervention or assistance in civil conflict aimed at 'changing' the legitimate government by the threat or use of force.<sup>20</sup> Similarly, another resolution, in 1965, declared that no state should "interfere in the civil strife of another state."<sup>21</sup> More authoritatively and in a more detailed fashion than any of these, the *Declaration on Principles of International Law* affirms that "organizing, instigating, assisting or participating in acts of civil strife or terrorist activities in another State" constitutes a threat or use of force."<sup>22</sup> The resolution contains a similar provision in the subsequent principle concerning the duty of non-intervention in matters within the domestic jurisdiction, reiterating that no state may "interfere in civil strife" in another state.<sup>23</sup>

When civil strife involves the right to self-determination - particularly in states under colonial rule - the use of force by the colonial power to suppress rebels is generally defined not as a matter of internal affairs, but rather in the context of the principle of prohibition of the use of force in international relations.<sup>24</sup> It thus raises the question of whether intervention in this kind of civil conflict by third party states is compatible with the spirit of Article 2(4) and the principle of non-intervention. In this respect, both the Declaration on Principles of International Law and the UN's Definition of Aggression assert that every state has the duty to "refrain from any forcible action" which would impede the exercise of self-determination and that such peoples are entitled to "receive support" for their struggle to that end.<sup>25</sup> Hence, civil conflicts entailing self-determination may provide the states with a possible justification to militarily intervene on behalf of the peoples seeking that end.

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<sup>19</sup> GA Res. 290 (IV), 1 December 1949.

<sup>20</sup> GA Res. 380 (V), 17 November 1950.

<sup>21</sup> GA Res. 2131 (XX), *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, 21 December 1965.

<sup>22</sup> GA Res. 2625 (XXV), 24 October 1970.

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

<sup>24</sup> Pazarcı, *Uluslararası Hukuk Dersleri*, pp. 112-113.

<sup>25</sup> GA Res. 2625 (XXV), 24 October 1970 and GA Res. 3314 (XXIX), 14 December 1974.

## Territorial Integrity and Political Independence

The terms "territorial integrity" and "political independence" is commonly taken to refer to "the total of legal rights which a state has."<sup>26</sup> In practice, these terms are generally emphasized with the addition of notions such as 'sovereignty' and 'inviolability.' For example, *Definition of Aggression*, adopted by consensus in 1974, refers specifically to "sovereignty, territorial integrity or political independence." The resolution puts forward a broad conception of prohibition of armed intervention and aggression, which includes not only invasions, but also attacks or military occupations; sending armed bands or mercenaries to carry out violent acts; shelling another state's territory; blocking its ports; and attacking the forces of another state.<sup>27</sup> Thus, it can be inferred that the prohibition of force in Article 2(4) does not only refer to the use of force aimed at termination of a state's territorial existence or the status of its political independence. Rather, it extends protection to the fundamental rights of states. In this sense, the prohibited force in Article 2(4) includes any kind of trans-border use of armed force, regardless of the intention of depriving that state of part of its territory. Hence, in terms of its legal effect, scholars argue that the term 'integrity' in the provision signifies 'inviolability,' prohibiting any kind of forcible cross-frontier activity.<sup>28</sup> Paragraph 7 of the Charter's preamble further reinforces this conclusion. It articulates the goal of ensuring that "armed force shall not be used, save in the common interest." On the other hand, the judgment of the ICJ in the *Corfu Channel* case, which denied the British line of reasoning according to which British minesweeping operation in Albanian territorial waters did not violate Albanian sovereignty as it neither threatened its territorial integrity nor its political independence (nor caused territorial loss or harmed the political independence of Albania), suggest that the prohibition of force laid down in Article 2(4) is all-embracing. It is therefore not restricted to the protection of territorial integrity or political independence in its strictest sense.<sup>29</sup>

### Article 2(7)

With respect to the interference of the UN, as an organisation, within the internal affairs of the member states, Article 2(7) directs the organs of the UN to respect domestic affairs of states and lays down a principle of non-intervention. It reads:

<sup>26</sup> Brownlie, *International Law*, p. 268.

<sup>27</sup> GA Res. 3314 (XXIX), 14 December 1974.

<sup>28</sup> Simma, *The Charter of the United Nations*, p. 117.

<sup>29</sup> *ICJ Reports* (1949), *Corfu Channel Case*, (Merits), p. 35.



"Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter but this principle shall not prejudice the application of enforcement measures under Chapter VII."

The principle of non-intervention stipulated by Article 2(7), is not the same principle as the duty of non-intervention of states established by general international law. Article 2(7) refers specifically to the Organisation's intervention, rather than the intervention of one state in another's affairs.<sup>30</sup> It represents "an interpretative guideline" for UN organs in "dealing with matters that are essentially within the domestic jurisdiction of a state."<sup>31</sup> It is argued that Article 2(7) is a "life-saver" clause for member states, which provides them with a sort of a veto right that they can employ for restricting the jurisdiction of UN organs.<sup>32</sup>

There are three rules embodied in Article 2(7). The first provision is addressed to the organs of the UN. It directs them to respect "domestic affairs." The second rule is addressed to the members of the UN. It maintains that they should not submit matters that are essentially within the domestic jurisdiction to the UN for a peaceful dispute settlement. Thus, the UN organs are guided to claim competence to consider disputes only on matters under international law, as opposed to questions that are within the exclusive jurisdiction of a state. The final component of the article specifies the only exception to the rule of non-intervention by the UN in the domestic affairs of a state. It thus establishes a limitation of domestic jurisdiction in relation to the enforcement measures contained in Chapter VII of the Charter.<sup>33</sup>

The difficulties arising out of the terms of Article 2(7) surround the definition of the terms "not to intervene" and "matters which are essentially within the domestic jurisdiction." The fact that Article 2(7) offers no specific criteria for determining what is to be regarded as essentially domestic or what amounts to

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<sup>30</sup> Kelsen, *The Law of the United Nations*, p. 770.

