1. Introduction

Under the ambit of international law, states are not permitted to threaten to use force nor can they use force against other states. This rule is mentioned under Article 2(4) of the United Nations Charter and is regarded as a peremptory norm. This prohibition on use of force is the most important obligation of the states under the international law. States being subject to international law enjoy both rights and obligations. Article 51 of the United Nations Charter gives the inherent right to the state to use self defense. But while exercising this right the state can not infringe the rights of another State. As per article 51 of the United Nation Charter states are allowed to use force only in special circumstances but states continue to use the force under other circumstances as well.

Before the establishment of the United Nations states were free to decide whether to wage war or not to wage war against one another. There was no regulation on the States for the use of force. The only guiding principle on the State was the moral consideration relating to ‘just’ war and ‘unjust’ war. Further the determination of ‘justness’ of the war was based on subjective interpretation. This allowed states to wage brutal wars against one another.

United Nations after its establishment has been successful in dealing with the use of force by the states, but it faces criticisms. The criticisms that are faced by the United Nations Charter are that firstly whether the prohibition of use of force should only continue to be military use of force and secondly how should States deal with the non state entities such as terrorism organizations which are not governed by the Charter rules.


As per article 2(4) of the Charter of the United Nations:

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

Article 2 (4) is the essential ingredient of the UN Charter as it provide a better collective security system. But its interpretation is still debated since certain terms of the Article has not been explained properly. The scope of prohibition of “the threat of use of force” is not precisely given.

The various terms contained in article 2(4) has been broken down and analyzed to understand the proper implication of the article.

2.1. Meaning of Force

There is an ongoing controversy regarding the meaning of ‘force’ under Article 2(4) of the Charter. This debate arose because of the absence of the adjective ‘armed’ before ‘force’ in the provision. The question which arises is whether Article 2(4) envisages any other types of force like economic sanctions in addition to armed force.

Basic understanding is that only military force is prohibited under Article 2(4). Those who are support this position has given two main reasons. The first reason is that since United Nations was formed after the Second World War in response to the grave violence and atrocities, the force referred to in the provision means the kind of force which was used during the world war, which was only military force. Psychological or economic pressure does not come within the purview of Article 2(4) unless coupled with the
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use or the threat of force. Secondly, refusal of one State to trade with another was not considered a violation of international law. Consequently, only military forces were prohibited not any other sanctions in 1945 and that position has not changed till date.

Even though only military force is prohibited under Article 2(4), it has been made clear by the United Nations that economic aggression is also not acceptable when used to coerce other states.

2.2. Threats of Force

A threat of force is a form of coercion. It is not required under that the international law that a state must have the capability to deliver its threat, or that a threat is coupled with any concrete demand before such a threat can be considered unlawful. Threat is unlawful under Article 2(4) and the force used for threatening would also be illegal when used. An illegal threat can cause only an unlawful force and vice versa.

2.3. Refrain in their International Relations

Use of force by one State against another is prohibited but not force used by State within the territory. The reason for the limitation under this provision can be given as the principle of sovereignty and territorial integrity which States continue to guard. No interfere should be allowed with the internal affairs of any state neither by any other state or by United Nation, and this has been time-honored principle of international law. However, contemporary international law sees the reliance on sovereignty shifting in favor of other critical principles, such as those relating to human rights and self-determination. States often argue that they are free to use force to resolve their internal problems within their territory since Article 2(4) only covers international relations.

There are several problems with the arguments proffered by States in favor of using force within their territories. Firstly the UN Charter states that states are suppose to settle their disputes peacefully. Evidence suggest that use of force in one’s territory results in equal or even worst impact on a whole region rather than on State attacking another.

Also, whenever States argue that they use force only to deal with internal problems, they automatically assume that such use of force is legal and that disputes can be purely domestic. In fact, As per Article 2(7) of the UN Charter, UN is not allowed to interfere in matters occurring within the domestic jurisdiction of its member States.

Another problem with this argument of use of force internally is that whenever States argue for the use of force to deal with internal matters, they assume that it is always possible to characterize conflicts as either internal or international.

Similarly, by using force to capture a territory, a State assumes that the territory is, in law, its own. Thus claims by the UK and Argentina over the Falkland Islands, and India and Pakistan over Kashmir all overlooked the important fact that, at the time such force was used; none of these States had undisputed title to the concerned territory.

2.4. Territorial Integrity and Political Independence

There is an argument regarding the interpretation of prohibition in Article 2(4). Some support the narrow interpretation which would mean that more cases will fall within the realm of legality; while others think that it should be interpreted as widely as possible, so that fewer cases will be considered legal under the provision. A permissive view in the present context implies that any force that does not result in permanent loss of any part of a State’s territory does not violate its territorial integrity. A broad interpretation suggests that the purpose of the phrase is not narrow the scope of the prohibited force; rather, “it is an assurance that the threat or use of force will not be permitted under any circumstances, except as allowed by the Charter”.

In practice, this interpretation mainly arise whenever a States use force to rescue their nationals from abroad, or they use force for democracy in other countries, or they use force to prevent humanitarian tragedies. None of these instances is explicitly recognized by the United Nation Charter as constituting lawful use of force, no matter how charitable the motive might appear.

The operative paragraph 23 of Friendly Relations Declaration, 1970 states that:

..No State or group of States has the right to intervene, directly or indirectly, for any reasons whatever, in the internal or external affairs of any other State. Consequently armed interventions and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.

The reference to ‘any reasons whatever’ is broad enough to cover such motives as humanitarian interventions, protection of one’s nationals, and any other reasons on which a State may want to rely as a justification for the use against another State.

