THE FORCE OF RECENT EVENTS IN BROADENING THE HORIZON OF ARTICLE 2(4): CAN THE CHARTER ACCOMMODATE CYBER ATTACKS AND THE RESPONSIBILITY TO PROTECT?

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ABSTRACT

The concept of use of force is a core principle of international law which is embodied in a complex legal framework. The ambit, threshold and limit of Article 2(4) of the UN Charter has been discussed by the International Court of Justice (ICJ) and jurists in detail, outlining the traditional definition of force and supplementing dependent concepts like armed attack and self-defense in the context of a kinetic attack. However, seventy years after the inception of the UN Charter, the authors of this paper believe that ideals of territorial integrity and sovereignty have evolved and science and technology have progressed. The notion of force has shifted dramatically from the Nicaragua case. Taking into account recent events, this paper will discuss two diverse topics that credit their inception to Article 2(4).

First, this paper will analyze another contemporary change in the circumstances under which force is used, namely the doctrine of responsibility to protect. This doctrine as can be seen in recent cases has been used as a justification for unilateral humanitarian intervention. This paper will aim to analyze, whether, this unilateral humanitarian intervention has become custom, and is now an exception to Article 2(4) of the charter or does it continue to be illegal and if so, what the possible solutions to the same.

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Secondly, this paper has dealt with using the cyber domain as a weapon and the threshold where force becomes an armed attack under Article 51 with respect to a computer network attack. The authors have also discussed the appropriate response to a cyber-attack and noted the confluence of the law of state responsibility.

Analyzing both sides of this very problem, this paper will aim at proving that the evolving nature of Article 2(4) must be recognized and codified to usher in an era of stability and safety to the subjects of international law who are living in an age where traditional notions of force and armed attack are colliding with the expanding horizon of Article 2(4).

1. PROLOGUE

All conflicts in the sphere of international politics can be reduced to contests of a legal nature.

-Hersch Lauterpacht

Sir Lauterpacht was accurate, in his deduction, as, more often than not, what is perceived to be legal is largely different from what is accepted to be legal, which in turn greatly differs from what is actually legal within the domain of international law. In 1945, the world had witnessed two world wars when and the threat of artillery power and formidable armies played a role in converting the dynamics of international law.[1] Hence the legal order was no longer based on 'an absence of war' but rather on 'the presence of peace'.[2] In light of the same, Part I of this paper will focus on the history and evolution of Article 2 (4) of the UN Charter.

However, events that have taken place in the last two decades, have largely changed the contours of the very foundation of International peace and security, namely, the prohibition on the use of force as contained in Article 2(4). In 1999, the North Atlantic Treaty Organization (NATO) sent forces to Yugoslavia, and undertook mass scale bombings, in support of the Kosovar's right of self-determination, and termed it to be a justified intervention on the basis of 'humanitarian'

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1 G Ress, *Interpretation of the Charter*, 13, 23-25 in The Charter Of the United Nations: A Commentary (Bruno Simma et al.eds., 2nd ed., 2002).

2 K.C.Wellens, *The United Security Council and new threats to the peace: back to the future*, 8 Journal of Conflict and Security Law 15 (2003).

ends[3]. Today, we find a similar situation occurring in Crimea, where the same alleged humanitarian purpose, has led to the annexation of Crimea by Russia, which is termed by the world community at large to be a gross violation of the territorial integrity of Ukraine[4]. Part II of this paper will be primarily dealing with the paradigm shift in the circumstances under which force is used. Further, an analysis of whether the intervention in favour of Kosovo has set a dangerous precedent in favour of humanitarian intervention and a study on the contours of humanitarian intervention, in the event of its legality, will be under taken as well.

Another aspect of force that has undergone a drastic change is the gradual shift in the type of force used. The UN was founded to protect future generations from the scourge of war and thus the notion of force after two world wars was limited to military instruments and attacks at that point in time.[5] Slowly, a shift to nuclear weapons occurred, followed by chemical and biological weapons, and now, in this age of technology, weaponry has extended to that of cyber weapons. Thus, Part III, will discuss and analyze the legality or illegality of cyber warfare, and propose suggestions to better regulate the same.

Lastly, Part IV of this paper, will deal with a possible confluence between these two contemporary changes in the domain of force, and propose certain checks and balances, to ensure that international peace and security is not compromised.

1.1. The Ambit of Article 2(4) of the Charter – A Brief Overview:

To save succeeding generations from the scourge of war, this twice in our lifetime has brought untold sorrow to mankind.

-Preamble, Charter of the United Nations

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[3] *Minutes of the 3988th Meeting of the U.N Security Council,* 3988th meeting, U.N Document S/ PV.3988, (24/3/1999), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/kos 20SPV3988.pdf, last seen on 2/3/2015.

[4] *Ambassador Murmokaite - Statement of the UN Assistant Secretary-General on Crimea,* United Nations Organization, available at http://www.un.org/apps/news/story.asp?NewsI D=47253#.VCw1MGeSzm5, last seen on 1/1/2015.

[5] Preamble, UN Charter, 1945.

The foundation of the international system rests in the prohibition on use of force, as the preamble of the Charter clearly lays out. Article 2(4) of the Charter explicitly states that all member nations should refrain from the threat or use of force against another state.[6] In ordinary parlance, force can be defined as power, pressure or violence directed against a person or a thing.[7] If one broadly interprets the same, it can mean kinetic use of force or other means of financial, diplomatic, economic and ideological coercion.[8]However, the *travaux preparatoires* of the Charter shows that a proposal to increase the ambit of Article 2(4) to include economic coercion was clearly rejected by the United Nations.[9] Hence, it can be concluded that the use of force as envisaged in the United Nations Charter and accepted by the world community was only restricted to acts of military aggression and the traditional, kinetic notion of force that included armies and artilleries.

Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of the nation. The ambit of Article 2(4) is predominantlyis restricted to the use of armed[10] or physical force[11] and the threat of the same. It is argued, that the provision is to be interpreted broadly, not restricting itself to a direct threat or use of force, but also extending to the indirect threat or use of force.[12]

However, there are two universally recognized exceptions to Article 2(4) of the Charter. The first is the right of self-defense as enshrined in

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6 Article 2(4), U.N. Charter, 1945.

7 B.A.Garner, *Black's Law Dictionary,* 717 (9th ed., 2009).

8 Michael Gervais*, Cyber Attacks and the Laws of War*, 30 Berkeley Journal of International Law 525, 536 (2012).

9 Ibid, at 537.

10 A Verdoss and B Simma, *Universelles Volkerrecht,* 478 (3rd edn, Dunker and Humbolt 1984); H Kelsen and R Tucker, *Principles of International law*, 86 (2nd edn, Rinehart 1966); I Brownlie, *International Law and the Use of Force,* 362 (Clarendon Press 1963); U.N. General Assembly, *Definition of Aggression*, Res. 3314 (XXIX), Sess. 29, U.N.Document A/RES/3314, available at http://daccess-dds-ny.un.org/doc/RESO LUTION/GE N/NR0/739/16/I MG/NR073916.pdf?OpenElement last seen on 20/03/2015 (hereinafter known as the Definition of Aggression Resolution).

11 H Kelsen and R Tucker, *Principles of International law*, 86 (2nd edn, Rinehart 1966); I Brownlie, *International Law and the Use of Force,* 362-363, 376 (Clarendon Press 1963).

12 A Randelzhofer, *Use of Force,* 4 Encyclopedia of Public International Law 248, 250 (1999); A Verdoss and B Simma *Universelles Volkerrecht,* 481 (3rd edn., 1984); L Zanardi, *Indirect Military Aggression*, 111 in *The Current Legal Regulation of the Use of Force* (Antonio Cassese, Martinus Nijhoff Publishers 1986).

Article 51, where a state may resort to force to defend itself if it is faced with an armed attack.[13] The second is the right of collective self-defense/humanitarian intervention through the Security Council under the auspices of chapter VII of the Charter, where a threat to international peace and security exists[14]. Article 3 of Definition of Aggression UNGA Resolution 3314 (which was accepted to be custom, in the *Nicaragua* judgment by the ICJ)[15],lays out the various forms of aggression that include bombardment by armed forced, military occupation, attack or invasion of armed forces and the use of armed forces, bands, groups, irregulars or mercenaries.[16]

The court noted the existence of a gap between Article 2(4) and Article 51[17] and jurists propound that the use of different phraseology with respect to 'armed attack' and 'use of force' was done with the intent to differentiate between the two terms.[18] The difference lies in the fact that while use of force can accelerate to an armed attack, the threshold of armed attack is achieved only when the attack leaves behind a trail of human casualties or ample destruction of property. If there is an armed attack that does not involve significant destruction or loss of human life, the use of force would fall short of an armed attack, which gives a state the right to defend herself, under Article 51 of the Charter. [19]

2. UNILATERALUSE OF FORCE AND THE RESPONSIBILITY TO PROTECT:

Intervention only works when the people concerned seem to be keen for peace.

- Nelson Mandela

The prohibition on use of force rests on the fact that the inherent sovereignty of a state must be respected. The responsibility to protect doctrine, thus, emerged, when this sovereignty was looked at not as a

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[13] Article 51, UN Charter, 1945.
[14] Chapter VII, UN Charter, 1945.
[15] Article 3, Definition of Aggression Resolution; Nicaragua v US, [1986] ICJ Rep 14, 101 (International Court of Justice).
[16] Article 3, Definition of Aggression Resolution.
[17] Nicaragua v US, [1986] ICJ Rep 14, 101 (International Court of Justice).
[18] Yoram Dinstein, *Cyber War and International Law: Concluding Remarks at the 2012 Naval War College International Law Conference*, 89 International Law Studies 276, 279 (2013).
[19] Ibid.

right but as a responsibility, which may be forgone, under certain circumstances. The responsibility to protect doctrine, surfaced for the first time, in 2001 under the mandate of the International Commission on Intervention and State Sovereignty[20], and was later, emphasized by the High-Level Panel on Threats, Challenges, and Change, in 2004, in its report[21] and finally by the General Assembly, in 2005.[22] The Security Council on numerous occasions has applied the principle and carried out collective measures as well.[23]

The concept of responsibility to protect is essentially an obligation upon all states to prevent and protect its populations from genocide, war, ethnic cleansing and other human rights violations. It further entails that if that state fails to do so, then the international community through the United Nations and with the prior sanction of the SC may take collective action and intervene on humanitarian grounds. Thus, it reinforces the power of the Security Council under Chapter VII of the charter where the UN has the power to intervene, including for humanitarian purposes, in any Member State but the same can only be invoked, if the situation is a threat to international peace and security as covered by Article 39 of the Charter. However, several states, resort to unilateral use of force, and use, the doctrine of 'responsibility to protect'

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[20] *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Commission on Intervention and State Sovereignty, (December 2001), available athttp://responsibilitytoprotect.org/ICISS%20Report.pdf, last seen on 9/01/2015.