<sup>31</sup> Simma, *The Charter of the United Nations*, p. 143.

<sup>32</sup> Seha L. Meray, *Devletler Hukukunda Birleşmiş Milletler Antlaşması ve Tatbikatına Göre Milli Yetki Meselesi (The Issue of Domestic Jurisdiction According to the United Nations Charter and Practice in International Law)*, Ankara, İstiklal Matbaacılık ve Gazetecilik Koll. Ort., 1952, p. 45.

<sup>33</sup> Simma, *The Charter of the United Nations*, p. 149.

intervention has consequently provided UN organs with a good deal of leeway in applying these terms to particular cases.<sup>34</sup> Thus, it is necessary to reflect on the implied criteria for permissible UN intervention within the sphere of domestic affairs, with reference to the practices of the UN.

### **The Scope of the United Nations' Jurisdiction**

Article 2(7) proscribes intervention, but does not prohibit all actions and decisions of the United Nations relating to domestic affairs.<sup>35</sup> Therefore, confining the meaning of 'intervention' to describe instances of coercive interference by the United Nations would be misleading. As a result, the analysis of the concept of intervention and the meaning of "to intervene" as set out in Article 2(7) should be extended to those acts of the United Nations, which fall short of enforcement action. Thus, questions arise concerning which activities lying outside the scope of Chapter VII may be claimed as falling within UN jurisdiction, and as to the ways the UN can utilise to bypass the prohibition of intervention in domestic affairs as stipulated in Article 2(7).

The history of the UN's practices demonstrates that the Organisation may undertake either indirect or direct intervention in the domestic affairs of a state. It may interfere in the domestic affairs of a state without carrying out an action on the territory of the state in question. Included in this kind of interventions are activities like putting the issue on the agenda of any UN body, discussing the issue in that forum, and making recommendations. With respect to such indirect interventions, the Organisation's practice has been consistent. Despite the occasional objection from the concerned states, UN organs have considered and discussed the issues in question automatically.<sup>36</sup>

In making recommendations and adopting resolutions expressing a certain position on an internal matter, UN bodies have considered themselves competent to the extent that an "international concern" has been expressed on a given matter. While the matter at hand may not be deemed as one constituting a threat to or breach of peace (meriting enforcement action under Chapter VII), the existence of

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<sup>34</sup>Oscar Schachter, "The United Nations and Internal Conflict" in John Norton Moore, *Law and Civil War in the Modern World*, Baltimore. The Johns Hopkins University Press, 1974, p. 402. For detailed elaboration of the latitude assumed by the United Nations organs, see Rosalyn Higgins, *The Development of International Law Through The Political Organs of the United Nations*, London, Oxford University Press, 1963, pp. 64-130.

<sup>35</sup>Schachter, "The United Nations and Internal Conflict," p. 421.

<sup>36</sup>Meray, *Devletler Hukukunda Birleşmiş Milletler Antlaşması*, p. 181; Ali L. Karaosmanoğlu, "Birleşmiş Milletler Antlaşmasının 2 inci Madde 7 inci Fıkrasının İç Savaşlar Bakımından Yorumu" (The Interpretation of Article 2(7) of the United Nations Charter With Respect to Civil Wars), *Siyasal Bilgiler Fakültesi Dergisi* (Journal of Faculty of Political Science), Vol. 3 (1972), p. 193.

international ramifications "may none the less serve as a basis for jurisdiction."<sup>37</sup> Thus, any matter that is regarded as a potential threat to the peace can be proclaimed to be of "international concern," which in turn removes it from the scope of "domestic jurisdiction."<sup>38</sup>

It was in relation to the Spanish question that, in 1946, the concept of "international concern" was first elaborated. While it was recognised in the Security Council that the nature of a regime was unquestionably a matter of domestic jurisdiction, a resolution was adopted to set up a sub-committee to determine whether the situation in Spain "has led to international friction and does endanger international peace and security."<sup>39</sup> This resolution was significant, for it established that investigations to determine facts, even on a matter generally recognised to be within domestic jurisdiction, did not in itself constitute an intervention, and as such, did not fall within the purview of Article 2(7). The sub-committee found that although the situation in Spain was not "an existing threat within the meaning of Article 39," it constituted "a potential menace to international peace," the continuance of which was "likely to endanger the maintenance of peace and security within the meaning of Article 34."<sup>40</sup> Accordingly, the sub-committee determined that the Security Council had no jurisdiction to "direct or authorize enforcement measures under Article 40 or 42"<sup>41</sup> Rather, the matter was to be dealt with by the Security Council within the context of Chapter VI of the Charter, which lays out measures for peaceful settlement and adjustment.<sup>42</sup> Despite the failure of subsequent resolutions, the Spanish question initiated the idea that "*matters prima facie* of domestic jurisdiction may be of international concern in certain circumstances."<sup>43</sup> Henceforth, the idea of "international concern" was to become a major element in giving the Security Council the authority to transcend the only exception to Article 2(7), namely the application of enforcement measures under Chapter VII, opening before "the Organisation a wide field of possibilities in situations that had been hitherto deemed to fall within the domestic jurisdiction."<sup>44</sup> More precisely, the concept of "international concern," which is broader than that of breach of, or threat to, international peace, indicates that threats for less severe than those requiring enforcement measures may pave the way for action despite the limiting provisions of Article 2(7).

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<sup>37</sup> Higgins, *The Development of International Law*, p. 77.

