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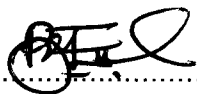
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MUZENGA KELVIN

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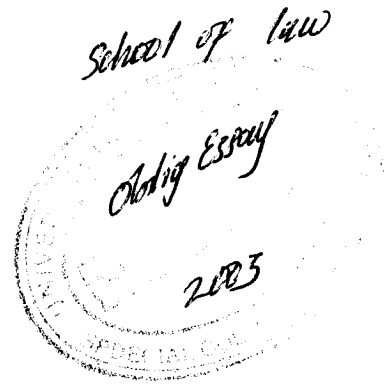
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THE LEGALITY OF THE US- LED WAR AGAINST IRAQ

BY



MUZENGA KELVIN

A directed research paper submitted to the University of Zambia Law faculty in partial fulfillment of the requirements for the award of the Degree of bachelor of laws (LLB).

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DEDICATION

This paper is dedicated to Monica, and the entire innocent lives, which were lost in pursuance of an illegal invasion of Iraq by the coalition forces.

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"Blessed are the peacemakers: for they shall be called the children of God." Mathews 5 v 9.

ABBREVIATIONS

AJIL	American Journal of International Law
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ILC	International Law Commission
SC	Security Council
UK	United Kingdom
UNMOVIC	United Nations Monitoring, Verification and Inspection Council
UNO	United Nations Organisation
UNSC	United Nations Security Council
US	United States

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CHAPTER ONE

1.1.0 INTRODUCTION

The struggle for international organisation is as old as man himself. Geologists do not agree on the age of the earth nor do anthropologists agree on how long man has been on it. In either case however, the span of time involved is beyond human comprehension. What is clear to us in modern times is that we live in a world which could easily be encircled in less time than it took centuries ago. Even then, the need for international or intercommunal understanding was and still is indispensable, as every part of it is dependant in some respect or other on every other part. The explosion of atomic devices anywhere can endanger the very existence of life itself in any part.

The existence of interests common to the peoples and governments of various states and requiring some concerted action on the part of these governments was recognized from the moment of the emergence of the modern state system. It is, therefore, not surprising that the Thirty Years War (1618-1648) which marked, according to leading historians,¹ the birth of the modern state system also witnessed the publication of the first systematic treatise on international law. Hugo Grotius' *De Jure Belli et pacis* was an important landmark in the

¹ See Arthur Nussbaum, *A Concise History of the Law of Nations* rev. ed (New York: the Macmillan co.1954)

development of a body of rules and principles which sovereign states would accept as binding upon them in their relations with each other.²

Today, with the growth of economic and social interdependence and recognition that certain common human needs can only be met by organized intergovernmental corporation, have brought some modification or alleviation of the excessive tendency toward world political fragmentation. Goodrich goes further to state that:

...It must be recognized that (1) the growing belief that war would result from unrestrained competition of nation state and (2) fear of the economic and social consequences of war, have chiefly motivated efforts to organize international political relations on an orderly and stable basis.³

It is common knowledge therefore that before the emergence of the First World War, the need for some limitation of the right to engage in war and for constructive cooperation between governments in the larger interest of peace and stability was recognised. Professor Starke re-echoes this by stating that:

To settle international disputes as early as possible, and in a manner fair and just to the parties involved, has been a long-standing aim of international law, and the rules of procedure in this connection are partly a matter of custom and practice..⁴

² Goodrich, The United Nations, 1959. p.3

³ Ibid at p. 7

⁴ International law, 1989, 10th edn p.435

It should be stressed that the legitimacy of the user of war as an instrument of national policy was admitted in principle. Efforts made to outlaw war were partial and marginal in character.⁵ Moreover, for the most part, international law and practice assumed the legality of war and concentrated rather on reducing the occasions for its use and regulating the manner of its employment.⁶

Amidst all these somewhat shoddy efforts, the events of the late summer of the fall of 1914 saw within it the emergence of the First World War. After this war, the international community decided to come up with an international organisation charged with the maintenance of international peace and security. It became clear that states dreaded the recurrence of the terrors and economic repercussions of the 1914 war. In pursuance of this end therefore, states adopted the Covenant of the League of Nations.⁷ The underlying principle was to achieve international peace and security.

However, the failure of the League sanctions against Italy in 1935 and 1936, accompanied by the rearmament of Germany, and in particular by the remilitarization of the Rhineland in 1936, made it morally certain that the peace loving peoples of the world, unless they were to surrender to the forces of

⁵ See one of the Conventions drafted and approved at the second Hague Conference of 1907 outlawed the use of armed force in the collection of contract debts.

⁶ See Leonard Woolf, *International Governments*, 1916, pp. 24-63

⁷ Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, 1946, p.3

aggression without resistance, would sooner or later have to take up the challenge again, with bloodshed and wanton destruction as the inevitable consequences.⁸ Consequently, the challenge was unfortunately accepted in 1939 such that by 1941 the war had spread to all continents and all the major powers of the world were involved.

At the end of this war, which brought with it untold sorrow to mankind, exhausted states examined the weaknesses of the League of Nations and thence from adopted the Charter of United of the Nations of 1945, which established the United Nations Organizations (UNO).

It is clear from the Charter that the UNO is charged with the maintenance of international peace and security, and to that end, to take effective collective measures for the preventive and removal of threats of peace, to bring about by peaceful means settlement of international disputes or situations which might lead to a breach of the peace and that the use of force should at all times be a last resort and has to be sanctioned by the United Nations Security Council.⁹

⁸ Ibid at p. 4

⁹ Article 1(1) of the United Nations Charter.

This paper will in the next chapter critically analyze the legality of US led war against Iraq¹⁰; Chapter three will ascertain the role and relevance of the United Nations Organization; Chapter four will demonstrate that the arrogance of the George Bush and Tony Blair ed administrations possesses a greater risk of erosion to the international law principle of sovereign equality and territorial integrity of state; chapter five will recommend the prosecution of the perpetrators of the illegal war; and finally, chapter six will seek to summarize the paper and make recommendations.

¹⁰ Of 11th March 2003

CHAPTER TWO

2.0.0 THE LEGALITY OF THE WAR ON IRAQ

2.1.0 INTRODUCTION

The relation of war to the international system was stated by W.E. Hall in the words "international law has no alternative but to accept war independently of the justice of its origin, as a relation which the parties to it may set up, they choose and busy itself in regulating the effect of the relations."¹¹ This no doubt represented the position of the law at the beginning of the 20th century. Paradoxically, at the same time that international law condoned war it controlled resort to armed force short of war by the law of reprisals and governed its conduct by the laws of war.¹²

In the quest for a more centralized and effective system for the regulation and general restriction of the use of force as a means of resolving international disputes, states adopted the League of Nations in 1919 following the disastrous war of 1914. It became apparently clear from the events prior to the beginning of the Second World War that the league system failed to preserve international peace and security. Most writers have advanced many reasons as to the cause of

¹¹ (ed) International Law, 8th edn p. 82

¹² See Harris, Cases and Materials on International law, 1998, 5th edn p. 897

the failures of the league.¹³ It would seem, however, that the specific failures of the 1930s were not due, so much to the absence of, or the failure to maintain a balance of power as to the short sightedness, the confusion, and the political impotence of the governments of these countries which had the power and a clear interest in using it to keep the peace, but which failed to take advantage of the opportunities presented. Goodrich states that "it was not the assumptions that were wrong or the system that was defective; rather, it was a human failure, the inability of peoples and governments to develop and carry out those policies which their best interests in the not-so-long run required."¹⁴

After the Second World War, a much more effective system is embodied in the Charter of the United Nations set up in 1945. Article 2 (4) of the United Nations prohibits the use of force, save for the two main exceptions under Article 51 and Chapter VII.