[21] *A More Secure World: Our shared responsibility,* Report of the Secretary- General's High Level Panel on Threats, Challenges and Change, U.N. Document A/59/565, (December 2004) available at http://www.un.org/en/peace building/pdf/historical/hlp_more_secure_world.pdf, last seen on 20/3/2015.

[22] U.N General Assembly, *2005 World Summit Outcome,* RES 61/1 of 2005, Sess. 60, U.N document A/59/2005, (24 October 2005), available at http://daccess- dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/ N0 5487 60.pdf?OpenElement, last seen on 22/02/2015.

[23] U.N. Security Council, *Granting the Secretary-General Discretion in the Further Employment of Personnel of the United Nations Operation in Somalis,* Res 794 of 1992, Sess. 47 UN Doc S/RES/794 (3 December 1992), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-F6E4FF96FF9%7D/Chap%20VII%20SRES %20 794.pdf, last seen on 14/4/2015;U. N. Security Council *Authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti,* Res 940 of 1994 sess. UN Document S/RES/940 (31 July 1994) available at http://daccess-dds-ny.un .org /doc /UN Document /GEN /N94 /312/ 22/PDF/N9431222.pdf?OpenElement last seen on 14/4/2015.

as a justification. It is this contemporary increase in use of unilateral force and its legality that is in question today.

The Charter establishes the sovereign equality of States in Article 2(1), the obligation to settle disputes peacefully in Article 2(3), and specific exceptions to the prohibition of use of force, in Article 51 and Chapter VII of the charter. These principles are further developed in subsequent general assembly resolutions. [24] Therefore, for any humanitarian intervention to be justified under international law it must be in accordance with these principles or come within an established exception to their application or a normative custom must be shown, in light of recent state practice.

2.1. Can the use of force be positive? : The promise of intervention in the protection of human rights:

"Humanitarian intervention draws its powerful appeal from the revolutionary discourse of human rights, which promises liberation fromtyranny and a future built on something other than militarised andtechnocratic state interests."

-Anne Orford, 'Reading Humanitarian Intervention'.

Scholarly opinion in the last century has supported the right of states to intervene in other states on humanitarian grounds. [25] The simple reasoning for this follows from the fact that an intervention on

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[24] United Nations General Assembly,*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Res 2625, Sess.25, UN Doc A/RES/25/2625 (24/10/1970) available at http://www.un-documents.net/a25r2625.htm, last seen on 20/3/2015 ; United Nations General Assembly, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,* Res 2131 Sess. 20 UN Doc A/RES/20/2131 (21 December 1965) available at http://www.un-documents.net/a20r2131.htm last seen on 20/3/2015 ; United Nations General Assembly, *Definition of Aggression*, Res 3314, Sess. 29, UN Doc A/RES/3314. (14 December 1974), available at http://daccess-dds-n y.un m.org /doc/RESOLUTION/GEN/NR0 /739 /16/I MG /N R0739 16.pdf?OpenElement, last seen on 20/3/2015.

[25] Lilich, R.B, '*Humanitarian intervention, a reply to Ian Brownlie and a plea for constrictive alternatives* , 229, 241 & 250 in Law and civil war in the modern world (Moore, JN, 1974) , Fonteyne J.P, *The customary international law doctrine of humanitarian intervention : Its current validity under the UN charter*, 4, Calif. W Int'l LJ, 203, 258 (1974); Reisman, M/McDougal, M.S., '*Humanitarian intervention to protect the Ibos*' in Reisman, M/McDougal, M.S., '*Humanitarian intervention to protect the Ibos*', 167, 178 & 192-3 in Humanitarian Intervention and the UN (Lillich R.B, 1973).

humanitarian grounds is directed neither against the territorial integrity nor the political independence of other and moreover is in conformity with other 'preemptory norms' of the charter. [26] It is interesting to note at this point that the same argument, was raised by Britain in the Corfu Channel case, in 1951, but the ICJ rejected the same, and decided against Britain.[27]

Humanitarian intervention is seen as a need for balancing the opposite goals of conflict minimalization and protection of human rights which is why under certain circumstances, humanitarian intervention is considered lawful[28]. Judge Simma, in his separate opinion in the *DRC v. Uganda* case, has also emphasized that in light of the use of force by the entire international community against terrorist activities, particularly with respect to the Bush doctrine, a new and expanded definition of the term self defense should be duly adopted.[29]

There have been cases when the UNSC retrospectively or retroactively recognizes the use of force for humanitarian intervention. For example, the US, UK and the French invaded Iraq in support of the Kurdistan movement, to protect the human rights of the Kurds in Iraq, despite there being no prior authorization by the UNSC[30].

The NATO Bombing in Yugoslavia, was the true turning point for humanitarian intervention, as it largely influenced, subsequent measures in favour of mitigating human rights violations in Kosovo. Though the NATO bombing in Yugoslavia received contrary opinions, several countries spoke in support of the same, such as UK, US and France, in particular, the Belgian government's submissions in the *Legality of Use of Force* [31] cases outlines the support for the right of humanitarian intervention,

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[26] Tom Farer*,'Law and War'* 55in The Future of the International Legal Order (CE Black and RA Falk ,1st edn, 1969), Michael Akehurst, *Humanitarian intervention,* 105 in Intervention in World Politics (Hedley Bull, 1984) 105.

[27] UK v Albania [1949] ICJ Rep 4, 35 (International Court of Justice).