<sup>38</sup> Ali L. Karaosmanoğlu, "UNFICYP and The Problem of Consent" in Reşat Arın, *Cyprus and International Law* (Ankara: Foreign Policy Institute, 2002), p. 98; Higgins, *The Development of International Law*, p. 77.

<sup>39</sup> SC Res. 7, 29 April 1946.

<sup>40</sup> *UN Yearbook 1946-1947*, p. 348.

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

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

<sup>43</sup> Higgins, *The Development of International Law*, p. 79.

<sup>44</sup> Karaosmanoğlu, "UNFICYP and The Problem of Consent," p. 98.

The element of "international concern" as the basis of jurisdiction can be observed in various General Assembly resolutions, for example, in those dealing with apartheid in South Africa. In a series of resolutions related to the issue, the General Assembly maintained that apartheid constituted "a grave threat to the peaceful relations between ethnic groups in the world;"<sup>45</sup> was "prejudicial to international harmony;"<sup>46</sup> and had "led to international friction."<sup>47</sup> Likewise, with respect to the Angolan situation, the General Assembly stated that it was "likely to endanger international peace and security,"<sup>48</sup> backed up by the Security Council, which found that the continuation of Angolan situation constituted "an actual and potential cause of international friction."<sup>49</sup> Thus, the Organisation has shown a tendency to link domestic situations with international peace on the grounds of "international concern."<sup>50</sup>

The criterion of "international concern" remains highly vague due to the political nature of such a claim. The decisions of UN organs are political, in the conventional meaning of the term, simply by virtue of the composition of its members, which are governments. Such decisions are most often the outcome of a coalition of national interests, mirroring considerations of benefits and costs of the proposed measures.<sup>51</sup> The broader goal of the UN, particularly the aim of maintaining international peace and security, arms UN organs with considerable latitude to deal with issues falling under domestic jurisdiction. In other words, any matter can find its justification in one or another of the United Nations aims. Thus, such criteria are the "product of political processes and reflect a particular combination of circumstances."<sup>52</sup>

This said, from its inception, the UN has intervened in domestic affairs of states more directly as well. The Organisation has either embarked on actions within the territory of a state or attempted to influence the military, political and economic affairs of a state. Study, investigation and inquiry of any subsidiary body or commission carried out in accordance with Article 34 of the UN Charter<sup>53</sup> are among the types of non-military intervention practiced by the United Nations. This

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<sup>45</sup> GA Res. 820 (IX), 14 December 1954.

<sup>46</sup> GA Res. 1375 (XIV), 17 November 1959.

<sup>47</sup> GA Res. 1598 (XV), 13 April 1961.

<sup>48</sup> GA Res. 1603 (XV), 20 April 1961.

<sup>49</sup> SC Res. 163, 9 June 1961.

<sup>50</sup> Karaosmanoğlu, "UNFICYP and The Problem of Consent," p. 98.

<sup>51</sup> Schachter, "The United Nations and Internal Conflict," p. 402.

<sup>52</sup> *Ibid.*

<sup>53</sup> Article 34 reads: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."

UN practice reveals that activities outside the territory of the state are not considered to be prohibited by Article 2(7), to the extent that there is an "international concern." The proscription against UN intervention in domestic affairs seems to crystallize when a fact-finding mission is to be undertaken on the spot, for states are not obliged to admit the Organisation's investigative and observational activities on their territories. It is an accepted rule of international law that all the activities assumed on the territory of a given state by an international organisation constitute a violation of its sovereignty.<sup>54</sup> In such cases, the decisive element in overcoming the prohibition of intervention other than the exception provided in Article 2(7) (i.e. enforcement actions under Chapter VII), appears to be the 'consent' of the legitimate government to the inquiry on its territory.

The most important issue within the terms of Article 2(7) concerns the deployment of foreign military units in a sovereign state and taking military action within the territory of that state. In this respect, one can make a distinction between the non-coercive and coercive military actions of the UN.<sup>55</sup> Since coercive intervention may be interpreted as an enforcement action, the question arises as to what qualifies as non-coercive military action and the conditions under which they would not be considered in contravention of Article 2(7). The UN's actions are not considered coercive as long as the aim is not to compel the parties to a conflict to agree on a certain solution or to change the political and military balance in favor of one party at the expense of the other.<sup>56</sup> In this sense, peacekeeping operations may be regarded as actions involving no forcible measures, since they require the "consent of the protagonists, impartiality on the part of the United Nations Forces, and resort to arms only in self-defence."<sup>57</sup> Thus, the 'consent' of a state or of the parties to a dispute within a state, in cases of domestic conflict is not only an important political factor ensuring the cooperation of the parties with the peacekeepers, but also an essential legal requirement to sidestep the prohibition of intervention outlined in Article 2(7).<sup>58</sup>

### **The Scope and Content of Domestic Jurisdiction**

Another difficulty with respect to the interpretation of Article 2(7) is related to the issue of the scope and content of "domestic jurisdiction." The Charter itself does not contain a definition of the term "domestic jurisdiction." At the San

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<sup>54</sup> Karaosmanoğlu, "UNFICYP and The Problem of Consent," p. 99.

<sup>55</sup> Karaosmanoğlu, "Birleşmiş Milletler Andlaşmasının 2 inci Madde 7 inci Fıkrasının İç Savaşlar Bakımından Yorumu," p. 192.

<sup>56</sup> *Ibid.*

<sup>57</sup> *The Blue Helmets: A Review of United Nations Peace-Keeping*, New York, The United Nations, 1996, p. 4.

<sup>58</sup> Karaosmanoğlu, "UNFICYP and The Problem of Consent," p. 99.