Iraq tested the UN Charter system in a way complementary to that associated with the Kosovo controversy. The Iraq test was associated with the impact of the September 11 attacks and the challenge of mega-terrorism.¹⁵ The initial American military response to the al Qaeda attack, and continuing threat was directed at Afghanistan, a convenient territorial target because it both seemed to

¹³ see Gerhart Niemeyer, "The Balance-Sheet of the League Experiment" International Organization, VI (1952) pp537-558

¹⁴ The United Nations, 1966, 7th edn pp. 17-18

¹⁵ A discussion of this challenge and the challenge and the US response is the theme of Richard Falk, The Great Terror, and War 2003.

be the nerve centre of the terrorist organization and a Taliban regime that allowed the al Qaeda, to operate extensive terrorist training bases within its territory and they lacked some crucial attributes needed for full membership in the international society, including the failure to obtain widespread diplomatic recognition. The waging of the war to supplant the Taliban regime and destroy the al Qaeda base operations in Afghanistan was widely accepted by the entire spectrum of countries active in the world politics, although there was only the most minimal effort by the U.S. Government to demonstrate that it was acting with UN framework.¹⁶

When the al Qaeda responsibility for the September 11 was amply demonstrated, the prospect of future attacks seemed great and possibly imminent, and the American capability to win the war at a proportional cost seemed convincing.

It must be observed here that there was no significant international opposition to the American initiation and conduct of the Afghanistan war, and varying levels of support from all America's allies. International law was stretched in these novel circumstances to provide a major state with the practical option of responding with force to one important source of mega-terrorist warfare.

¹⁶ Richard Falk, War Prevention and the UN, counterpunch, July 2, 2003.

However, when the Iraq phase of the September 11 response beyond Afghanistan began to be discussed by American leaders, most reactions around the world were highly critical, generating a worldwide peace movement dedicated to avoiding the war and a variety of efforts by governments to urge an alternative to war.¹⁷ In spite of this opposition and criticisms against the use of force against Iraq, the United States and the United Kingdom proceeded with impunity to unleash their military might on Iraq.

In the aftermath of the Iraq war, the question posed, in the form of a challenge to the United Nations Security Council by President George W. Bush, in the Course of his September 11, 2002 speech to the General Assembly: "will the UN serve the purpose of its founding, or will it be irrelevant?",¹⁸ seems to have at least two answers. The answer of the US government would suggest that the UN turned out to be irrelevant due to its failure to endorse recourse to war against Saddam Hussein. The answer to those who opposed the war is that the United Nations Security Council (UNSC) served the purpose of its founding by its refusal to endorse recourse to a war that could not be reconciled with the UN Charter and international law in general.

This chapter is therefore mainly dedicated to the ascertainment of the legality of the attack on Iraq by US and UK, the justification for so doing, and will to a

¹⁷ See Thaliff Deen, "Lawyers, Doctors warn UN over US attack on Iraq," UN inter press News Agency, February 12, 2003.

¹⁸ President's Remarks at the UN General Assembly "sept. 12 2003, white house text

minimal extent consider the general position of international law with regard to the use of force.

2.2.0 LEGAL ISSUES OF THE WAR

At international law, no issue is more important than the control of unauthorized violence, or what Professor John Norton Moore¹⁹ referred to as the maintenance of minimum public order: that is, an orderly world in which change takes place by negotiation, by consensual arrangement, and not by unauthorized coercion. This is what is called *jus ad bellum*, that is, the law concerning the initiation of coercion; when is it lawful to engage in the use of force?

War as professor Starke²⁰ puts it in its most generally understood sense was the contest between two or more states primarily through their armed forces, the ultimate purpose of each contestant being to vanquish the other and impose its conditions of peace.

The widely accepted definition of war, is that by W.E. Hall, which was judicially approved in the case of *Driefontein Consolidated Gold Mines v Janson*²¹.

When differences between states reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which in the combatant may use regulated violence against

¹⁹ see "international and the use of force", Proceedings from the federalist Society Conference of May 2000 [www.fed-soc.org]

²⁰Supra note 5 at p.527

²¹(1900) 2Q.B. 339

each other, until one of the two has been brought to accept such terms as his enemy is willing to grant.

Following the invasion of Iraq by the UK and the US, a lot of debate was sparked as to the legality of this invasion. Thirty-one Canadian professors of international law at 15 law faculties declared, in an open letter issued on Wednesday, just before US president Bush announced that the war had commenced, that the US-led coalition's war against Iraq was illegal. They stressed the fact that the attack would be a fundamental breach of international law and seriously threatens the integrity of the international legal order that had been in place since the end of the Second World War.²² The immediate issue that comes to the fore is to briefly assess the position of international law with regard to the use of force.

2.2.1 LEGITIMATE USE OF FORCE

At international law, there is a general ban on the threat or use of force. Article 2 paragraph 4 of the Charter of the United Nations provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the charter." The International Law Commission in the course of its work on the codification of the law of treaties expressed the view that "the law of the charter concerning the prohibition of the use of force in itself

²² Henry Michaels "Canadian Law Professors Declare US -Led War Illegal" 22 March 2003 [www.wsw.com]

constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”²³

The International Court of Justice in the case of *Nicaragua v United States*²⁴, with regard prohibition on the use of force, referred to the widely held view that this principle was *jus cogens*, in other words, a peremptory norm of international law from which states cannot derogate.

The development of this fundamental principle in international law can be traced to a period shortly after early 1928 under the *Briand-Kellogg Pact*²⁵ the member states parties declared in the most categorical terms renouncement of recourse to war for the resolution of international controversies and make it absolutely illegal the use of war in pursuit of national policies.

A further development of this principle is evident in the *declaration on the Inadmissibility of intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*,²⁶ a General Assembly Resolution which declares in part that:

No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal affairs of any other state. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the

²³ Ed.Y.B.ILC, 1966,II p.247

²⁴ (1986) ICJ Reports 14, at para 190

²⁵ known as the General Treaty of Paris for the Renunciation of War of 27 August 1928

²⁶ General Assembly resolution 2131(xx) Dec.21 1965, (1960) 60 A.J.I.L. 662

state or against its political, economic and cultural elements, are not condoned. (Art. 1)

All this confirms the findings of the international law commission that the prohibition of the use of force in international law has evolved to be a fundamental principle recognized by civilized states from which states cannot derogate. Does this therefore entail that there is no legitimate use of force in international law? Certainly not.

There are basically two ways in which force may be used legitimately in international law. This is to be found in Articles 51 and Part VII of the Charter of the UN. Article 51 provides explicitly that:

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 at any time such action as it deems necessary in order to maintain or restore international peace and security.

It is clear also that from Articles 39, 41, 42 and 44 of the Charter that the Security Council is mandated, in its fundamental role of preservation of international peace and security, to use force where other measures would be inadequate or have proved inadequate.

It is prudent therefore to conclude that the position in international law with regard to the use of force is restricted only in the exercise of the right to individual or collective self-defense in the face of an armed attack and upon express authorization of the United Nations Security Council.

