AN ASSESSMENT OF INTERNATIONAL CONSTITUTIONALISM IN CONJUNCTION WITH THE USE OF FORCE IN ARMED CONFLICT

Bharath Gururagavendran[*]

Abstract *One of the resounding hallmarks for progressive development is internationalization. In the changing geopolitical landscapes of contemporary times, the establishment of an ordered international framework is necessary for political and economic stability. In such an international context, the legal underpinnings to such institutions must be extrapolated, and the engendering of an international legal order is the next logical step in facilitating a truly international world. But, given the valuable opportunity cost of state sovereignty in such a trade-off, the international community has been reluctant to structurally reform international law, in favour of an international constitution that fulfils functional objectives (as it is essentially the practice of institutional international law). This paper takes cognizance of the manifest exigency for an international constitution, and to that effect, justifies its conception of an international constitutionalism, i.e., sectoral international constitutionalism.*

Upon conceptualizing the nature of an authentic international constitution, the paper examines one fundamental concern in the field of international law, being the use of force in armed conflict. And it showcases how an approach of sectoral international constitutionalism is efficacious when the grundnorm (i.e. the international constitution) is the United Nations Charter. The paper critically analyses the current trajectory that the nation states are adopting, and accordingly advances a proposition that international constitutionalism is soon to be an essential component in geopolitical landscapes. Upon making a case for the UN Charter to be the archetypal international constitution, the paper conducts a logical approach to check whether the inherent objectives that are to be satisfied by international sectoral constitutions, are in fact satisfied and critiques the failure of the UN (i.e. the UN Charter) which in certain respects impede the possibility of cognizing a truly international setting. And contextualising the problems faced as such, the paper concludes by stipulating a few changes of significant import that would

institutionally remodel the UN, and go a long way in the generation of a new international legal order.

1. INTRODUCTION

A continually growing internationalism is a characteristic feature of the contemporary post-Westphalian world. A legitimate conception of the evolving nation state can only be engendered, when premised on a contemporary understanding of expanding international collaborations and developments. Even prior to the institution of the United Nations, an international context has manifested, and an increasingly inclusive world has developed since. Developments such as the advancement of the archetypal western liberal model in culturally differing societies, and a deeply pervasive globalisation that has made its presence felt in domestic, regional, and international markets, engender a suitable background for the generation of an international framework that seeks to address various issues of import.

There are several causal factors that warrant the existence of such an international set-up. Perhaps the most pressing factor is that of the necessity for economic cooperation. It is a documented fact that resources are limited; it is also known that concentration of resources is not uniform. A reading of both these ostensibly self-evident social facts showcases the necessity for resource-sharing (i.e. economic trade). As is the case with any form of ordered affirmative action (by an institutional authority), legal institutions must provide regulations and procedural laws that mandate the activity that is required (i.e. in this case, economic activity). Another extremely pressing cause that has warranted the existence of an international system is the institutionalization of cosmopolitan morality post the events of World War II. The implementational reality of such a cosmopolitan morality is best evidenced in the creation of inalienable universal moral norms that have been integrated into a framework of human rights. World War II shocked the moral conscience of humanity, specifically, the events of the Holocaust, and the resultant backlash led to the formulation of a structurally consistent and functional international organisation (i.e. the United Nations).

The League of Nations, which was the precursor to the United Nations, failed from a functional perspective for the simple reason that an organisation that governs itself by a legal mandate (that dictates nature, and extent of functionality of the organisation) requires the power of enforceability in the matter of ensuring authentic functioning, and the League of Nations could not hold nation states legally accountable, and thus, neither enforceability, or punishment for lack of it thereof, was possible by the League. Post the second world war, the atrocities committed due to expansionism and war prompted the international community to develop a legal text that would be formulated on the principles of human rights, respect for sovereignty, and international peace and security.

And to that effect, the United Nations Charter has been instrumentally successful in fulfilling the legal dimensions to the matters of import mentioned above. Therefore, it only follows that the natural conclusion to such a realization would be the establishment of a legal-political institution that oversaw and facilitated the aforementioned objectives. This was the context in which the multinational organisation, i.e. the UN was formulated.

Out of the several objectives that the United Nations has assumed, the two prerogatives that are arguably the most essential are safeguarding state sovereignty and guaranteeing international peace and security. Internationalism and, subsequently, relevant precepts of international law are fundamental elements of contemporary reality, and certain issues demand the lens of analysis to be entrenched in an international perspective. The contemporary problems that affect the discipline of law (in terms of lacunae in its theoretical abstraction) and society (real & practical problems that plague society) are at their crux, problems relating to state sovereignty, and the extent of state responsibility in national and international arenas. And perhaps the most dangerous hindrance to state sovereignty is the use of force in international law. And it is this specific practice, i.e., of the use of force that must be critically analysed in light of international law pertaining to the subject matter.

The legal underpinnings of such an international context would be well suited, if adjusted to a structurally cogent and functionally valid framework, that operates as an international constitution. Such an international constitution has not manifested, and the hypothesis is merely a hypothetical derived from the current social facts, and the projected trajectory of international law, and international arrangements in the world. To reiterate, the most important objective in international law, is in ensuring international peace and security, and the guarantee of state sovereignty, and the use of force is a critical component in the conceptualisation of an international constitution that deals with the subject matter.