Francisco Conference (1945), the issue of the definition of the term was not raised.<sup>59</sup> This omission did not stem from an implied consensus on its definition. On the contrary, it is argued that, Article 2(7) "was deliberately made ambiguous in recognition of the fact that it dealt with an issue so difficult of solution as to be better left unsolved."<sup>60</sup>

In the twenty-six years of League practice, only one case shed light on the limits defining this term. In its advisory opinion to the League Council on the matter of the *Nationality Decrees* issued in Tunis and Morocco, the Permanent Court of International Justice stated:

"The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations."<sup>61</sup>

The Court also asserted that even in the case of a matter which was not principally governed by international law,

"the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states. In such a case, jurisdiction which, in principle, belongs solely to the state, is limited by rules of international law."<sup>62</sup>

Two specific rules were derived from this formulation. Firstly, the content of domestic jurisdiction does not comprise a neat and rigid list of issues that exclusively belongs to the domain of a state. Its precise scope is to be determined rather on the basis of the facts of each case, along with the prevailing state of international relations. Secondly, the domestic jurisdiction of a state is restricted by the commitments and obligations that it might have deliberately assumed towards other states under a specific treaty or agreement.<sup>63</sup> Thus, international law, created through multilateral conventions and bilateral treaties, "removes the subjects regulated in these conventions" from domestic jurisdiction.<sup>64</sup>

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<sup>59</sup> For the arguments of various delegations at San Francisco Conference with respect to Article 2(7), see Meray, *Devletler Hukukunda Birleşmiş Milletler Antlaşması*, pp. 40-42.

<sup>60</sup> Francis O. Wilcox and Carl M. Marcy, *Proposals For Changes in the United Nations*, Washington D.C., 1955, p. 263, quoted in M. S. Rajan, *United Nations and World Politics*, New Delhi, Har-Anand Publications, 1995, p. 164.

<sup>61</sup> *PCIJ Report*, Ser. B, No. 4 (1923).

<sup>62</sup> *Ibid.*

<sup>63</sup> M. S. Rajan, "Defining 'Domestic Jurisdiction': Is It Necessary? Is It Feasible? Is it Useful?", *The Indian Journal Of International Law* (New Delhi), Vol. 1, No.1 (July 1960), reprinted in M. S. Rajan, *United Nations and World Politics*, pp. 147-148.

<sup>64</sup> Simma, *The Charter of the United Nations*, p. 152.

One other problem related to the interpretation of the "domestic jurisdiction" clause is the importance attached to the phrase "matters *essentially* within the domestic jurisdiction." While the corresponding provision of the League Covenant (Article 15(8)) referred to "a matter which by international law is *solely* within the domestic jurisdiction," the UN Charter provision substituted 'essentially' for 'solely' and left out the "international law" criterion to establish whether a matter falls within domestic or international jurisdiction. Scholars contend that the substitution was meant to restrict the jurisdiction of the Organisation vis a vis the member states. In this respect, Vincent argues that the principle of non-intervention as laid down in Article 2(7) aims to "preserve the state against the emergence of a superstate."<sup>65</sup> Another scholar observes that Article 2(7) is "the quintessence of the tendency of the sovereignty dogma to resist progress."<sup>66</sup> Yet, another commentator notes that there are no matters that can be classified by nature neither as solely nor essentially domestic. It is only when there is no customary or contractual international law regulating an issue then that matter can be said to be solely, but not essentially, within the domestic jurisdiction of a state.<sup>67</sup> This implies that the question can only be resolved by reference to "international law." However, even if a state is bound by a legal obligation under international law, that is to say, even if the matter is not considered to be solely an issue of domestic jurisdiction, a state may still claim that this matter is 'essentially' within its domestic jurisdiction. In consequence, it may be presumed that the state concerned has an obligation only under general international law or with respect to a specific treaty (if it refers to the matter in question), but not under the law of the Charter. Thus, the term 'essentially' broadens the scope of domestic jurisdiction and makes its content substantially flexible and vague.

Unlike the Covenant provision, Article 2(7) did not designate international law as reference for defining the parameters of domestic jurisdiction. At the San Francisco Conference, the US representative, John Foster Dulles explained the reason for the omission by pointing out that international law was subject to constant change and thus evaded definition.<sup>68</sup> On the other hand, the Australian delegate, Dr. Evatt argued that mention of international law in the provision would be redundant, since there was no other possible standard for determining the nature of a jurisdiction.<sup>69</sup> One commentator asserts that Article 2(7) was intended to preserve "international law at its present stage" and resist "a further development of

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<sup>65</sup> R. J. Vincent, *Nonintervention and International Order*, Princeton, Princeton University Press, 1974, p. 235.

<sup>66</sup> Alf Ross, *Constitution of the United Nations*, Copenhagen, Ejnar Munksgaard, 1950, p. 129, quoted in Vincent, *Nonintervention*, p. 236.

<sup>67</sup> Kelsen, *The Law of the United Nations*, pp. 776-779.

<sup>68</sup> Quoted in D. J. Harris, *Cases and Materials on International Law*, London, Sweet & Maxwell, 1998, p. 973.

<sup>69</sup> Meray, *Devletler Hukukunda Birleşmiş Milletler Antlaşması*, p. 49.

it through the efforts of the United Nations to regulate those things which are now abandoned, in anarchistic fashion, to the struggle for political power."<sup>70</sup> Nonetheless, other scholars argue the significance of the criterion of international law should not be exaggerated. First, because, international law has not offered a precise definition of the term domestic jurisdiction; and second, no specific rules exist in general international law for determining the nature of jurisdictions.<sup>71</sup> However, one might infer that the decisive factor in the determination of matters within domestic jurisdiction was intended to be "political and circumstantial, rather than exclusively or constantly be of a legal character."<sup>72</sup> To date, the practice of the United Nations demonstrates that its interpretation remains uncertain due to the influence of political factors.