[28] Fonteyne J.P, *The customary international law doctrine of humanitarian intervention: Its current validity under the UN charter*, 4, Calif. W International Law Journal 203, 255 (1974).

[29] DRC v Uganda [2005] ICJ Rep 334, 337 (Separate Opinion of Judge Simma, International Court of Justice).

[30] Foreign Affairs Committee ,*The FCO Memorandum to the HC Foreign affairs Committee* 63 British Ybk Intl L 825(1992); DJ Harris, *Cases and Materials on International Law* 779, (3rd edn, 1983).

[31] Serbia and Montenegro v. UK, [2004] ICJ Rep 1307, 1320 (International Court of Justice).

> "This is not an intervention against the territorial integrity or independence of the former republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress, for this reason the kingdom of Belgium takes the view that this an armed humanitarian intervention, compatible with Article 2(4) of the charter which covers only intervention against the territorial integrity and political independence of a state."

Further, Australia's support of the East Timor liberation movement[32] and India's intervention of East Pakistan were both justified by the respective states on grounds of responsibility to protect and humanitarian intervention[33]. Thus there has been a reasonable amount of state practice as well as scholarly opinion in support of humanitarian intervention.

2.2. The imbalance, instability and illegality of Humanitarian Intervention

The great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force
-International Law Commission, 1966

Even though the above section clearly elucidates a possible support for humanitarian intervention, the fact remains, that humanitarian intervention, in reality, is not a recognized exception to Article 2(4) of the UN Charter. It is argued, by the proponents of unilateral humanitarian intervention, that humanitarian intervention is legal as it does not affect the territorial integrity or the political independence of a State; however, this was not added in order to restrict the operation of Article 2(4)[34], but as an added safeguard. It should be noted, that the only exceptions are the right of self defense and collective security under chapter VII of the Charter and unilateral humanitarian intervention does not fall under the same.

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[32] Australian Department of Foreign Affairs, *Annual Report 1974*, 53 (Australian Government Printing Service, 1975).

[33] *India's recognition of Bangladesh was reported in telegram 18766 from New Delhi, December 6,* National Archives, RG 59, Central Files 1970-73, POL INDIA-PAK, available at http://hcidhaka.gov.in/pages.php?id=1252, last seen on 2/10/2014.

[34] UK v Albania, [1949] ICJ Rep 4.35 (International Court of Justice).

The GA Resolution on the Definition of Aggression states that, '*No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression*.'[35] Humanitarian intervention is permissible to the extent it is sanctioned by the SC.[36] The only invasions on the basis of humanitarian considerations have been India in East Pakistan, Vietnam in Cambodia and Tanzania in Uganda which could all be justified on account of self defense under Article 51.[37] The more recent state practice would include the NATO bombing of Kosovo and Russian intervention of Crimea, which were both condemned by the world community at large[38]. In fact, many scholars believe that the Russian intervention of Crimea, is hypocrisy at its best, and the west and the ICJ in its advisory opinion[39], have set a dangerous precedent for years to come.

Humanitarian intervention has also been used in the context of self determination movements around the world[40] as the above examples have also indicated. However, the same has been considered to be a violation of the territorial integrity of the parent state and this is affirmed in state practice as evidenced in Scotland[41], Biafra[42], Kashmir[43],

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[35] United Nations General Assembly, *Definition of Aggression*, Res 3314, Sess. 29, UN Doc A/RES/3314 (14/12/1974), available at http://daccess-dds-ny.unm.org /doc/RESO LUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement, last seen on 20/3/2015.

[36] Article 42, UN Charter 1945; Y Dinstein, *War, Aggression, Self-Defence, 67* (3rd edn, 2001).

[37] S V Scott, A J Billingsley and C Michaelson ,*International Law and the Use of force- A Documentary and Reference Guide,* 101 (1st ed, 2010).

[38] *Ambassador Murmokaite - Statement of the UN Assistant Secretary-General on Crimea*, United Nations Organization, available at http://www.un.org/apps/news/story.asp? NewsID =47253#.VCw1MGeSzm5 last seen on 1/1/2015; United Nations Security Council Press Release, *Security Council rejects demand for cessation of use of force against Federal Republic of Yugoslavia*, U.N Document SC/6659 (26/3/1999) available at http:/ /www.un.org/press/en/1999/19990326.sc6659.html, last seen on 26/12/2014.

[39] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo [2010] ICJ Rep 403, 437 (Advisory Opinion, International Court of Justice).

[40] L. Eastwood, *Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia,* 3, Duke Journal of Comparative and International Law 299, 310-313 (1993); L R Evans. *Secession and the use of force in international law*, Cambridge Student Law Review 1, 4-5 (2008); N Higgins, K.OReilly, '*The Use of Force, Wars of National Liberation and the Right to Self-Determination in the South Ossetian Conflict*, 9 International Criminal Law Review 567-583 *(*2009).

[41] *Recognizing the friendship between the United Kingdom and the United States and expressing the support of the House of Representatives for a united, secure, and prosperous United Kingdom*, United States Congress-House of Representatives (7/8/2014), available at https://w

Cyprus[44], Kosovo[45] and Hong Kong[46] to name a few. Further, it is an established norm, that a countermeasure in response to a violation of an *erga omnes* obligation must not involve violations of *jus cogens* norms (notably the prohibition against the use of force), or affect obligations to settle disputes by pacific means.[47]While the right to self determination is an *erga omnes* obligation[48], Article 2(4) is a *jus cogens* norm[49], and therefore, a *jus cogens* norm cannot be violated to defend an *erga omnes* obligation, thus at a fundamental level negating the use of humanitarian intervention to achieve self-determination of states, which by itself is largely contested in the international domain.

