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THE RECOURSE TO USE OF FORCE IN THE POST COLD WAR ERA: A CRITICAL ANALAYSIS OF THE ROLES AND RESPONSIBILITIES OF THE UNITED NATIONS SECURITY COUNCIL.

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE

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DEDICATION

I dedicate this dissertation to my beloved family!

Acknowledgement

This work would not have been possible had you not kept me safe and strong. Thank God!

I always feel the limitless love, care, prayer and support of my parents. May God give you long life!

I am particularly indebted to my Advisor Dr. Daniel Alemu for his precious contributions, unreserved guidance and constructive comments.

All friends of mine, who are besides me in all the hard times, deserve great appreciation.

Thank you all.

Acronyms

AJIL - American Journal of International Law

Art. - Article

ASIL - American Society of International Law

AU - African Union

DRC - Democratic Republic of Congo

EJIL - European Journal of International Law

ICJ - International Court of Justice

ILC - International Law Commission

NATO - Northern Atlantic Treaty Organization

NSS - National Security Strategy

Res. - Resolution

UK - United Kingdom

UN - United Nations

UNGA – United Nations General Assembly

UNSC/SC - United Nations Security Council

USA/US - United States of America

WMD - Weapons of Mass Destruction

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Abstract

Though armed conflicts have been prevalent since antiquity, no express prohibition against the use of force under international law existed until recently. The adoption of the UN Charter relatively settled the matter. However, when we probe the post-UN Charter state practice, the jurisprudence of the use of force aspires to indicate some rectified paradigm and wildly at variance with the Charter's language though it is not yet well developed and crystallized. Here, it is clear that the authority of the SC to use force under the rubric of maintaining international peace and security appears to be elastic and often discretionary. Thus resort to use of force by individual states under Art.51 as well as customary international law is subject to rigorous and controversial requirements. This is so because, it is believed that the collective security system would best serve the purpose of the international community.

The theoretical as well as practical problems pertaining to the issue of use of force, the perceived practices of states, trends in its evolvement and progresses in this area, and the SC's reactions and the tantalizing issues thereof remained unsettled. After reflecting on the skeleton of its recent stage, different shortfalls have been observed. These include: how should the conceptual flaws and gaps under the Charter be remedied? Can the Charter system with its strict provisions on the use of force withstand the prevailing pressures from unseen and unconventional actors and enlarged demands of the international community? How should the prevalent practices of international actors be integrated under the international law framework? What meanings should be accorded to the inactions, tolerance and/or subsequent approval of the SC for actions which basically violate the Charter norms?

International law should not be theorized and it needs to take in to account each concrete situation and impart meaning to the prevailing legal rules on the ground. Hence, the rules regulating use of force needs to keep pace with and reflect the realities and practices at hand. Apart from deviant state practices, there are also some interesting regional developments, for instance, the introduction of interventionist doctrine by the African Union. The manner the SC has been functioning also imports of some considerations in the development of international law. Analyzing these issues inline with the Post Cold War facts is essential to specify the meaning of the rule of law in this sphere.

Accordingly, the thesis argues that to effectively respond to the threats to peace and security posed by unconventional actors and proliferation of WMD and, to the demands of international community to promote justice, human rights and democracy, a comprehensive measure, among other things, attaching a due consideration to the implications of the SC's behaviors (as it musters public support) should be adopted to ensure the viability of the global security system. This includes, ensuring the adaptability of the Charter norms, adopting a relatively relaxed threshold to weigh the validity of measures for cases of establishing customary rules, and recognizing and trying to set refined rules for the newly emerging norms.

CHAPTER ONE

Introduction

1.1. Back ground

'*We need to adapt our international system better to a world with new actors, new responsibilities, and new possibilities for peace and progress.*'[1]

Though the legitimacy of armed conflict has been an issue of concern since antiquity, no express prohibition against the use of force under international law existed prior to the twentieth century.[2] And in the aftermath of the Second World War, the prohibition on the use or threat to use of force was introduced as the cornerstone of the UN system under Art.2 (4) of its constitutive Charter.[3] Such prohibition was also found to be a rule of international customary law by the ICJ in the Nicaragua case,[4] and even said to have attained the status of peremptory (*jus cogens*) norm.[5]

Apart from such general ban, the Charter has provided two exceptions; the United Nations Security Council (SC) option for enforcement actions, and the inherent right of self-defense.[6] The Charter, of course, favored a collective security mechanism and mandated the SC with the primary responsibility to maintain and restore international peace and security.[7] However, both exceptions are not working as they were contemplated by the drafters of the Charter. The clear meaning and scope of Art. 51 of the Charter and its effect on and/or interplay with the

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[1] UN Secretary General, Kofi Annan, 2003, as quoted in Richemond Daphne, *Normativity in International Law: the case of Unilateral Humanitarian Intervention*, 6YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL,45 (2003) at 67.

[2] JOHN DUGARD, INTERNATIONAL LAW; A SOUTH AFRICAN PERSPECTIVE, 3rd ed., JUTA AND CO LTD. (2005) at 501.

[3] *See*, IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, OXFORD UNIVERSITY PRESS, OXFORD (1963).

[4] This has been recognized by ICJ in the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.) ICJ Reports 14 (1986) paras.98-100 [Hereinafter, Nicaragua case, ICJ Reports 14 (1986)].

[5] Bruno Simma, *NATO, the UN and the Use of Force; Legal Aspects*, 10 EJIL, 1-22, (1999) at 3. Article 53 of the Vienna Convention on the Law of Treaties of 1969, defines it as 'a *norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is allowed…'*

[6] MALCOLM N. SHAW, INTERNATIONAL LAW, CAMBRIDGE UNIVERSITY PRESS, CAMBRIDGE (6th ed. 2008) p. 1124; *See also*, Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, ASIL Presidential Task Force on Terrorism (Washington, DC: ASIL, 2002) at 3.

[7] *See*, United Nations Charter, (1945) Art.24.

customary international law rules on the use of force has remained litigious.[8] In addition, for various reasons, the SC, which is getting active since the end of the Cold War period,[9] has failed to meet the demands of the international community by maintaining and restoring international peace and security.[10]

Accordingly, states have been acting contrary to the Charter norms, claiming that the prohibition of the resort to the use of force was only restricted to 'international relations' and, the Charter only regulates conventional threats from conventional actors.[11] Recent threats, such as Terrorism, Weapons of Mass Destruction (WMD), the late 1990s humanitarian crisis in Kosovo and its concomitant spill-over effects, and developments in the field of human rights calling for humanitarian intervention and Responsibility to protect (R2P) have added complexity to the issue of when to use force, and further fueled the concerns and debates thereof.[12]

Unilateral use of force by States or group of States, argumentatively, aiming at fostering and protecting the emerging norms and/or generally relying on the increased 'positive security'[13] concerns, has become a prevalent practice.[14] The SC has also been attempting to address such concerns by being in active at times, via subsequent ratification, and adoption of some resolutions which have been expressed as expanding the Charter limits of its powers.[15] Among others, the peacekeeping operation, not contemplated in the Charter, has been used to

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[8] *See e.g.*, Mikael Nabati, *International Law at a Cross-roads; Self-defense, Global Terrorism, and Preemption (A Call to Rethink the Self-defense Normative Framework)*, 13 TRANSNAT'L L. & CONTEMP. PROBS.771 (2003) at 790-791; and ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD, Oxford (1986) at 230 and *ff.*

[9] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, OXFORD UNIVERSITY PRESS (2nd ed. 2004) at 13.

[10] *See generally*, ANTHONY CLARK AREND & ROBERT J. BECK: INTERNATIONAL LAW AND THE USE OF FORCE, BEYOND THE UN CHARTER PARADIGM, ROUTLEDGE, LONDON (1993).

[11] *See* United Nations Charter, (1945) Art.2 (4) of the 'All Members shall refrain in *their international relations* from the threat or use of force…' [Emphasis added].

[12] *See for instance*, Nico J. Schrijver, *Reforming the UN Security Council in Pursuance of Collective Security*, 12(1) JOURNAL OF CONflICT & SECURITY LAW 127 (2007) at 128; *see also* Richard Falk, *What Future for the UN Charter System of War Prevention?* 97 AJIL, 590 (2003); and Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?* 12 WILLAMETTE J. INT'L L. & DISPUTE RES. 100 (2004) at 122.

[13] Karel C. Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 (1) JOURNAL OF CONFLICTS AND SECURITY LAW, 15 (2003) at 15 and *ff.*

[14] *See e.g.*, Ruth Wedgwood, *Unilateral Action in the UN System*, 11 EJIL, 349 (2000) at 352; and Antonio Cassese, *Ex iniuria ius oritus; Are We Moving Towards International Legitimating of Forcible Humanitarian Countermeasures in the World Community*? 10 EJIL 23 (1999) at 24.

[15] *See* Stefan Talmon, *The Security Council as World Legislature, Notes and Comments*, 99 AJIL, 175 (2005), and Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations,* 16 LEIDEN J. INT'L L. 593 (2003) at 596.

tackle intrastate conflicts;[16] and it has been broadening the 'scope of threat to peace and security' so as to establish its mandate under Art.39 of the Charter.

In response to the observed state practices and that of the SC, some scholars suggest that the Charter system is for all practical purpose dead;[17] while others put blame on the SC for its failure to regulate the international peace and security affairs and insisted that the Charter framework still functions with out any reinterpretation.[18] However, mostly the Scholars have approached the pressure on the Charter rules regulating use of force, and the diverse trends the SC in a sectorial manner. To the best knowledge of this author, critical consideration of the actions and inactions of the SC *vis-à-vis* the observed developments and the then prevailed different circumstances has not been done in a concerted manner.

Accordingly, this thesis builds upon those scattered and case specific considerations of legal scholars, examines the measures of the SC *vis-à-vis* practical happenings and would reflect on the contemporary stand of the international law rules governing the use of force, including the Charter rules. To this end, the roles and responsibilities of the SC, the status and possible implications of some of its thought provoking resolutions, the effect of 'emerging norms' on the existing international law and the Charter norms are scrutinized.

1.2. Statement of the Problem

Ever since the inception of the UN, the world community has shown its commitment towards making the world peaceful and hospitable to all mankind. In spite of this zealous ambition, international peace and security has been and continues to be threatened and, at times, disrupted.[19] International law did not concretely outlaw war or the use of force by states before 1928,[20] and with the birth of the UN Charter, however, resort to the use or threat of use of force is, in principle, prohibited.[21] In effecting its primary responsibility, particularly, in the

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[16] SHAW, *supra* note 6, at 1224; *see also* GRAY, *supra* note 9, at 195.

[17] Anthony Clark Arend, *International Law and the Preemptive use of Military Force*, 26(2) THE WASHINGTON QUARTERLY, 89 (2003) at 102; *see generally*, MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO, PALGRAVE MACMILLAN, NEW YORK (1st ed, 2001).

[18] *See for instance*, W. Michael Reisman & Andrea Armstrong, *'The Past and Future of the Claim of Preemptive Self-Defense',* 100 AJIL, 525 (2006) at 525, and Oscar Schachter, *'In Defense of International Rules on the Use of Force',* 53 U. CHI. L. REV 113 (1986).

[19] *See* Edward Gordon, *Article 2(4) in the Historical Context*, 10 YALE J. INT'L L. 271 (1985) at 273.

[20] DUGARD, *supra* note 2.

[21] *See* BRAWNLIE, *supra* note 3.

post-cold war era, the SC has started to incorporate some issues, such as humanitarian crisis, as part of its endeavor to ensure international peace and security. Trends in the practice of the SC seem to reveal extension of its original scope of intervention such as in the form of, *inter alia*, peacekeeping operations which have transpired a considerable scholarly debate.[22]

Needless to mention that the stipulations regulating the use of force incorporated under the Charter have puzzled courts and commentators, including, at times, the ICJ itself, and neither the ICJ nor the SC has authoritatively determined the precise meaning of Art.51.[23] Of course, it is unwise to expect an irreproachable task from the drafters of those days, since the global phenomena remains in constant flux. Art.2 (4) is limited to the use of force in 'international relations' which is now being subjected to the emerging hierarchy of values and norms in different fields such as human rights and self-determination.[24] Is the use of force against non-state actors outlawed impliedly?

Apart from the conceptual flaws posed under Art.2 (4), the precise meaning of Art.51 remains to be a bone of scholarly contention. Does it outlaw the pre-Charter conception of the customary right to self-defense including the pre-emptive self defense? Though the ICJ holds to the negative, there are jurists who opt for strict interpretation of the provision.[25]

In practice, states have been claiming the right to pre-emptive self defense at different times, including the powerful ones.[26] Though the emergence of new and unconventional threats and greater scope of security have been propagated for unilateralism, some scholars insist on the Charter system norms as sufficient to address all the developments and categorically reject such claims for deviation,[27] while others argue in a fashion that has turned absolute away the Charter system and by considering such developments, they suggested that a new legal

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[22] Michael Bothe, *Peace-Keeping*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. I, 648, at 648 (Bruno Simma (ed.), 2nd ed, 2002).

[23] *See for instance*, Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defense, Independent Thinking on the Principles of International Affairs*, ROYAL INST'T OF INT'L AFFAIRS, (2005) available at http://www.chathamhouse.org.uk/research/international_law/papers/view/-/id/308/, visited on Sept. 23, 2010; s*ee also* Amos N. Guiora, *Self-Defense - From the Wild West to 9/11: Who, What, When*, 41 CORNELL INT'L L. J. 631 (2008) at 632.

[24] Michael J. Glennon, *The New Interventionism; The Search for a Just International Law*, 78 (3) FOREIGN AFFAIRS, (1999) at 2, available at http://www.jstor.org/stable/20049274, accessed on June 15, 2010.

[25] Reisman & Armstrong, *supra* note 18.

[26] *See e.g.*, The National Security Strategy (NSS) of the United States, Sept. 2002, available at http://www.white house.gov/nsc/nss.html visited on June 12, 2010. [hereinafter, NSS - US (2002)]

[27] *See*, Schachter, *supra* note 18.

framework to regulate the use of force in international law should be aspired for.[28] Accordingly, what effects should such State practices be given, *vis-à-vis* the international law rules, has remained unsolved.

During the occurrence of some controversial unilateral use of forces in the name of humanitarian intervention or preemptive self defense, including against non-state actors, what becomes anomaly is the responses of the SC. At times, it has kept silent without condemning the actions,[29] or even adopted subsequent resolutions which are considered, by some, as giving subsequent ratification or validation to what are overtly in violation of the Charter rules.[30] Hence, the inaction, silence and/or subsequent ratification by the SC of such phenomenal episode so far have triggered different understandings amongst prominent international legal scholars.[31] However, no comprehensive analysis of these facts with the objective realities, such as the tolerance of the international community and considerable number of States that the SC has been facing has been made.

1.3. Objectives of the Study

1.3.1. General Objective

The general objective of the Study is to probe the post Cold War era 'Use of Force' experience by taking into consideration the emerging hierarchy of values and norms, and to appraise the position of the SC in light of its roles and responsibilities, i.e., to flesh out the controversial 'Resolutions' it has adopted. This trend has been followed by scholarly debates and diverse views, and practical responses.

[28] *See* Arend, *supra* note 17.

[29] *See*, Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and Its Relevance Today*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, OXFORD UNIVERSITY PRESS, 61 (Vaughan Lowe, *et al*. (eds.), 2008) at 63; and Adam Roberts*, Law and the Use of Force after Iraq*; 45 (2) SURVIVAL, 31-59 (2003) at 38.

[30] *See generally*, Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 643 (2007); and Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14(3) EJIL 437 (2003) at 465-466.

[31] *See for instance* Michael J. Glennon, '*Why the Security Council Failed*', 82 (3) FOREIGN AFFAIRS, (May/June, 2003) at 16.

1.3.2. Specific Objectives

The study aims:

- To see the UN rules on the use of force *vis-à-vis* new developments and to evaluate and analyze the pre-Charter, the Charter and emerging norms and consider the legal standings of pre-emptive self defense in general and against terrorism specifically, and humanitarian intervention (or Responsibility to Protect);

- To examine the connotation of the extension of the 'threat to peace and security' phrase by the SC to humanitarian crisis, and some other developments and to prognosticate the insinuation and effects of the silence, in action, and/or ratification of unilateral measures and the resolution of SC adopted prior, during and subsequent to the unilateral actions;

- To put light on the challenges and prospects of the use of force in the contemporary international legal order.

1.4. Research Questions

This study endeavors to answer several questions. The main question is on how to appreciate the effects of emerging security concerns such as terrorism and development of greater values for human rights issues on the Charter framework regulating use of force and international law in general, and particularly in light of the SC's practices. Within this broad brush stroke canvassing, among others things, addresses the following points:

- What do we mean by the use of force under international law and who is allowed to make use of force? And potentially against whom?
- When is the SC entitled to authorize the use of force? What is the clear scope of the expression '…threat to international peace and security'? What is the implication of such extension on this expression taken by the SC on the trend in the use of force?
- Having had the recently developed international obligations, on the one hand and the tensions in the world, on the other, is the Charter system sound enough to regulate the issue of use of force?

- How should we appraise the silence, inaction, and/or subsequent ratification by the SC of some anomalies to the Charter system? Any way out to reconcile with the Charter system?
- What possible way forward can be set?

1.5. Significance of the Study

International peace and security has been and continuing to be a core issue of the world system. But the current unpredicted and generally veiled acts of terrorists, the ever increasing scope of the protection and recognition of human rights which calls for either humanitarian intervention or responsibility to protect of the Global community, and invention of WMD have casted shadow on it. Neither the actions of the SC nor current practices provide for a clear understanding of the issue of use of force. A number of scholarly writings that have tried to address this issue, though from some specific views, also failed to give the general outlook about the current status of international law on the use of force in the face of these developments.

This thesis would contribute its share in terms of furnishing an insight on the legal structure of the UN system, and identifying whether the measures that have been taken to tackle increased risks of terrorism, WMD, and measures for humanitarian concerns have bypassed the Charter norms. Apart from conducting a critical analysis of the views proposed by different scholars, selected resolutions of the SC reflecting its post Cold-War practices and factors underscoring these practices has been fleshed out to draw the real stand of the currently controversial issues regarding the use of force, including the mandate of the SC. It hopefully adds some modest to inpart this problematic and dynamic issue. It will also give highlight on whether there is a need for the adoption of a new framework outside the Charter system or not, and if need be, what considerations should be put in place.