What then is the justification for the invasion of Iraq by the US-UK led forces?

2.3.0 JUSTIFICATION FOR THE WAR

There are two basic arguments that the coalition forces have advanced justifying the invasion of Iraq. The first one is that the Security Council resolutions 1441 by implication and necessary interpretation read together with Resolution 687, authorized member states to resort to the use of force and compel the compliance of Iraq to many resolutions made by the Security Council.²⁷ The other reason for proceeding immediately against Iraq was articulated in the form of a claimed right of pre-emptive warfare, abstractly explained as necessary conduct in view of the alleged interface between weapons of mass destruction and the extremist tactics of the mega terrorists.²⁸ An evaluation of these claims will now be turned to, in relation to the position of international law.

²⁷ Supra, note 28

²⁸ Initially fully depicted in "remarks by the president at 2002 Graduation Exercise of the US military Academy," June 1 2002; given a more enduring and authoritative status by the emphasis in the official white house document THE NATIONAL SECURITY STRATEGY OF THE USA, September 2002, esp chapter vi pp.13-16

2.3.1 SECURITY COUNCIL RESOLUTIONS 1441, 678 AND 687

The US and British governments have claimed that their invasion is justified by UN SC Resolution (SCR) 1441 and two old Security Council Resolutions (SCR) authorizing force to end the Iraq occupation of Kuwait and setting out the terms of the cease-fire after the Gulf war of 1991. Security Council resolution 1441 sponsored jointly by the UK and the US states at paragraph 1 that the SC acting under Chapter VII of the UN charter:

Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolutions 687 (1991), in particular through Iraq's failure to cooperate with the UN inspectors and IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 678.

Consequently, SCR 1441 offers Iraq a final opportunity to comply with its disarmament obligations and sets up what is described at paragraph 2 as:

An enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the council.

Paragraphs 4, 11 and 12 of the SCR 1441 deal with the event of non-compliance by Iraq with the terms of the resolution which would be considered as a further material breach which would be reported to the council for assessment and paragraph 11 directs the executive chairman of the United Nations Monitoring, verification and inspection Council (UNMOVIC) and the director-general of the International Atomic Energy Agency (IAEA) to report to the council any failure to

comply by Iraq and by virtue of paragraph 12 the SC decides to convene immediately upon receipt of a report in order to consider the situation and the need for full compliance with all the relevant council resolutions in order to secure international peace and security.

Colin Powell²⁹ is reported as saying:

The United States believes because of past material breaches, current material breaches and new material breaches there is more than enough authority for it to act...I can assure you that if he doesn't comply this time we are going to ask the UN to give authorization for all necessary means, and if the UN isn't willing to do that, the United States with like-minded nations will go and disarm him forcefully.

Jack Straw meanwhile, stated on 10th November 2002 that: "military action is bound to follow if Saddam Hussein does not fully cooperate with the terms of this resolution." Furthermore, in response to MPs questions on the resolution in the House of Commons on 7th November, 2002, Mr. Straw stated :

I do not want to anticipate what will happen if there is a breach except to say that although we would much prefer decisions to be taken within the SC, we have always made it clear that within international law we have to reserve our right to take military action, if that is required within the existing charter and existing body of UNSC Resolutions, if for example, a subsequent resolution were to be vetoed.

The question that arises from the statements above therefore is, to what extent the UK and the US can rely on the existing body of UNSC resolutions?

²⁹ Daily Telegraph, 11 November 2002.

EXPRESS AUTHORISATION

It is clear that SCR 1441 does not expressly authorize member states to use force in the event of non-compliance. The first draft circulated at the UN by UK and US sought³⁰ express authorization but was rejected by other Security Council members. It contained the following paragraph:

The Security Council ...determined to secure full compliance with its decision, acting under chapter VII of the charter of the UN.....
Decides that false statement or omissions in the declarations submitted by Iraq to the council and the failure by Iraq at any time to comply and cooperate fully in accordance with the provisions laid out in this resolution, shall constitute a further material breach of Iraq's obligations and that such breach authorizes members states to use all necessary means to restore international peace and security in the area.³¹

This paragraph was highly controversial, receiving the notable opposition of Russia and France, two of the five permanent members of the SC. As a result, on 23 October 2002, the UK and US presented a draft to the SC, which had been modified to remove any reference to authorization to 'member states to use all necessary means (now paragraph 4 of SCR 1441).

It is extraordinary for the UK and US to seek to rely on SCR 1441 as an authority force against Iraq. This is because after the first draft which provided for such authorisation was rejected, the two states made changes to it, which removed

³⁰ See the opinion by Rabinder Singh and Charlotte Kilroy, "in the Matter of the Potential Use of Armed Force by UK against Iraq and in the matter of reliance for that use of Force on the UNSC resolution 1441 of 15th nov.2003 [www.publicinterestlawyers.co.uk]

³¹ Ibid

such kind of 'automaticity' and 'hidden triggers'. So, as the Resolution stands, this authorisation is lacking.

Michael Mandel, a professor of law at York University in Toronto, stated categorically that, "Resolution 1441 makes a lot of demands on Iraq many completely unreasonable, but it does not say or even imply that any state can attack the country for failing to comply with them. It says that it is the responsibility of the SC as a body to decide whether and to what extent there has been compliance and what to do about it and the SC can only lawfully act when nine of the 15 members vote in favour and none of the five permanent members exercises its veto."³²

If America and Britain, 'big powers' for that matter, have no insight as to what a specific authorization for war looks like, their lack of understanding should no doubt be cleared by taking a look at UNSC Resolution 678 of November 29, 1990 which launched the gulf war. It specifically stated that it "authorizes member states ...to use all necessary means" in order to enforce the Security Council's resolutions on Kuwait. This is the huge missing ingredient from Resolution 1441.

It must be noted, that there were some reports which suggested that government officials asserted the fact that there was no language in SCR 1441

³² Toronto star Newspaper of April 4, 2003, Friday

explicitly ruling out the use of force by the US or UK, without a further Security Council Resolution, means that they are not 'handcuffed' by the SCR 1441 into obtaining such a resolution.³³ Jules Lobel and Michael Ratner address a similar argument adopted by the US in relation to Resolution 1154:

The failure to adopt a resolution opposing US action cannot be deemed dispositive when any such resolution would have been fruitless in the face of US and UK veto power. Still the Security Council did the next best thing; it adopted a resolution that did not provide the US with authority it sought and members stated their understanding that the resolution was intended to preclude any such authority.³⁴

For the reason set out above, the reliance of the UK and US on Security Council Resolutions is flawed and as a consequence their attack on Iraq without a further Security Council Resolution is a violation of the purposes of the UN Charter set in Article 1, and Article 2(4).

Furthermore, as pointed out above it is only the Security Council, which has the power under Article 39 to determine whether there was need to take action under Articles 41 and 42.

2.3.2 THE RIGHT OF SELF DEFENCE

³³ see Anton La Guardian, 11 November 2002 in the Daily telegraph

³⁴ Bypassing the SC: 'Ambiguous authorizations to use force, Ceasefire and the Iraq Inspection Regime' (1999) AJIL p. 124

As it has already been alluded to, the UK and the US's main justification for proceeding immediately against Iraq was articulated in the form of a claimed right of pre-emptive warfare, as it was alleged that there is a connection between the weapons of mass destruction and the extremist tactics of mega-terrorists.³⁵ It was argued that it was unacceptable in these circumstances for the United States to wait to be attacked, and that pre-emptive warfare was essential to uphold the security of the 'civilized' portion of the world. Bush in his talk at the United Nations said "we cannot stand by and do nothing while dangers gather."³⁶

The right of pre-emption is an extension of the right of self-defence as stipulated in Article 51 of the UN Charter. The issue that arises at this stage is whether the right to pre-emptive warfare exists in international law?