### Authority Determining Competence

Yet another problem with the interpretation of Article 2(7) is the question of authority, that is, deciding who is competent to determine whether a matter is essentially within the domestic jurisdiction of a state or within that of an organ of the UN in specific instances. Article 2(7) does not contain any provision to delegate this power to any organ of the UN. The non-inclusion of a competent authority has given way to two contrary views: one arguing that each member decides whether the matter in question is essentially within its domestic jurisdiction,<sup>73</sup> and the other, that the organs of the UN, in the exercise of their individual functions, are the competent authorities for such determinations.<sup>74</sup> For example, in 1954 Greece requested that the item "Application under the auspices of the United Nations, of the principle of equal rights and self-determination of peoples in the case of the population of the island of Cyprus" be placed on the agenda of the General Assembly's ninth session.<sup>75</sup> The British representative argued that the matter fell essentially within the domestic jurisdiction of the United Kingdom, since Cyprus was a British possession. In support of the British claim, the Turkish representative maintained that Article 2(7) of the Charter precluded discussion of the Cyprus

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<sup>70</sup> Ross, quoted in Vincent, *Nonintervention*, p. 235.

<sup>71</sup> See for example, Rajan, *United Nations and World Politics*, p. 147. For an opposite view that in fact domestic jurisdiction has a clear meaning in international law, in that it refers to those matters where a state's discretion is not limited by obligations imposed by international law, see Michael Akehurst, *A Modern Introduction to International Law*, London, George Allen and Unwin, 1984, p. 169.

<sup>72</sup> M. S. Rajan, "United States Attitude Towards Domestic Jurisdiction in the United Nations," *International Organization* (Boston), Vol. 13, No.1 (1954), reprinted in Rajan, *United Nations and World Politics*, p. 215.

<sup>73</sup> Kelsen, *The Law of the United Nations*, pp. 783-784.

<sup>74</sup> Alf Ross, *Constitution of the United Nations*, Copenhagen, Ejnar Munksgaard, 1950, p. 130, quoted in Rajan, *United Nations and World Politics*, p. 217. See also Meray, *Devletler Hukukunda Birleşmiş Milletler Anlaşması*, p. 50.

<sup>75</sup> Letter of 16 August 1954 from President of the Council of Ministers of Greece to Secretary-General, UN Doc. A/2703 (1954).



question in the General Assembly because a question of domestic jurisdiction was involved.<sup>76</sup> By Resolution 814 (IX), the Assembly decided not to consider the item.<sup>77</sup> The following year, the Assembly declined a similar Greek request to include the item on its agenda.<sup>78</sup> Finally, however, in 1956, the UK requested that the Greek complaint should be discussed together with a complaint of its own charging Greece for giving support for terrorism in Cyprus.<sup>79</sup> As such, the question of authority determining competence remains unsettled.

### **Exceptions to Article 2(4) and Article 2(7)**

The Charter system, while prohibiting the threat and use of force by states, designates the UN as the sole authority able to use force legitimately for maintaining international peace and security. With respect to the rule of non-intervention, the enforcement measures under Chapter VII represent the only exception provided by the Charter. On the other hand, the prohibition of force by states is not absolute as well. The UN Charter provides for an exception to this rule in relation to measures of collective and individual self-defence.<sup>80</sup>

### **Enforcement Measures**

The maintenance of peace and security, as indicated in Article 1(1) of the UN Charter, is the essential aim of the United Nations. In this respect, the primary jurisdiction is assigned to the Security Council (Article 24). Accordingly, Chapter VII focuses on the preservation and restoration of peace. It constitutes the core of the collective security machinery of the United Nations. The Security Council is empowered to make decisions binding on UN member states, concerning economic and military measures for maintaining or restoring international peace and security.

### **Security Council**

Under Chapter VII, the Security Council is first required to determine whether a "threat to peace, breach of the peace, or act of aggression" exists before

<sup>76</sup> *UN Yearbook* (1954), pp. 94-95.

<sup>77</sup> GA Res. 814 (IX), 17 December 1954.

<sup>78</sup> *UN Yearbook* (1955), pp. 77-78.

<sup>79</sup> *UN Yearbook* (1956), pp. 121-122.

<sup>80</sup> In addition to these, there are two other exceptions to Article 2(4). One of these is explained in Article 106, which enables the five permanent members of the Security Council to take joint military action if the Member States have not yet made special agreements with the Security Council to provide military contingents to take part in an enforcement action. Articles 107 and 53 contain another exception. They allow for the use of force against the 'enemy' states of the Second World War. The changed circumstances since then, however, have rendered these exceptions practically void. Hence, in this article, force used in self-defence and force authorized by the Security Council are presumed to be the two exceptions pertinent under current international standards.

it can take measures pursuant to Chapter VII (Article 39). Chapter VII does not, however, furnish explicit definitions as to what constitutes a threat to peace, a breach of the peace, or an act of aggression. It leaves this completely to the judgment of the Security Council. Thus, as one scholar notes, "a threat to the peace is whatever the Security Council says is a threat to the peace."<sup>81</sup>