1.6. Research Methodology

This is a qualitative research and it primarily relies on analyzing UN Charter provisions on the use of force, international treaties, international customary norms, UNSC Resolutions, and literature review of different books, journal and articles. Inaddition, interview has also been made to substabtiate some issues considered in the study. Analyzing the views entertained by

different scholars, the author, in a multidisciplinary fashion, critically comments on the observed loopholes. Besides, apart from providing an insight to the rules on the use of force, the study analyses some of the seminal resolutions adopted by the SC in response to or after the happenings of some controversial events like the 9/11 attacks.

1.7. Limitation of the Study

As the research is primarily based on the secondary sources, the real intents of the international actors may not be presented neutrally, as different scholars may be biased for one or another reason. In addition, the modality by which the SC has adopted resolutions, i.e., cross reference to previous adopted bulky resolutions, has added some difficulty to the research. Efforts made to consult officials of different organizations, save the head of the African Regional Peace and Security officer, have remained invain. Financial problems and unavailability of the Credit Card facility system have badly constrained the author from tracing some resent materials, especially electronic books. Time constraint and problems associated with internet facility also contributed to the work in the negative.

1.8. Scope of the Study

The study principally addresses, the measures taken by the SC, at different times and places, and their repercussion, in an effort to throw light to the emerging trends in the use of force and their spill over effects on the existing international law norms in the area. For making the task manageable, principally, only post Kosovo (basically post 1999) issues are dealt with in a detailed fashion. Of course, to give the study a solid foundation, the research deals with the rules of international law dealing with the use of force. It tries to build on the issue from the pre-Charter period to the contemporary era.

1.9. Organization of the Study

The study has six Chapters. It is organized in a manner that would portray, the subject matter with a relative ease in a clear and coherent manner. The proposal part generally introduces the research and forms the First Chapter of the study. Chapter Two provides general overview of on the use of force including the historical considerations and post-Charter self-help use of force paradigms. The Third Chapter addresses the theoretical and normative framework of the concept of use of force. In addition, comparison of the pre-Charter and Charter rules have

been considered in an effort to see whether there has emerged a paradigm shift in enforcing the UN Charter so as to meet the recent day needs of broadened security concerns.

Under the Fourth Chapter, the collective security scheme adopted under the Charter and the roles and responsibilities of the SC has been probed. In this regard, the status of resolutions adopted by the SC, and the legal standings of peacekeeping operations it has been conducting is considered. In addition, it explores the practices of the SC, i.e., its silence, inaction and/or subsequent blessings it has been making.

The Fifth Chapter deals with the use of forces under the realm of proposed developments such as preemptive self-defense against terrorists, for the protection of nationals and humanitarian purposes; and whether such actions could be verified under the Charter rule or not, and if not, what possible options could be made. Regional development and the Ethiopian practice in this regard have also been touched upon under this Chapter. Moreover, the challenges and prospects of the existing legal framework regulating the use of force have been pinpointed. Eventually, in the last Chapter, concluding remarks and recommendations are forwarded.

Chapter Two

2.1 General Overview on the Use of Force

The issue of use of force is one of the most controversial areas of international law and one where the law may seem ineffective. History reveals the fact that the use of force is the bluntest and most destructive tool available to a nation State in the protection of its interests. Until recently, using force has been regarded the prerogative of a sovereign State, and the question of when to permit countries to rely on this blunt instrument has bedeviled many throughout the 20thC, i.e., its legitimacy.[32] Variety of perceptions prevailed, at different times, ranging from the mere intent of showing military might to having just causes to go to war.

In due course, however, a deep rooted curiosity and sentiment of the international community to regulate, and if possible, to abolish use of force under the international milieu has been shown. Among others, the Covenant of the League of Nations has vividly depicted the fact that 'any war or threat of war was dangerous to the entire community.'[33] It should be noted that the League system has not prohibited war or the use of force, but it set up a procedure designed to restrict it to tolerable levels.[34] And finally international law relating to the recourse to force developed over the centuries, is culminated in the UN Charter. Since then, the ban on the use of force is and has always been considered to be peremptory in nature, and has often been described as the cornerstone of the modern international system.[35] The purpose of the law was to address conventional threats posed by conventional actors, States,[36] and did not contemplate unconventional threats and non-State actors.

However, due to the ever expanding scope of international law and recent developments, the Charter provisions which, for instance, are not catching up with evolving trends of rebellious activities and new wave of terrorism, and the general nature of conflicts, only interstate, the

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[32] Michael N. Schmitt, *International Law and the Use of Force: The Jus Ad Bellum*, 2(3) THE QUARTERLY JOURNAL89 (2003) at 89*;* Ian Brownlie, '*International Law and the Use of Force by States' Revisited*, CHINESE J. INT'L L, (2002) available at http://chinesejil.oxfordjournals.org, visited on July 28, 2010.

[33] League of Nations Covenant of 1919, Art.10. *See also* some other subsequent developments in the regulation of the use of force under (1.2 section of the thesis).

[34] SHAW, *supra* note 6, at1122.

[35] *See for instance,* DRC-Uganda case, ICJ Reports 201 (2005), at para.148

[36] Arend, *supra* note 17, at 97.

Charter's anachronistic focus on which it was founded, are deemed to have gone obsolete.[37] Given these changes in the nature of the conflicts, scholars began to clearly suggest the need to re-articulate international law, particularly, the Charter provisions on use of force.[38] It is further buttressed by State practices involving the violation of the Charter system where between 1945 and 2006, 118 of the 192 UN member-States fought approximately 291 conflicts in which over 18 million peoples died.[39] A number of incidents have occurred to evince a telling gap between the practice and what the rules prescribe which would in turn draw cynicism about the effectiveness of legal restraints on the use of force.[40] Despite these deviant practices of States, the SC has not in most of the cases condemned them and, at times, it gives *post facto* validation of the violations. Then, what conclusions and implications should be drawn?

These factors coupled with the observed legal and conceptual deficiency of the Charter provisions governing the use of force, have let legal publicists and States, principally powerful ones, to adopt diverse understandings about the current status of Charter frame work and the over all international legal norms on the use of force. Scholars also commented that international law is neither more nor less than what the powerful actors in the system, and, to a lesser extent, the global community of international jurists, say it is.[41]

For the afore-raised reasons, some said that it is increasingly apparent that the UN cannot address every potential and actual conflict troubling the world.[42] It is based on this background that this study tries to unravel the bewilderment thereof taking in to consideration both the underpinning rational behind the Charter provisions and the prevailing objective

[37] Glennon, *supra* note 24, at 2-7.

[38] *See generally*, Baker Mark, *Terrorism and the Inherent Right of Self-Defense; A Call to Amend Article 51 of the United Nations Charter*, 10 HOUS. J. INTL. L., 25 (1987); Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes U.N. Charter*, 19 B.U. INT'L. L.J, 207 (1999); Travalio Gregory, *Terrorism, International Law, and the Use of Military Force*, 18 WISC. INTL. L.J., 145 (2000); Thomas Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?* 5 WASH. U. JL. & POLY, 51 (2001); and Falk, *supra* note 12.

[39] *See* Center for Systemic peace, Major episodes of Political Violence 1945-2006, available at http://cpass.georgetown.edu/center/publications/articles/, visited on Sept 10, 2010.

[40] Gordon, *supra* note 19. The Journal provides that 'it is less than clear that subjecting the formal expressions of state consent to further validation in the form of corroborative behavior would reduce the level of cynicism about the efficacy of international legal norms'.

[41] Falk, *supra* note 12, at 594.

[42] Boutros Boutros-Ghali: Report of the Secretary General: Improving preparedness for conflict prevention and peacekeeping in Africa. Doc. A/50/711-S/1995/911, Paragraph 4, 1 November 1995.

realities, including the practices and trends followed by the SC *vis-à-vis* its roles and responsibilities. And pin points the existence of a shift in trends and conceptions regarding international law regulating the use of force.

2.2 Historical Consideration on the Use of Force

Development of international law as it relates to the recourse to force reveals a complicated historical process. Until the 19th century, no express prohibition against the use of force existed under international law though often the legitimacy of armed conflict has been the issue of concern since ancient times.[43] Through the 19th and 20th centuries, prohibitions and laws on the use of force developed haphazardly and often failed to otherwise reflect existing sophistication.[44] The decision by States to employ armed force in their international relations enjoyed close to a full measure of legitimacy under international law as force used in a way that clearly violated another State's established right was treated as a subject of concern only between the power employing State and the targeted State.[45]

Accordingly, the choice to use force as a component of international relations was traditionally considered a fundamental right of the 'sovereign'. Machiavelli, speaking in the age prior to the Peace of Westphalia classically concluded, 'war is just…when it is necessary, and arms are righteous for those whose only hope remains in arms.'[46] The traditional notion of just war has subsequently been eroded, and the need to exclude ideological considerations as the basis of a just war, in the light of the destructive seventeenth-century religious conflicts, and attempted to redefine the just war in terms of self-defense, the protection of property and the punishment for wrongs suffered by the citizens of particular State and ultimately, the legality of the recourse to war was seen to depend upon the formal processes of law.[47] This presaged the rise of positivism which later coupled with the definitive establishment of the European balance of power system after the Peace of Westphalia in 1648, contributed for the

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[43] Schmitt, *supra* note 32.
[44] *See generally,* BROWNLIE, *supra* note 3.
[45] Gordon, *supra* note 19, at 271.
[46] Niccolò Machiavelli, *Discourses on Livy bk.3 ch.12 para.3, (Julia Bondanella & Peter Bondanella Trans., Oxford University Press* 1997) (1517) as cited in Greg Moore, The Global Prohibition Regime on the Use of Force: New Challenges, (Oct.2005) at 1, available at https://portfolio.du.edu/portfolio/getportfoliofile?uid=54231, visited on Sept.12, 2010.
[47] SHAW, *supra* note 6, at 1120.

disappearance of the concept of just war from international law as such,[48] and legitimized the notion of sovereignty and the modern State system.[49]

History also evidenced that, ever since Athens founded the *Delian League* in 478 B.C., however, humanity has striven to establish a structure for truly lasting peace, before conflict erupts, not after. Recent hopes have focused on joining States together into international organizations with supranational force. This reflects the prevailing belief that the balance of power, however skillfully the scaffolding of State sovereignty might be aligned, cannot last.[50]

Following this, it was the Convention for the pacific Settlement of International disputes, concluded at the first Hague Peace Conference in 1899, which critically weakened the theoretical foundations of this traditional perspective regarding the use of force, and form a blue print in this regard. By advocating peaceful mechanisms of dispute resolutions, this convention established the international community's independent interest in the prevention or cessation of international armed conflict and deprived warfare of the legitimacy it derived from the presumed prerogatives of national sovereignty.[51] Generally, the 19th C practice was described as contradictory and one cannot depict the then approach.[52] Of course, today the notion of sovereignty has been eroded by the emergence of some basic norms of Human rights and the promotion of democratic governance reaches into the realm of international affairs, formerly shielded by the principle of non-intervention when the international community and actors are called upon to render assistance in the promotion of such values. These issues also become a matter of international concern and no longer fall within the protected internal domains.[53]

During those eras, it was also evident that there was a customary international law which prohibits the use of force and, of course, it allows for certain exceptions, i.e., the cases of self-

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[48] SHAW, *supra* note 6, at 1120. The doctrine of the just war arose with the increasing power of Christianity and declined with the outbreak of the inter-Christian religious wars and the establishment of an order of secular sovereign states.
[49] Glennon, *supra* note 24, at 6.
[50] *Id*.
[51] Gordon, *supra* note 19, at 272.
[52] Brownlie, *supra* note 32, at 2.
[53] *See*, Glean Hollands and Gwen Ansell, Winds of Small Changes, http://www.buchfreund.de/en/productListing.php?used=1&productId=49022946, visited on April 12, 2010.

defense.[54] The classical formulation of the right of self-defense under customary law appeared in the Caroline Case in 1837,[55] where the so called traditional requirements of self-defense (including preemptive/anticipatory use of force) which had prophetic quality, most importantly- necessity and proportionality, had emerged.

After Word War I, the failure of the great European powers to sustain this delicate balancing act gave way to the *Wilsonian* idea of collective security.[56] Since then, the legal milieu began to change and modern regime of codified prohibitions on the use of force commenced to consolidate. Importantly, the League of Nations was founded with the hope that the international community would band together to legislate war out, though it did put some procedural restraints. However, some regarded the creation of the League of Nations as reflecting a completely different attitude to the problems of force in international order,[57] for the balance of power and the integrative model- represented efforts at imposing the rule of law, though in overwhelmingly different versions, to check interstate violence.

During the decades of 1920s and 30s, however, the league's pronouncements proved futile against the rapid rise of fascism in Europe and Asia. Through the constant challenges of the inter-war years to close the gaps in the Covenant and in an effort to achieve the total prohibition of war in international law, ultimately the signing in 1928 of the General Treaty for the Renunciation of War, otherwise termed as, the 'Kellogg-Briand Pact' was achieved,[58] which had again failed to be effective as was contemplated. However, until World War II was fought, a major step towards abolishing the 'right to use force' (*Jus ad bellum*) was not taken.

Following World War II, the UN was founded to, in the words of its Charter, 'save succeeding generations from the scourge of war' and its Charter provides for a strict

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[54] *See* Nicaragua case, ICJ Report 14 (1986) paras.98-100.

[55] It was a dispute between the US and Britain, where the US Secretary of State Daniel Webster informed the British government that for a plea of self-defense to succeed it would be necessary '*to show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation' and that the action was neither 'unreasonable nor excessive'. See* Ray Y. Jennings, *The Caroline and McLeod Cases,* 32 AJIL, 82 (1938) at 82.

[56] *See generally* Richard Falk, *The Pursuit of International Justice: Present Dilemmas and an Imagined Future*, 52 JOURNAL OF INTERNATIONAL AFFAIRS, (1999), available at http://www.questia.com/googlescholar.qst?docId=5001 891535, visited on Sept.21, 2010.

[57] IAN BROWNLIE, Chapter 3, as cited in SHAW, *supra* note 6, at 1121.

[58] SHAW, *supra* note 6, at 1122.

prohibition on the use of force in the international relations. Reflecting on the mindset of the drafters, a commentator asserted that:

> '*just as generals too often refight the last war, when the drafters of the UN Charter set its limits on state power, they responded to the crises precipitating World War II, without anticipating those that would follow it.*'[59]

Nevertheless, in the aftermath of the Woeld War II, it appeared self-evident to the UN founders that they could not condemn all resort to force, and hence, the inclusions of collective security system and Art. 51 in the UN Charter were necessitated. In addition, it can, argumentatively, be the case that where a State consents to the use of force in its territory, the measure is understood not to be '*against the territorial integrity or political independence*' of that State and, thus, not in violation of the Art.2 (4) prohibition on the use of force. It is, therefore, understood that one State (or group of States) may use force in the territory of another with that other State's consent.[60]

However, the stipulations regulating the use of force incorporated under the Charter have remained confusing. For instance, neither the ICJ nor the SC has authoritatively determined the precise meaning of Art.51. Art.2 (4) has also been the subject of many extensive and learned analyses as well as judicial scrutiny- by ICJ in the Nicaragua case, 1986; the Advisory Opinion on Legality of Nuclear Weapons rendered upon request of UNGA in 1996; ICJ, Yugoslavia v. NATO countries-1999 onwards, the Democratic Republic of Congo v. Uganda-2000 onwards, and the 1970 UN General Assembly Declaration on friendly relations. In addition, what remains more controversial is whether the Charter regime introduced a paradigm shift from the pre-Charter era, and if so, in what context.[61]

The principle of refraining from threat or use of force has been confirmed and developed since the Charter system in other international instruments: such as the 1965 Declaration on

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[59] Glennon, *supra* note 24, at 3.

[60] David Wippman, *Treaty-Based Intervention: Who Can Say No?* 62 (2) U. CHI. L. REV. 607(1995) at 620-623.

[61] *For instance*, how are we going to incorporate and/or treat the pre-Charter conception of customary rules on the use of force? How states having a reservation on the Charter provision on the prohibition of force, like United States of America (US) be regulated? The ICJ in the Nicaragua case decided that the two are distinct and they have separate existence, and though reservation has been claimed by US, the customary law on the prohibition on the use of force is applicable on US.

Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty adopted by UNGA (UNGA Res.2131, UN Doc. A/601), the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of United Nations (UNGA Res.2625 (XXV)), the 1974 Definition of Aggression (UNGA Res.3314 (XXIV)), the Helsinki Final Act of 1975, and the 1987 Declaration on Enhancing the Effectiveness of the Principle of Refraining from the Use of Force (UNGA Res.22 (XLII)). It has been indicated that the evolution of this principle represents a landmark and a fundamental change in the development of international law.[62]

The cold war period in history also put its own signpost on the prevailing practices and understandings regarding the use of force under the international plane. The position of the Soviet Union, which preached that the communist states constituted a commonwealth whose principal member and protector was Russia,[63] is considered as a challenge to the international law order, which is established on the '*the will of all nations or of many nations*' and which reckoned the division of the world into independent states enjoying equal rights to exist, propagated by the traditional thinking about international law since the time of Hugo Grotius, and still advocated by the Western lawyers to be the position of the Charter system.[64] From this perspective, the Cold War era reflected the tension between different views of what rules should govern international order as well as a contest between the world's supreme military powers. The subsequent willingness of the Soviet Union to re-examine its position had raised hopes for reaching agreement on core international law principles like the use of force, the right of self-defense, and the role of the SC in maintaining international peace and security.[65]

The Cold War had imposed a dualistic superstructure upon international relations that had had implications for virtually all serious international political disputes and had fettered the

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[62] JOSEF MRAZEK, PROHIBITION OF THE USE AND THREAT OF FORCE; SELF-DEFENSE AND SELF-HELP IN INTERNATIONAL LAW, IN 27 CANADIAN YEAR BOOK INTERNATIONAL LAW, 81 (C. B. Bourne , ED, 1989) at 81.

[63] *see generally*, Eric F. Green, *Socialists Internationalism; Theoria and Praxis in Soviet International Law*, 13, YALE J. INT'L L, 306 (1988) at 306.

[64] Nicholas Rostow, *The International Use of Force after Cold War,* 32(2) HARVARD INT'L. L. J. 411 (1991) at 411- 413.