2.3. Threshold of Humanitarian Intervention

'The Council may only take such [forceful] action . . . as may be necessary to maintain or restore international peace and security'

-Article 42, UN charter.

Assuming the validity of humanitarian intervention, one has to also analyze the permissible threshold of unilateral humanitarian intervention.

The biggest arguments against humanitarian intervention have been that is has been used disproportionately, and in situations that do not

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ww.congress.gov/113/bills/hres713/BILLS-113hres713ih.pdf, last seen on 7/1/2015.

[42] T D Musgrave, *Self-Determination and National Minorities*, 197 (1997).

[43] *Transcript of Media Briefing by Official Spokesperson and Joint Secretary Shri Syed Akbaruddin*, Ministry of External Affairs, Government of India, (20/9/2014) available at http://www.mea.gov.in/mediabriefings.Htm?dtl/24026/Transcript+of+Media+Briefing+by+Official+Spokesperson+and+Joint+Secretary+BM+September+20+2014, last seen on 3/1/2015.

[44] United Nations Security Council, Press Release, *Security Council fails to adopt text on Cyprus, as Russian Federation casts technical veto*, UN Document SC/8066 (21/4/2004) available at http://www.un.org/press/en/2004/sc8066.doc.htm, last seen on 7/1/2015.

[45] *UNSC Press Release*, Security Council Expresses Deep Concern at Escalating Violence in Kosovo, UN Document SC/6637 (29/1/1999), available at http://www.un.org/press/en/1999/19990129.sc6637.html, last seen on 7/1/2015.

[46] *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference*, Ministry of Foreign Affairs, People's Republic of China (30/9/2014), available at http://www.Fmco prc.gov.hk/eng/xwdt/wjbt/t1197147.htm, last seen on 1/1/2015.

[47] India v Pakistan [1972] ICJ Rep 46, 53 (International Civil Aviation Organization Council); US v Iran, [1980] ICJ Rep 3, 28 (International Court of Justice).

[48] Portugal v Australia, [1995] ICJ Rep 90, 102 (International Court of Justice).

[49] Nicaragua v US, [1986] ICJ Rep 14, 90 (International Court of Justice).

command the same. As, the facts and circumstances are different in each situation where humanitarian intervention has been carried out, there has to be an adherence of at least the basic principles of necessity and proportionality [50], which as can be seen on the number of cases elucidated above, was not followed. This is a pre requirement in all cases, where unilateral measures are taken, such as countermeasures[51] as well as the right of self- defense as enshrined in Art 51 of the Charter. Thus the same should be complied with in this regard as well.

Thus, as can be deduced from the above, that in light of conflicting state practice, and opinio Juris, it cannot be said at this point, that unilateral humanitarian intervention, is permissible under the charter, however, the fact in hand is indicative of the fact, that there is growing acceptance of humanitarian action taken, particularly when it is in furtherance of other founding UN principles, and thus, it is necessary, at this point to carve out certain sound legal norms governing the same, so that, misuse of this, can be better curbed.

3. CYBER-ATTACKS: A NEW FORM OF FORCE

Global interconnectedness brought about through linked digital information networks brings immense benefits, but it also places a new set of offensive weapons in the hands of states and non-state actors.

- Matthew.C. Waxman, Back to the Future of Article 2(4).

As the above sections have clearly elucidated, use of force as it existed in 1945 and as it exists today, has drastically transformed. The ambit of use of force is only widening due to the betterment of technology, the imbalance of power among states, and due to vast discrepancies in notions of democracy and human rights.[52] Subsequent sections of this paper, will aim to analyze the contemporary changes in the definition of

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[50] RY Jennings, *'The Caroline and McLeod Cases'* 32 American Journal of Int'l Law 82, 89 (1938); *Letter from Daniel Webster to Lord Ashburton on July 28 1842* 30 British and Foreign State Papers 195 (1843).

[50] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo CR 2009/32 (10 December 2009) 42, 50 and 54 (Oral Submissions of the United Kingdom, International Court of Justice).

[51] Article 51, Articles of State Responsibility.

[52] T M Franck, *Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States*, 64 American Journal of International Law 813 (1970).

force and weaponry, and whether or not it is time to expand the said definition, in light of growing usage of cyber-attacks.

3.1. The Cyber Domain as a Weapon

The Charter neither expressly prohibits, nor permits, the use of any specific weapon

- Opined by the ICJ in the Threat or Use of Nuclear Weapons judgment

In order to determine whether, there has been an evolution of the definition of force and that of an armed attack with respect to cyber warfare , the definition of a weapon or 'arms' is of paramount importance. While guns and weapons belonging to traditional combat fall under this category, the meaning of the word 'arm' took a paradigm shift after 9/11 when two commercial airplanes were used as weapons by a terrorist group that caused wide spread death and destruction.[53] Hence, the notion of weapons changed radically at that point and it was agreed that it was not the designation of design or conventional use of a device, but rather, the intent with which it is used that makes it a weapon in the domain of Article 51.[54].

There are two basic kinds of hostile actions that can be taken against a computer network, namely cyber exploitation and cyber-attack. Cyber exploitation uses cyber offensive actions to obtain information in an adversary's computer system or network.[55] The focus of this article however is on cyber-attack which has been defined by the National Research Council, whose breakthrough article in 2009 has given a strong foundation for the possibility of codification of cyber laws, as 'deliberate actions to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information and/or programs resident in or transiting these systems or networks'.[56] The existence of these cyber-attacks brings about the question, if the cyber domain can indeed, be attributed the status of a 'weapon' or not. Noted international jurist

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[53] *Armed Attack by Karl Zemanek*, Max Planck Encyclopedia of Public International Law October 2013, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241, last seen on 15/03/2015.