The academic discourse on international constitutionalism however, has not been limited due to the fact that its manifestation has not occurred yet. The opinion on the subject matter is reflective of the fact that international constitutionalism is seen as the future, in constantly evolving geopolitical dynamics. This paper seeks to address the question of state sovereignty in the quest for international peace and security, and ostensibly, the corollary of the use of force. The scope of investigation will be premised from assessing the largest and most efficacious institution (i.e. the United Nations) in the international framework of nation states, to advance the proposition of a futuristic international constitution, manifest in the form of the United Nations Charter. It shall seek to accomplish this objective by examining:

The nature of a possible international constitutionalism, via exploration of the different possibilities available (the primary possibilities are listed):

- Customary international law
- United Nations Charter

The role of the posited international constitution in the paradigm of the use of force in international law. To this effect, the paper examines the case of:

- The exercise of self-defence in international law
- Interventions

2. RELEVANCE OF INTERNATIONAL CONSTITUTIONALISM IN THE CONTEMPORARY WORLD

International constitutionalism is the normative legal framework that provides a regulatory mechanism that governs the established functions of the world community, and establishes a mandate for a new international legal order. Just as the intrinsic quiddity of laws that manifest in India's legal system, is materialized through the form of its grundnorm (i.e. the Constitution of India), the quiddity of the system of international laws that are in place to provide an existential and functional legal basis for the regulation of political wills of the nation states, lies in its normative structure that constitutes an international legal order. While the essence of international constitutionalism may just be that, there exist several contrasting theories that stipulate what it truly entails, and amidst the debate on the subject, Walker's definition of international constitutionalism stands valid for the purposes of this paper: "indispensable symbolic and normative framework for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of a post-Westphalia world". The two overarching variants of international constitutionalism are:

- Sectoral international constitutionalism
- World order constitutionalism

For the purposes of this paper, sectoral constitutionalism is investigated in light of the use of force in international law. And this is because of the relationship that sectoral constitutionalism shares with institutional law, and if one were to posit a hypothesis, as to the projected legal trajectory, the resolution would be a furthering of the development of institutional law. Institutional law essentially deals with organisations that operate at an international level, and the assignment of rights, liabilities, and responsibilities that are to be accorded to the organisation vary based on the nature of the organisation and its functionality, which is why there exists a trade-off between normative fulfilment and functional efficacy. In practice, however, the application of institutional law is in conjunction with international law, as most of the relevant organisations that can be meaningfully classified as institutions that come under the purview of institutional law, are primarily international in nature. And therefore, the

institutional law that is discussed in close conjunction with sectoral-international constitutionalism is that of an international institutional law. The best example substantiating such a claim can be seen in the existence of the United Nations, which interfaces with both institutional law, (as an institution of significant import) and international law, as the United Nations Charter is one of most important sources of international law. It becomes particularly important in the case of intervention, as the use of force in international law is extremely contestable, and as such, institutions within the purview of a deliberative, enforceable, and judicial capacity are of absolute importance in the ascertaining of legal validity and relevance in an international context (normative and functional relevance).

The problem with world order constitutionalism is that it is not suited to a constantly metamorphosing world. In an era where information is on the rise, and different avenues, and unconventional areas in several disciplines (social and scientific institutions) are being constantly discovered, legal development is crucial to the issue of regulation in these said fields. Several problems that plague society need distinct legal reforms that address the issue as the problems that plague society -themselves are extremely intricate, and constitute areas of possible scope for development of regulatory and judicial mechanisms by the discipline of law. A historical analysis of the institutions that existed two decades ago, in relation to the existent contemporary institutions showcases the fact that problems have cropped up, and have become multidimensional variants that require specific solutions catered to it. This is possibly why the study of law in of itself has become exceedingly interdisciplinary, interfacing with sciences and the social sciences. Therefore, a single process, i.e. a single legal system at an international level cannot possibly hope to solve the legal concerns of every nation. The severity of such a responsibility must be cognized, as international constitutionalism is principally organised around functional perspectives. The mere conception that the political will of a nation can be surrendered to an institution that is jurisprudentially based on a set of base legal principles signifies an extraordinary perceptual shift towards the status of state sovereignty. And therefore, this decreased relevance to state sovereignty is for obvious reasons, not for metaphysical motives, but rather engendered for functional causes. And considering that the premise in of itself is only suited around establishing efficacious functionality (in terms of recognition, and regulation), that premise must be satisfied in its conclusion, and the natural conclusion of espousing world order constitutionalism is the probable failure in functionality. It is categorically impossible to establish a singular system of laws facilitating and providing the grounding of a new international legal order, as it essentially calls for the superimposition of a static solution on a dynamic system.

In light of the presented problems of world constitutionalism, an institutional sectoral constitutionalism offers the necessary solutions to ensure the functional fulfilment of the objectives of the respective institutions. It entails

a separation of duties and accords them to different institutions, and these institutions are accorded a legal status, and within the ambit of the specific objective that the institution seeks to address, it assumes the legal standing of a grundnorm granting semantic legitimacy to the conception of international constitutionalism.