There is disagreement amongst scholars in international law as to the scope of the right of states to self-defence, concerning Article 51 of the UN Charter. Those who have adopted a narrow interpretation of this article emphasize that this right is only available to a state when an "armed attack" occurs. Kelson³⁷ reads Article 51 as meaning that for UN members the right of self-defence "has no other content than the one determined by Article 51." It is argued that anticipatory self-defence does not exist because of the use of the words "an armed attack

³⁵ Supra, note 28

³⁶ See supra, note 18

³⁷ The Law of the United Nations (1950) p. 914

occurs" in Article 51. Brownlie takes the argument further that "the ordinary meaning of the phrase precludes action which is preventive in character."³⁸

Those who support a wide right of self-defence going beyond the right to respond to an armed attack on a state's territory argue, first, that Article 51, through its reference to 'inherent' right to self-defence, preserves the earlier customary international law right to self-defence. The Charter does not take away pre-existing rights of states without express provision. Secondly, they argue that at the time of the conclusion of the Charter there was a wide customary international law right of self-defence, allowing the protection of nationals and anticipatory self-defence.³⁹

In the light of these arguments, what then is the position of international law? Is the right to pre-emptive attack included in the right to self-defence engraved in Article 51 of the Charter?

Christine Gray in *International Law and the Use of Force* states that the right to self-defence is an exception to the prohibition of the use of force in Article 2(4) and therefore should be narrowly construed.⁴⁰ It follows therefore that any ambiguities in interpretation should be resolved in favour of the prohibition.

³⁸ International Law and the Use of Force by States (1963) p. 275

³⁹ see Bowett, Self defence in International Law (1958) pp. 188-192

⁴⁰ (2000) p. 86

Henkin as quoted in *Harris's cases and Materials on International Law*⁴¹, argues against the right of anticipatory self-defence as follows:

Nothing in ...its drafting...suggests that the framers of the charter intended something broader than the language implied..... It was that mild, old-fashioned second World War which persuaded all nations that for future national interests will have to be vindicated, or necessary change achieved as well as can be by political means, but not by war and military self-help. They recognized the exception of self-defence in emergency, but limited to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication....It is precisely in the age of the major deterrent that nations should not be encouraged to strike first under the pretext of prevention or pre-emption.

The need to keep self-defence within strict limits has also been echoed by Brierly⁴² when he stated that since aggressive war has been declared an international crime, nearly every aggressive act is sought to be portrayed as an act of self-defence. He further states that the right of self-defence was pleaded at Nuremberg and Tokyo on behalf of the Germany and Japanese major war criminals and rejected by the war crimes tribunals.⁴³

The position is made clearer by the decision of the International Court of Justice in the *Nicaragua case* when it stated that "in the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack."⁴⁴ "Armed attack" was defined in relation to Article 3 of the

⁴¹ (1998) 5th edn, p. 897

⁴² The Law of Nations, 'An Introduction to the International Law of Peace (1963) 6th edn., p. 406

⁴³ Ibid

⁴⁴ (1986) ICJ Reports, p. 14 at para.195

*General Assembly Resolution on the Definition of Aggression*⁴⁵ as including not merely action by regular armed forces across an international border, but also the sending, by or on behalf of a state, of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state with such gravity as to amount to *inter alia* an armed attack conducted by regular forces, or its substantial involvement therein.

It is clear from the *Nicaragua case* that the right of self-defence is only available when there has actually been an armed attack meeting the requirements set out above. The international commission of Jurists and other international law experts have categorically condemned the war on Iraq as a banned war of aggression and argued further that the right of self-defence cannot be relied upon as the rule governing self-defence applies only when an enemy attack has already taken place or is imminent.⁴⁶

Even if we were to agree with a wider interpretation of Article 51 and that it preserves the right to self-defence as it existed in customary international law, states agree and emphasise the fact that self-defence must be necessary and proportionate. The requirements of necessity and proportionality are often traced back to the 1837 *Caroline incident*, involving a pre-emptive attack by the British forces in Canada on a ship manned by Canadian rebels, planning an attack from

⁴⁵ Resolutions 1314 (xxix) 14 Dec. 1974, 29th Sess. Supp. 31

⁴⁶ See article by Peter Schwarz, 'International Legal experts Regard Iraq War as Illegal', 26 March 2003, the world's socialist website.

the USA.⁴⁷ Following this incident, the American secretary of state Daniel Webster said that 'a necessity of self-defence, instant, overwhelming leaving no choice of means and no moment for deliberation' and further that the action taken must involve 'nothing unreasonable or excessive, since the act justified by the necessity of defence must be limited by that necessity and kept clearly within it'.⁴⁸ Irrespective of the status of the Caroline incident as a precedent, necessity and proportionality have played a crucial role in state justification of the use of force in self-defence and in international response.⁴⁹

What then is the position with regard to the use of force against Iraq in reliance on the right of self-defence?

To begin with, in the words of Article 51, there was no "armed attack" on the territories of UK and US to justify their invasion of Iraq. There seems to be no such extension of the right of self-defence in international law to include the right to pre-emptive attack and states have as such avoided relying on this principle. Christine Gray⁵⁰ agrees with this proposition by stating that "the clear trend in state practice is to try to bring the action within Article 51 and to claim the existence of an armed attack rather than to expressly argue for a wider right under customary international law. Because of the arrogance of the UK Tony

⁴⁷ See Jennings, *The Caroline and McLeod cases* (1938) 32 AJIL p. 86

⁴⁸ *supra*, note 41 at p. 406

⁴⁹ *supra*, note 40 at 106

⁵⁰ *Ibid*, at p. 115

Blair led and the US George Bush led administrations, they have been caught up in their web of deception such that it is impossible for them to mark out any actions of Iraq that would constitute an armed attack. Even then, the international customary law only authorizes the use of force when the attack is imminent. There was no evidence that Iraq was preparing to attack the US or UK and further, there was no established link between the activities of Mega-terrorists and Saddam Hussein. The fact that UN weapons inspectors had resumed their work in Iraq weakens their arguments further and given a little more time, they would have successfully concluded the work had it not been for the US move to unleash its military might on Iraq.⁵¹

2.4.0 CONCLUSION

It remains clear to us therefore that neither America nor Britain had legal justification for attacking Iraq. This is so because as it has been observed above, there was no authority from the Security Council to proceed with the use of force against Iraq and further that there is nothing in resolution 1441 which would be construed as giving such authority to the US or UK. Further, reliance on the right of self-defence does not stand because Article 51 requires that it can only be relied upon in response to an armed attack. Even when we were to widen the scope of this right, it may only be relied upon when an attack against the US was

⁵¹ See 'War, a Tragic Failure of Diplomacy' Buaneews, 20 March 2003 [www.allAfrica.com]

imminent and the force used was proportionate. None of these situations existed in the case of Iraq.