[54] Ibid.

[55] Anna Wortham, *Should Cyber Exploitation Ever Constitute a Demonstration of Hostile Intent That May Violate UN Charter Provisions Prohibiting the Threat or Use of Force?*, 64 Federal Communications Law Journal 643, 646 (2011).

[56] W. A. Owens, K. W. Dam & H. S. Lin, *Technology, Policy, Law, And Ethics Regarding U.S. Acquisition And Use Of Cyberattack Capabilities* I, 11 (National Research Council Eds., 2009).

Yoram Dinstein has answered aggressively in the affirmative by stating that 'cyber' must be looked upon as a weapon which is not in any way less than other weapons used in the course of an armed attack.[57] According to him, the test of a new weapon is not how intimidating it looksor how ingeniously the novel mechanism works, but what harm it is liable to produce.[58]

Even in the event that the cyber domain is not accepted as a weapon by itself, the ICJ's opinion on the Legality of Nuclear Weapons[59] has clearly held that the threshold of threat of force was deemed to be met when there existed a 'signaled intention to use force'. Thus, if an action is performed through a computer network with a specific intention of harming a state, person or adversary computer network, it constitutes an attack. This was further affirmed through the jurisprudence established by the ICJ in the Oil Platforms Case.[60]

3.2. Cyber-Attack and the Threshold of Force:

The logic behind this extension of the principle of non-use of force to reprisals has been that if use of force was made permissible not as a lone restricted measure of self-defence, but also for other minor provocations demanding counter-measures, the day would soon dawn when the world would have to face the major catastrophe of a third World War - an event so dreaded in 1946 as to have justified concrete measures being taken forthwith to eliminate such a contingency arising in the future.

\- *Former ICJ President Nagendra Singh*

In the *Armed Activities on the Territory of Congo* case, the ICJ has opined that a violation of Article 2(4) emerged from the magnitude and duration of one state party's actions.[61] Hence it can be reasonably inferred that a cyber-attack that causes damage or destruction to a great magnitude, should be considered to be a use of force as covered under

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[57] Supra 18, p.280.
[58] Ibid.
[59] Legality of the Threat or Use of Nuclear Weapons, [1996] ICJ Rep 226, 246(Advisory opinion, International Court of Justice).
[60] Islamic Republic of Iran v. United States of America, [2003] ICJ Rep 161(International Court of Justice).
[61] Democratic Republic of Congo v Uganda, [2005] ICJ Rep 168, 225 (International Court of Justice).

Article 2(4) of the charter.[62]Further, under the doctrine of strict liability, which has been laid out in the *Trail Smelter arbitration*award [63] and subsequently upheld by the ICJ[64], it could be argued that any cyber-attack that affects the critical infrastructure of a state is a violation of Article 2(4).[65]

An appropriate example of a cyber-attack in this category would be the 2008 Estonia cyber-attack. Estonia had a very active e-governance system, which enabled its citizens to vote online and further, a majority of bank transactions also happened through the World Wide Web.[66] In 2007, when the government decided to relocate a monument that commemorated Soviet troops and their contribution, Estonia was under a cyber-siege for weeks because of the activities of a certain group of hackers who allegedly had Russian allegiance.[67] The websites of the Department of Justice and Ministry of Foreign Affairs were shut down, the civilians who logged onto government websites had their computers frozen, the servers of two of Estonia's largest banks [68] and the emergency hotline number as well was temporarily suspended.[69]

Given that critical infrastructure was under attack for an extended period of time, this can be stated as a cyber-attack that arguably, in the opinion of the authors should qualify as a violation of Article 2(4). It is our opinion, that such an attack is synonymous to that of an armed attack if the same could unequivocally be attributed to Russia or another state party.[70] However, even though there was a strong suspicion that Russian hackersinsulated by the government of Russia were behind the

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[62] D. E. Graham, *Cyber Threats and the Laws of War,* 4 Journal of National Security Law and Policy 87, 91 (2010); MatthewC.Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 Yale Journal of International Law 421, 436 (2011); *Cyberwarfare and International Law 2011 by Nils Melzer*, UNIDIR Resources, available at http://www.unidir.org/files/publications/pdfs/cyberwarfare-and-international-law-382.pdf, last seen on 15/04/2015.

[63] United States v. Canada,3 U.N. Rep. Int'l Arb.Awards 1905 (1941, Arbitral Tribunal).

[64] UK v Albania, [1949] ICJ Rep 15 (International Court of Justice).

[65] Walter Gary Sharp, *Cyberspace & the Use of Force*, 129-31 (1st ed., 1999).

[66] Marc Olivier, *CYBER WARFARE The Frontline of 21st Century Conflict*, 20 LBJ Journal of Public Affairs 23, 27 (2012).

[67] Ibid.

[68] Titiriga Remus, *Cyber-attacks and International law of armed conflicts; a "jus ad bellum" perspective*, 8 Journal of International Commercial Law and Technology 179, 185 (2013).

[69] Supra 67.

[70] Ibid.

attacks, it could not be linked to the State of Russia directly.[71] This lack of attribution of a wrongful act makes pinning responsibility with respect to a cyber-attack extremely difficult and is essentially the reason, why it is hard, to pin liability on a state for the same. Thus, it is all the more essential that certain mechanisms must be set in place, for attributing liability on the perpetrating state.