Nor does Article 39 qualify that the threat to, or the breach of 'international' peace. In spite of the stated aim of maintaining or restoring 'international' peace, it refers to 'any' threat to peace. Hence, according to the wording of the article, the Security Council's definition of a threat to peace does not need to derive from instances that are specified in Article 2(4). In other words, a threat to peace does not necessarily have to be a conflict between two states.<sup>82</sup> Moreover, read in conjunction with Article 2(7), the Organisation is authorised to intervene in matters of domestic jurisdiction in cases where there is judged to be a threat to, or breach of, the peace as determined by the Security Council in accordance with Article 39. Therefore, a threat to peace, a breach of peace, or an act of aggression may well be extended to include domestic affairs, such as civil war, violations of human rights, or the existence of a repressive regime. In this context, Article 39 leaves it to the exclusive discretion of the Security Council to decide what factors constitute a threat to, or breach of international peace and against whom the enforcement action for the maintenance or restoration of the international peace is to be carried out. In practice, on many occasions, the Security Council has found a number of such situations as constituting a threat to or breach of peace. Thus, 'essentially' domestic nature of the situation does not impede the Council from assuming jurisdiction, once it determines that a threat to international peace and security in fact exists. In this sense, Article 39, combined with Articles 41 and 42, implies the "forcible interference in the sphere of a state."<sup>83</sup> As a result, the notions "threat to peace, breach of the peace" permit a highly subjective interpretation, compared to, for example, the "threat or use of force" under Article 2(4), which is a more "objectively determinable conduct."<sup>84</sup>

The Security Council's determination of the existence of a threat to, or breach of the peace, or an act of aggression, is a precondition for undertaking further measures under Chapter VII. In this respect, Article 41 contains provisions for non-military sanctions against a wrongdoing state. If the sanctions undertaken in accordance with Article 41 fail, or are judged to be insufficient, the Council may

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<sup>81</sup> Akehurst, *A Modern Introduction to International Law*, p. 181.

<sup>82</sup> Kelsen, *The Law of the United Nations*, p. 731.

<sup>83</sup> *Ibid.*, p. 735.

<sup>84</sup> *Ibid.*, p. 737.

proceed to take measures involving air, sea or land forces in accordance with Article 42. The decision of the Security Council is binding over the member states (Article 25).<sup>85</sup> In practice, the absence of agreements for providing the Organisation with the "armed forces, assistance and facilities" between the Organisation and member states upon Security Council's call for the military measures (Article 43), and the non-functioning of a Military Staff Committee (Article 47) have led to the evolution and innovation in the implementation of enforcement measures. One such innovation is the Security Council's extension of its jurisdiction over the years, to authorise the use of force by states in some instances, or to recommend this type of action in others.

### **Role of Regional Organisations**

One potential source of authorisation for interventions is regional organisations. Chapter VIII of the Charter designates a possible role in the maintenance of international peace and security to "regional arrangements or agencies," on the condition that such actions are consistent with the UN's purposes and principles (Article 52). Article 52(2) imposes on the members of the UN that are party to such arrangements to seek "peaceful settlement of local disputes" within the framework of such arrangements "before referring them to the Security Council." Hence, peace-keeping operations through regional organisations are not proscribed, since forces under peace-keeping are not within the scope of Article 2(4).<sup>86</sup> Examples of this include the 1961 Arab League Force deployed in Kuwait, the 1965 Inter-American Peace Force deployed in the Dominican Republic and established by the Organisation of American States, the 1976 Inter-Arab Deterrence Force in Lebanon sponsored by the Arab League, the 1981-1982 Organisation of African Union Force in Chad, and, 1995 IFOR/SFOR and 2004 EUFOR, in Bosnia-Herzegovina established by NATO and the EU respectively.

In terms of enforcement actions, Article 53(1) empowers the Security Council to "utilise such regional arrangements or agencies for enforcement action under its authority." The next clause of the article makes it clear that regional organisations do not have an independent authority regarding enforcement action. Article 54 requires that the Security Council "be kept fully informed of activities

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<sup>85</sup> It should be noted that, as the ICJ indicated in the *Certain Expenses* advisory opinion (1962), measures under Article 42 represent "enforcement measures" against a state. Thus, they are distinguished from the deployment of peace-keeping forces, where there is a prior agreement with the state that they are stationed, by the fact that enforcement actions are carried out against the will of the state. For *Certain Expenses* case, see Harris, *Cases and Materials*, pp. 975-984.

<sup>86</sup> Funda Keskin, *Uluslararası Hukukta Kuvvet Kullanma: Savaş, Karışma ve Birleşmiş Milletler (The Use of Force in International Law: War, Intervention and the United Nations)*, Ankara, Mülkiyeliler Birliği Vakfı Yayınları, 1998, p. 156.

undertaken or in contemplation under regional arrangements" with respect to "the maintenance of peace and security." Thus, the Charter expresses in clear language that regional organisations are only allowed to take up action towards peacekeeping. It stipulates that such organisations are prohibited from exercising Chapter VII powers, unless they have obtained prior Security Council authorisation.

### **Role of the General Assembly Regarding International Peace and Security**

The UN Charter has assigned a secondary role to the General Assembly in matters of peace and security. Article 11 provides that the General Assembly may consider and make recommendations regarding matters related to the maintenance of international peace and security. However, under Article 12, it is constrained from making such recommendations "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter ... unless the Security Council so requests."

Despite these limitations, the 1950 *Uniting for Peace* Resolution expressly authorises the Assembly to make recommendations on enforcement measures, including military action, when the Security Council is unable to act.<sup>87</sup> Thus, the General Assembly is a potential source of authorisation when the Security Council fails to act decisively. The *Uniting for Peace* resolution also provides the mechanism of being able to call an "Emergency Special Session" within 24 hours. It empowers the General Assembly to assume these powers only after an occurrence of the breach of peace or an act of aggression, but leaves the condition of threat to peace out of its scope. The resolution is significant in that it substantially broadens the Assembly's area of jurisdiction, and gives the General Assembly the right to decide whether a breach of peace or an act of aggression has taken place - a right exclusively reserved for the Security Council by the Charter.<sup>88</sup> In this sense, some have argued that the Resolution has fundamentally rearranged the collective security mechanism of the United Nations.<sup>89</sup> Nevertheless, the fact that in practice, General Assembly has effectively employed the rights conferred by the Resolution only once in the Korean case (1951), suggests the lessening relevance of the resolution, in spite of its technical existence.<sup>90</sup> The practice of the General Assembly

<sup>87</sup> GA Res. 377 (V), 3 November 1950.