The manner in which sectoral constitutionalism would manifest is through an internal division of its procedural and normative content. And, that is precisely why sectoral constitutionalism branches off into two variants:

- Procedural sectoral constitutionalism
- Substantive sectoral constitutionalism

Procedural constitutionalism deals with the development of organisational structures that operate on the substantive law that is provided for in a particular legal concept. The organisational structures provide for a functional fulfilment of the goals that are entailed, and the legal grounding for any such affirmative action adopted by the institutions in question would be provided for in the substantive law that is guaranteed. An example shall substantiate the method of operation: in the legal paradigm of human rights, the procedural sectoral constitutionalism can be accorded to the organisation that is, the United Nations Human Rights Council, whereas the Universal Declaration of Human Rights would amount to the substantive sectoral constitutionalism.

The problem with conceptualising international constitutionalism in such a manner, is the syntactical fallacy in labelling it as constitutionalism. It must be understood that while the substantive and procedural aspects of sectoral constitutionalism may not be tantamount to (in isolation or in totality) a constitutional perspective on this subject matter, it still highlights the vital concerns that international constitutionalism must face. And, another reason why there exists scope for mischaracterising sectoral constitutionalism in its current form is due to the fact that the present understanding of constitutionalism is premised on the conception that is formulated at a national level. Such a legal system is naturally singular, and structurally solid and functionally relevant in its expression of the political will of the nation on a variety of issues. This presupposition must be destroyed at the very outset, because any postulation that is made is essentially a hypothesis that does not possess empirical substantiation. Therefore, variations in the structural integrity of such models are absolutely permissible, as they are established only in light of resolving some of the intrinsic problems that accompanies internationalisation, but is left unaccompanied by an international constitution.

The actual relevance of an international constitution can only be conceptualized when observing the role played by the state in dealing with contemporary problems that threaten the fabric of society. In order to conceptualize the role of a state, it is assumed to play a role in three different levels:

- National level (i.e. domestic arrangement of laws within the territorial boundaries of the nation)
- Regional level (Regional arrangement of laws and measures in place, in light of multilateral organisations that carry out obligations embodied by more than one state. This can be classified as international, but is not so in the truest sense of the word, international, as it is not universally international. E.g. SAARC)
- Universally international (applying to all or most nation states in the world. E.g. The United Nations)

Now in light of issues such as use of force in international law, it becomes fairly evident that the State's first two levels of operation are useless in guaranteeing a meaningful resolution of conflict that is compatible with international law. The idea of the use of force, can either be one of the two things, interventions or the right to self-defence. In the case of effectuating action at the national level, w.r.t. the right to self-defence, it becomes entirely problematic, as military action is left unregulated, and affirmative action that erodes the sovereignty of states involved in the dispute is left to occur unfettered by the required shackles of the law. And the cause for engendering the institution of the United Nations was to avoid the very same problem that would be caused by following a route wherein nation states essentially act on issues that are essentially the subject matter of international law. The effects of war are devastating, and it can have several repercussions on other nation states in the world, as the nature of weaponry and warfare in itself has undergone significant reform. What exacerbates the situation is the idea of regional military organisations such as the NATO that also operate as there exist principles of collective self-defence which mandate affirmative action. And such a system of warfare (i.e. the use of force) becomes extremely detrimental to the interests of international peace and security.

The very first lines of the UN Charter's Preamble are to save the succeeding generations from the scourge of war. And military action by several nation states of the world compromises international peace and security, and as a result, steps should be taken to ensure that regulation, and conflict resolution occur at the international level, where any act/decision taken or made is done under the watchful scope of the international community. This ensures that the international community is made a stakeholder in this regard, and several legal concerns of accountability, reparations, and judicial action can be deliberated upon in an international forum.

That is precisely why in the interests of the international setting's (i.e. the United Nations) primary objectives of facilitating international peace and security, an international constitution is perhaps the only solution. The problems that the world in all its geopolitical vacillation, are all inherently international in nature, and therefore, it is logically congruous to assert that the solution

must also conform to an international legal order. And in the eventuality of a possible international legal order, international constitutionalism would have to manifest as it provides a normative grundnorm to the substantive considerations of the law.

3. THE NATURE OF AN INTERNATIONAL CONSTITUTION

There are a multitude of sources from where international law is derivable, and to that effect, the possibilities of generation of an international constitution would also naturally be multitudinous in nature. But it must be understood that not all sources of international law can be classified as legitimate grounds for the formulation of an international constitution. For example, the advisory opinion of the International Court of Justice under the auspices of the Statute of the ICJ (65[1] & 65[2]) may well be considered exemplary legal opinion, but has no real authority. And the idea of authority is important in the notion of an international constitution, as one of the chief reasons for the opposition to an international constitution is that international law in of itself is essentially soft law, and lacking enforceability, it stands to have no practical benefit in the devisal of an international legal order.