[65] *Id,* at 414.

operations of the UN in particular.[66] Then, some 'regional' efforts, which were/are believed to cover the gap created in the UN system of collective security, like North Atlantic Treaty Organization (NATO) 1949, and Warsaw Pact in 1955 founded by Soviet Union, were necessitated and, of course, they depicted the then ideological differences.[67]

The dissolution of the Soviet Union in 1991 marked the end of the Cold War and the re-emergence of a system of international relations based upon multiple sources of power untrammeled by ideological determinacy.[68] The ending of inexorable superpower confrontation has led to an increase in instability in Europe and emphasized paradoxically both the revitalization and the limitations of the UN.[69] The end of the Cold War marked the onset of the transformation of the UN into its now active role of maintaining international peace and security,[70] albeit at times, it has been witnessed that it remained dysfunctional for permanent members of the SC usually employ their veto power when their particular interest is involved.

In addition, the recent unconventional threats and international actors, and developments in the field of human rights calling for humanitarian intervention and Responsibility to Protect (R2P) added perplexity the Charter rules. In a number of instances, we have witnessed the clear violation of the Charter provisions by States which have tried to justify their actions on slightly different basis but within the ambit of the Charter norms, which provokes further thoughts. Again, obviously, the norms governing the use of force by non-State actors have not kept pace with those pertaining to States. All these episodes so far observed have triggered different outlook and some even go to suggest that the Charter system is no more practical, and a new set of rules have to be put in place so as to maintain the effectiveness and credibility of the functioning of the international system.[71]

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[66] *See e.g.*, Richard Bilder, *International Law in the 'New World Order': Some Preliminary Reflections*, 1 FLORIDA STATE UNIVERSITY JOURNAL OF TRANSNATIONAL LAW AND POLICY, 1(1992) at 1.

[67] DUGARD, *supra* note 2, at 517

[68] SHAW, *supra* note 6, at 36.

[69] *Id*. at 37.

[70] Joelle Matrak, Is Task-Sharing the Answer to UN Peacekeeping Problems? July 31, 2008, available at http://globalpolicy.org/component/content/article/199/40875.html, visited on July 12, 2010.

[71] *See generally*, Arend , *supra* note 17.

2.3 The Post-Charter Self-Help Paradigm

This period marks the Cold War era, where the SC had remained dormant and less effective when the permanent members repeatedly used their veto power, and only since the end of this period that it has been able to operate as it was intended to do in 1945.[72] This explains why most of the forcible interventions of doubtful legality, threatening the peace of the world between 1945 and 1990, were not acted upon by the SC.[73] As stated earlier, in a number of instances, States tend to use force in violation of the Charter system. The fact that only under few of these occasions has the UN been able to mount a collective enforcement action, and that more by a fluke than by dint of organizational responsiveness, nations for their security have increasingly fallen back on their own resources and on military and regional alliances.[74] Similarly, a scholar stated that the net result of the ineffectiveness of the Charter regime for general enforcement might be more accurately described as a partial revival of a unilateral *jus ad bellum*.[75] And under the Charter system, with no mechanism for objective fact-findings, the concept of self defense remains a convenient shield for self-serving and aggressive conducts of States.[76]

For instance, the Soviet intervention in Hungary in 1956 at the request of the puppet regime to suppress an uprising that it alleged was supported by foreign forces under the guise of collective self defense;[77] Czechoslovakia in 1968 under the Warsaw Pact; and Afghanistan in 1979 again claiming that it acted in a collective self defense to protect an incumbent puppet government against foreign-supported rebels,[78]were not met with any action by the SC. And the same went to the United States interventions in the Dominican Republic in 1965, where the US openly asserted the right of a regional grouping to use force to secure conformity in self defense against the attack of an 'alien ideology and foreign inspiration';[79] Vietnam

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[72] DUGARD, *supra note* 2, p.486.
[73] *Id*. at 489.
[74] Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States,* 64(5) AJIL 809 (1970) at 811.
[75] *See e.g.,* Michael W. Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 78 ASIL 74, (1984).
[76] Franck, *supra* note 74.
[77] D. J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW, SWEET &. MAXWELL, LONDON (6th ed, 2004) p.917.
[78] *Id*, at 918.
[79] Franck, *supra* note 74, at 834.

from1965 to1973 where the US supported the South Vietnam because it claimed that the rebels, the Vietcong, were supported by North Vietnam, and it was acting under collective self-defense;[80] Grenada in 1983 to protect its nationals and, also the government against Cuban-supported revolutionaries;[81] or Panama in 1989 where US claimed that it intervened in self defense to protect its nationals. Here a draft SC resolution condemning the invasion as contrary to international law was vetoed by Washington. But almost identical resolution was put to the UNGA some days later, to condemn the invasion as a flagrant violation of international law.[82]

The US and the Soviet Union have, in short, both asserted the right to establish regions of super-power paramount to which Art. 2 (4) of the UN Charter does not apply.[83] In all these occasions, the great powers intervened to advance their own ideological interests, though frequently they tried to justify their actions based on self defense including collective one.[84] Here in under, are considerations of selected unilateral measures which, as the writer thinks, would help in the analysis of the core objectives of the research.

Apart from the slightly aforementioned self-help measures, the popular Israeli Six-Day War in 1967 is worth examining. Here, Israel justified its attack on Egypt at the start of this war as a preemptive use of force in self defense on the grounds that the mobilization of Egyptian forces on the Israeli border, the closure of the Straits of Tiran, and the conclusion of a military pact between Egypt and Jordan provided evidence of an imminent attack.[85] As was the case in those incidents enumerated earlier, here again, the SC took no resolution though different

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[80] *See* Memorandum on the Legality of United States Participation in the Defense of Vietnam, prepared by the Legal Advisor of the US State Department, included in 60 AJIL, 565 (1966), as cited in JOHN DUGARD, *supra* note 2, at 521. The underlying concerns about the interplay between sovereign discretion on matters of use of force and UN authority and general international law were vigorously debated during the cold war era, especially during the latter stages of the Vietnam War. *See also,* Falk, *supra* note 12.

[81] Letter from *Davis R. Robinson,* the Legal Adviser, United States Department of State, dated Feb. 10, 1984 as cited in John Quigley, *The United States Invasion of Grenada: Stranger than Fiction,* 18 (2) THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW,271 (1987). 271-352. This act was accompanied by the Organization of Eastern Caribbean States; see U.S. Dept. of State, Bureau of Pub. Affairs, OECS Statement (Oct. 25, 1983), in 83 DEP'T ST. BULL. 67 (1983) at 67-68, where Art.8 of the constitutive act was invoked for their action

[82] *See generally*, Ven P Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AJIL, 494 (1990).

[83] Franck, *supra* note 74, at 835.

[84] DUGARD, *supra* note 2, at 522.

[85] *See* Amos Shapira, *The Six-Day War and the Right of Self Defense*, 6 ISRAEL LAW REVIEW, 65 (1971).

oppositions were exerted against Israel.[86] In another case, the Israel's attack on the Iraqi nuclear reactor in 1981 as an act of preemptive use of force in self-defense as claimed by Israel was, however, condemned by the SC unanimously.[87]

The other consideration goes to the Indian's intervention in East Pakistan (now Bangladesh) in 1971, which constitutes complex and interrelates issues- clearly carried with it a number of questions of important international consequence: alien intervention, military aggression, separatism, the controversy over the Bangladesh movement as a struggle for national liberation as well as other political interests,[88] is also one of the famous but short lived incident. The use of force taken by India, on its part, was justified on the ground of self defense to the Pakistani Air Force (PAF) strike on 3 December 1971 which Pakistan called it use of force in pre-emptive self-defense to a massive buildup of Indian forces on the border with East Pakistan.[89] Albeit a resolution was adopted by the UNGA on December 7, 1971, as the SC was blocked by Soviet vetoes consideration of the intervention moved to UNGA under the Uniting for Peace procedure,[90] which called for an immediate end to the war and troop withdrawals on both sides,[91] they fell far short in deciding the issue of aggression or legality of the use of force in that instance.

Tanzania 'intervened' or 'counter-attacked' Uganda in February 1979, on the ground that on 12 October 1978, Uganda invaded Tanzania in an effort to annex the Kagera region.[92] Tanzania's effort was supported by Ugandan insurgents, and finally toppled the then Ugandan President, and this act was explained on the part of Tanzania as constituting a self-defense.[93] International reaction to the Tanzanian intervention was muted and there was no focused

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[86] DUGARD, *supra* note 2, at 508.
[87] *See* UNSC Resolution 487, 1981. (S/RES/487) 19 June 1981, 2,288th meetings.
[88] The yet unsettled crisis on Kashmir, area for instance, is the public secret issue pondering both parties since 1947. *See also*, Mohammad Habib Sidky, *Chinese World Strategy and South Asia: The China Factor in Indo-Pakistani Relations,* 16(10) ASIAN SURVEY 965 (1976) at 966.
[89] Intervention before 1990: International Development Research Center (IDRC), available at http://www.idrc.ca/en/ev-28497-201-1-DO_TOPIC.html, visited on Oct. 10, 2010.
[90] *Id*. The General Assembly, concerned at the inaction of the SC and its failure to play the role provided in the Charter, passed Uniting for Peace Resolution No.377. *See* UN DOC UNGA A/RES/377 A, 3 November 1950.
[91] Sidky, *supra* note 88, at 971.
[92] For detailed analysis of this Boundary issue visit http://www.law.fsu.edu/library/collection/limitsinseas/ibs055.pdf, visited on Sept. 17, 2010.
[93] THOMAS FRANCK, RECOURSE TO FORCE; STATE ACTION AGAINST THREATS AND ARMED ATTACKS, CAMBRIGDE UNIVERSITY PRESS, UK (2002) at139-145.

debate at the SC on the validity of the Tanzanian and Ugandan claims and counterclaims concerning the self defense argument or humanitarian intervention issues.[94] The OAU discussed the Tanzanian intervention on three separate occasions, the February and July meetings of the Council of Ministers, and then the July meeting of the Heads of State and Government, but with no condemnation of the Tanzanian action.[95] In addition, South Africa, in 1980s took a number of military raids against its neighboring countries including Zambia, Botswana, Lesotho, and Angola as a preemptive strike in self defense albeit none of it was welcomed by the SC.[96]

The war in Kosovo in 1999, which resulted from a classic case of confrontation between one people's historical claim (Serbs- minorities) and another people's (Albanian- majority) ethnic claim to the same territory Kosovo, adds fuel to the already- in- motion debates on the international law structure specially on the use of force. At the time the horror of ethnic cleansing in the Serbian province where Serbs supported by the Slobodan Milosevic of Yugoslavia attacked Albanians was well publicized,[97] and though the SC failed to respond, 'a coalition of the willing' acting under the umbrella of NATO, used force in the face of the urgent humanitarian dangers facing the Albanian Kosovars.[98] This action of NATO was then confronted with some critical issues, including whether force can be used for humanitarian purposes at all and without the SC authorization; and as Kosovo still formed part of Yugoslavia and there exists no cross boarder attack whether such incident would invite an international military response.[99] Here, the SC refrained from blaming or expressly blessing this involvement[100] albeit its prior and post event resolutions are some how interpreted by legal apologists as authorizing and/or legitimizing NATO's actions, while others including the Independent International Commission on Kosovo, concluded that the intervention in Kosovo was 'illegal, but legitimate.'[101] Critical analyses of this intervention and the issues of

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[94] Intervention before 1990, *supra* note 89.
[95] *Id.*
[96] DUGARD, *supra* note 2, at 509.
[97] Glennon, *supra* note 24, at 1.
[98] Falk, *supra* note 12, at 591.
[99] Glennon, *supra* note 24, at 1.
[100] *See* For instance, the wordings of UNSC Resolutions 1160- 1119/1998, 1203/1999 and later Res.1244/1999.
[101] Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned, Oxford University Press, UK (2002) at 185-198. /HOW TO CITE REPORT/

legality/illegality dichotomy are discussed under Chapter Four and Five of this thesis respectively.

The other incident, where a State used force upon its unilateral decision of the fact that there are conditions which entitle it to do so, occurres when Uganda 'intervened' the Democratic Republic of Congo (DRC) in 2000. In this particular case, Uganda claimed to have acted in self-defense against the DRC, as an armed attack has been launched on it not by the Congolese armed forces but rather by the Allied Democratic Forces (ADF)- a rebel group operating against Uganda from Congolese territory.[102] This case has also been referred to ICJ, and the court has found that Uganda by engaging in these 'military activities', violated the principle of non-use of force in international relations and the principle of non-intervention,[103] though it has avoided dealing with the explicit request of the DRC to find that Uganda, by its massive use of force against the Applicant, has committed an act of aggression. It is true that the SC, despite adopting a whole series of resolutions on the situation in the Great Lakes region in para.150 of the Judgment, has never gone as far as expressly qualifying the Ugandan invasion as an act of aggression, even though it appears as an example and enlivening academic discourse to coin such incidents as 'the most serious and dangerous form of the illegal use of force' as laid down in General Assembly Res.3314 (XXIX).[104]

One more critical event, in the use of force under international law by a State or States against another State, is the US and UK 'attack and invasion' of Iraq. Here, the two countries tried to justify their positions based on different grounds[105] ranging form the extended authority of the SC Res. 678(1990) and 687(1991); they were acting in self-defense to subsuming the attack on Iraq within the wider, ongoing war against global terrorism, and implying that the undertaking should be seen as an element in the antiterrorism campaign launched in response to the 9/11 attacks.[106] The SC Res.1441 (2002) has furnished justification to this end. When

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[102] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Report 201 (2005), *see* separate opinion of Judge Simma, http://www.unipg.it/~scipol/tutor/uploads/opinione _separata_ simma.pdf, visited on June 10, 2010. [Hereinafter, DRC v Uganda, ICJ Report 201 (2005)]
[103] DRC v Uganda, ICJ Report 201 (2005) para.345 (1).
[104] *See generally,* DRC v Uganda, ICJ Report 201 (2005), separate opinion of Judge Simma.
[105] See Adam P. Tait, *The Legal War: A Justification for Military Action in Iraq*, 9 GONZ. J. INT'L L. 96 (2005).
[106] Falk, *supra* note 12, at 592-93.

explaining the US vote in favor of Res.1441, US Permanent Representative to the UN Ambassador John Negroponte stated that:

> '*If the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member State from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN resolutions and protect world peace and security.*'[107]

Also the US President George W. Bush said that;

> '*We cannot stand by and do nothing while dangers gather… we are in a conflict between good and evil, and America will call evil by its name. By confronting evil and lawless regimes, we do not create a problem, we reveal a problem. And we will lead the world in opposing it.*'[108] '*The interesting thing about SC's resolution is all countries are free to act*'.[109]

Accordingly, US officials seem to argue that the Charter is extraneous, that the ceasefire had conditions other than the actual one, and that SC Res.1441 contains strong warning language and does not explicitly prohibit the use of force, and thus, they seem to conclude that US is at liberty to use force against Iraq.[110] However, most scholars rejected such justifications as shaky, and concluded that such an act is opportunistic repudiation of legal restraints by the world's sole superpower, and label the invasion as an unlawful.[111] Much more analysis of the effect of SC resolutions and the reliance of US on the previous resolutions of the SC adopted during the Kuwait crisis is made under the Fourth Chapter of this thesis.

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[107] US Permanent Representative to the UN Ambassador John Negroponte, statement to the UN SC, US Mission to the UN, press release 187, 8 November 2002, http://www.un.int/usa/02_187.htm, visited on June 10, 2010.

[108] Address to the United Nations General Assembly in New York City, 38 WEEKLYCOMP. PRES. DOC.1529 (Sept.16, 2002).

[109] US President George W. Bush, interview with European print roundtable, Office of the Whitehouse Press Secretary, 18 Nov.2002, http://www.whitehouse.gov/news/releases/2002/11/20021118-6.html, visited on Oct.12, 2010.

[110] Nathaniel Hurd, Security *Council Resolution 1441 and the Potential Use of Force Against Iraq*, (2002) at 7, available at http://www.casi.org.uk/info/hurd021206.pdf, visited on Sept.25, 2010.

[111] For detailed critics on the justifications so provided by US and UK, *see* DUGARD, *supra* note 2, at 519-520.

Again, as in relation to Kosovo, the SC refrained from censuring the US and its allies, and the UN seems fully willing to play whatever part is assigned to it during the current period of military occupation and political, economic, and social reconstruction, so far under exclusive US/UK control.[112] The approach it has taken under Res.1483 (2003) is indicative of a tension between acquiescence and opposition of such an act, and scholars suggest that this would place a high degree of ambiguity on the Iraq war as precedent.[113]

In 2008, the Russia's unilateral intervention in Georgia has also been tried to be justified under the self-defense clause, though such action is considered as a violation of the many SC's resolutions recognizing the territorial integrity and political independence of Georgia.[114] In addition, recently countries sometimes react with the pretext of self-defense against non-State actors principally terrorist groups. Thus, Colombia appealed to self-defense in an operation against the Revolutionary Armed Force of Colombia (FARC) in Ecuador in 2008 [115] This was also the case with Turkish operations against the Kurdistan Workers' Party - Parti Karkerani Kurdistan (PKK) on Iraqi territory in 1995 and 2007-2008,[116] the American operation *Infinite Reach* against Al-Qaida in Sudan and Afghanistan in 1998,[117] the American actions against Al- Qaida fighters in Somalia in 2007-2008, and the recent attacks on Taliban fighters and locations in Pakistan.

Moreover, the second Lebanon War of 2006 contains a number of elements which are not only relevant for a good insight into present-day (combat) operations, but also controversial with regard to certain aspects of legal bases and legal regimes. On the 12th of July 2006, Hezbollah launched several missiles against Israeli military positions and border villages.