It must be emphasized that there is no legal sanction for preventive war or pre-emptive warfare. Should a state regard itself as threatened by another state although no hostilities have taken place, the threatened state is obliged to call on the Security Council, the only body authorized to legitimize military action in such a case. Articles 41 and 42 of the UN Charter make it clear that war is a matter of last resort. International law, it must be emphasized, allows for pre-emptive strikes, but only in the event of an imminent threat. Legal scholars said Iraq posed no such threat, particularly with the presence of UN weapons inspectors in the country.

We can therefore say like a prominent German Professor of state and international law, Dietrich Murswiek wrote in the *Suddeutsche Zeitung*: "the stand point put forward in the press that by giving orders for an attack without authorization from the security council Bush is operating in a 'gray area' is false. Without express allowance through a new resolution, the war against Iraq is a banned war of aggression, a crime from the stand point of international Law."⁵²

⁵² supra, note 45

CHAPTER THREE

3.1.0 THE ROLE AND RELEVANCE OF THE UNITED NATIONS ORGANISATION

3.1.1 INTRODUCTION

The idea of world peace is, in itself, a relatively recent idea. Not so long ago all over the World and in Europe in particular, every generation had had “its” war. A certain fatalism towards war was rooted in our mentalities. War was almost considered as inevitable and peace was only a vague utopian dream. The first 20th Century peace movements were born between the two wars, that is in the twenties and thirties, and gave rise to the League of Nations. Unfortunately, the League failed in its quest because the member states had not succeeded in endowing the league with instruments needed to establish peace, such as our modern –day peacekeepers. The rise in nationalistic movements in the 19th and 20th Centuries that provoked the two World Wars played, according to some, a major role in the idea of creating the conditions for World peace.

Faced with the largest catastrophes in human history, men and women around the planet began to dream of a better, peaceful World. This, as we have seen above, led to the creation of the UNO charged with the maintenance of international peace and security.

In the light of the US led war in Iraq a lot of legal issues arise as to the role and relevancy of the UNO. The UNO had neither condoned nor condemned this war, and it certainly didn't authorize it, yet war happened. A question therefore arises: has the UNO therefore become irrelevant? What is its failure? This chapter is designed to ascertain the role of the UNO in the light of the unauthorized use of force by the United States and the UK.

3.1.2 THE ROLE OF THE UNO

In international law, the maintenance of peace and security is very cardinal. So long as force can be used with impunity to achieve selfish ends, the strong will have little reason to use methods of co-operation and accommodation to achieve common purposes, and the weak will find little protection in such procedures. As it has been observed above, the two World wars have demonstrated not only that war is immensely destructive for all concerned but also that it solves few problems, creates many more than it solves, and generally leaves nations both great and small in a worse condition than it found them.

This is what premised the formulation of United Nations Organisation whose primary and pivotal role was to maintain international peace and security. It was therefore not surprising that those who wrote the charter, establishing the United Nations Organisation, should have been convinced that the first job of the new organization, both in time and in importance, was to keep the peace.

Paragraph 1 of the preamble to the charter of the United Nations declares *inter alia* that the peoples of the United Nations are determined to save succeeding generations from the scourge of war, which twice brought untold sorrow to mankind. This appears as the first of the other proclamations in the preamble. This must be taken note of. Further Article 1 provides the purpose of the United Nations. The very first purpose in paragraph 1 is: "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." This clearly shows that the central role of the UNO is to preserve international peace and security.

Professor Starke defines the United Nations in a simplistic way as "an organization of independent states which have accepted the obligations contained in the United Nations charter signed at San Francisco on 26 June 1945."⁵³ The Charter therefore, places upon the Security Council, the primary responsibility for the maintenance of international peace and security.⁵⁴ This responsibility is made particularly clear with respect to measures to be taken in

⁵³ Supra, note 5 at p. 630

⁵⁴ Article 24(1) of the Charter

case of a threat to the peace, breach of the peace, or act of aggression. The Security Council alone is expressly directed to determine the existence of such a condition, and recommend or decide measures to be taken to restore international peace and security.⁵⁵

Furthermore, the charter defines in considerable detail what particular measures the Council may take and how it is to take them, although it gives the Council very wide discretion in the evaluation of circumstances, the choice of means and the timing of its actions. For instance, acting under Article 39 and Chapter VI of the Charter, it may exercise its powers of peaceful settlement and adjustment, that is, it may investigate the dispute or situation and make recommendations to the parties regarding the procedures and methods of settlement and adjustment. Under Article 40 it may call upon the parties to comply with provisional measures intended to prevent an aggravation of the situation, without prejudice, however, "to the rights, claims or position of the parties concerned." Under Article 41 and 42, it may require members to take such political, economic and military measures as may be necessary to restore international peace and security.

It must be observed that the Security Council can only legally operate to sanction the use of force when nine of the fifteen members, including the concurring votes of the permanent members are in the affirmative.⁵⁶ It is clear that the

⁵⁵ See charter VII of the charter

⁵⁶ Article 27(2)

charter sets up a firm mechanism to prevent the unregulated use of force against the territorial integrity of other states. Accordingly, the American delegates to the San Francisco conference fifty-eight years ago reported to the president that:

If any single provision of the Charter has more substance than the others, it is surely the first sentence of Article 39, which places upon the Security Council the duty to determine the existence of 'any threat to the peace, breach of the peace or act of aggression' and to make recommendations or decide upon measures to be taken 'to maintain or restore international peace and security.'⁵⁷

It is undisputable therefore, in the post World War II era, that the UNO plays a pivotal role in the regulation of the use of force and as it has already been discussed in Charter above, there are basically two ways in which force may be resorted to in international law. This may be in individual or collective self-defence when there has been an armed attack or where it is sufficiently imminent, or when there is authorization from the Security Council. In the case of individual or collective self-defence there is an obligation on the state, which has exercised this right to report to the Security Council, which may take some measures, which brings an end to the continuance of this right.

In the light of the US and UK led war against Iraq, a cardinal question arises as to the effectiveness of the UNO in meeting the challenges of the 21st century. The Charter is well equipped to meet the challenges of our modern age. In 1990

⁵⁷ United States Department of state, Charter of the United Nations, Report to the President on the results of the San Francisco conference by the chairman of the United nations delegation, the Secretary of State, 26 June 1945. Dept. of State Publ. 2349, pp. 90-91

when Iraq invaded and occupied Kuwait, the Security Council passed Resolution 678 authorizing the use of all necessary means” by member states in order to achieve full compliance of Iraq to previous Security Council Resolutions and to restore international peace and security. Even if the legal basis of this Resolution in the Charter is questioned⁵⁸ (it is argued that the action of the coalition forces throughout was not UNO action but an exercise of the right of collection self-defence, and the “authorization” in Resolution 678 was of political rather than legal significance), it was a clear manifestation of the power of the UNO in an effort to preserve international peace and security.

Now, when the US and the UK sought a Security Council Resolution authorizing the use of force against Iraq, the Security Council rejected it. The reason was very simple; the arguments, which were advanced justifying the use of force against Iraq, were weak and extremely inadequate to justify the lawful sanction of the use of force. After it became apparent that efforts to get Security Council authorization were futile, the US decided to unilaterally and forcibly disarm Iraq as Colin Powell was reported to have promised⁵⁹. The UNO served the purpose of its founding by exercising its right to ensure that force is not used unless all other avenues of peaceful resolution have been tried and failed.