Therefore, it becomes clear that while there maybe myriad possibilities for an international constitution, the fact of the matter remains, that only the sources of international law that prescribe rules and regulations and mechanisms for enforceability, can even be considered as a possible international constitution. The other important reason why such a conception of an international constitution is required is because only enforceable aspects of international law are compatible with sectoral international constitutionalism. For reasons stated above, the natural conclusion that the paper posits in the structural format of an international constitution is that of the sectoral variant. And as stated above, the two branches of sectoral constitutionalism are:

- Procedural sectoral constitutionalism (international)
- Substantive sectoral constitutionalism (international)

And considering how there are the basic prerequisites for the generation of an international constitution, their fulfilment is of the utmost import. In terms of substantive sectoral law, several of the possibilities are sufficient in the goal to provide an international constitution, e.g.:

- UNGA resolutions (that have not already been accorded the status of customary international law. They are accorded the status upon State practice that is in alignment with the resolution's principles and clauses)
- Reports by bodies of the United Nations
- Advisory opinions of the International Court of Justice

There are two manifest commonalities in the aforementioned examples of international law, and the first commonality, is as mentioned above, an existence of core substantive law that seeks to provide legal opinion on a particular legal concept). The second commonality that is found in the instances described above is the inherent lack of a procedural sectoral constitutionalism. Considering how sectoral constitutionalism is extremely interrelated to institutional law, it must be recognized that a fully functioning organisational structure that operates on a legal basis must be existent. These examples lack such organisations that can enforce mandate, and as a result, such cases of international law cannot possibly be adopted as a viable source for an international constitution.

The discussed cases of international law are essentially consent based. And whilst the currently prevailing model of international law essentially operates on the basis of state consent, the entire idea of shifting towards an international constitutionalism is to ensure that state-consent does not designate the success or failure of a precept of international law. This policy allocates much more importance to the role of the state in international law as opposed to an international legal order. The categorical imperative of international constitutionalism is the establishment of a new legal order at the global level, that does not falter when states withdraw, make reservations, or fail to provide consent on issues of legal and global relevance. And upon observing the trajectory of international law, it becomes fundamentally evident that the global community is moving towards such a reality, as peremptory norms (i.e. *jus cogens*), treaty obligations, state practice, and Charter law are all essentially available as enforceable legal tenets regardless of consent. And if that is any indication to the future of international affairs, it becomes evident that a centralized and powerful international legal order constitutes it (and as such, at its crux, will lie an international constitution).

Therefore, the only two real sources of international law, that possess the capacity to be classified as a possible mechanism of an international constitution are:

- The Charter of the United Nations
- Customary International Law

Upon inspection of the following sources, the fundamental fallacy with (customary international law becomes evident. It is intrinsically malleable, and contingent on consent, and not on the enforceable quiddity of its normative structure. This is precisely what international constitutionalism is looking to avoid, as it achieves to stray away from the idea of consent- based governance in international law. Even in the case of peremptory norms, i.e. *jus cogens*, the one thing that becomes apparent is the fundamental fallacy of its substantive position. The conceptual legitimacy of peremptory norms is always questioned, and dubious as legal scholars question its origins. The source of origination is

essentially challenged. Customary international law is intrinsically a case of state practice that has been followed from antiquity, or is the product of treaty obligations looking to enforce a principle of international law. The quality of enforceability is through the international court of justice, as it is legally possible to try states for violation of international obligations, and the notion of state practice from antiquity or treaty obligations does come under the ambit of what can be classified as "*international obligations*". Therefore, enforceability is essentially guaranteed through the institution of the ICJ. Therefore, the fallacy can be best described as a jurisprudential lacuna in the subject matter of its foundation (as its foundational legitimacy is not premised on conventions, or actual legal covenants that positively establish the nature, extent and limitations of the law in question).

Another fallacy in the case of customary international law is the functional failure of several cases of violations of customary international law. From a functional perspective, the enforcement mechanism in of itself is riddled with several concerns, the primary concern being the utter breakdown of the precept of customary international law in question, upon non-compliance. This was evidenced in the case of the Kellogg Briand Pact which was a multilateral treaty entered into in the year of 1928. The important signatories were the United States of America, the Federal Republic of Germany, and the French Republic. This stipulated that nation states would not resort to war under any circumstances to resolve disputes or conflicts. Its legacy was merely symbolic as the world devolved into a war only 11 years later. This brings to light another important limitation with customary international law, and that is the fact that whilst procedural sectoral constitutionalism is conspicuously incomplete w.r.t. the fact that no fully functioning organisations cater to the pragmatic achieving of the objectives in its entirety. And in the cases, that they do provide for some form of accomplishment (i.e. the ICJ), it need not be entirely fulfilling of its objective. For e.g., in *Nicaragua* v. *United States of America*[1], despite the International Court of Justice deciding that they possessed the jurisdiction to try the case, the United States of America exited voluntarily from the case, and it must be understood that the jurisdiction that the ICJ possesses is voluntary compulsory jurisdiction, and in this case, despite declaring jurisdiction to exist, the organisation could do little to prevent the United States of America from exiting the case. But reverting to the limitation that manifests in the case of the ICJ, the fundamental problem is that there is no structural cohesiveness to the idea of customary international law. Principles of customary international law maybe derivable from distinct cases and treaties (e.g. the *Corfu Channel* case), but are not amalgamated into a definite legal text which could serve as a bedrock for a new international legal order (i.e. an international constitution).

An international constitution must be structurally robust, and functionally valid, and it should essentially behave as a grundnorm that provides validity

[1] 1986 ICJ Rep 14.

to the international law in question. This does not necessarily mean that an international constitution requires to deal with all concerns universally. It just implies that in deciding a particular legal concept that pertains to a specific issue, sectoral international constitutionalism dictates that the totality of legal opinion offered, must be present in one particular form that mandates the operation of organisations that ensure the enforceability (i.e. legitimate functionality) of the law in of itself. A real life example will substantiate the assertion being advanced; in the case of intervention (or rather the use of force), an international constitution would essentially be genuine and valid if the international law to be offered on said issue was present in one homogenous form of the law. Customary international law on the other hand adopts a more haphazard route, as several cases and treaties all behave as valid sources of international law. Therefore, customary international law cannot be meaningfully termed as a grundnorm for the international law on intervention.