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[112] Falk, *supra* note 12, at 593.
[113] Falk, *supra* note 12, at 596.
[114] *See* further consideration on this issue at http://www.jstor.org/stable/pdfplus/20456731.pdf?acceptTC=true, visited on Oct 15, 2010.
[115] *See* Declaration of the Ministry of Foreign Relations of Colombia No. 081, March 2, 2008. For an analysis, *see further*, Waisberg Tatiana, *Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors*, 12 (17) ASIL, (2008), http://www.asil.org/insights/2008/08/ insights 080822.html#author, visited on June 23, 2010.
[116] *See* A/59/815- S/2005/349, 25 May 1995 (Letter from the Chargé D'Affaires a.i. of Turkey to the (UN) addressed to the Secretary General and Security Council.
[117] *See* The Notification to the SC, UN Doc. S/1998/780, (Letter from the Permanent Representative of the US to the UN addressed to the President of the SC, (1998); *see also* KENNETH MANUSAMA, THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA: APPLYING THE PRINCIPLE OF LEGALITY, MARTINUS NIJHOFF PUBLISHERS, (2006) at 288-289.

This barrage was a diversionary maneuver to support another Hezbollah-unit that in a different location, near Zarit and Shtula, crossed the border and ambushed an Israeli patrol (two armored vehicles).[118] Even some writers argue that, the action of 12 July 2006 on itself was of sufficient gravity, in view of scale and effects, to qualify as an armed attack.[119] Following this attack of Hezbollah fighters on an Israeli border patrol, Israeli decided to launch a large-scale military operation called *Operation Change of Direction*.[120] Then, Israel reported the attacks on its territory, which it conceived as acts of war, to the SC on 12 July 2006, and it simultaneously announced measures, explicitly appealing to its right of self-defense.[121] In the meeting of the SC, it appeared that several members questioned the endorsement of Israel's right of self-defense within the conditions from the Charter and customary law.[122] Ultimately, the self-defense against Lebanon was found out that it was disproportionate and not necessary in the circumstances of the case.[123]

From all the afore raised elements of disparity by State practices from the core principles of the Charter provisions, and evolving humanitarian concerns taking some shape under the UN system, it would enable one, at least in theory, to note that there should be something to tackle these problems. And much more involvement of the UN, nearly a universal organization, is contemplated, as the domestic jurisdiction exclusion of UN intervention expressed in Art.2 (7) of the Charter has definitely been under challenge from the widespread grassroots initiatives and governmental advocacy of humanitarian intervention especially in the years following the Cold War period.[124]

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[118] Ruys Tom, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah*, 43 STAN. J. INT'L L, 265 (2007) at 268.

[119] Paul Ducheine and Eric Pouw, *Operation Change of Direction: A Short Survey of the Legal Basis and the Applicable Legal Regimes*, NL-ARMS, 51-96 (2009) at 61; *See also*, Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?'*, 60 (1) THE AIR FORCE LAW REVIEW, 29 (2007) at 79-80.

[120] Ducheine and Pouw, *supra* note 119, at 51.

[121] UN Doc. S/2006/515; A/60/937 of 12 July (2006) (Letters from the Permanent Representative of Israel to the (UN) addressed to the SG and the President of the SC) available at http://unispal.un.org/UNISPAL.NSF /0/E807 FC933A355C94852571AA00517B18, visited on Sept 15, 2010.

[122] *See* UN Doc. S/PV.5489 (2006) (Provisional Records of the 5489th meeting of the SC (61th year)): In favor- UK, Greece, Japan, Peru, Denmark; against (i.e. as a result of the lack of proportionality) - Russia, Ghana, Argentina, Qatar, China ('armed aggression') and the DRC.

[123] Ducheine and Pouw, *supra* note 119, at 72.

[124] *See for instance*, Falk, *supra* note 12, at 596.

As a result, the question remains to be: How should such a pattern of circumvention of the Charter rules combined with the reluctance of the SC to seek censure for such violations, be construed from the evolutionary dynamics of international law? There are various suggestions, each of which illuminates the issue to some extent, but none seems to provide a cogent normative development of international law. Some generally tend to assert that the observed pattern of behavior confirms a skeptical trend that suggests the Charter system no longer meets, or never met, the realities of world politics, and is not authoritative in relation to the behavior of States.[125] While others put forward that, as the State practices are in variant with the Charter system, this fact should be taken as a *creative tension* that suggests respect for the underlying values of the world community, viewing legality as a matter of degree, not either/or, and as requiring continuing adjustment to changing circumstances, such as the claims of preemption right in relation to mega-terrorism provides a reasonable doctrinal explanation for an expanded legal order of self-defense.[126]

In the subsequent parts of the thesis, the observed State practices, whether they might go in line with or not to the basic Charter system upon the emergence of new phenomenon which are/would be classified as threat to international peace and security and the manner in which the principal UN organ, SC, has been effecting its responsibilities and whether one can draw some prospective elements thereof and their insinuation on the existing international law framework for the regulation of use of force are analysed in an enthralling manner.

[125] GLENNON, *supra* note 17; *See also* AREND & BECK, *supra* note 10.
[126] Falk, *supra* note 12, at 593.

Chapter Three

3.1 Conceptual Framework of the International Use of Force

For the reason that the UN Charter does not explicitly provide the definition of the fundamental notion of use of force and threat of force, their meanings and scope have remained to be matters of dispute. However, the prevalent understanding of the notion is that, it primarily refers to the prohibition of physical or armed force other than other sorts of forces.[127] As per Art.2 (4) of the UN Charter, not only are uses of armed force forbidden, but so too are threats to use of force. The prohibition under this article, as it stands, is limited to force used in international relations and, international law prohibits neither recourse to revolution nor the suppression of an internal revolution. In addition, are issues of *indirect use* of forces, like the act of supporting the rebel groups, providing with military bases, or using surrogate forces outlawed under this provision? Though these acts do not have explicit room under this Charter provision, some later developments tend to embrace such constructive ways of using forces.[128]

For the fact that the Charter is grounded on a premise that is simply no longer valid and regarded as the Charter's anachronistic focus,[129] there is the assumption that the core threat to international security still comes from inter-state violence. Although the prohibition on force primarily refers to inter-state relations, in its broader sense, as some commentators propose, it also covers cross-border use of force against non-state actors, like Hezbollah; the operation of which as well concerns the territorial integrity of the state where the non-state actor is located.[130] On the contrary, some contend that the use of force against non-state actors in the

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[127] Albrecht Randelzhofer, *Article 2(4),* in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. I, 112, at 117-119 (Bruno Simma (ed.), 2nd ed, 2002).

[128] *See* The 1965 Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (A/RES/20/2131, 7 Dec. 1965); The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UNGA Res.2625, 25th Sess., 28, U.N. Doc. A/8028, 1970; The 1974 Definition of Aggression (GA Res. 3314, UN GAOR, 29th Sess.31, UN Doc.A/9631, 1974); Nicaragua case, ICJ Reports 14 (1986) paras. 108, 118-9, and 191; and UNSC Resolutions. 1373(2001) and 1566(2004), which condemned terrorism and remained states their obligation not to allow armed bands to make use of their territories. *See also*, Oscar Schachter, *The Right of State to Use Armed Force*, 82 MICH. L. REV. 1620, (1984) at 1625. 'Art.2 (4) prohibits not only the resort to armed force, but also the resort to other violent measures short of war directly or indirectly.' *See further*, SHAW, *supra* note 6, at 1018.

[129] Glennon, *supra* note 24, at 2.

[130] Ducheine and Pouw, *supra* note 119, at 53.

form of a brief liberation action against a non-state actor, as was the case in the Israeli Thunderbolt operation in Entebbe (1971) and/or other affairs irrespective of their objectives, fall under the prohibition perspective.[131] For the proponents of the latter view, an invasion, however, brief in duration, violates the essence of territorial integrity, the right of a state to control access to its territory.[132]

Are non-members relieved of such prohibition or limitation under Art. 2 (4)? This general prohibition also covers non-members too, so long as Art. 2 (6) of the Charter provides that:

> '*The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.'*

In addition, the prohibition on the use of force has also been considered as forming a rule of customary international law and, there are scholars who suggest that it has attained the status of '*jus cogence*' deviation from which, by members and non-members alike, would entail international liability.[133]

Another critical issue is whether the prohibition of the use of force under Art. 2 (4) covers the use of economic forces. There is a strain of opinion holding that whereas 'armed attack' is referred to in Art.51, the use of the solitary word 'force' in Art. 2 (4) holds a wider meaning, encompassing economic forces or other methods of non-military coercion.[134] Although such measures may be banned by certain other provisions of the Charter, it does not seem plausible to justify such a wide non-military interpretation of Art. 2 (4) in the light of subsequent state practices. The uncertainty of the rules relating to the prohibition of economic coercion is illustrated by the Nicaragua Case where ICJ rejected the claim that some economic measures taken by the US constitute intervention.[135] The argument that economic coercion is prohibited

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[131] Randelzhofer, *supra* note 127, at 123.
[132] Oscar Schachter, *The Legality of Pro-democratic Invasion*, 78 (3) AJIL, 645 (1984) at 649.
[133] SHAW, *supra* note 6, at 126; *See also*, Gordon A. Christenson, Rushing *Customary International Law, in Appraisal of the ICJ'S Decision: Nicaragua V. United States (Merits)*, 81 AJIL 77, at 101-105, (1987), where the fact that ICJ considered this principle as a *jus cogens* norm has been explained.
[134] *See* generally Corneliu Bjola, *Legitimating the Use of Force in International Politics: A Communicative Action Perspective*, 11 E J INT'L AFFAIRS, 266 (2005) at 266-303.
[135] Nicaragua case, ICJ Reports 14 (1986) paras.244-245.

by Art. 2 (4) is generally not accepted and supported by the drafting history of the provision.[136] However, there is now considerable support for the view that economic coercion violates the principle of non-intervention unless authorized by the SC acting under Chapter VII.[137] To this end, developing countries maintain that, as economic coercion may destroy the political independence of a state as effectively as armed force, it is essential to interpret Art.2 (4) to encompass all forms of force, to which the Western nations oppose until the 1973 Arab oil boycott shook the economies of the West.[138]

Moreover, Art. 2 (4) prohibits force that would jeopardize the *'territorial integrity or political independence'* of a nation, but certain forms of economic coercion rise in violation of it.[139] Then the question is: should such acts entitle the use of force by the victim state? Some scholars argue that one of the principal reasons for restricting 'force' to physical or armed force was the conviction that stretching it by including economic coercion would necessarily empower States to have the license of use of force to defend against such conduct.[140] Hitherto, international law on the use of force has yet to codify an effective response to economic coercion when it threatens the sovereignty and existence of a state. The writer argues that a state should be allowed some legitimate recourse under international law, such as reference to the SC, or taking some retaliatory measures by ceasing economic and diplomatic relations, or to take justified retaliatory actions to punish or deter a wrong doer.

In addition, the meaning of the phrase '*…or in any other manner inconsistent…*' under this provision remains mysterious. Does it allow the incorporation of any other exception from the general ban stipulated thereof? Or, is it merely meant to make the prohibition a watertight

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[136] A look at paragraph seven of the preamble and Articles 44, 46,51and 53 of the Charter; the 1970 UN General Assembly Declaration on friendly relations; and applying teleological interpretation suggest that the word 'force' is limited to 'armed or military force.' In addition, when we see the *travaux preparatoires* of the Charter, Brazil's proposal to extend the ban on the use of force to cover economic enforcement was rejected (Documents of the United Nations Conference on International Organization (UNCIO), Vol.6, (1945) at 334.

[137] Y Z Blum, *Economic Boycotts in International Law,* 12 TEXAS INTERNATIONAL LAW JOURNAL 5 (1977) at 5-16 & J. Paust & A.P. Blaustein, *The Arab-Oil Weapon, A Threat to International Peace,* 68 AJIL 410 (1974), at 410 -439.

[138] DUGARD, *supra* note 2, at 503. *See also* Paust & Blaustein, *supra* note 137.

[139] *See for instance*, The US act on Chile, CIA Reveals Covert Acts in Chile (Sept. 19, 2000), http://cbsnews.cbs.com/stories/2000/09/11/world/main232452.shtml, visited on April 23, 2010.

[140] John Lawerence Hargrove, *Appraisals of the ICJ's Decision: Nicaragua v.US*, 81 AJIL 135, (1987) at 140.

one? Some distinguished publicists, for instance, Bruno Simma, supported the later view.[141] On the contrary, there are scholars who suggest that, especially taking in to consideration, economic sanctions, for instance, against South Africa, even if such coercion may be considered as unlawful intervention under international law, it is clear that it is illegal only if it seeks to 'subordinate' the exercise of the target state's sovereign rights for some purposes inconsistent with the principles of the Charter.[142] In case of South Africa under apartheid, numerous recommendations of the UNGA and SC designated the imposition of economic sanctions against South Africa as action designed to ensure the compliance with the principles of the Charter, and hence, it is inline with Art. 2 (4).[143]

Generally, this traditional rule is now subject to developments in different fields of international law, human rights, issue of self-determination, terrorism, invention of chemical and biological weapons, and humanitarian interventions. Accordingly, Art. 2 (4) does not provide a complete picture of the use of force under the international arena today, hence, is anachronistic. In this regard, some suggest that the provision must be read in its context with Arts.39, 51, and 53, which themselves posses vague expressions.[144]

3.2 The Normative Aspects of International Use of Force

3.2.1 General Principles of Law Common to Nations

General principles of law constitute a reservior of legal principles, when there are no rules of treaty or customary law applicable to them.[145] Such principles of law are basically found in municipal systems which are supposed to fill the lacunas in international law. By introducing some elements like- humanity, equity, reasonableness and liability rules under the rubric of international law, they have, to some extent, evidenced some natural law elements to it. Under different legal systems, there are rules which are, in one way or another, related to the use of force in different circumstances. It is believed that the over all structure of international rules prohibiting use of force have fetched some normative elements thereof.

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[141] Simma, *supra* note 5.
[142] DUGARD, *supra* note 2, at 504.
[143] K Ferguson Brown, *The Legality of Economic Sanctions Against South Africa in Contemporary International Law*, 14 **SAYIL**, 1988-9, at 59, as cited in *supra* note 2, at 483.
[144] Ranelzhofer, *supra* note 127, at 117.
[145] *See* Art.38 (1) (c) of the statute of International Court of Justice.

3.2.2 The Just War Theory

The doctrine of the just-war arose as a consequence of the Christianization of the Roman Empire and the ensuing abandonment by Christians of pacifism. Force could be used provided it complied with the divine will.[146] St Augustine defined the just war in terms of avenging of injuries suffered where the guilty party has refused to make amends.[147] St Thomas Aquinas in the thirteenth century took the definition of the just war a stage further by declaring that it was the subjective guilt of the wrongdoer that had to be punished rather than the objectively wrong activity.[148] He wrote that war could be justified provided it was waged by the *sovereign authority*, it was accompanied by a *just cause* (i.e. the punishment of wrongdoers) and, it was supported by the *right intentions* on the part of the belligerents. Use of force is, hence, a legitimate one as per this theory since antiquity. Accordingly, though today the scope has been diminished for various reasons, use of force has an entrenched root in this doctrine.

3.2.3 The Kellogg Doctrine/ Briand Pact of 1928

It refers to a multilateral treaty where members agree to renounce the resort to war as an instrument of national policy in their mutual relations and to resolve all international disputes by peaceful means alone.[149] In the early tumultuous times, politics and military adventure were regarded as a sovereign right, and considered crucial to the realist sensibility in the balance of power among nations.[150]This treaty has introduced a core principle on the prohibition of threat to or use of force by states in their international relations on which the current Charter system has been based. Needless to cite that, this treaty has furnished an elevated normative value to this international law principle.

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[146] SHAW, *supra* note 6, at 1157.

[147] *See* JOHN EPPSTEIN, THE CATHOLIC TRADITION OF THE LAW OF NATIONS, BURNS, OATES & WASHBOURNE LTD, WASHINGTON, D.C (1935) at 66 and *ff*.

[148]*See* Von Elbe, *The Evolution of the Concept of the Just war in International Law*, 33 AJIL, 665 (1939) at 669.

[149] Treaty providing for the Renunciation of War as an Instrument of National Policy, 1928, available at http://www.fletcher.tufts.edu/multi/texts/historical/bh115.txt, visited on April 23, 2010.

[150] *See* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS, 1st ed. MCGRAW-HILL, UNIVERSITY OF CALIFORNIA, BERKELY (1979).

3.2.4 Customary International Law Norms

As illustrated earlier, until recent decades customary international law deemed the right to use force and even to go to war to be an essential attribute of every state.[151] Through time, however, the principle of non-use of force has been established as a principle of international customary law and, through that framework, it also consistently recognizes self-defense as a legitimate basis for the use of force.[152] This has been asserted by ICJ when confronted with issues involving Arts.2 (4) and 51 of the Charter and, more specifically, in the *Nicaragua case* where it ruled that 'a parallel right of self-defense exist in customary international law.'[153]

As vividly illustrated elsewhere in the thesis, while ICJ juxtaposed this customary right with the Charter provisions, it has considered the *Caroline case* and briefed that 'the submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law.[154] However, what remains contentious is whether the principle of non-use of force has been established as a principle of international customary law with an identical normative content, but independent of Art. 2 (4).[155]

The emergence of some vital values of the international community has, however, left in limbo this established international law rule as it may not squarely fit to the exigency of the 21st Century normative reality on the ground. And some scholars even asserted that the current state practices and the over all objective realities of our world testify the coming in to picture of new customary international law norm for the regulation of the use of force in the international arena.[156] Of course, in analyzing whether or not new norms have emerged; consistency, duration and generality requirements of States' practices need to be assessed,

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[151] Hyde Charles Cheney, *International Law Chiefly As Interpreted and Applied by the United States*, 13 (4) VIRGINIA LAW REVIEW, 1011 (1945) at 1011-1014.

[152] *Id.*

[153] Nicaragua case, ICJ Reports 14 (1986) para. 188. Here, the court even went further and said that the phrase 'inherent right' under Art.51preserves the pre-Charter customary right.

[154] Nicaragua case, ICJ Reports 14 (1986) paras. 40 - 41. The court confirmed this dictum in the Oil Platforms Case (Iran v. U.S. case) (Merits), ICJ Reports 161 (2003) para76. The same goes in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons.

[155] Shinya Murase, The Relationship between the United Nations Charter and General International Law Regarding Non-Use of Force: The Case of NATO's Air Campaign in the Kosovo Crisis of 1999, available at, http://www.lcil.cam.ac.uk/Media/lectures/doc/Murase.doc, visited on April 28, 2010.