⁵⁸ Supra, note 12 at p. 961

⁵⁹ Daily telegraph, 11 November 2002

George Bush earlier in February,⁶⁰ warned that he was willing to attack Iraq with or without Security Council authorization. This attitude by the president was unfortunate and poses a grave danger for the future of international law, the United Nations, and a peaceful international order.

The Security Council did not authorize the illegal war but the US and UK proceeded to attack Iraq and there was no effort made to stop it. A question therefore, arises: is the UNO relevant?

3.1.3 THE RELEVANCE OF THE UNO

As we have seen above, professor Starke defined the United Nations as the organization of independence states which have accepted the obligations of the United Nations Charter. Now, when the question about the relevance of the UNO in the light of its failure to stop the illegal war of aggression against Iraq is asked, it is basically challenging or questioning the states which constitute this organization.

Legal experts⁶¹ are convinced that there is no authority that could force the US government to abide by international law. It is submitted however that the binding force of international law is based on the fundamental principle of *pacta sunt servanda*, that agreements between states are to be respected.

⁶⁰Thalif Deen, United Nations, Inter Press service News Agency, February 12, 2003

⁶¹ supra, note 45

Consequently, the UNO Charter establishes the framework and the basis for the use of force and the procedure to be followed.

It is contended that the UNO does have the authority which should have compelled the US to comply with its obligations in international law. This should have been achieved by the other members simply invoking the provisions of article 51 of the Charter which authorizes the use of collective self-defence, against the US and UK for attacking Iraq. All this did not happen. The states and the international community simply condemned the war as illegal. So what next? Who then should we say is irrelevant? Is it the UNO or the member states? If anything, it is the states, which are contributing to the irrelevance of the UNO because they themselves are proving to be irrelevant and timid.

As in relation to the Kosovo war⁶², the UNSC refrained from censuring the United States and its allies, and even today, the UNO seems fully willing to play whatever part assigned to it during the current period of military occupation and political, economic, and social reconstruction, So far under exclusive US and UK control.

How then should such a pattern of circumvention of charter rules combined with the reluctance of the UNSC to seek censure for such violations be construed from

⁶² see supra, note 39 at pp. 193-195

the perspective of the future of international law? There are several overlapping modes of interpretation, each of which illuminates the issue to some extent, but none seems to provide a satisfactory account from the perspective of international law. The problem of course is that the US stands accused of flouting international law and working with the UNO only when it serves its own interests. Last month George W. Bush appealed⁶³ to the UNO for help in bringing law and order to Iraq and for considerable financial and troop commitments from UN members to help rebuild the country it illegally bombed in March and April.

It is not surprising that most countries are not willing to do this, especially as it is clear that the US will not in any case concede any real authority to the UNO. It has slept through the memory of most states that not so long ago Bush caustically earlier this year (2003) labelled the UN "irrelevant" because it refused to approve a war most felt was unjustified. In the face of increasing American casualties, staggering costs and lowering opinion polls, however, Bush has had to seek material and moral support from this now very relevant body.

In order to preserve the integrity of the UNO, it should not succumb to the requests of the US except where the United Nations should have a central and pivotal role in the reconstruction of Iraq and not the US or UK. This will stimulate some confidence from within its membership and will seek to defeat the

⁶³ See Marianne Hanson, 'Alexander Downer's Comments not enough to strengthen the UN,' Friday 10 October 2003 [www.onlineopinion.com]

assertion that the UNO is an extension of the US foreign policy at whatsoever stage.

3.2.0 CONCLUSION

The United Nations organization is still relevant and still plays its role of regulating the use of force. It is clear that the members who are failing to respect their obligations under the charter are weakening the charter system and in the process of dismantling the entire structure of law-based international security created since World War II.

When Bush says he does not require to ask anybody's permission, this cannot just be attributed to the arrogance that comes with power. There is a legal issue at stake. If this standpoint is established and becomes a new rule of international law, then the general ban on force will have been done away with in a practical sense.

Therefore, states should act against violators of the Charter obligations and international law principles in order to preserve the United Nations from collapse.

CHAPTER FOUR

4.1.0 THE PRINCIPLE OF SOVEREIGN EQUALITY AND TERRITORIAL INTEGRITY

4.1.2 INTRODUCTION

In international law, the sovereign equality of states is a fundamental principle which member states or the international community is expected to respect. The activities of the so-called 'coalition of the willing' most especially the US and UK poses a greater risk to the erosion of these fundamental principles. This chapter will therefore explain the meaning of these principles and show the extent of their risk of erosion.

4.1.2 THE PRINCIPLE OF SOVEREIGN EQUALITY OF ALL STATES

Nationalist writers who sought to establish a link between the law of nations and the law of nature introduced the doctrine of equality in international law. This is clearly brought out in the passage, for instance, by Christian Wolff in his major work *jus gentium methodo scientifica pertratatum*:

By nature all nations are equal the one to the other. For nations are considered as individual free persons living in a state of nature. Therefore, since by nature all men are equal, all nations too are by nature equal the one to the other.⁶⁴

This preposition was adopted in the charter of the UNO. Article 2 paragraph 1 provides that the organization is based on the principle of the sovereign equality

⁶⁴ 1749, Prolegomena, Para. 16

of all its members. Today, the doctrine of equality exists with some encouraging emphasis as shown by its affirmation and definition under the heading, '*The Principle of Sovereign Equality of States*' in the *Declaration on Principles of International Law concerning friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations* (1970)⁶⁵. This declaration espoused that 'all states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

Flowing from this principle, each member state to the UNO is entitled to one vote in the General Assembly in decision-making. There are however, acceptable inequalities which are tentatively recognized in the charter. For example, the five great powers, the United Kingdom, Russia, the United States, France and China are the sole permanent members of the United Nations Security Council, and may 'veto' decisions of the council.⁶⁶ In challenging the efficacy of the doctrine of sovereign equality of all states as espoused originally, Brierly says that 'politically the great powers have long exercised a primacy among states, and both in the covenant and the charter this has been converted into a legal primacy.'⁶⁷

⁶⁵ General Assembly Resolution 2625(XV), as compiled in Blackstone's International Law Documents 2000, [4th ed] p.173

⁶⁶ See Article 27

⁶⁷ The Law of Nations "An Introduction to the International Law of Peace." (1963) [6th ed] p.132

The cardinal and contentious aspect of the doctrine of sovereign equality, which lies at the core of this chapter, is that brought out by professor Starke. He states that 'the doctrine imports not merely equality at law, but also the capacity for equal legal rights and duties.'

It is clear, therefore, from the arrogant activities of George Bush and Tony Blair that these international 'giants' are *de facto* immune from their general international law obligations and the charter provisions, which they duly accepted. This is so because there is apparently no authority in international law which can rise and challenge the activities of these 'major powers' and impose possible sanctions against specific violators. How then can this be construed in international law? It is simple: the United States as a dominant state in a unipolar world order enjoys an exemption from legal accountability with respect to use of force irreconcilable with the UN Charter system and general international law. Other states in contrast, would be generally held to account unless directly protected under the US exemption. This is seen in the case of Israel which has persistently breached UN Security Council Resolutions over the years and has always been protected from being asked to comply with and cease its nuclear weapons program by the United States⁶⁸ through the use of its veto⁶⁹.

⁶⁸ See Marianne Hamson, "Alexander Downer's Comments are not enough to strengthen the UN" Friday October 10 2003 ([www. Onlineopinion.com](http://www.Onlineopinion.com).)