Therefore, the one thing that becomes evident upon the assimilation of information regarding the other alternatives that could have decidedly been the international constitution on intervention, (i.e. the use of force) is that by the method of cancellation, the UN Charter fulfils all the criteria, and is currently the best bet for an international constitution on the international law of intervention. The next section will explain the basis for the UN Charter's choice as an international constitution, and it shall also justify how the UN Charter is best suited for dealing with the problem of the use of force in international law.

4. THE UN CHARTER- AN INTERNATIONAL CONSTITUTION ON THE USE OF FORCE

In a sectoral international constitution, there are several objectives that are to be satisfied before according a status of "international constitution" to the body of international law being referred to. The criteria are as follows:

- The existence of substantive law that elaborates a particular legal concept in relation to a particular issue. With the added element of it singularly encompassing the entire legal opinion on the matter. That is, it must be structurally authentic and consistent.
- The existence of an organisation that ensures enforceability, and the fulfilment of the institution's norm. It must possess procedural legitimacy in its organisational framework.

The first criterion pertains to the substantive-institutional criteria (institutional as sectoral constitutionalism pertains as a generality to institutions), and the second discusses functionality, which in effect, imbibes a sense of realism to the substantive core of institutions such as the United Nations rendering them, well-ordered legal systems with well-defined institutions designed to last. Considering the fact that the proposed institutional authority that would

be a potential candidate for an international constitution, (as it were), specifically pertaining to the use of force in the international arena is the United Nations, this paper shall examine how the aspirational directive, and current state practice (and international law on the matter at hand) is geared towards accomplishing the same (thereby satisfying its own prerogative, and the paper's prediction).

4.1. Introduction

At the very outset, the UN Charter espouses a principled congruity with its institutional framework. This can be evidenced (as stated above) in the very first lines of the Preamble to the UN Charter: "to save the succeeding generations from the scourge of war". The policy that is adopted by that of the UN is intrinsically non-interventionism, and while the UN Charter deals with several issues of significant import, the most important priority is that of dealing with the issue of safeguarding international peace and security, and to that effect, its ideological position (i.e. institutional norm) of non-intervention is reflected in the very first chapter of the UN Charter; "Purposes and Principles of the United Nations" Article 2(4), which stipulates 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 Purposes of the United Nations".

The prudent question, therefore, would be a questioning of the nature of questioning that must take place, in an existential assessment of the institution of the United Nations. And as such, one must closely inspect article 103 of the UN Charter, which reads as follows: "In the event of any conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail." This becomes crucial, because in any assessment where possible institutions, and as a consequence, relevant and *causally warranted* instruments (i.e. instruments engendered from institutions) are considered as contenders for an international constitution, the settlement of competing interests between different systems (either institutions, or instruments) is of fundamental import. Therefore, the case that can be made for the UN Charter to be a forerunner, in the endeavour to become an international constitution, becomes even more persuasive.

As a result, it becomes abundantly clear that the text of the United Nations charter is of utmost importance, and this bit of information can be stated to be crucial, (at the risk of hyperbole) as it implies that the optimal-approach would be that of *textualism*. And as any literalist understanding of statutory or codified law would dictate, an examination of the important provisions is necessary. Therefore, with regards to the international constitutionalism on the use of force, there are certain interrelated paradigms to examine. There is firstly,

the substantive content of what '*using force*' dictates in a contemporary setting. And secondly, the idea of state sovereignty which constitutes the other end of the equation of any usage of force in an international arena. And lastly, it deals with the overarching manner in which international peace and security also form significantly important priorities in a conceptual discussion on the usage of force in international law. The relationality between these concepts is not hard to understand, as a theoretical abstraction, and through several important cases, and subsequently developed provisions of customary international law, the relevant links have been drawn out, for e.g.

4.1.1. Corfu Channel Case, the Nicaragua case, & the Naulilaa Dispute

The use of force, if not considered justified, (its justification is multi-levelled, and hierarchised into different subsections of conflict that each deal with their own substantive law on the relevant issue [i.e. special type of conflict]) can be considered an affront to a State's sovereignty which occupies the highest position of respect in an international system. In this manner, state sovereignty and the usage of force form antithetical constructions to one another. This is broadly understood in light of the overarching consideration of international peace and security, for the uncomplicated reason that the very idea of a fully functioning and existentially secure international system of states is contingent on peace and stability amongst nations. Therefore, the next section of the paper shall examine the first two paradigms mentioned above, whilst simultaneously investigating the diverse ways of using force in international law.

4.2. Article 2(4)

Article 2(4) is particularly important for two reasons, the first is for the importance that is accorded to the policy of non-intervention, and the second is for the clear manner in which it seeks to safeguard state sovereignty. The implicature which suggests the protection of state sovereignty is ensured by a call for nations to refrain in the use of force against the territorial integrity or political independence of the State which essentially amount to state sovereignty. In this manner, the interrelatedness of state sovereignty and the use of force can be conceptualized.