2.5. Inconsistent with the Purposes of the United Nations

Under Article 2(4) of the United Nation Charter, no State can use force in any other manner inconsistent with the purposes on the United Nations. States sometimes argue that they use force in-order to protect human rights or prevent humanitarian tragedies and this is why it is not inconsistent with the purposes of United Nations. Since one of the main purposes of the United Nations is to prevent humanitarian tragedies, using force to prevent a State from violating its citizens’ rights or destroying their lives is perfectly inconsistent with Article 2(4).

Since the Charter does not recognize humanitarian intervention, such action is illegal unless it is authorized by the Security Council. In other words, humanitarian intervention can become a pretext for meddling in the internal affairs of other states.

3. Exceptions to the Prohibition of the use of Force

The United Nations Charter provides for exceptions to the prohibition on the use of force:

- States can use force in self defence (Article 51)
- United Nation Security Council authorized forces commonly called ‘collective security’ for maintaining peace and security.
- States can use force against former enemy States(Article 107)

Article 107 permits UN member State to attack one of the former enemy States if the UN cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV), available at: http://www.refworld.org/docid/3dda11f104.html [accessed 20th November 2017]
member State believed that the former enemy was renewing its policy of aggression. However, since all former enemy States are now UN members, Article 107 is regarded as a dead provision. Article 2(4) of United Nation Charter prohibits unilateral use of force or force not used in self defence.

4. Interpretation of Article 51 of UN Charter

The United Nation Charter does not define the term ‘armed attack’. Attack of one territory by the regular forces of another state by land, sea or space is usually considered as armed attack. But it is often debated that whether armed attack can only be levied by regular forces.

The International Court Justice defined armed attack as “an attack that occur on a significant scale by armed bands or groups on behalf of a state as to amount to an actual armed attack conducted by regular armed forces or its substantial involvement therein”. The International Court of Justice in the Hostages case had used the term armed attack with regard to “the actual storming of the embassy and the hostage taking of its personnel”. Since the International Court of Justice work in a consistent manner, it is to be believed that armed attack in the cases of Nicaragua and Hostages would come under the scope of Article 51 of the United Nation Charter.

Hans Kelsen stated, “An attack as meant under article 51 UN Charter consists of an actual armed attack by one State against another”. Non state actors were not considered under article 51 at that time. Under Article 2(4) it is not explicitly stated that non-state actors are forbidden from using force and hence such force used by non state actors cannot create right to self defence under Article 51. Therefore Article 51 is not available in case of terrorist attacks.

But the self defense right against terrorist attack can be used under customary law. Customary right of self defense comes under the United Nation Charter by the use of the terminology “inherent right” under Article 51.

4.1. In case of Terrorist Organisations

Article 51 permits only States to take self defence measures. But in today’s scenario states are not the only entities that can use or cause armed attacks. It can be seen that in the last decades that non state attacks have increased significantly, attack by terrorist groups and other organizations have increased in large number.

Prohibition of use of force by non state actors is not stated under Article 2(4). This leaves a void as to whether states can defend themselves when attacked by such non state actors.

In order to act in self defence against a non-State entity, a State against which an armed attack has occurred has two options. First, it has to show that the attack is conducted by a non-State entity, Secondly the act is done with actual or implicit knowledge of a State or it is a state sponsored attack.

4.2. Anticipatory Self Defence

Anticipatory self defense is taken by states when they are confronted by imminent attack. Such an imminent attack needs to be an armed attack and should be a controversial one according to Article 51. The UN Charter does not explicitly provide for anticipatory self defence but as a right it originates from the customary international law principles. Anticipatory self defence as a doctrine was articulated in the Caroline Case. Two criteria were given in regard to permissible use of anticipatory self defence. First was necessity and the second criterion was proportionality.9

4.2.1. Anticipatory Self-Defence after 9/11

After the 9/11 attacks, states have started claiming the right of anticipatory self defence. The importance of such provision has increased in the international law scenario.

The United Nations Security Council Resolution 1373\(^{10}\) had decided on the following:

"States shall take necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other states by exchange of information;"

"States shall cooperate with each other, particularly through bilateral and multilateral arrangements and agreements, in order to prevent and suppress terrorist attacks and take action against perpetrators of such acts."

Mandating States to “take the necessary steps to prevent the commission of terrorist acts including by provision of early warning to other States by exchange of information” can be interpreted in many ways. Thus if one State provides any early warning to another State that there is a plan being hatched on its territory, or that of a third State, which is to culminate in an attack against another State, nothing stops the latter from attacking the group hatching the plan. Resolution 1373 seems to support such an action fully.\(^{11}\)

However, the Security Council still requires some evidence before a State can take action to forestall a terrorist attack. This indicates that anticipatory self defence must be based on real evidence of an impending attack. Therefore this resolution cannot justify actions based on the preemptive doctrine, which is a nebulous doctrine that would allow a State to attack another State not because the latter has an intention to attack it, but because it has a history of violence towards other States.

Conclusion

United Nations was formed to avoid the tragedies of war. The main purpose of the UN is to promote peace and security among the member States. Article 2(4) prohibits use of force under and Article 51 is an exception to Article 2(4). Though both the articles provide the circumstances under which force is prohibited and force can be used, but still it is not void of ambiguities. The UN Charter is silent as to the role of non-state actors in use of force. Expanding the scope of Article 51 may lead to the degradation of the fundamental purpose of the United Nation which is to promote peace and security among the member nation and world. Expanding the scope of Article 51 may lead to uncheck use of force by States in pretence of their self defence.


\(^{11}\) ibid