[156] Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW, at 604 (Malcolm Evans (ed.), 2003). Here among other things relaxing the traditional norm requirements i.e. necessity and proportionality on case by case basis considering the capabilities and objectives of today's adversaries is proposed.

and, to this end, ICJ depicts that the practice had to be consistent but *need not be in absolutely rigorous conformity*.[157] Accordingly, variations of a custom may be permitted which would buttress such a position in the existence of fissure in the observed practices.

3.2.5 Treaty Law- the UN Charter

The UN Charter, almost a universal treaty, designed a system which proscribes resort to the use of force under Art. 2 (4). It has also indicated some exceptions under which the use of force may become legitimate under Art. 51 and SC scheme. One of the central purposes of the UN Charter is to prevent States from attacking other States, and a State is surely less likely to attack another when it credibly expects the use of force in response by the other State, or the other State and its allies.[158] This, in turn has strengthened the normativity of the rules on the use of force. The contents of its provisions regulating use of force and the observed loopholes and perplexities have been well addressed in the preceding sections and here it suffices to conclude that, as per the Charter, such prohibition is obligatory, and even acquires the status of *Jus cogens* norm as mentioned earlier.

3.3 The Legal Parameters of Use of Force

In a nation-state system developed out of the circumstances existing at the time of the Peace of Westphalia in 1648, the territorial foundation of sovereignty has produced special challenges for international law and non-state actors. Though State remains the dominate actor in international relations and international law, yet the non-state actor plays an increasingly influential role.[159] The readings of both Art. 2 (4) and Art. 51 presuppose the prohibition and use of force by States respectively; especially the stipulation under Art. 2 (4) is crystal-clear to this end.

Apart from this, there are collective security and collective self-defense schemes recognized under the Charter, where international and regional organizations would be allowed to make use of force. Today, the distinction which was foreseen under the Charter with regard to *collective security*- which is to be undertaken by the SC, and *collective self defense* under

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[157] Nicaragua case, ICJ Reports 14 (1986) paras.188 and *ff.*
[158] *See* William H. Taft, *International Law and the Use of Force*, 36 GEO. J. INT'L L, 659 (2004-2005) at 659.
[159] *See* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1999) at 403-435.

Art.51, where the attack against a state threatens the security of the assisting states,[160] has been abandoned.[161] And this has been inferred from the ICJ rulings in the Nicaragua case,[162] and the resolutions of the SC during the Kuwait invasion which called for third states to lend aid to Kuwait even if no attack or threat has been exerted on them, and they had no treaty or special links with Kuwait.[163]

The issue remains open ended in that it fails to answer the question that, what would happen if groups like *Al Qaeda*, multi-national corporations, and most disturbingly, the private military industry or firms (PMF - whose behavior is dictated not by the rule of law, but by simple economics)[164] employ force. Should states be allowed to use force against such groups? To some extent it is permissible. As indicated above, by including such acts under the realm of the indirect use of force, states might be able to defend themselves. International law rules on State responsibility could also be consulted to attribute the acts of these informal groups to states controlling, supporting or harboring such groups. However, we should also be assiduous in creating imputation of responsibility in light of what ICJ carefully did at the Nicaragua case:

> '*it limited the imputation of responsibility from being expanded to legitimate action against states supporting non-state actors' use of force unless that support rises to the level of active participation or control.*'[165]

Though such higher standards set by the ICJ, at times, face challenges and even, as will be discussed subsequently, the court itself is said to lessen the threshold. What about the

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[160] DEREK W BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW, PRAEGER, NEW YORK, (1958) at 206 - 207.

[161] DUGARD, *supra* note 2, at 517. The meaning of collective self defense has been a controversial subject though its purpose reasonably seems clear- to recognize that states may link their own defense with the defense of another state or states. *See* MYRES MC DOUGAL AND FLORENTINO FELICIANO: LAW AND MINIMUM WORLD PUBLIC ORDER, THE LEGAL REGULATION OF INTERNATIONAL COERCION, YALE UNIVERSITY PRESS, NEW HAVEN (1961) AT 247-248; LASSA OPPENHEIM, INTERNATIONAL LAW, 7TH ED, H. LAUTERPACHT, LONGMANS, LONDON (1952) at 155-56, where it is stated that a collective self-defense is no more than rationally conceived individual self-defense.

[162] Nicaragua case, ICJ Report 14 (1986) para.105.

[163] *See* Resolutions 661 and 678(1990); *see also*, Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AJIL 452, (1991) at 457.

[164] P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004) at 524.

[165] Brawnlie, *supra* note 3, at 370.

ramifications of the recent SC Resolutions on terrorism and acts of other international actors like ILC? There are different indications that would force us consider relaxed approach to cope up with the current developments. At any cost, it is a well established rule of customary international law that states should use proportional force in self-defense, irrespective of who and where it is going to do so.

Taking these general remarks, the situations on which use of force under international law is exempted from being pronounced as illegal will be considered in light of the afore-raised questions.

3.3.1 Use of Force by and upon the Authorization of the Security Council

The SC is given, under the Charter, a primary but not an *exclusive* responsibility,[166] for the maintenance of international peace and security. To this end, it can make use of force.[167] This is the principal exception to the prohibition on the use of force, in addition to the permissible use of force under Art.51 of the Charter. Here, it is important to portray a skeptical view forwarded by some commentators which reads:

> *'because of a greater resort to the Council to authorize the use of force internationally, but also because of a noticeable tendency to avoid doing so in certain cases, arguments have grown that, even beyond narrowly constructed cases of self defense, explicit Council authorization for the use of force may no longer be required, however politically useful it can prove.'* [168]

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[166] *See,* Uniting for Peace UNGA Res.377 (V) A (1)- 'if the Security Council … fails to exercise its primary responsibility for the maintenance of international peace and security … the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security'- *this could be what is enunciated under Art.14 of the Charter*; also, in Certain Expenses Case, ICJ Report 151 (1962) at 163, the fact that the Security Council has *a primary but not an exclusive responsibility* for the maintenance of international peace and security has been upheld by the ICJ, and in the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, it has formally confirmed that the prohibition of simultaneous action has been superseded by practice (I.C.J. Reports 2004, p. 136, at paras. 27 and 28) [Emphasis added].

[167] *See* Art. 24 cum. Art. 1 (1), Art 39 and Art. 42 of the UN Charter.

[168] DAVID M. MALONE (ED), THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY, LYNNE RIENNER PUBLISHER, (2004) at 11.

Under Art. 39 of the Charter, the SC has the authority to determine the existence, not only of breaches of the peace or acts of aggression that have already occurred, but also of threats to the peace; and under Art. 42 of same, it has the authority to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. These authorities seem to encompass the possibility of preemptive use of force.[169] Art. 42 only contemplates, explicitly, that the SC may take the action on its own, in line with the arrangements to be made under Art. 43. As this arrangement is not yet put in practice, the SC, in practice, has been authorizing willing member states to use force on its behalf. The possibility of such a delegation, as illustrated later under the Fourth Chapter, is doubtful.

It is also a well established practice that, as in the case where a state acts in self defense, the SC should act deliberately and cautiously, considering always the possibility of peaceful remedies, before invoking Chapter VII to authorize the use of force to meet threats to international peace and security.[170]

One may still have arguments about how the Council has taken the decision, particularly with regard to questions of the basis of the SC's authority, the scope of that authority, and how long that authority lasts. Issues like economic sanctions,[171] and the scope of the expressions 'threat to or breach of peace, or acts of aggression' remained contentious and, the Council's discretion to so label a situation is essentially unfettered.[172] Once the situation, however argumentative, has reached Art.39's threshold and as long as the necessary decision is taken, the intervention under UN flag nevertheless remains lawful.

However, the SC has not adequately delivered its promise to provide prompt and effective collective security against aggressor States. Only under few incidents it has authorized the use

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[169] Taft, *supra* note 158, at 661.

[170] *Id*.

[171] *See* Arguments presented in MacDonald, *Resort to International Economic Coercion*, 17 U, TORONTO L. J. 86, (1967), as cited under Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 (1) EJIL 63 (2002) at 65. Since the end of the Cold War, sanctions have become more common and have been imposed in a number of situations. The problem with sanctions is that they also have impacts on human rights.

[172] Despite the existence of a number of UN Resolutions which recognized the extensive violation of human rights and other humanitarian aspects, for example refugee flows, as constituting threat to international peace and security, and decided on, recommended, or authorized economic sanctions or military measures; there are scholars who hold the view that human right violations do not give rise to collective actions under Art. 39- *see for instance*, Higgins, *International Law and Rhodesia*, 23 WORLD TODAY (1965) at 103, as cited under Mary Ellen O'Connell, *supra* note 171, at 66.

of force under Chapter VII and those are the measures taken in 1950 at the time of North Korea's invention of South Korea under Res.83 and 84; in 1966 as a response to the Rhodesia's unilateral declaration of independence under Res.221; in 1991 during the Iraq invasion of Kuwait under Res.678 allowing the use of 'all the necessary means';[173] in 1992 considering the continuation of the situation in Somalia as a threat to international peace and security under Res.794, Haiti Res.940, Sierra Leone Res.1132, and in 1999, it intervened to restore peace and security in East Timor following the violence that ensued after the territory had overwhelmingly voted for independence form Indonesia under Res.1264/99.

This result is a product of several interrelated factors, including the failure of States themselves to enter into the special agreements that would give rise to an armed force at the SC's disposal as per Art.43 of the Charter, extensive use of the veto power by the permanent members, paralyzing political and ideological divisions,[174] and a loss of confidence, especially by the western and powerful States, on the effectiveness of a politicized UN to broker conflicts dispassionately.[175]

Recently, it has been giving subsequent ratification for actions taken by different international actors. Referring to what is provided under Art 53(1) of the Charter some argue that it leaves a room for the possibility of 'implicit or *ex post facto* authorization.'[176] In addition, the conspicuous issue which should be raised here is the implication of Chapter VII and Art.25 of the UN Charter which gives a binding force to the decisions adopted by the SC. Does this entitle the SC to create or impose new obligations having no basis in the Charter? And, what force does a resolution adopted under the general power of the SC out side Chapter VII have? These issues posed controversies which are not yet solved.[177] The ramification of such an authorization as to whether or not the SC has such a power, and the effects of the resolutions adopted under the SC's general power, are analyzed later under the Fourth Chapter.

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[173] Here what is anomaly is that the coalition's action in Operation Desert Storm was not made under the UN flag or UN command. *See* GRAY, *supra* note 9, at 205.

[174] Devika Hovell, *Chinks in the Armour: International Law, Terrorism and the Use of Force*, 27(2) UNSWLJ 398 (2004) at 402.

[175] AREND & BECK, *supra* note 10, at 36.

[176] Simma, *supra* note 5, at 4.

[177] ICJ accepted the interpretation that the decisions of SC even under its general powers have binding forces- see the Namibia Opinion, 1971 Report 16. *See also* P Szaz, *The Security Council Starts Legislating*, 96 AJIL 901, (2002).

3.3.2 Use of Force in Self-defense

Under the UN Charter Art. 51, an exception to the general prohibition on the use of force has been provided. And, it is illustrated that the dual purpose of self-defense is: (1) fending off an attack in progress or impending and negate the consequences thereof; (2) preventing a sequel to the initial attack.[178] However, this exception on the use of force in self-defense is subject to great rhetorical ebb and flow of debates. The most significant factor in complicating a rather 'simple' right of self-defense accorded by Art. 51, has been the changing nature of warfare itself while the Charter foresaw only organized incursions of large military formations of one state into the territory of another state.[179] Modern warfare, however, has inconveniently bypassed these Queensberry-like practices and tended to proceed along two radically different lines, one too small and the other too large to be encompassed effectively by Art. 51.[180] These two categories are, first, wars of agitation, infiltration and subversion carried on by proxy through national liberation movements, and, second, nuclear wars involving the instantaneous use of weapons of near-paralyzing destructiveness in a first strike.[181]

The current increased scrutiny and reliance upon Art. 51 exposed the ambiguities and flaws in the drafting of the provision and the difficulty of extrapolating what it exactly permitted. For example, a literal reading of Art. 51 would prevent a member nation from attacking a hostile neighbor that is amassing troops on its border with obvious ill intent, a classic example of what jurists call anticipatory self-defense. Yet, many international lawyers believe that Art.51 should not render illegal Israel's 1967 attack on Egypt, Jordan, and Syria at the outset of the Six-Day War.[182]

This principle has been developed under customary international law, and legitimate self defense in customary international law has three main requirements:[183] an actual or threat of infringement of the rights of the defending State; a failure or inability on the part of the other state to use its own legal powers to stop or prevent the infringement; and acts of self-defense should be strictly confined to the object of stopping or preventing the infringement, and be

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[178] Ducheine and Pouw, *supra* note 119, at 56.
[179] Franck, *supra* note 74, at 812.
[180] *Id.*
[181] *Id.*
[182] *See for e.g.,* Anthony D'Amato, *Israel's Air Strike up on the Iraqi Nuclear Reactor,* 77 AJIL 584 (1983) at 584.
[183] ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW, 150 LEADING CASES, OLD BAILEY PRESS (2002) at 365.

reasonably proportionate to what is required for achieving this object. The other crucial issue, here is, whether this Charter provision has superseded the customary international law rule or, simply stated, what potential relation is created there after? Though scholars took different views in this regard, the ICJ, in reflecting on this issue, held that:

> '*The principal rules of the Charter and customary law on the subject are identical; the essential consideration is that both sets of rules flow from a common principle of outlawing the use of force in international relations. …the principle of non-use of force expressed in Art.2 (4) was not only a principle of customary international law, but also a fundamental or cardinal principle of such law.*'[184]

Recently, the Bush administration announced its new doctrine of preemption, the debate over the parameters of legal self-defense aired from the halls of academia onto the nation's op-ed pages of current history and television news programs. The legality and wisdom of the doctrine of preemption has inevitably become entangled in deliberations over Iraq, but the doctrine is intended to encompass much more than a single conflict. In this regard though the customary international law, as reiterated by the ICJ in the *Nicaragua case*, is some how clearer, the strict preconditions set thereof, left it some how inflexible to accommodate the recently developing phenomenon. Taking these issues at the back of our mind, lets examine what this right really refers to and the parameters set thereof.

3.3.2.1 Essential Features of the Right to Self-defense

The use of force in self defense is described as an 'inherent right' of a state under the Charter. This inherency is some times interpreted to put up use of force by a state in preemption. As can be inferred from the stipulation of Art. 51, there seems to be no strict need to resort to peaceful settlement efforts, despite what is provided under Art. 2(3) calls for pacific dispute settlement. Moreover, under customary international law on the recourse to use of force, the element of where *necessity* is interpreted to require the exhaustion of available alternative realistic means to settle the matter. This right is also a conditional, as there are thresholds of 'armed attack', and 'the intrinsic requirements of necessity (immediacy) and proportionality',

[184] Nicaragua case, ICJ Reports 14 (1986) paras.97 & 100. Remember also that the court pointed out the fact that they have parallel existence at para.188.

and temporary one which would last until the SC takes measures as can be inferred from Art. 51. Such exercise of self-defense also needs to be reported immediately to the SC.

As the essence of self-defense is self-help and self-judging, there is no room for members having veto power to protect a State, which has decided the existence of a situation which would warrant the use of force, from employing it.[185] This assertion has been supported by some scholars while others object to it. Those who uphold this statement interpret Art. 51 as an affirmation of an inherent right predating the Charter system, and the right of individual or collective self-defense requires no action by the SC before exercise and the customary international law of necessity and proportionality would dictate the degree of permissible defensive force.[186] Accordingly, for such groups, the SC authorization constitutes a politically useful, but legally unnecessary, step because the right of self-defense emanates from the very nature of the states system. When we see the *travaux préparatoires* of the Charter, under which, there is a clear indication of the fact that regional arrangements can act in self-defense without the need for authorization by the SC.[187] This also puts light on the core point, in support of the above view, by uncovering the dilemma.

On the contrary, there are others who represent discomfort with the fact that self-defense is self-judging in the first place, and they further argued that Art.51 'is not an affirmative grant of a right to self-defense but a statement of the situations in which the exercise of an 'inherent right' is not precluded by the Charter.'[188] The core idea behind such proposition is that the SC decides not only what measures shall be taken under Art.41 and 42 'to give effect to its decisions' but also whether the right to use force in self defense exists at all in a particular situation. Conflicts between victim States, believing that they must use force in self-defense, and the SC are foreseeable, and the Charter implies that they be resolved in favor of the SC.[189] Accordingly, Art. 51 circumscribes the exercise of right temporally and substantively and it

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[185] *See generally*, Myres Mc Dougal and Feliciano, *supra* note 161, at 126-27, 217-44. It took the position that 'each state has to decide for itself, whether it must turn to force of arms to defend itself' as quoted in Nicholas Rostow, *supra* note 64, at 416.

[186] Rostow, *supra* note 64, at 416.

[187] Hakimi, *supra* note 30, at 651.

[188] Abram Chayes, *The Use of Force in the Persian Gulf (Paper prepared for the US -Soviet Conference on the Non-Use of Force*,(1990), as cited in Nicholas Rostow, *supra* note 64, at 417.

[189] C.H.M. Waldock, *The Regulation of the Use of Force by Individual states in International Law*, 81(2) RECUEIL DES COURS 451 (1952) at 495-496.

fits self-defense into a framework that delegates 'primary' responsibility for international peace and security to the SC.[190] Nicholas further justifies this view by forwarding;

> '*The authors of the UN system genuinely hoped that the great powers would, in fact take responsibility for world peace and granted the SC such a mandate, while also they seem to have recognized that the permanent members might not do so. To some the right of self-defense provides a saving grace for an international regime viewed as a recipe for anarchy. Accordingly, Art.51 complements the permanent members' veto in the SC.*' [191]

In the traditional war, self-defense paradigm allows for States to protect themselves either against conventional threats, armies massing against their border, or after an attack by another nation-state. However, self-defense during unconventional or 'unseen enemy' paradigm is ambiguous, and it is not inherently clear who is attacking the state or who the state is protecting itself against.[192] This issue has also significantly affected the self-defense discussion of the contemporary period.

As discussed earlier, this right is not also strictly limited to the victim or would be victim state(s) but it gives a room for other states to cooperate in averting the situation. In addition, measures taken in preparation of self-defense are not contrary to international law.[193]

3.3.2.2 Conditions Attached to Use of Force in Self-defense

Though this right is reserved to states under the Charter system and, in a bit broader terms, under the customary international law, it does not mean that there are no stakes of the international community and, hence, there are conditions attributed thereto. Among others, the articulation under Art. 51 provides 'armed attack' as the key legal criterion triggering a forcible action taken in self-defense. The logical questions which demand clarification include: What it means and constitutes? Does it include an imminent armed attack? By whom should it be committed? These issues have remained brainteasers.