The Article, while laying out charter provisions that seek to guarantee state sovereignty by issuing descriptive declarations of illegality (not explicitly, as it assumes a call for refraining of the activity) if force is used between or amongst nations. However, while charter law may seem to exert a stronghold on the engendered implicature on state sovereignty, the relevance and spirit of Article 2(4) extends deeper than a charter prescription. The article and the very notion of non-interventionism is a part of customary international law. In the 1970 Declaration on Principles of International Law, Article 2(4) was

elaborated as a core principle, and systematically analysed. The outcome of such a systematisation, was a clear expounding of the distinct kinds of force which would not be permitted, under the auspices of the relevant article. This ideological deliberation is also pertinent to the cognizing of the normative content that represents the amalgamation of the customary international law-perspectives on this article, and the article, in of itself. The various kinds of force are as such:

- Wars (Expansionist policies by military means, i.e. acts of militaristic aggression)
- Violation of borders (thereby violating state sovereignty)
- Acts of reprisals
- Deprivation of the right to self-determination and political independence
- Interference in a foreign nation's internal matters

In such a conceptual discussion on the use of force, the different modes in which use of force manifests in international law can be broadly categorised into the following groups:

- War – (covers a)
- Self-Defence (comes under [b] and requires independent and exclusive analysis)
- Interventions (covers b in part, c, d, & e)

Therefore, to understand the legal legitimacy of the UN charter as an international constitution, the following investigation must be conducted: Both the objectives that are mentioned as essentials for sectoral international constitution should be examined w.r.t. the UN to examine whether the three diverse types of the use of force are adequately addressed.

4.2.1. War

If one were to conduct a historical analysis of the roots of war, and military aggression, there is a deep almost paradoxical road map caved with instances of archaic military aggression, that go a long way in assisting a teleological investigation that critically examines the legality of war. While it is an entirely different question to assimilate and present historical findings regarding the feasibility of war, some notable findings that leading to consciousness development of the contemporary position of war are:

a) Pre-Christianisation of legal systems and warfare: War is not so much an ethical dilemma, as it is a resource-based problem. Ergo, legal analysis is limitative in every regard.

b) Christianisation of war, and formulation of legal theories seeking to justify and explain the causes of war. Namely, Aquinas and St. Augustine, who helped explain the just cause theory, and the qualifications of a *just war*, respectively. This spirit of pacifism which shaped, an anti-aggression policy of Europe (in theory, which was not reflected in practice whatsoever, irrespective of the efforts involved), which of its own merit was largely influential in shaping our world's current legal system.

c) Post-Christianisation of legal systems: This was the beginning of a new era in the international sphere, as institutions such as the League of Nations, and instruments such as the Kellogg Briand Pact, entered into existence. This establishment was a symbolic representation of the failure of observing subjective and ideological considerations of warfare (which bordered on intent determination and sovereign authority), and moved onto an objective criterion of collective need based action and reactionary allowance as opposed to warrantable actions (whose qualifications are personal and situational). This natural rejection of subjective criterion in favour of an objective system that determined legitimacy, is logical to say the least, given the fact that most Christian theories seeking to justify war between and amongst countries, produced paradoxical outcomes, that were indistinguishable, and impossible to adjudicate.

War, as can be seen from the terse historical timescale, is represented in the contemporary world as an illegal act. Prior to any legal justifications that render insight to the effect that war is illegal, it must be stated that Article 2(4) outlines that very same solution, as a prescriptive warning of the maladies of war. The Kellogg-Briand Pact was never terminated, and while it was violated due to the horrendous activities of World War II, its non-renunciation and reaffirmation in several other inter-war treaties only seeks to establish foundational integrity to the stipulation that war must be illegal. Therefore, it is an impossibility in today's setting to declare war, as an existing state of legal relations between or amongst nations. What makes this even more contentious, and fortunately impossible for any return of war, into today's legal systems is the implicature engendered from article 103 of the UN Charter (as mentioned above). Even if newer inter-war treaties were entered into (hypothetically), there would be no resultant outcome that would justify and prove the existential validity of war, for the simple reason that Charter Law, for what it stands justifies the existent status-quo, which again, fortunately rests with the "illegal" description of war.

The aims/objectives, the Preamble to the UN Charter, and the Charter itself establish the "substantive-law" basis which satisfies the first criterion for being a substantive sectoral constitution. Its enforceability is not limited only to the ICJ, but also extends to the United Nations as well. The United Nations

can effectuate enforceability using the threat of imposition of sanctions, embargoes, etc. And if the member nations of the UN under the auspices of the United Nations decide to follow a policy of seclusion, or forced isolationism, then the country at the receiving end of the UN's force suffers greatly. And in several cases, even the symbolic authority of the UN is enough to necessitate action. For instance, for several legal scholars in India, the establishment of a national human rights institution in the first place, was simply to avoid mounting international flak and pressure (from the UN). Therefore, in this manner, even procedural sectoral constitutionalism is provided for. (As institutions and distinct organisations operating on a mandate all exist to ensure enforceability)

4.2.2. Self-Defence

The right to self-defence, of member nations applies when nation states aggressively use force to commit acts of aggression and violate the territorial sovereignty of other member nations, and thus, violate state sovereignty. This is where the idea of the use of force becomes a double-edged sword, as:

a) The use of force violates state sovereignty as it destroys the territorial integrity and impedes political independence of a state.

b) But, the use of force can also help safeguard state sovereignty as it can be accorded as a protection under law (that can be utilized when attacked). That is, if a member nation of the UN is attacked militarily, then the nation has a legal right to retaliate (with proportionality of course), and as the member nation retaliating has been accorded the legal right to retaliate, he does not have to be held accountable, whereas the first aggressor will be held accountable under the full force of international law, and the Security Council (the body possessing primary responsibility in the UN) can take appropriate measures to punish the aggressor.