3.3. Cyber and Armed attacks: A comparative perspective:

Stuxnet has increased the likelihood that malware authors, be they nation-states or smaller entities, will perpetrate similar attacks in the future and it has proven such attacks possible, raised awareness of them and perhaps interest in them among malicious entities.

- *Paul Mueller and Babak Yadegari in 'The Stuxnet Worm'*

Another method of identifying, if there is indeed a requirement to expand the threshold for use of force encompassing a cyber attack, is to compare the consequence of the cyber-attack to a traditional attack.

If the intent behind the cyber-attack was to cause death or destruction and if the consequence of that attack is equivalent to that of a kinetic attack, it should be deemed to be a violation of Article 2(4).[72] The importance of this approach is that the nuances of the impugned cyber-attack involving jurisdiction, method of attack and nature of device would be eliminated and the Charter can directly be utilized to pin liability in such a situation.[73]

An example to highlight its importance is the Stuxnet virus, which was used by the United States of America and Israel against the Iranian Republic in 2010. The virus took control of the Natanz nuclear plant and caused almost one fifth of the nuclear centrifuges to spin out of control and self-destruct.[74] Though this was a cyber-attack, the effect it had on the Iranian nuclear reactor was similar to the 1981 Israeli airstrike that destroyed a partially constructed nuclear reactor in

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[71] Supra 67.
[72] Supra 8.
[73] I Brownlie, *International Law and the Use of Force,* 362 (1st edn., 1963).
[74] Reese Nguyen, *Navigating Jus Ad Bellum in the Age of Cyber Warfare*, 101 California Law Review 1079, 1082 (2013).

Baghdad.[75] Assuming that, the Stuxnet virus was a use of force, it is also imperative to analyze if it did amount to an armed attack to which the State of Iran could have responded under Article 51.

The attack used a virus to shut down a nuclear facility and in doing so; it invaded the territorial integrity of Iran.[76] Further, while deciding the threshold of armed conflict, the 'scale and effect test' that draws the line between a use of force and armed attack, which was established by the ICJ in the Nicaragua case must also be considered.[77] In this test, it has been opined that there is a *de minimis* threshold between an armed attack and use of force.[78] Thus, even small scale bombings that result in destruction and loss of lives are capable of being armed attack under Article 51.[79] On the other hand, firing a large missile capable of huge destruction in an unpopulated wilderness may amount to use of force but does not rise to an armed attack due to the lack of damage to people and property.[80]

Thus, from the above, an inference can be drawn that, in the cyber domain, the equivalent of firing a missile into wilderness would be the cyber-attack on Estonia which caused inconvenience and rose to the use of force but in the Stuxnet case, there was actual destruction of property due to a cyber-attack which made it an armed attack. Thus, it follows, that a cyber attack, should come under the purview of Art 2(4), and based on itsintensity,it may evolve to an armed attack from use of force.

3.4. The North Korean Cyber-Attack of 2014:

The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multidimensional issues involved.

-Opined by the ICJ in the Aegean Sea Continental Shelf case

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[75] *1981: Israel bombs Baghdad nuclear reactor*, British Broadcasting Corporation, available athttp://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm, last seen at 10/03/2015.

[76] Irving Lachow, *The Stuxnet Enigma-Implications for the Future of Cybersecurity*, 11 Georgetown Journal of International Affairs 118, 123 (2011).

[77] Nicaragua v US, [1986] ICJ Rep 14, 220 (International Court of Justice).

[78] Ibid.

[79] Yoram Dinstein, *War, Aggression and Self-Defense*, 193 (5th edn., 2001).

[80] Supra 8, at 543.

In November 2014, a group of individuals calling themselves '*The Guardians of Peace*' hacked into Sony files and leaked confidential data and emails belonging to the company, holding them ransom to prevent and threatened to bomb theatres which release the Hollywood movie, 'The Interview'.[81] The government of USA attributed the attack to North Korea and they believed North Korea had crossed a 'threshold' as the act was committed with the aim of causing financial destruction to a US company.[82]

This 'threshold' can be examined by a test propagated by the eminent cyber warfare scholar Michael. N. Schmitt, which identifies six elements that establish the threshold of use of force for a cyber-attack which are namely: [83]

i. severity (degree of property damage and personal injury)
ii. immediacy (manifestation of negative consequences)
iii. proximity (closeness of the act and its consequences)
iv. invasiveness (the extent of territorial penetration)
v. measurability (quantifiable damage or consequences)
vi. presumptive legitimacy (whether the act was legal under domestic or international law)

The severity of the attack did not cause the state of USA any damage, but caused the multinational corporation of Sony immense financial loses. The immediacy of the attack is established as the leak was due to the hack and the economic loss was suffered because of the cyber-attack thus establishing proximity. With respect to measurability, the loss of revenue from the movie release and the loss of profits due to the leaked confidential files can be ascertained while the act of hacking and leaking data was illegal in itself.

Thus on all six counts, it can be reasonably deduced that the cyber-attack by North Korea was a use of force.

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[81] *Sony cyber-attack: North Korea faces new US sanctions*, British Broadcasting Corporation, available at http://www.bbc.com/news/world-us-canada-30661973, last seen on 15/03/2015.

[82] *Condemning Cyber-Attack by North Korea - Press statement of John Kerry on 19 December 2014*, U.S Department of State, available at http://www.state.gov/secretary/remarks/2014/12/235444.htm, last seen on 1/2/2015.