<sup>88</sup> Çelik, *Milletlerarası Hukuk*, p. 420.

<sup>89</sup> Keskin, *Uluslararası Hukukta Kuvvet Kullanma*, pp. 147-148.

<sup>90</sup> The General Assembly has acted under *Uniting for Peace* resolution on several occasions, including the Suez question (1956), the Hungarian question (1956), Lebanon and Jordan (1958), the Congo question (1960), the Middle East (1967), the Pakistan Civil War (1972), Afghanistan (1980), the Palestine situation (1980, 1982), Namibia (1981) and the Question of Occupied Arab Territories (1982). In almost all of these cases, an emergency special session was held, but no enforcement action was undertaken. The resolution was raised in 1956 as the basis for the formation of a multinational force (UNEF), which operated on Egyptian territory with Egyptian consent after the Suez crisis. However, since UNEF was established with Egypt's consent, the ICJ decided in the *Certain Expenses* case that UNEF was not an enforcement action "within the compass of the Chapter VII of the Charter." For *Certain Expenses* case, see Harris, *Cases and Materials*, pp. 975-984.

with respect to matters of peace and security, thus, has been confined to examination, discussion, and occasionally, condemnation. Nonetheless, it is important to note that an intervention having the necessary two thirds backing or more of the General Assembly, usually has a strong moral and political legitimacy, even in the absence of Security Council endorsement.

### **Self-defence as an Exception to Article 2(4)**

As elaborated above, Article 2(4) strictly proscribes states from using force in resolving their differences. Nonetheless, Article 51, which contains the right to individual and collective self-defence, provides for the only exception to the proscription of the unilateral use of force, specifying the conditions under which individual states may resort to force. It states:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security."

There is considerable controversy regarding Article 51, as the scope of self-defence and the circumstances under which the right of self-defence may be exercised are ill-defined. This also applies to the nature of what is meant by "armed attack." The most contentious issue pertains to whether the use of right of self-defence is confined to the circumstances whereby an armed attack has already occurred or whether this right can be invoked in anticipation of such an attack. On the one hand, there are those who argue that Article 51, read in conjunction with general prohibition of the use of force set out in Article 2(4), limits the invocation of such a right to cases where an actual armed attack has occurred.<sup>91</sup> This view accepts no other circumstances under which the right to self-defence may be invoked. In this connection, the term "inherent right" is taken to imply the undeniable nature of this right to members and non-members alike, and to indicate

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<sup>91</sup> Brownlie, *International Law*, p. 265; Kelsen, *The Law of the United Nations*, pp. 797-798; Hersch Lauterpacht, *L. Oppenheim, International Law*, p. 299; Louis Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 1979, pp. 140-143.

that the UN may provide assistance to a non-member in their defence against an armed attack. Thus, it is argued that the term 'inherent' was intended to underline that defence against an armed attack is a right of every sovereign state.<sup>92</sup>

On the other hand, there are legal scholars who argue that Article 51 should not be interpreted as excluding the right to anticipatory self-defence in the case of an imminent danger of attack. This view rejects the restrictive interpretation of the word 'if', as it is employed in Article 51, as meaning "if and only if." To that effect, these scholars point out that by qualifying the right of self-defence as 'inherent,' the article indicates the existence of a right of self-defence in pre-Charter customary international law, according to which preventive measures are permitted. Hence, it is argued that the article did not intend to restrict the pre-existing customary right. In this sense, the argument goes, by the term "armed attack," Article 51 refers merely to one situation, whereby a state could invoke the right of self-defence.<sup>93</sup> Supporters of this view refer to the legal criteria for permissible self-defence as formulated in the case of *Steamer Caroline*,<sup>94</sup> as reflecting the authoritative customary law.<sup>95</sup> According to the formulation in the aftermath of this case, the anticipatory self-defence is admissible, when "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>96</sup>

There has been no authoritative decision in international litigation on the question of anticipatory self-defence. In the *Nicaragua* case, the ICJ left the question open, by not expressing any view on that issue.<sup>97</sup> Despite the fact that a number of states have argued for such a right on several occasions, the view that the UN Charter prohibits the use of force unless it consists of an armed attack, seems to prevail in the literature. Nonetheless, most recently, the United States military intervention in Iraq (2003) has shifted the debate to whether Article 51 provides for pre-emptive and/or preventive military action. In this respect, while underlining the

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<sup>92</sup> Kelsen, *The Law of the United Nations*, p. 792.

<sup>93</sup> D. W. Bowett, *Self-Defence in International Law*, New York: Frederick A. Praeger, 1958, p. 185. Also, Higgins, *The Development of International Law*, p. 201.

<sup>94</sup> For summary of this case, see Hersch Lauterpacht, L. Oppenheim, *International Law*, pp. 300-301. For the historical details, see Walter LaFeber, *The American Age, US Foreign Policy At Home and Abroad, 1750 to the Present*, New York, W. W. Norton & Company, 1994, pp. 109-110.