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[190] Rostow, *supra* note 64, at 416.
[191] Rostow, *supra* note 64, at 419.
[192] Guiora, *supra* note 23.
[193] GEORGE SCHWARZENBERGER, INTERNATIONAL LAW, THE LAW OF ARMED CONFLICT, VOL. 2, STEVENS AND SONS, (1968) at 35.

The meaning of what '*armed attack*' means, not being given by the Charter, remained uncertain.[194] However, commentators stipulate that armed attacks are characterized by a combination of elements without a need to define the term. It is said to have, first of all, a cross-border character.[195] Besides, a combination of quantitative (the scale- the measure of the method used and the means, and the effects- the scale and the type of consequences (material, physical and symbolic damage) of the attack), and qualitative (about the nature, such as the method applied, the means used and the status of the attacker) aspects are determiners.[196]

There is also a view that, especially when such attack comes from a state, an armed attack means any sort of use of armed force, and does not need to cross some threshold of intensity, irrespective of the view of the ICJ which suggest that there may be instances of the use of force which are not of sufficient gravity as to scale and effect to constitute an armed attack for the purpose of self-defense.[197] Any requirement, that a use of force must attain certain gravity and, those mere frontier incidents, for example, are excluded, is relevant only in so far as the minor nature of an attack is *prima facie* evidence of absence of intention to attack or honest mistake,[198] and, it may also be relevant to the issues of necessity and proportionality.[199]

When unconventional or alternative techniques, new methods and means are used for an armed attack and, when these unorthodox techniques are applied with the same purpose as a classic use of force, i.e., the generation of physical (kinetic) effect, for instance, as in the 9/11 attacks, they need to be classified as constituting an armed attack.[200] Some also believe that,

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[194] *See generally* Albrecht Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. I, 788, at 794-796 (Bruno Simma (ed.), 2nd ed, 2002). Here much more perplexity of the issue has been raise, especially in comparison with acts of aggression, as defined by the UNGA.

[195] Ducheine and Pouw, *supra* note 119, at 60. This is also underlined by ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, 9 July 2004, at para.139.

[196] *Id*.

[197] Wilmshurst, *supra* note 23, at 6.

[198] The fact that, the term 'armed attack' requires the attacker to have the intention to attack has been indicated by ICJ in the *Oil Platforms* Case, at para.64. 'But to the extent that this may be read as suggesting that military attacks on a state or its vessels do not trigger a right of self-defence as long as the attacks are not aimed specifically at the particular state or its vessels but rather are *carried out indiscriminately*,' this part of the ICJ's ruling in *Oil Platforms* has been criticised as not being supported by International Law. *See also* Wilmshurst, *supra* note 23, at 6. [Emphasis added]

[199] Wilmshurts, *supra* note 23, at 6.

[200] Stahn, C., '*Nicaragua is dead, long live Nicaragua', the Right to Self-defense under Art.51 UN Charter and International Terrorism*, in TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? SPRINGER, BERLIN/HEIDELBERG, 827-877, at 858.(Walter, C., *et al* (eds.), 2004)

for the purpose of Article 51, an armed attack includes not only an attack against the territory of the State, including its airspace and territorial sea, but also attacks directed against emanations of the State, such as its armed forces or embassies abroad and, may also include, in certain circumstances, attacks against private citizens abroad or civil ships and airliners.[201]

The doctrine of accumulation of events has been reckoned, even if a separate attack may not meet the quantitative elements. But if it forms part and parcel of a more comprehensive armed campaign, it could qualify to be an armed attack in the sense of the Charter provision.[202] ICJ seems to *implicitly* accept this doctrine, and the same goes to state practices. For instance, Israel and USA have, on a number of occasions, relied on such a doctrine to justify their measures.[203] In this regard, albeit ICJ entertained issues involving what constituted an armed attack, it has not yet articulated an *explicit* standard of proof for the *establishment or attribution* of an armed attack as a precursor to assessing the lawfulness of claims regarding the right to self-defense.[204] In the Nicaragua case, relied in part on the UNGA's Definition of Aggression,[205] it decided that:

> '*armed attack includes 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 of such gravity as to amount to, inter alia, an actual armed attack conducted by regular forces, or the substantial involvement therein*.'[206]

Again, what remains questionable is, whether the occurrence of actual armed attack is a *sin qua non* for the coming in to picture of the right to self defense or the existence of threat to that effect suffices to launch self-defense attack. Read in line with the prohibition of *use/threat to use force* and, looking at the customary practices, it would be logical to allow a

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[201] Wilmshurst, *supra* note 23, at 6.
[202] Ducheine and Pouw, *supra* note 119, at 62.
[203] *Id.*
[204] M. Ellen O'Connell, *Rules of Evidence for the Use of Force in International Law's New Era*, 100 ASIL Proc.44, (2006) at 43.
[205] *See* The Definition of Aggression, GA Res. 3314, UN GAOR, 29th Sess.31, UN Doc. A/9631, 1974; *see also* The 1970 UNGA Declaration on Principles of International Law.
[206] Nicaragua case, ICJ Reports 14 (1986) paras.126 & 127.

state to make use of force when there is an imminent attack,[207] though some jurists deny such interpretation.[208]

The other issue, i.e., the source of the attack (author) for which self defense is contemplated need to be identified. Here, some commentators, taking into consideration the jurisprudence of ICJ [209]and, the overall logic and spirit of the Charter coupled with the writings of distinguished legal scholars,[210] conclude that the attack should emanate from a *state* despite no such explicit reference is made under Art. 51. A scholar opinioned that it is better to maintain a tight rule on the use of force, and accept in limited contexts, that the rule might have to be broken.[211]

A Judge in ICJ holds the view that such a restrictive reading of Art. 51 might well have reflected the state or, rather, the prevailing interpretation, of the international law on self-defense for a long time. However, in the light of more recent developments it ought to be considered urgently not only in State practice but also by the court with regard to accompanying *opinio juris*.[212] He stated that:

> '*if armed attacks are carried out by irregular forces from such territory against a neighboring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it would be unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State and the Charter does not require so.*'[213]

Following the inter-state approach for Art.51, the proponents of this view have also accepted the possibility of attribution based on the fulfillment of some conditions, such as effective

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[207] Kofi Annan, In Larger Freedom, Towards Development, Security and Human Rights for All, (UN Doc. A/59/2005, 21 March 2005) [hereinafter In Larger Freedom], para. 124.

[208] They tend to follow literal meaning of the provision, and restrict the use of force in self defense only in cases where there exists actual armed attack. *See* BROWNLIE, *supra* note 3, at 187-193; YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE, 3rd ed, CAMBRIDGE, (2001) at 166-168, and HANS KELSEN, THE LAW OF THE UNITED NATIONS, STEVENS LONDON, (1950) at 914.

[209] In all the three; Nicaragua case, Israel fence case, and DRC V. Uganda, cases '*State element'* has been underscored.

[210] *See notably*, Christian J. Tams, *The Use of Force Against Terrorists*, 20 EJIL 359 (2009).

[211] Taft, *supra* note 157, at 662.

[212] *See* DRC v Uganda, ICJ Report 201 (2005), separate opinion of judge Simma.

[213] *See* DRC v Uganda, ICJ Report 201 (2005), separate opinion of judge Simma.

control test, so that the victim State will be entitled to use force in self-defense when non-state actors produce the attack.[214] As observed in its rulings, for imputing acts of non-state authors, the ICJ generally demands a '*clear and convincing*' evidence and '*effective control*' requirements to attribute their acts to a State. The comparison of Nicaragua and Oil platform cases *vis-à-vis* that of the DRC v. Uganda, however, shows the existence of some leniency on the part of ICJ to adopt a relatively relaxed standard to attribute actions as constituting an armed attack as understood under the Charter.[215] Apart from sending its agents/mercenaries, if a State 'controlled or supported the attackers; possibly where it fails, or appears unable or unwilling to control them or, where it subsequently adopted the acts of the attackers as its own, acts of non-state players can possibly be attributed to States'[216] and, would entitle a victim State to legitimately use force in self-defense.[217] The SC Resolutions those following the 9/11 attack, argumentatively, suggest this extension for the sake of attribution.[218]

On the contrary, others argue that self-defense is available against armed attacks even if these attacks cannot be attributed to the territorial State.[219] They try to substantiate their position stating that Art.51 does require that the attack be from a 'State' and to this end they cite the *travaux préparatoires* of the Charter, where the reference to '*by any state'* from the proposed clause- 'in the event of an attack *by any State* against any member State,' under Art.51 is later cancelled out.[220] Also, the right to use force in self-defense is an inherent right and is not

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[214] This standard has been criticized by the International Criminal Tribunal for Yugoslavia in the *Tadic* case and here an 'over all control test' was adopted. The ILC in its work on state responsibility, the UNGA's Res. 2652(XXV) 1970 and 49/60, 1994, adopted some relaxed and elaborated rules for attribution.

[215] Fluctuating evidentiary Standards for Self-defense in the ICJ; [http://journals.cambridge.org/ action/ display Fulltext?type=1&fid=3802400&jid=ILQ&volumeId=58&issueId=01&aid=3802392](http://journals.cambridge.org/action/displayFulltext?type=1&fid=3802400&jid=ILQ&volumeId=58&issueId=01&aid=3802392), visited on May 3, 2010.

[216] O'Connell, *supra* note 6, at 7. *See also* Responsibility of States for Internationally Wrongful Acts, Arts.4-11, UNGA Res.56/83, (2002).

[217] However, ICJ in its judgment in the Case concerning Armed Activities on the territory of the Congo v Uganda paras.146 and 147, ruled that unwillingness or inability of a State to deal with irregular forces on its territory is insufficient to create a right in self-defense against the State, though, at the same time, it failed to indicating what possible action a victim State may take in the case of an armed attack by irregular forces, where no involvement of a state can be proved.

[218] *See generally*, Maggs E. Gregory, *How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear weapon Development Facilities under the UN Charter*, 57(1) SYRACUSE L. REV 465 (2006). It shows that previously, SC favored 'restrictive interpretation' of Art.51.

[219] DRC v Uganda, ICJ Reports 201 (2005) separate opinion of Judge Simma, at para.12, and judge Kooij- mans, at para.30; and also Judge Buergenthal's view in the Israeli Wall opinion (ICJ Rep. 2004, 136, para.6).

[220] US Department of State, Foreign Relations of the United States, Diplomatic Papers, 1945 (1967) at 674, as cited in Kearley, T., Regulation of preventive and pre-emptive force in the United Nations Charter: a search for original intent, Wyoming Law Review 663 (2003) at 694.

dependent upon any prior breach of international law by or attribution to the State in the territory of which defensive force is used.[221] In addition, the broad support from states and international organizations like NATO, EU, and OAS for the American-British reaction against Afghanistan (Operation Enduring Freedom), and even the SC reference to the 'inherent right of self-defense' under its resolutions 1367 and 1373, is also an indicative of this.[222]

For this second view, self-defense is directed against the author of the armed attack, irrespective of status, State or non-state actor(s).[223] For one thing, the logic and purpose of self defense require that the attacked State defends itself against the attacker.[224] In addition, the Caroline case in international customary law shows that self-defense can be directed against non-state actors. Finally, there is support in legal doctrine for this view,[225] as is shown in the report of the Expert Meeting on Counter-Terrorism Strategies, where they assert that 'a new understanding is emerging that the right of self-defense also exists in relation to an armed attack which cannot directly be ascribed to another State.'[226]

Accordingly, it is evident that self defense would be illusory if the addressee and the author are not one and the same; and one opts for State centric interpretation. By the same token, if we have to adhere to the view, which takes the position that self-defense is available, irrespective of the status of the author, the basic principle of the Charter, 'state sovereignty' of the addressee, may be endangered. The proponents of this latter view further indicate that this basic principle of international law prohibits States, *without a legitimate basis*, to exert their authority on the territory of another State.[227] Hence, the right to self-defense, provided the

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[221] Wilmshurst, *supra* note 23, at 12.
[222] *See* Ducheine and Pouw, *supra* note 119, at 63.
[223] Ducheine, P.A.L, Krijgsmacht, Geweldgebruik & Terreurbestrijding; een onderzoek naar juridische aspecten van de rol van strijdkrachten bij de bestrijding van terrorisme, Nijmegen: Wolf Legal Publishers, (dissertation University of Amsterdam) (2008) at 256-259, as cited in Ducheine and Pouw, *supra* note 119, at 65.
[224] *Id*, at 258, as cited in Ducheine and Pouw, *supra* note 119, at 65.
[225] MANUSAMA, *supra* note 117, at 292-293.
[226] Nico Schrijver, and L.v.d. Herik, *Counter-terrorism Strategies, Human Rights and International Law: Meeting the Challenges, Expert Meeting Counter-terrorism Strategies* (10-13 April 2007), in LIV Netherlands International Law Review (2007) at 571-587.
[227] Ducheine, *supra* note 223, at 260, as cited in Ducheine and Pouw, *supra* note 119, at 66.

limiting conditions of necessity and proportionality are met, is such a legal basis, a 'permissive rule' is deemed to be fulfilled.[228]

The concepts of necessity and proportionality, which are intrinsic to and at the heart of self-defense, are parameters simultaneous to the use of force in self-defense. Though Art.51 does not expressly set these conditions, submission of the exercise of the right of self defense to these conditions is a rule of customary international law.[229] In our contemporary world, no complaint as to the need for the fulfillment of these conditions has been put in place though the standards through which they need to be weighted have been debated.

The necessity criterion raises important evidential as well as substantive issues. It is essential to demonstrate that, as a reasonable conclusion on the basis of facts reasonably known at the time, the armed attack which has occurred or, is reasonably believed to be imminent, requires the response that is proposed.[230] Necessity is related to the armed attack (assault) and the purpose of self-defense; the purpose of the author of the attack (assault) and the availability of alternatives.[231] Accordingly, necessity, first of all, implies that peaceful alternatives prevail over military reactions and, as soon as realistic alternatives present themselves during a reaction of self-defense or the threat or the source of the attacks has been taken away, the necessity for self-defense terminates.[232] To this end the criterion of imminence can be seen to be an aspect of it, in as much as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack.[233] In deciding whether there exists a state of necessity on which a state can act, all these facts need to be taken in to consideration.

Proportionality as a criterion of self-defense, on the other hand, requires consideration of the type of weaponry to be used, an investigation that necessitates an analysis of the principles of

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[228] *See for instance*, Feredric L Kirgis, *Pre-emptive Action to Forestall Terrorism*, 2002, http://www.asil.org/insights/insigh88.htm#author, visited on Sept. 10, 2010.
[229] *See* the Nicaragua case, ICJ Reports 14 (1986) para.176; and its advisory opinion on Legality of the Threat or Use of Nuclear Weapons- ICJ Reports 1996 (I), p. 245, para.41
[230] DINSTEIN, *supra* note 208, at 220. *See also* SHAW, *supra* note 6 at 1031.
[231] Gill, T.D., THE 11TH OF SEPTEMBER AND THE INTERNATIONAL LAW OF MILITARY OPERATIONS, AMSTERDAM: VOSSIUSPERS, ORATION UNIVERSITY OF AMSTERDAM, (2002) at 17.
[232] Ducheine and Pouw, *supra* note 119, at 58.
[233] Wilmshurst, *supra* note 23, at 7.

international humanitarian law.[234] In the *Caroline* formulation, the principle of proportionality is stated to require 'nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'[235] There is a question, in particular, on valuing proportionality, i.e., relating to the damage that might be caused or, rather to the scope of the threat to which the response in self-defense is proposed. For cases of pre-emptive use of force the standard of proof is even keener.

Proportionality refers to both the quantitative and qualitative aspects of self-defense and, is related to the parity between the attack and the defense measured in terms of the total scale and effects or both, as well as, the purpose of the attack(er) and the defense.[236] The parity between form and scale of the attack and the defense can be assessed through a combination of quantitative and qualitative aspects. ICJ notes that in assessing proportionality, the total scale of the armed attacks or 'the scale of whole operation' that gives rise to the reaction, may be taken into account.[237] In addition, it has been indicated that the purpose of the armed attack plays some role in determining whether proportional force is used.[238]

When we see the post Charter regime, however, there comes a challenge to adhere to these strict traditional requirements, especially in cases of preemptive/anticipatory use of force. The infamous 9/11 attack, which took the blue print for the adoption of the National Security Strategy (NSS) by US, the supper power, is regarded as the most egregious or illustrious scenario of the efforts made to this end.[239]

The other burning issue in this regard is who can decide the existence of facts or conditions which would call for the use of force in self defense. From the discussions made under the preceding sub-section, the author tries to reflect on the arguments forwarded on this issue.

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[234] The ICJ in the Legality of the Threat or Use of Nuclear Weapons case took the view that the proportionality principle may 'not in itself exclude the use of nuclear weapons in self-defense in all circumstances', but that 'a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict' *see* at http://www.icj-cij.org/docket/files/95/7497.pdf.

[235] Nicaragua case ICJ Reports 14 (1986) para.176; see also, para.41 of the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Report 90, 1996.

[236] Ducheine and Pouw, *supra* note 119, at 57.

[237] *Oil Platforms* Case (Iran v. US) 2003, para.77

[238] Ducheine and Pouw, *supra* note 119, at 57.

[239] NSS - US (2002), *supra* note 26, adopted that, '*…we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries … the greater is the risk… the more compelling the case for taking anticipatory action to defend ourselves...*' [Emphasis added].

Here, it suffices to generally assert that it falls primarily to the discretion of the inflicted state to determine whether it is a case of armed attack or self-defense. This classification prevails until the international community, for instance, the SC, decides otherwise.[240]

In conclusion, a state which needs to take action on the basis of self-defense needs taking into consideration these various issues and act accordingly, so as to live up to the Charter's provisions and international law principles and escape the potential criticisms that would usually meet such self-help measures.