[83] M.N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 Columbia Journal of Transnational Law 885, 914-15 (1999).

3.5. Response to a Cyber Use of Force Not Amounting to an Armed Attack under the Law of State Responsibility:

It is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.

- Sir Robert Ago

In the event the attack does not amount to an armed attack for which self-defense under Article 51 is possible, the injured state can invoke the responsibility of the perpetrator state through the internationally wrongful act.[84] The injured state can take retortions, which are essentially, unfriendly but lawful acts against the other state.[85] An example would be an injured state shutting down the servers of the perpetrators in case of a cyber-attack.[86] Following this, the injured state can take countermeasures until the perpetrator state ceases with its wrongful act.[87] The countermeasure should however be proportionate[88], reversible and temporary[89] in nature. Its purpose must be to induce the state conducting the cyber-attack to cease its activity and the countermeasure must end immediately after the injured state's purpose has been achieved.[90] After the North-Korean cyber-attack, USA took valid countermeasures by imposing sanctions on Korea.[91]

Another question that arises, is in the event that a cyber-attack is a use of force or armed attack, should the response by the injured state be

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[84] Article 1, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[85] Denis Alland, *The Definition of Countermeasures*, 1131 in *The Law of International Responsibility* (James Crawford, Alain Pellet, and Simon Olleson, 1st ed., 2010).

[86] Supra 8, at 555.

[87] Article 22, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[88] Article 50, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001; US v France [1978] 18 417, 433 (International Arbitration Tribunal); Hungary/Slovakia [1997] ICJ Rep 7, 27 (International Court of Justice).

[89] Article 49, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[90] Article 52, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[91] *Exectuive Order of the President imposing additional sanction in respect of North Korea,* Barack Obama, United States Government, available at https://www.whitehouse.gov/the-press-office/2015/01/02/executive-order-imposing-additional-sanctions-respect-north-korea, last seen on 23/12/2014.

through the cyber domain or can it use kinetic methods as well? The legal opinion on this issue is bifurcated with a few jurists believing that a state can respond to a cyber-attack with conventional and traditional weapons[92] while others believe that the response should only be through the cyber-domain.[93] While the cyber-activities of certain state actors can be examined through existing treaty and customary law, there is a need to evolve a *lex specialis* framework for cyber-law as there are nuanced subjects in international law that find a place in this dimension like non-state actors, anticipatory and interceptive self-defense, espionage and terrorism. Given the wide ambit of cyber-attacks and the all-pervasive presence of the cyber-domain, it is in the interest of the world community to evolve the definition of use of force and armed attack as this would be the first step towards shaping a universal doctrine regarding cyber-attacks and consequences arising from the same.

4. Conclusion – The Confluence Between Cyber Attacks and Humanitarian Intervention: The Way Forward

The cyber domain is a creature of contradiction. While it connects the world community and provides a platform for countries to govern their citizens through the internet, it is highly susceptible and vulnerable to attacks. It has become a necessity and its indispensable nature exacerbates the nature of problems associated with it. There is a requirement to codify the evolution of Article 2(4) due to the intricate interconnection of international law issues related to it. The expansion of the concept of use of force would lead to an altogether different threshold to prove an armed attack. This in turn would influence the notion of self-defense and hence alter the requirements of proportionality and necessity required to legitimize self-defense. Controversial issues in international law which are debated among jurists like anticipatory self-defense would gain a different character when associated with the cyber domain. Beyond these transformations, humanitarian law would be altered as well. The notion of war would change and dependent concepts like civilian objects and belligerent occupation would also have to evolve.

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[92] Supra 18, at 280.

[93] Marco Roscini, *World Wide Warfare - Jus ad Bellum and the Use of Cyber Force*, 14 Max Plank Yearbook of International Law 85, 120 (2010).

Apart from this, there is a requirement for a specialized United Nations international cyber warfare committee (which has been recommended to the UN General Assembly by the Republic of Chad) to monitor the growth and development of the cyber domain and threats associated with the same. Here is further a probability, that with this maturity in weaponry, the same weaponry could be used to invade territories with alleged humanitarian perspectives. This would be largely possible at this point, due to the catastrophic impact, and complete lack of governance, which makes it all the more necessary to cater to the regulation of cyber force as well as humanitarian intervention.

One thing that is most definitely common between the two is an imbalance of states. This imbalance is a result of other certain technological superiority, or certain political superiority, as the case may be. As far as unilateral humanitarian intervention is concerned, it was in 1986, in the *Nicaragua* judgment that the ICJ ruled, that humanitarian intervention was not custom. Times have changed since then, and unilateral humanitarian intervention has increased since then, with the *Kosovo* case in particular. This is a perfect case of imbalance, where an essentially west dominated organization took it upon itself to ensure peace and security, thus it is time to stop ignoring the same. The authors admit that unilateral humanitarian intervention can at no instance be held to be legal even today, but maybe, it is time for the UN to act more immediately, in times of dire need, where there are gross human rights violations, and to utilize the collective security measures, accorded to it under the charter more effectively, so as to avoid these circumstances. There has to be a line drawn, which will not result in the crumbling of territorial integrity of states. One way to ensure this would be a special organization for force under the auspices of the UN or according the General Assembly powers in times of extenuating circumstances, so that the 'veto' may be surpassed.

The result of neglecting the issue of cyber-attack and probable cyber warfare along with unilateral humanitarian intervention would render the object and purpose of the United Nations, which is to preserve and protect peace, completely void.