⁶⁹ The Latest use of the Veto to protect Israel was exercised on 14th October, 2003 Reported by BBC on 15th October 2003 at 6AM GMT

When Iraq, contrary to the principles of international law, occupied Kuwait, there was a general outcry and this led to the passing of Resolutions 678 sponsored by the US authorizing the use of all necessary means against Iraq. This is no doubt, a situation that required the intervention of the international community because the activities of Iraq were in violation of the UN charter. This was most certainly made possible because the US was against Iraq and further that the other veto wielding members of the Security Council were satisfied that they needed to enforce international law.

Can we therefore, say that the rules of international law are applicable to all states equally, irrespective of differences of an economic, social, political or other nature? What then are the rules of international law? Would we not be correct if we stated that international law constitutes what the US and the UK does and says it is? This is far from the truth, but this trend is very dangerous.

The pattern of behaviour confirms a skeptical trend that suggests the Charter system no longer accords, or never did accord, with the realities of world politics, and is not authoritative in relation to the behaviour of states⁷⁰. This time we have seen the US and the UK blatantly violating international law, what has the rest of the international community done apart from just condemning the war as illegal, and as for the Security Council, refusing to authorize the use of force?

⁷⁰ See Michael J. Glennon, Why the Security Failed, *Foreign Affairs* 82 (No.3):16-35 (2003)

They all kept watching a legitimate member of the UNO being vanquished, only to be fooled by being invited to help in rebuilding the country, which not so long ago was illegally bombed by the same war criminals.

Is there anything left for the territorial integrity of states? Will it be left unscathed?

4.1.3 THE PRINCIPLE OF TERRITORIAL INTEGRITY

According to Brierly⁷¹, 'at the basis of international law lies in the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over person and things to the exclusion of the jurisdiction of other states. What this entails is that a state within its delimited boundaries can do anything as long as it is in conformity with international law principles. It follows also that the people in that state so recognized have a right of self-determination⁷²; thus determining who should be their leader, at what time and how long. Integrity refers to the state of being whole and not divided⁷³.

Article 2(4) of the Charter states that 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner

⁷¹ Supra, note 4 at p.163

⁷² See Article 1(2) of the Charter of the United Nations

⁷³ See Oxford Advanced Learner's Dictionary (2000) [6th ed] p.623

inconsistent with the purposes of the United Nations.' This principle was taken up in the General Assembly Resolution 2625, which solemnly proclaims that 'states shall refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state....' The Resolution further highlights the duty of states not to intervene in matters within the domestic jurisdiction of any state.

Bush and Blair are doing a complete opposite of the provisions above. Bush viewed the attack as a way of emancipating the Iraq people from an oppressive regime of Saddam Hussein. It is submitted that this is not the province of George Bush and Tony Blair! It is up to the Iraqis to remove a leadership which is oppressive because they alone have that power. This is a blatant affront on the territorial integrity of Iraq and the right to self-determination of the Iraqi people.

The UK and the US cannot seek to justify their interventions on humanitarian reasons because there were no sufficient and necessary reasons for such a military intervention. Furthermore, such a right of humanitarian intervention is not legally valid and does not seem to exist as at now⁷⁴.

Professor Lowe of Oxford University stated⁷⁵ that Bush and Blair had further "muddied the waters" legally by speaking of toppling Saddam Hussein. There is

⁷⁴ See Supra, note at 24 and 26-42

⁷⁵ Supra, note

no precedent in international law for using force to change a regime, a proposition that Lowe labeled "dangerous". Indeed this is very dangerous as it may develop to be a rule of international customary law, which would justify intervention in domestic affairs of states, interfering with the territorial integrity of states.

4.2.0 CONCLUSION

If the arrogance of the likes of Tony Blair and George bush are left unchecked, it would no doubt lead to the erosion of the principle of sovereign equality and territorial integrity of states. The international community are partially to blame for behaving like 'castrated bulls' which even after castration allows its entitlements to be impinged upon.

Unless the international community through the established channels, though defective and requiring reform take action against the perpetrators of the illegal assault on the well established principles of international law, international law will indeed be what America ordains and they will fulfil their idea "to rule and conquer the World through the doctrine of quick victory through overwhelming force. This will mark the beginning of a new World order regulated by the whims and fancies of one country to the detriment of international harmony and co-existence.

CHAPTER FIVE

5.1.0 THE PROSECUTION OF PERPETRATORS OF THE ILLEGAL WAR

5.1.1 INTRODUCTION

It has been contended through out this paper, and it is still submitted that there was no legal basis in international law for an invasion of Iraq. Unsubstantiated allegations about weapons plus a desire for a change of leadership do not even begin to justify war. The UN Charter opens with the words 'we the peoples of the United Nations determined to save succeeding generations from the scourge ...' this is why the Security Council could not authorize a war which is in clear breach of the UN Charter and international customary law. How then can we prosecute murderers at home (in municipal law) and yet we leave people who murder people in other lands through abuse of political and military might? This chapter is therefore designed to recommend the prosecution of the perpetrators of the illegal invasion of Iraq for the crime of aggression, war crimes and crimes against humanity.

5.1.2 THE CRIME OF AGGRESSION

According to Malcolm Shaw on *International law*⁷⁶ aggression, including the Nuremburg formulation of "planning, preparing or waging aggressive war" is a crime under customary international law. He states further that "under

⁷⁶ 1997, 4th edn, p.185

customary international law individuals are criminally liable for aggression, including the Nuremburg formulation of planning, preparing or waging aggressive war.”⁷⁷ The Nuremburg principles as edited by Peter .J. Marcus⁷⁸ stipulates that “the initiating and waging of aggressive war is a crime.” Thus, “political and military leaders of a government, when they act in a political capacity, who initiate and wage an aggressive war, commit a crime against humanity for which they may be tried by a duly constituted tribunal.”

The most striking thing about these international law provisions above is that no attempt is made to define what may constitute a war of aggression. A special committee set up by the UN General Assembly in 1967 to prepare an adequate definition of aggression, only managed to come with a definition which was approved by the General Assembly in 1974.⁷⁹ This clearly shows how difficult it was to come up with a generally accepted definition. Article 1 of the definition contained the following prescriptive formula: ‘aggression is the use of armed force by a state against the sovereign, territorial integrity or political independence of another state, or in any manner inconsistent with the Charter of the UN as set out in this definition.’ This appears to be an authoritative definition as it was generally accepted by the General Assembly.

⁷⁷ Ibid, pp184-190

⁷⁸ 2000, principle no. 1 [www.ninehundred.com]

⁷⁹ As quoted in supra note 4 at pp536-537

As far as international law is concerned, waging a war which is forbidden by the Charter and general international law is a crime. It is only by punishing individuals who commit such crimes that the provisions of international law can be enforced. These would include the president of the United States, George Bush, the British Prime Minister Tony Blair and the soldiers who were involved in the illegal invasion. However, they cannot be prosecuted before the International Criminal Court (ICC), established by the Rome Statute of the International Criminal Court⁸⁰ because this crime does not fall within the categories of crimes to which the court may exercise jurisdiction over,⁸¹ until the crime is defined and necessary amendments are made pursuant to articles 121 and 123.