This is admittedly paradoxical, considering the fact that the UN Charter and customary international law on the matter of the "use of force" have all independently and collectively deemed it to be an abject illegality. But the use of force by itself is not to be deemed illegal. Article 2(4) may stand testament to the call for non-interventionism and pacifism in international relations, but Article 51 exists for the specific reason mentioned above (explained through how the use of force can actually be used as a double-edged sword).

However, there is one primary area of focus that must be critically examined, as the UN Charter fails to answer one fundamental question that has only grown increasingly relevant in today's day and age. This is pertaining to the question of anticipatory self-defense. This paper provides a clear justification for its usage of textualism and its literalist interpretation of the UN Charter, borrowing from the Charter itself, almost mapping its proof of its existence

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onto itself in a Godelian fashion. But if the same manner of legal interpretation is utilised, then anticipatory self-defense should be as non-existent in state practice and international systems as war is. This is simply based on the fact that the word "anticipatory self-defense" just do not appear in the UN charter. (text of Article 51 written below) But this does not change the fact that it is in fact a reality, and while textualism was one important element of this paper's analysis of Charter law, the other and perhaps the most relevant element of this paper is the stress that is laid down on realism in the aspirational directive, and determined current trajectory (based on current state practice and recent history). Therefore, it would not only be unwise to ignore the practical realities of the current Middle Eastern crisis, or of the Iraq War, it would also be internally inconsistent. Therefore, the real question that becomes relevant and is unfortunately left unanswered is, the question of the legal permissibility of anticipatory self-defense. While there do exist theories and legal documents such as the Goldsmith interpretation of international law, the answer if answered in the affirmative, lacks foundational integrity (as mentioned above). This is particularly threating if the goal is to argue for the United Nations Charter to become an international constitution, for the simple reason that any well-ordered legal system that does not stand on established roots of legitimacy cannot, in any semantically meaningful sense of the term well-ordered, call itself, *well-ordered.*

The crux of the problem can be summarised as follows. And this is inevitably a paradox as well. If threats to use force are clearly considered to be equivalent to the use of force, and they are deemed to have the same status and carry the same effect, then a response to the actual force should naturally be equivalent to a response to the threat to use force. However, it is known that in international law, anticipatorily using self defense and protecting one's nation from an armed attack that is yet to occur is not permitted according to the UN charter. But there is a clear recognition of the congruity between a threat to use force and an actual use of force. If the primary reason behind allowing the right to self-defense a recognition of the horrific nature of the actual use of force, and one also knows that actual use of force and threats to use actual force are congruous, then the defense should be accorded in both circumstances, if internal logical consistency is sought after. And its ignorance, shall bear paradoxical fruit. Proof of this assertion can be found in the very text of Article 2(4) which covers threats of force as well as use of force. The ICJ in its advisory opinion under the auspices of article 65[1][2] of the Charter, tendered to the General Assembly on the Legality of the Threat or Use of Nuclear Weapons, stated as such: "signalled intention to use force if certain events occur" constitutes 'threat' pursuant to Article 2[4] of the UN. The very purpose of article 51, envisaged as a double-edged sword to the possible defects that arise from the strict implementation of Article 2(4) should technically account for all the qualifications of the relevant article. Its limitative feature requires institutional reworking.

But discounting the problem mentioned above, the current imperatives of the UN Charter are fairly straightforward, and satisfy the burdens necessary for it to be deemed an international constitution. In terms of procedural sectoral constitutionalism, the United Nations Security Council, which is the body that executes and enforces all significant decisions in the UN and is the body of primary responsibility in the UN, has the capacity to economically sanction any of its member nations. It must be understood that in the case of the UN, the ICJ also provides legal support of enforceability in conjunction to the United Nations. And on the count of substantive sectoral constitutionalism, the substantive law that applies on this particular subject matter is present in Article 51 of the UN Charter. In fact, the entire chapter VII of the UN Charter deals with action with respect to threats to the peace, breaches of the peace, and acts of aggression. Therefore, Charter Law is sufficiently adequate to deal with this matter.

Article 51 of the UN charter stipulates that, "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Mem- 10 her of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in exercise of the right of self defense 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".

4.3. Interventions

Continuing from the tangential discourse initiated in the previous section, the important legal query that must be resolved prior to any stipulation of the UN Charter, is that of the legal permissibility of "humanitarian interventions". Humanitarian interventions have three distinct criteria:

- Humanitarian intervention involves the threat and use of military forces as a central feature.
- It is an intervention in the sense that it entails interfering in the internal affairs of a state by sending military forces into the territory or airspace of a sovereign state that has not committed an act of aggression against another state.
- The intervention is in response to situations that do not necessarily pose direct threats to states' strategic interests, but instead is motivated by humanitarian objectives.