<sup>95</sup> Jennings refers to this case as the "*locus classicus*" of the customary law of self-defence. R. Y. Jennings, "The Caroline and McLeod Cases," *American Journal of International Law*, Vol. 32 (1938), p. 92. For similar views, see also Schachter, *International Law*, p. 151; and Anthony Clark Arend and Robert, J. Beck, *International Law and the Use of Force, Beyond the UN Charter Paradigm*, London, Routledge, 1993, p. 72.

<sup>96</sup> Upon the incident of invasion of American territorial waters, the American Secretary of State, Daniel Webster, set out the elements of self-defence that provided the philosophical basis for the right to use force in self-defence and the limits to the exercise of that right. See note of Webster to British authorities, 27 July 1842, quoted in Timothy L. H. McCormack, *Self-Defence in International Law, The Israeli Raid on the Iraqi Nuclear Reactor*, New York, St. Martin's Press, 1996, p. 183.

<sup>97</sup> *ICJ Reports* (1986), para. P. 194.

restrictive language of Article 51, the recent High-level Panel Report acknowledged the customary right of anticipatory self-defence where there is an imminent threat and provided that there is a proportionate response. However, the report argued strongly for Security Council authorisation in the case of non-imminent and non-proximate threats, and thus made a distinction between pre-emptive and preventive action.<sup>98</sup> The fact that the Panel did not recommend rewriting or reinterpretation of Article 51 points to the persistence of the concern with the preservation of the norms of non-intervention and prohibition of the use of force in its restrictive sense.

One other problem related to the exercise of the right of self-defence arises out of the subjective character of the decision to resort to force in self-defence. Because of the nature of the international system, each state is, by this right, entitled to judge on its own whether to resort to force to defend itself.<sup>99</sup> However, a legal question remains whether circumstances merit the legitimate exercise of self-defence.<sup>100</sup> Under Article 51, the exercise of right of self-defence is permissible "until the Security Council has taken the measures necessary to maintain international peace and security." As such, Article 51 recognises that there may be pressing situations, which requires an immediate defensive response. Thus, the language of the article allows states to temporarily judge the urgency of the situation and decide to act in defence, but at the same time by stipulating "measures taken in the exercise of self-defence shall be immediately reported to the Security Council," it also subjects the state's reasoning to international review.<sup>101</sup> In this respect, international precedent demonstrates that an action of defensive nature is not necessarily considered legitimate based solely on the judgment of the state taking that action. For example, Japan maintained that its action in Manchuria in 1931 was defensive. But the Assembly of the League of Nations concluded that the Japanese action could not be considered as a legitimate exercise of the right of self-defence.<sup>102</sup> In the same vein, the judgment of the International Military Tribunal in Nuremberg in 1946 rejected the German Nazi leaders' argument that Germany acted in self-defence and that every state must be the judge of whether a given situation yields to the exercise of the right of self-defence, by asserting that "whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if

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<sup>98</sup> *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, United Nations, 2004.

<sup>99</sup> Shaw, *International Law*, p. 694.

<sup>100</sup> J. L. Brierty, *The Law of Nations, An Introduction to the International Law of Peace*, London, Oxford University Press, 1942, p. 257; McCormack, *Self-Defence in International Law*, p. 259.

<sup>101</sup> Higgins, *The Development of International Law*, pp. 205, 207.

<sup>102</sup> Hersch Lauterpacht, *L. Oppenheim, International Law*, pp. 302-303.

international law is ever to be enforced.<sup>103</sup> As a result, due to the lack of objective criteria for assessing the alleged imminence of an attack and the consequent potential for abuse, the dominant view among legal scholars reads Article 51 as ruling out the use of force for self-defence, other than that in response to an armed attack.<sup>104</sup>

## Conclusion

Although the UN Charter does not explicitly lay down a principle of non-intervention applying to the relations between states, the principle is implicit in the general prohibition of the use of force in international relations and observable in the leading General Assembly declarations. Article 2(4) sets the illegality of any unilateral use of force not authorized by the UN. In this sense, it is the corner-stone of the rule of non-intervention between states. The norm it establishes has universal and imperative applicability in that it is consistently reaffirmed in a number of international documents as well as in the General Assembly declarations. Although the content of the article remains debated, it is generally interpreted as pertaining to the threat or use of armed force, employed directly or indirectly against another state. By allowing for only one condition as an exception to the prohibition of the use of force, the Charter has considerably limited the scope of legitimate self-help measures. Despite the contentions regarding the right of anticipatory self-defence, the recent debate is concerned with the preventive actions where the threat is not imminent.

While the UN Charter is restrictive with respect to the use of force by states, it is fairly open-ended with regards to the use of force and intervention by the Organisation itself. By assigning broad powers, particularly to the Security Council, in matters of international peace and security, it leaves a great deal of room for political considerations and deliberations. Although the enforcement measures under Chapter VII are the only exception to the rule of Organisation's non-intervention in domestic affairs, the UN has developed certain mechanisms for its interventions short of enforcement measures. In this regard, the essential steps the UN has assumed are a declaration of "international concern" on a given matter and 'consent' of the state at issue.

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<sup>103</sup> Judgment of the Military Tribunal at Nuremberg, 1946, *Trial of German Major War Criminals Before the International Military Tribunal*, quoted in Schachter, *International Law*, p. 137.

<sup>104</sup> Simma, *The Charter of the United Nations*, pp. 666-667; Brownlie, *International Law*, pp. 227-275; Akehurst, *A Modern Introduction to International Law*, pp. 222-223; Louis Henkin, *How Nations Behave*, pp. 141-145.



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In sum, the UN Charter strongly affirms that the norm of non-intervention as the main governing rule of state relations, and thus demonstrates the international society's persisting conviction that the norm is the primary safeguard for the preservation of order and the peaceful coexistence among states.