Because of this, it is recommended that a criminal tribunal be set up under the auspices of the Security Council to try these suspects. It is true that this appears to be a dream because the US and the UK are likely to veto any resolution to this effect. It is submitted that in the light of the fundamental principles of natural justice widely recognized by civilized states, also recognized in the UN Charter,⁸² especially *nemo iudex in causa sua*, the US and UK will be obliged to abstain from voting and exercising their veto, because it is their matter being discussed.

If this argument is forcefully advanced by the international community, there would certainly be a tribunal established to try these war mongers, considering

⁸⁰ Supra, note 63 at p.438

⁸¹ Article 5(2)

⁸² See Article 27(3)

that after the war it has become more and more apparent that the arguments advanced for proceeding immediately to attack Iraq were manipulated, sexed-up and false. For example Bush's assertion in his January speech that Iraq was seeking to buy large quantities of uranium from Africa turned out to be based on crudely forged documents from Niger.⁸³ And further Blair's assertion that Iraq had the capability to launch a chemical or biological attack within 45 minutes of the order being given was said to have been sexed-up.⁸⁴ With the way events are unfolding, this can be said to be true.

5.1.3 WAR CRIMES AND CRIMES AGAINST HUMANITY

Once a state of war has started, is known in international law as *jus in Bello* comes into play. This is a body of rules that seeks to mitigate the effects of war, called international humanitarian law. According to article 147 of the Fourth Geneva Convention war crimes are defined as "wilfully killing, torture or inhuman treatment including...wilful causing great suffering or serious injury to the body or health, unlawful deportation or transfer or unlawful confinement of a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights of fair and regular trial,...taking of hostages, and extensive destruction of and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

⁸³ Newsweek, July 21 2003 "A spy takes the Bullet" by Isikoff and Lipper at pp12-13

⁸⁴ Britain's September 2002 Dossier, Friday July 18, 2003 [www.cig.cnn.com]

By common article 3 of the Geneva conventions (1949), persons taking no active part in hostilities... shall in all circumstances be treated humanely. It is submitted that the use of cluster bombs though not explicitly prohibited by the Geneva law, the rules of war prohibit the use of inherently indiscriminate weapons or weapons that are incapable of being used in a manner that complies with the obligation to distinguish between civilians and combatants. The use of cluster bombs has been admitted by both US and British military.⁸⁵

British soldiers and Tony Blair may be indicted before the ICC under article 8 of the Statute for war crimes. The United States soldiers and Bush cannot be brought before the Court because the US is not a party to the Rome Statute. Alternatively for them, a war crimes tribunal could be set up in line with the preposition above.

According to section 7 of the Statute a 'crime against humanity means any of the following acts when committed as part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack: murder, extermination...' thus the indiscriminate bombing of civilian targets as was happening would suffice.⁸⁶ The rules and recommendations above with regard to setting up of a tribunal applies also with regard to American war criminals, and in

⁸⁵ Human Rights Watch "U.S. Misleading on Cluster Munitions" 25 April 2003

⁸⁶ 'U.S. Drops new high-tech Cluster bombs in Iraq' [<http://www.abc.net.au/newsitem>]

the case of the British, they are amenable to the jurisdiction of the ICC for the alleged crimes are applicable to crimes against humanity also.

5.2.0 CONCLUSION

The blatant violations by the US and Britain of the stipulations of the UN Charter, the four 1949 Geneva Conventions, the 1954 Convention of the Hague as well as the Statute of the ICC constitute war crimes, crimes against humanity and the crime of aggression which the international community can not afford to fold their arms, remain prostrate and do nothing.

CHAPTER SIX

6.0.0 CONCLUSION AND RECOMMENDATIONS

The war in Iraq resulted in the loss of thousands of lives. The war was illegal. However, the Coalition of the willing in all likelihood will experience no adverse consequences as a result of this. There is no effective recourse for the parties adversely affected by this. Not only is there no recourse, but there is not even an opportunity to test the legitimacy of the exercise. There is no forum for Iraq to test the dispute. This reveals the inherent shortcomings of international law, and raises for issue the legitimacy of international law:

The essence of legality is the principled, predictable, and consistent application of a single standard for the strong and weak alike. Selective manipulation of international law by powerful states undermines its legitimacy, just as domestic order is destroyed when powerful individuals are allowed to act above the law. This is the fundamental distinction between the rule of law to serve the common good of all people and the diktat of force to advance the special interests of a privileged elite.⁸⁷

⁸⁷ The weight of academic opinion favours the view that the war is unsupportable at the international law level: 'The Administration has made clear that such an attack is based on long-term foreign policy, if not moral reasons, and not on any concept of defending the United States from an imminent military threat': The New York City Bar Committee on International Security Affairs, Fall 2002; 'We consider that any future use of force without a new UN Security Council Resolution would constitute a crime against peace or aggressive war in violation of the UN Charter':

From a pragmatic perspective, however, the war in Iraq should not cause alarm. History has shown that states ultimately act in their self-interest to the extent that they can do so. It is not unexpected that a nation which enjoys military dominance would ignore legal standards and do as it wished. The fact that it was the US which acted in this way is not a particular criticism of the US. It has behaved no differently to other dominant nations in history. As Kuzminski has argued, to renounce the UN and other international institutions such as the World Court in favour of our military and economic power is the path of empire and tragedy, so often followed in the past.⁸⁸

The only constructive manner to approach the fallout from the war is to recognize the existing shortcoming of international law so far as defining the circumstances in which force can be used and deterring powerful states from using force. In this respect, it is recommended that radical amendments be made to the United Nations Charter in respect to:

- 1. Increasing the number of veto wielding members of the Security Council and also encouraging a wider regional representation on the Council including some African states as permanent members;*

Center for Constitutional Rights, on behalf of over 1,000 law professors and US legal organisations, January 24, 2002.

88 Adrian Kuzminski, Coastal Convergence Society, 'US Prepared to Violate International Law'(1 February 2003). Coastal Convergence Society [<http://www.tokyoprogressive.org/>]

2. Giving more power to the International Court of justice to enable it compel wanting states to appear before it and not only relying on the consent of the states parties concerned;
3. Entrenching the principles of natural justice in their entirety clearly in order to avoid states which have an interest in the matter, to hinder the enforcement of international against it by, for instance, using its veto power; and
4. Abolishing the veto power of the permanent members of the security council, as this has led to a lot of inequalities in the application of international law principles because abuse;

This may, however, prove to be impossible because Article 108 of the Charter requires that all permanent members of the Security Council should support an amendment in order for it to come into effect. It is less likely that they would easily accept amendments that seek to limit their power. For the sake of saving international law from demise, we implore these states to act accordingly.

It is recommended further that the United States of America and Britain be expelled from the United Nations Organization as they have persistently and consistently violated the principles contained in the charter. A legal hitch also exists in this regard because Article 6 requires that such matters be presented to the General Assembly by the Security Council. This may however be solved by

invoking Article 27(3) by requesting the state parties under discussion to abstain from voting. However, a question also arises: which state would raise such a motion?

Ultimately, it may not be possible to develop effective legal principles discouraging powerful states from exercising unilateral force. If this is so, it simply shows that we have exhausted the limits of international law. We should not, however, accept this conclusion readily. International law is, like all other areas of the law, a creation of human kind, and requires only will and the stroke of a pen to change it. As the debate about the function of international law (including use of force) becomes more complicated due to the increasing complexity of global political and economic structures, this simple proposition should be kept at the forefront of people's minds.

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