Finally, with regard to use of force in self-defense, as per Art. 51, there is duty to report to the SC by the responding state, and since the decision of ICJ on the effect of reporting in the Nicaragua case, states have generally been scrupulous in doing so to the SC.[241] It is noteworthy to portray that, though the formulation remains ambiguous, self-defense may only be applied until the SC has taken *measures necessary* to maintain international peace and security. Is this expression talking about the cessation of the already commenced attack in self-defense or, referring to a situation where the SC has taken some steps prior to the action of defending oneself but remains ineffective? This issue is scrutinized later.

3.3.2.3 Preemptive and Anticipatory Self-defense

International law has been grappling with the claim of preemptive self-defense for decades.[242] It as well brings theorists to the murky issue of self-defense: an ill-defined, ambiguous and controversial exception to the blanket prohibition on the use of force set out in Art.51 of the

[240] SCHMITT, M. N. AND J. PEJIC (eds.), INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULT LINES. ESSAYS IN HONOUR OF YORAM DINSTEIN, INTERNATIONAL HUMANITARIAN LAW SERIES, Vol.15, MARTINUS, NIJHOFF, LEIDEN, (2007) at 119-120; Greig, D.W. *Self-Defence and the Security Council: what does Article 51 require,* 40 INT'L & COMP. L. QUART. 366 (1991) at 392; Ducheine (2008), pp. 236-237. *But see* Gill, T.D. (2007), 'The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy', cited in the same material.

[241] Nicaragua case ICJ Reports 14 (1986) para.235. The Court said that failure to report by a state indicated a lack of belief that it was really using force in self defense.

[242] Though there are scholars who opted to make distinctions between preemptive and anticipatory self-defense, for the purpose of these paper they have been used interchangeably as no significance of such distinction, than being semantic, is appreciated. To this end, John Norton Moore, a Professor of Law at the University of Virginia and director of the Center for National Security Law, cast off such distinction, saying: "I do not have any idea what they are talking about … it doesn't help very much. I think that is just sort of like telling you that coffee keeps you awake because it contains a wake-active agent. You really have not learned anything when they say that.' Available at http://www.dcbar.org/for_lawyers/resources/publications /washingtonlawyer/ january _2003/ war.cfm, visited on May 10, 2010.

Charter and, especially, when interpreted with reference to customary international law. For instance, Cassimatis states that the issue which has caused international lawyers the greatest concern in this debate has been the 'so-called doctrine rejected of pre-emption', and the apparent absence of any effective means to discipline its application.[243] The concept of preemption, which has appeared as challenging the meaning of self-defense as it existed under Art.51, is not a new happening. Vattel, to cite an example, wrote about preemption as early as 1758.[244] Predating Vattel by almost a century, Thomas Hobbes said:

> '*…and from this diffidence of one another, there is no way for any man to secure himself so reasonable as anticipation, that is, by force of wiles to master the persons of all men he can, so long till he sees no other power enough to endanger him.*'[245]

Reckoning the existence and legality of anticipatory or preemptive self-defense, Bowett, holds that self-defense has, under traditional international law, always been anticipatory.[246] Generally, customary law permits preemptive self-defense only when a *threat is so grave and imminent* that the victim cannot wait to act in self-defense until the attack has actually started.[247]

The writer, in the preceding discussions, has portrayed the controversies raised pertaining to the possibility of extending the scope of Art. 51 to cover preemptive use of force.[248] When we see the Charter regime, under Art.51, the wording '…*if an armed attack occurs*…' appears to impose a condition that is antithetical to the whole idea of a preemptive use of force. But the right granted under Article 51 is virtually rendered trivial in certain circumstances if it does not extend to anticipatory actions. Generally, we can sum up the views forwarded by scholars

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[243] Anthony Cassimatis, *Confronting Iraq- Does International Law Matter?* (Speech delivered at the International Law Association Twilight Seminar, Brisbane, 15 April 2003) available at http://www.austlii.edu.au/au/journals/QUTLJJ/2004/14.html, visited on May 3, 2010.

[244] *See* Emmerich de Vattel, The Law of Nations, 1758, available at http://www.constitution.org/vattel/ vattel.htm, visited on April 15, 2010.

[245] Thomas Hobbes, Leviathan Chapter 13 para.4, 1668, Hackett Publishing (Edwin Curley (ed.), 1994).

[246] BOWETT, *supra* note 160.

[247] Aylin Seker Gorener, The Doctrine of Pre-Emption and the War Against Iraq Under International Law, http://www.sam.gov.tr/perceptions/Volume9/June-August2004/aylin.pdf, Here, it has been argued that the doctrine of preemption emerged particularly out of the precedent of Caroline incident.

[248] In Larger Freedom, para.124, took the view that '*imminent threats are fully covered* by Art. 51, which safeguards the inherent right of sovereign states to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.' [Emphasis added]

in three different categories. The first approach, some times referred to as a 'restrictive approach', represents those who deny the very possibility of preemption under the Charter system and, of course, is the prevailing position.[249] Here, those who deny the right of anticipatory self-defense may accept that a completed attack is sufficient to trigger the right to respond in anticipation of another attack.[250]

The second approach is relatively a relaxed one and, aspires to accommodate the issue of preemption. It asserts that the use of force, as per Art 51 of the Charter extends to the situations where no real armed attack but only an imminent threat exerted on a state by considering the phrase 'nothing in the present Charter shall impair an inherent right of … self-defense',[251] which is meant to accommodate customary international norms.[252] The armed attack requirement is meant merely to emphasize one important situation where that right may be exercised but does not exclude or exhaust other possibilities.[253] This view is reflected in the *travaux proparatoires* of the Charter. This interpretation has mostly relied on the historic practice reaching, at least, back to the Caroline case of 1842 which was also, as explained earlier, accepted by ICJ.

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[249] O'Connell, *supra* note 6, at 12. This has been further strengthened by the UNSC in its position on *Israel* vis-à-vis the *Osirak* and *Tanzania* cases. The UNGA has also interpreted Art.51 conservatively when looking at the fact that US bombarded Libya in 1986; and the ICJ, though did not squarely confronted the issue of preemption, asserted that a nation's mere possession of nuclear weapons neither violates Art.2 (4) nor give other nations the right to use military force in self-defense under Art.51. In addition in the Nicaragua case, though Nicaragua had engaged in cross-border incursions into Honduras and Costa Rica, and had supplied arms to rebels in El Salvador, the court hold that these minor events did not amount to 'armed attack' of the kind that Art.51 requires. *See the* Nicaragua case ICJ Reports 14 (1986) paras.119-120. *See also* the Oil Platform (Iran v.US) 2003 ICJ, para.185, where ICJ decided the attack on US ship does not meet the standard set under Art.51. In the Cuban Missile Crisis case (1962) UNSC did, however, take no explicit position.

[250] For instance, as in the *Caroline* incident, and in the case of the intervention in Afghanistan in 2001, which was categorized by the US and the UK as the exercise of the right of anticipatory self-defense (see UN Doc. S/2001/946 and UN Doc. S/2001/947)

[251] Nabati, *supra* note 8. Here it is argued that the right of self-defense would be an independent and autonomous right pre-existing the Charter rules and not subordinated to the requirements set forth in Art.51, and the words 'inherent right' were meant to preserve the right of self defense as defined by Customary International Law. *See also* CASSESE, *supra* note 8. He concludes that a consensus is growing to the effect that anticipatory self-defense is allowed but under strict conditions relating to proof of imminence of armed attack that would jeopardize the life of the target state.

[252] *See* D. P. O'CONNELL, INTERNATIONAL LAW, Stevens, LONDON, VOl. I, 2nd ed, (1970) at 317; Ian Johnstone, *Jus Ad Bellum*: *The Next Iraq*, ILSA J.INT'L & COMP. L.395, (2005) at 397-98; and Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV.699, (2005) at 729-730.

[253] Doehring, *Self-determination*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. I, 47, at 51 (Bruno Simma (ed.), 2nd ed, 2002).

Here, there exists a problem on how the thresholds of traditional elements, i.e., necessity and proportionality, under the customary international law, should be followed, which dissects the proponents of this approach. There is a view that assets preemptive use of force is only legal if it passes the stringent requirements of necessity including imminence, and proportionality. It is apt to consider at this juncture that authors of *Oppenheim's International Law* consider the requirements of necessity and proportionality to be 'even more pressing in relation to anticipatory self-defense than they are in other circumstances'.[254] The doctrine of preemption, as such, is less troublesome than its unilateral application in circumstances where the burden of persuasion as to the imminence and severity of the threat is not sustained.[255]

Accordingly, though the inherent right of self-defense permits a preemptive strike designed to thwart an imminent attack, the traditional requirements attached thereof would severely curtain such an attack for the case of terrorists and avoidance of WMD and the like. To the extent that a doctrine of 'pre-emption' encompasses a right to respond to threats which have not yet crystallized but which might materialize at some stage in the future, such a doctrine, sometimes called '*preventive defense*', has no basis in international law.[256]

On the contrary, some argue that the narrow standard which limits responses in self-defense to attacks which are imminent and unavoidable by any other means, can only apply when a potential victim state is able to rely on the police powers of the state from which the attack is anticipated. Hence, a *flexible standard* for determining necessity/ imminence is appropriate for situations in which the state from which attacks are anticipated is either unwilling or unable to prevent the attacks, or responsible for them.[257]

The third approach, which is a fairly relaxed and liberal but a much less widely held view, stipulates that states have or at least should have a right of anticipatory self defense that can justify a preemptive strike in some special incidents even if the nation has not suffered any

[254] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law,* Longman, 9th ed, (1992) at 421.
[255] Falk, *supra* note 12, at 595.
[256] Wilmshurst, *supra* note 23, at 9.
[257] Abraham D Sofaer, *On the Necessity of Pre-emption,* 14 EJIL 209 (2003) at 209.

armed attack and faces no imminent danger.[258] It lacks a clear legal footing under the text of Art.51 and the historic practices,[259] especially after the Charter regime, which shows a slight paradigm shift. Some scholars suggest that exercising preemptive self defense, especially against the 'unseen enemy', is extraordinarily difficult and fraught with enormous risks and dangers.[260] In this regard, the position adopted by US, which wants to 'change' the traditional requirements, preaches that, we must adapt the concept of imminent threat to the capabilities and objectives of rogue states and terrorists.[261]

There is also a question as to whether 'imminence' is a separate criterion in its own right, or simply part of the criterion of 'necessity' properly understood. As an additional criterion, however, it serves to place added emphasis on the fact that a forcible response in the circumstances lies at the limits of an already exceptional legal category, and therefore, requires a correspondingly high level of justification.[262] To this end, a scholar pointed out that the right to use force preemptively in self defense, which was affirmed in President Bush's NSS, is not a novel concept in international law, but it is a natural adaptation of the concept of 'imminence' to an era of weapons of mass destruction.[263] He underlines that:

> '*The right of self defense could be meaningless if a state cannot prevent an aggressive first strike involving weapons of mass destruction. The right to self defense must attach early enough to be meaningful and effective, and the concept of 'imminence' must take*

[258] Gregory, *supra* note 218, at 478. *See also*, Philip Bobbitt, *Wagging War Against Terror; An Essay for Sandy Levinson*, 40GA, L. Rev.753, (2006) at 772-73. Here it is argued that preemption is an absolute necessity given the disguised nature of terrorist attack.

[259] For instance, in 1967 when Israel launched a preemptive attack on Egypt and other Arab states, both UNSC and GA rejected the claim. The SC, instead, adopted Res.242 calling on Israel to withdraw from the territories and for the termination of all claims or states of belligerency and the acknowledgment of the territorial integrity and the right of every State in the region to live in peace. Again on June 7, 1981, Israel bombed and destroyed a nuclear reactor under construction in Iraq claiming that in removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defense within the meaning of this term in international law and as preserved also under the UN Charter which was unanimously condemned by the UNSC (SC res.487, UN Doc. S/RES/487, 1981).

[260] Guiora, *supra* note 23.

[261] *See* NSS-US (2002), *supra* note 26, at 15.

[262] Wilmshurst, *supra* note 23, at 9.

[263] Taft, *supra* note 158.

into account the threat posed by weapons of mass destruction, the intentions of those who possess such weapons, and the catastrophic consequences of their use.'[264]

Generally, there is no clear understanding and consensus among international jurists on this issue of preemption and so too is among states. Though, the writer beliefs that there is only semantic distinction between different terminologies employed in this regard, of course, the continuum from anticipatory, to preemptive, and to preventive self-defense becomes attenuated and controversial as the threat is seen as being less imminent. However, in exceptional situations, upon the presentation of clear and convincing evidences relative to a specific case, such resort need to allowed to be pragmatic and deal with threats like terrorism.

3.3.3 The actions of the Security Council that End the Right to Self-defense

The meaning of the statement with the 'until' clause provided under Art. 51 has resulted in considerable scholarly debate. In this regard, the manner in which Art. 51 of the Charter is framed was open to question, particularly during the Gulf crisis. Firstly, some suggested that this stipulation entitles states to self-defense only before the incidence or the issue is seized by the SC and, once the SC, which has a primary responsibility to maintain international peace and security, in whatever manner, comes to see the matter, regardless of the action taken or its success, the inherent right of States to self-defense is barred.[265] Accordingly, irrespective of the fact that a State has commenced making use of the right or not, any action of the SC will put an end to such a right and, the state is only left with the options to be granted by the SC.

Secondly, there are some who suggest that the 'effective SC action to maintain peace and security, thus removing the right of self-defense', must consist of, at least, some sort of direction to the combatants to cease fighting.[266] While such a view of Art. 51 would leave small powers that are attacked at the mercy of the Permanent Members, who may decide to sacrifice a small country in the interest of peace, as Britain, France, and Italy did in 1938 at

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[264] *Id*, at 660.
[265] *See* Schachter, *supra* note 18; CASSESE, *supra* note 8, at 235; Abram Chayes, *The Use of Force in Persian Gulf,* IN LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, (Lori Damrosch & David J. Scheffer (eds.) (1991) at 3.
[266] *See* Rostow, *supra* note 64, at 418.

Munich. Some may assert that it provides an arguably objective standard against which to interpret Art. 51's reference to SC 'measure'.[267]

Thirdly, some scholars argue that Art. 51 is formulated as an affirmation of, rather than as a limit on, the right to self-defense and, hence, it would be implausible and, of course, absurd to conclude that any measure, which is not adequate and effective, taken by the SC would blight a state's right to self-defense.[268] Accordingly, until the SC takes such a *measure necessary,* which is adequate and effective to do away with the problem the victim State has faced, there would exist a kind of concurrent power for both, and efforts of the SC which are short of what is necessary would not bar the continuing existence of the right to self-defense. Of course, this line of argument is in tune with the language and legislative history of Art. 51.[269] The possible logical question one can pose here is, in whose eyes should the measure be considered '*necessary to maintain international peace and security*'? For this position, though it seems both should have a say, the view of the SC should have the upper hand at any cost.

Generally, for all the three positions, what remains vital is not the commencement of an attack pursuant to the inherent right to self-defense but the manner in which the SC has and should weigh the matter. The writer is with the view that the action of the SC should settle the matter as to the satisfaction of the State under such an attack triggering the use of force in self-defense, and any action by the SC short of that and to which the State concerned consented, should not curtail its inherent right to resort to use force in self-defense.

3.3.4 Other Self-help Measures: Retorsion and Reprisal

Apart from the use of force in self-defense, states may use force in other senses referred to as, reprisal and Retorsion. Retorsion refers to the adoption by one state of an unfriendly and harmful act, which is nevertheless lawful, as a method of retaliation against the injurious legal activities of another state.[270] While reprisals are acts illegal in themselves and, adopted by a

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[267] *Id.*

[268] Eugene Rostow, *Until What? Enforcement Action or Collective Self-defense*, 85(3) AJIL, 506 (1991) at 510. *See also*, Alberto R Coll, *Legal Dimensions of the Use of Force in the Falklands War,* 77 ASIL. Proc.1, (1983).

[269] Malvina Halberstam, *The Right to Self-Defense Once the SC Takes Action,* 17 MICH. J. INT'L L. 229,(1995-96) at 239-243. *See also* the arguments raised by Rostow, *supra* note 64.

[270] SHAW, *supra* note 6, at 1022.

state in retaliation to an earlier illegal act by another state.[271] They are thus distinguishable from acts of Retorsion, which are in themselves lawful acts. The classic case dealing with the law of reprisals is the *Naulilaa* dispute between Portugal and Germany in 1928.[272] Here the tribunal emphasized that before reprisals could be undertaken, there had to be sufficient justification in the form of a previous act contrary to international law. If that was established, reprisals had to be preceded by an unsatisfied demand for reparation and accompanied by a sense of proportion between the offence and the reprisal.[273]

The Declaration on Friendly Relations provides that States have a duty to refrain from acts of reprisal involving the use of force.[274] In addition, the U.S. government, most state actors, the U.N. Security Council, and the International Court of Justice have officially taken the position that armed reprisals are outlawed.[275] Accordingly, reprisals, short of force, may still be undertaken legitimately, while reprisals involving armed force may be lawful if resorted to in conformity with the right of self-defense, to punish and deter certain prior illegal acts.

3.4 Witnessing a Shift in Paradigm under the Charter System

Under the first Chapter of this paper, it has been indicated that in the early days, the use of force in international relations was a matter of discretion left for states. Through time, however, for various reasons, there came a need to look into and regulate such practice has emerged. Consequently, only under certain identified conditions that a state was allowed to make use of force. For instance, under the customary international law, a state to respond to a threat and infringe on the territorial sovereignty of another nation, need to show the fulfillment of these four criteria: (1) It is acting in self-defense, (2) The attack is substantial

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[271] Derek W. Bowett, *Reprisals Including Recourse to Armed Force,* 66 AJIL, 1 (1972) at 1.

[272] The Naulilaa Case Portugal v Germany (1928), 2 UN Reports of International Arbitral Awards 1012 (Portuguese-German Mixed Arbitral Tribunal) refer http://law.jrank.org/pages/9791/Reprisal.html, visited on July 23, 2010.

[273] Those general rules are still applicable but have now to be interpreted in the light of the prohibition on the use of force posited by Article 2(4) of the UN Charter.

[274] *See* The 1970 Declaration on Principles of International Law.