It is not hard to cognize how the first two features of humanitarian interventions seem wildly antithetical to Charter law. It goes against the very principles of the UN Charter as read in from the Preamble to the Charter. By

involving the utilisation of the use/threat to use force, it violates Article 2(4) of the UN Charter, not to mention a violation of customary international law. The second feature in addition to all the illegalities listed here, is also specifically violative of article 51 of the UN Charter, for the simple reason that it advocates military involvement in another country that is yet to commit an armed attack against the aggressor nation's borders.

However, the most important aspect of what makes humanitarian interventions counter-intuitive and contradictory to the UN Charter is its last feature. It discusses humanitarian objectives, and motives of nations. This subjective deliberation of ideological and intentional considerations that determine the justifiability of warfare was seen as regressive, and in fact the ideological apparatus of the UN was created and geared to steer clear of such archaic approaches. This stance shift in modern times needs to be accommodated by the United Nations charter if the institution looks to keep abreast with changing realities. It is counter-intuitive in an even more strange manner. Citing the fast-evolving nature of conflict, and the impossibility of solutions in several situations (by the adoption of conventional means of problem solving, e.g. institutional dependence on the United Nation, military aggression is seen as a path to peace. The strangest aspect of humanitarian interventions is its counter-intuitiveness, as peace through war is as contradictory as lighting a place with darkness. In both cases, the discussion revolves around ontic-ontological constructs, and they are extremely antithetical to one another. However, it seems to be preferred. This philosophical dichotomy and any jurisprudential implications it may have in the international community must be ironed out w.r.t. humanitarian intervention is the futuristic goal is to make the Charter of the UN an international constitution.

The procedural and substantive law on the issue of interventions is clear in the UN Charter. The substantive law on this subject matter is presented in Chapter VII, which states: "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". This entire section explicates the basis for a UN mandated intervention, which must follow a certain protocol. It must be introduced in the form of a resolution in the SC, which mandates the necessity to intervene, and it must pass after voting in the Security Council, and upon doing so, military action can be effectuated. There are two kinds of interventions:

- Humanitarian interventions
- Non-humanitarian interventions- mandated by the UN Charter.

The UN mandated interventions have a clear body of substantive law in the Charter, and are procedurally legitimate as well, as there are clear considerations that must be cognized whilst conducting a UN mandated intervention.

5. CONCLUSION

In the examination of the three different variants of the use of force in international law, it must be noted that this analysis is not meant to provide a definitive answer that the UN charter is the archetypal epitome of an international constitution. It is not to suggest that in the determination of a well ordered and well defined legal system that possesses both existential certainty and functional legitimacy, the United Nations Charter presents itself as a paragon of constitutionalism. It is only meant to assert that it may well hold the key to becoming an international constitution if the social facts of the future are conducive to the development of an international constitution. Having said that, some of the inherent drawbacks in the UN Charter that can be significantly remodelled and institutionally reworked to suit the current undercurrents of international law are as follows:

- There is no charter law that deals with the issue of anticipatory self-defence.
- There is no charter law that deals with the issue of humanitarian intervention.
- There needs to be a greater amending power to the UN Charter, as there have been a significantly less number of amendments to the UN Charter.

The first drawback must be solved for the simple reason that the paradox that presents itself between the constituent elements of Articles 2[4] and 51, with specific regards to threats to use force and protection that can be accorded in cases of threats to use force, is of a grave type, and its presence, only institutionally dilutes the authority of the UN, as real-life instances of usage of anticipatory self-defense continue on existing regardless of the theoretical abstractions arising from legal principles. This is not to ignore the face-value criticism that can be levelled against the Charter, as it possesses a philosophical quandary, in the form of a paradox that is yet to be settled.

If there is any hope to ensure that the institution of an international constitution is lasting, it must keep pace with changing social realities. The very incongruity between humanitarian interventions and the UN Charter do not showcase a dynamism of the latter's systems. It merely comes across as a historical institution surviving on tradition and net positive benefits that remains steeped in a static equilibrium of sorts when it comes to the engaging questions. The last drawback is crucial, as a lack of amending power to the UN Charter keeps the United Nations entrenched in a static status-quo, but the problems are dynamic, and multidimensional. In order to ensure that the United Nations futuristically develops into an international constitution, it needs to institutionally evolve with evolving social facts.

As elaborated above, the entire conceptual discussion on international constitutionalism is essentially premised on a hypothesis. There are no concrete material facts that dictate how it will pan out in actuality. This does not however preclude legal scholars to postulate a narrative, and hypothesise a framework for an international legal order. And that is precisely what this paper does.

This research paper essentially examines what kind of international constitutionalism is more likely to manifest (and arrives at the sectoral approach as opposed to the world order approach), and consequently, extrapolates the necessary criterion required for said manifestation. Through method of cancellation, and sufficient theoretical discourse on the subject matter, the paper arrives at a conclusive answer regarding the composition and possible form of international law, that an international constitution would be best suited to that future world (and the answer that is arrived at is the United Nations). This paper also examines the nature of the use of force in international law, and posits why national constitutionalism is insufficient and fails when subjected to questions that are intrinsically international. The paper then proceeds to examine the use of force by exploring three different variants of it (interventions, self-defence and war) under the broad umbrella of the extrapolated objectives required to effectuate an international constitutionalism, and provides through rigorous examination, the different areas that require institutional and legal reform, if an international constitution can ever be accomplished.