[275] Jues Lobel, *The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan*, 24 YALE J. INTL L. 537 (1999), as quoted in Amos Guiora, Global Perspectives on Counterterrorism, Aspen Publishers, (2007).

and military (i.e., not an isolated armed incident); (3) The offending nation is complicit, unwilling, or unable to prevent further attacks; (4) The attack is widespread and imminent.[276]

Following the two world wars, which clearly showed the inadequacy/leniency of the international rules relating to the prohibition of use of force, a kind of solid stipulation was introduced under the UN Charter. The Charter clearly outlaws any recourse to use of force except under the narrowly articulated instances; self- defense and SC mechanisms. However, whether this Charter has brought a shift in pattern, remains argumentative, especially, depending on the scope of the meanings attributed to Art.2 (4) and Art.51. Some take the view that the Charter regime has strictly abridged the scope of resorting to force[277] while others assert that it simply codifies the pre-Charter trends.[278] The Charter regime, of course, outlaws some situations under which use of force was deemed legitimate traditionally- like the protection of nationals, and did not explicitly recognize anticipatory use of force; hence, it showed a slight change in pattern.

In addition, in the traditional self-defense paradigm, states can protect themselves either against conventional threats, armies amassing against their border, or after attack by another nation-state is made. However, self-defense during such unconventional or 'unseen enemy' paradigm is ambiguous and, it is not inherently clear who is attacking the state or who the state is protecting itself against.[279] In such instances, the Charter does not apparently allow recourse to use of force. It is the view of the writer that, the Charter has introduced a shift in paradigm. Moreover, it will be a remiss or being oblivious if one fails to appreciate the efforts of some scholars calling for a shift of applicable law on the use of force from the sole UN Charter framework to the ambit of general international law, say for example, to include the international customary norms, which is couched in this line of argument.[280]

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[276] *See generally*, Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CWRJIL 1 (2002); Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT'L & COMP. L. 851, (2004) at 852-855.
[277] O'Connell, *supra* note 6, at 12.
[278] *See for instance*, Rostow, *supra* note 64, at 416; O'CONNELL, *supra* note 252, at 317, and Johnstone, *supra* note 252.
[279] Guiora, *supra* note 23.
[280] Murase, *supra* note 155.

Chapter Four

4. Collective Security System under Chapter VII

4.1. Understanding Chapter VII of the Charter

The aim of the drafters of the UN Charter was not only to prohibit the unilateral use of force by states in Art. 2 (4) but also to centralize control of the use of force in the SC under Chapter VII.[281] In this vein, the SC has been given the primary responsibility for the maintenance of international peace and security and to this end; it can take various measures stipulated under this Chapter including the use of force as indicted under Art. 42 of the Charter.[282]

In addition, the initial plan was that the SC would have its own standing army to use in response to what it considered threat to the peace, breaches of the peace and acts of aggression, via the procedures adopted under Art. 43 of the Charter. This did not, however, materialize for different reasons of which the effect of the Cold War was the critical one.[283] As it has been described elsewhere under this thesis, it has forced the SC to make use of other alternatives, like authorizing member states in general terms such as 'all the necessary measures', to use of force upon deciding certain events as constituting threat or breach of international peace and security. And, the possibility of delegation is only indicated under Art.53 for regional arrangements or agencies. It follows from this that it has no *explicit* power under the Charter to authorize use of force by coalitions of the '*able and willing*' as it has been practiced recently. Though there are some doubts about this unique role of the SC, it has been prevalently agreed that this can be an implied power of the SC under the Charter.[284]

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[281] Frowein/Krisch, *Action with Respect to Threats to the Peace, Breach of the Peace and Acts of Aggression*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. I, 701, at 701 and *ff* (Bruno Simma (ed.), 2nd ed, 2002).

[282] *See generally,* Brado Fassbender, *Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq*, 13(1) EJIL, 273 (2002).

[283] GRAY, *supra* note 9, at 195.

[284] Neis Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'*, 11 *EJIL* 541(2000) at 547 and *ff*. *See also*, the decision of ICJ on the implied power of an international organization in Reparation for Injuries case, ICJ Reports (1949) 182, where it asserted that 'Under international law, the organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'

Commentators assert that the real power of the SC flows from this Chapter, which permits it to take legally binding decisions under Art.25 directing member states to impose economic sanctions or to use force to maintain international peace.[285] Because of the serious consequences of such measures, the permanent members thereof have not hesitated to make use of their veto power under Art.27 (3), which was employed intensively during the Cold War era, and this fact significantly disabled it from making use of it.[286]

For the SC to trigger action under this Chapter, it is a precondition, as per Art.39 of the Charter, that the situation in question has been decided as constituting a 'threat to peace, breach of the peace, or act of aggression.'[287] For disputes or situations which do not qualify to fall under these categories, the SC may not employ this Chapter so as to give response to such issues. The question is then: Is the SC appropriate organ for such a decision? And, what guidelines or thresholds should be employed in this regard? In the subsequent parts of the paper due consideration of these facts have been made. For now, such a decision is considered as a political decision made by a political body subject to the possibility of veto by one of the permanent members, especially where their interests are involved.[288]

Once the SC decided, with discretion, that a given incident or situation qualifies to meet the threshold indicated under Art. 39, it can possibly take three sorts of responses (enforcement measures). These are the provisional measure indicated under Art. 40 of the Charter, non-forcible measures as defined under Art. 41, and forcible measures enshrined under Art. 42 of the Charter. With regard to the latter mandate, the High-level Panel, setup by the UN Secretary-General to consider the future of the collective security system, recommended that force should be used only if there is a serious threat, for a proper purpose, as a last resort, involving proportional means, and when military force is likely to have better results than

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[285] E DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL, HART PUBLISHING, OXFORD (2004) at 217-247.
[286] DUGARD, *supra note* 2, at 489.
[287] *See*, however, the SC resolutions 1696 and 1737 adopted in 2006 against Iran nuclear program which calls for the implementation action under Chapter VII, with out apparently categorizing (finding) the situation as constituting a threat to international peace and security.
[288] Derek W Bowett, *Judicial and Political Functions of the Security Council and the International Court of Justice*, in THE CHANGING CONSTITUTION OF THE UNITED NATIONS, (H Fox (ed.,) 1997) at 70-80.

inaction.[289] But, as these conditions, which are believed to inject transparency on its decision-makings, accountability and ultimately acceptability of the decisions, put certain limitations on the SC's power, they remain unacceptable or rhetoric.[290]

In addition to the indicated three modes of responses, some also add a fourth response, i.e., *legislation*, as an emerging one in the practice of the SC.[291] Later, the issues on what specific measures could be taken under the three responses and whether the emerging fourth measure does have legal backing are discussed.

It was indicated earlier that during the Cold War, the SC was dormant and, occasionally threatened to use Chapter VII; often it called for action without taking any binding decisions.[292] When it did act under Chapter VII, its approach was generally flexible rather than formalistic; it did not, save in some exceptions,[293] specify the exact Article of the Chapter under which it was acting. In most of its resolutions, the practice employed by the SC was using the language of the provision rather than citing the provision explicitly. This reluctance by the SC to identify the precise legal basis for its resolutions, especially those pertaining to peacekeeping operations, had led to protracted speculation by some commentators on its legal basis under the Charter.[294]

So also, Art. 2 (7) of the Charter authorizes the SC to intervene in matters essentially within the domestic jurisdiction of a state where a 'threat to the peace, breach of the peace, or act of aggression' occurs. Accordingly, this Chapter retains the non-interference prohibition for the SC. With regard to this particular authority, what remains ambiguous is the meanings of

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[289] High-level Panel Report on: Threats, Challenges and Change, Amore Secured World: Our Shared Responsibility, Doc. A/59/565 of 2 December 2004, [hereinafter High-level Panel Report] para.207; *see also* In larger Freedom, para.126. For critical analysis and comments of the report of the panel in general and the five conditions specifically suggested *see* Michael J. Glennon, *Platonism, Adaptivism, and Illusion in UN Reform*, 6 (2) CHICAGO JOURNAL OF INTERNATIONAL LAW, 613 (2006) at 613-640.

[290] Christine Gray, *The Charter Limitations on the Use of Force; Theory and Practice*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 86 OXFORD UNIVERSITY PRESS, (Vaughan Lowe, *et al*. (eds.), 2008) at 90.

[291] DUGARD, *supra note* 2, at 490; José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873, (2003) at 874.

[292] GRAY, *supra* note 9, at 196.

[293] *For instance*, SC Resolution 589- demanding cease-fire in the 1980-88 Iran-Iraq conflict was unusual in that it expressly stated that the SC was acting under Art.39 and 40.

[294] GRAY, *supra* note 9, at 197.

'matters' and 'essentially with in domestic jurisdiction of a state'. There are different suggestions attached to these issues which are, outside the scope of this work.[295]

What remains more thought provoking is the practice of the SC under this Chapter, i.e., the issue of peacekeeping/enforcement operation. As indicated in the preceding discussions, the formal scheme of the Chapter VII has not stood up to the pressure of the Cold War. This led to the evolution of such operations, principally, via the effort of the UNGA. It has some how enabled the SC to act, though not to the level it was expected to. The operation through time widened its scope and, at times, involved the use of force for different purposes, which some called it 'the third generation of peacekeeping.'[296] At least, in these cases, peacekeeping has, therefore, become peace enforcement. Though it has blurred the gap between Chapter VI and VII, this transformation in the interest of humanity, as described by some, is a necessary evolution of the exercise of the implied powers conferred on the SC by the Charter.[297]

And, finally, the enforcement measures contemplated under this Chapter are not of an absolute and an unconditional nature. Art. 24 (2) seems to qualify the general enforcement measures to be adopted under the Chapter by compelling the SC to act in accordance with the Purposes and Principles of the UN.[298] The latter are often, notwithstanding the extraordinary developments of recent times, described as having a timeless quality and reflecting some eternal truths.[299] Recalling that the SC is not an omnipotent organ, some argue that, as per Art.25 of the Charter, states should accept and carry out only those decisions of the Council which are *intra vires* and consistent with the Charter.[300]

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[295] For further critical analysis and arguments on these issues, *see* Minasse HAILE, DOMESTIC JURISDICTION; UNITED NATIONS CONSIDERATION OF DOMESTIC QUESTIONS AND OF THEIR INTERNATIONAL EFFECTS, THE ETHIOPIAN PUBLISHING SHARE COMPANY, (1968).

[296] *See e.g.*, Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, 50 ICLQ 613 (2001), *see also* Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AJIL 583(2001).

[297] DUGARD, *supra* note 2, at 498.

[298] On the contrary, according to Frowein Krisch, the UN purposes and principles 'establish guidelines rather than concrete limits for SC action. *See* Krisch, s*upra* note 281, at 710.

[299] ROSALYN HIGGINS, THE NEW UNITED NATIONS: APPEARANCE AND REALITY, THE JOSEPHINE ONOH MEMORIAL LECTURE, UNIVERSITY OF HULL PRESS, ENGLAND (1993), p.143.

[300] Aristotle Constantinides, An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq, available at http://www.esil-sedi.eu/fichiers/en/Constantinides_782.pdf, visited on July 18, 2010.

4.2. The Roles and Responsibilities of the Security Council

Explaining the roles and responsibilities of the SC could be made by making emphasis on different grounds. So, perhaps if we want to look at the basic roles of the SC, we should ask not just what it was created for but why it could be created in that form, which really has little parallel anywhere else in the world structure.[301] Its roles and responsibilities emanate primarily from its powers and functions stipulated under Art. 24 and 25 of the Charter. Under Art. 24 the SC is depicted as an organ which ensures a prompt and effective action and that responsibility is conferred upon it by the UN. The question of what the action should be for lies in the very first words of the Charter which talk about saving future generations from all the horrors of war.[302] This being the core concern of the Charter, there are also other objectives introduced under its Art.1.[303] In addition, Art. 26 provides for other responsibility of the SC: '*it shall be responsible for formulating … plans to be submitted to the Members of the UN for the establishment of a system for the regulation of armaments.*'

Needless to mention that the SC can only work within the limited competence of the UN itself, and that competence has never extended to say, running the world's financial, economic and trading activities, which are so important for the broader dimensions of human security and welfare today. Despite the fact that the UN's specialized agencies deal with many aspects of economic and social existence and with important security challenges like disease, hunger and refugee, in practice, they are not very effectively coordinated by the UN centre in New York, Geveva and even less by the SC as such, and hence, it is basicaly fair to look at the SC's role in terms of the evolution of the more traditional, conflict and armament related security agenda.[304]

But, the question is how far the original broad but vague missions and powers of the SC correspond to the dramatically evolving security challenges, and to the tasks of not just saving but improving the world in accordance with the golden purposes introduced under the

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[301] Alyson JK Bailes, The Role of the UN Security Council in the Twenty-First Century, Dept. of Political Science, University of Iceland, available at http://www.utanrikisraduneyti.is/media/frambod/Alyson_Bailes. doc, visited on Sept. 15, 2010.

[302] *Id.*

[303] For instance, the maintenance of international peace and security and promoting and encouraging respect for human rights and for fundamental freedoms, and the like are some of the objective to cite.

[304] Bailes, *supra* note 301.

Charter. Today, the idea of security and welfare goes far beyond simple notions of war and peace; there are other vital values attaining some sort of normative status. These, *inter alia*, include the need for economic development, greater respect for human rights and the rule of law, environmental issues, and concerns of unconventional threats and actors. In addition, the SC has endorsed the 'responsibility to protect' principle, which may compel greater military engagement by the SC, in protecting civilian populations at risk of atrocious crimes.[305]

How does the SC match up to this new set of tasks? The SC should pursue for adaptation and exploration taking into account such developments. And, only then that it would deserve its place as a continuing central actor, as was intended during its formation, in the current collective security system. To this end, the SC should have the most crucial and central role in deciding where new interventions should take place, in giving them a clear international legal base, and the like. To fulfill its stated objectives and responsibilities, first, it has been mandated under Chapter VI, where it can *recommend* way outs to settle disputes of a nature likely to endanger international peace and security. In this regard, the SC has unique powers to try to avoid or limit open conflicts and to cut off non-conflict developments that are particularly dangerous for peace by positive steps, like mediation and peace talks or, by the threat and imposition of various sanctions.

Also, as per Chapter VII, it can take binding decisions and enforcement measures to ensure or restore international peace and security.[306] Here, a range of measures are left for the SC. Apart from taking provisional measures, like a cease-fire or withdrawal of forces, etc, as per Art. 40, it can take compelling measures short of armed force including severance of diplomatic relations and economic sanctions based on Art. 41. Some more measures taken, based on the stipulation of this article, are discussed under the next sub-section of the thesis. Though the SC's power to authorize and impose economic sanctions is unquestionable, there seems to be a growing sense that economic sanctions may be at odds with the rest of the UN Charter, and

[305] SC Res.1674 of 28 Apr. 2006, para.4.

[306] In practice, however, the SC has been adopting some binding decision even out side the scheme of Chapter VII. Regarding the validity of such extra-Chapter VII resolutions having binding nature, once, in the *Namibia* Advisory Opinion, ICJ concluded that the SC can make binding resolutions acting not only under Art.25 but also Art.24 which conferred upon it a general power. *See,* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971) 53, at para.115

some rectifications like freezing the accounts of officials and other alternatives have been put in place.[307]

Most critically, acting under this Chapter, the SC, as per Art.42 when it finds that the action previously taken would be inadequate or has proved to be inadequate, it can take and, argumentatively, as indicated under the second chapter of this paper, authorize member states to use forceful military measures. The SC acting generally under the Charter has not only initiated many more sanctions and peacekeeping missions, but it has also broadened the scope of what it can do, at times, not shying away from authorizing the use of force to topple regimes.[308] For some, the Council's discretion to so label a situation is essentially unfettered,[309] and since the end of the Cold War, it has made use of that discretion with great frequency.

Authorization can be granted in three ways: increasingly common is the extension of a mandate to a coalition of the willing- the Interim Security Assistance Force for maintaining order. For instance, the one in and around Kabul in the aftermath of Operation Enduring Freedom is a recent example of this approach.[310] It can also mandate an international organization, such as NATO, which has received, vis-à-vis its ongoing operations in Bosnia-Herzegovina (SFOR) and Kosovo (KFOR);[311] and it may authorize the creation of a UN force- like the UN Mission in Sierra Leone.[312] Commenting on such resolutions, a scholar pointed out that the Charter has no hard limits for these resolutions; at most they do not fit well with the Charter system.[313] In this regard, the SC is requested by a number of countries to exercise its responsibility in substance, instead of only giving a formal but flimsy seal of

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[307] *See, e.g.,* Various NGO authors, Iraq Sanctions: Humanitarian Implications and Options for the Future, August 6, 2002, http://www.globalpolicy.org/security/sanction/iraq1/2002/paper.htm, and Treaty-Monitoring Bodies of the UN Human Rights System, http://www.cam.ac.uk/societies/casi/info/un.html#hr, both visited on Sept. 15, 2010.

[308] *See for instance*, the SC Res.940/1994 authorization of use of force in Haiti.

[309] Schmitt, *supra* note 30, at 91.

[310] *See* SC Res.1511 of 16 Oct. 2003.

[311] Schmitt, *supra* note 30, at 91.

[312] *See* SC Res.1132; *See also* Schmitt, *supra* note 30, at 91.

[313] Blokker, *supra* 283, at 552.

approval, and to have full control on the authorization it has given for coalitions or so, so as to avoid the scenario of '*authority with out accountability*' on the part of the assignee.[314]

The SC clearly has, among others, the afore-mentioned roles though there is controversy as to whether its findings are conclusive as to legality and illegality, and as to the content of the applicable norm. Whereas commentators used to discuss the problems of inaction of the SC, now they concern themselves also with difficulties over the legitimacy of its actions.[315] Does the SC have the final say on as to what is an act of aggression, threat to the peace, or breach of the peace under Art.39? This question as to the scope of SC's power is important because it has become increasingly active since the end of the Cold War.[316] For instance, during the negotiation of the Rome statute, where the US argued for any referral to the court, should come through the SC but opposed by almost all the negotiators.[317] The Convention goes so far as to grant the new Court a share in one of the most important responsibilities granted exclusively to the Council in the UN Charter, i.e., the right to determine an act of aggression.[318] By conferring upon the court such a right, countries repudiated one of the fundamental articles of the faith and confidence in the UN's security structure, and this is one scenario where the monopoly is put at stake.[319]

On top of this, the debate whether judicial review of the SC's resolutions on the use of force is possible and desirable and, whether it should be the ICJ, rather than the SC, that has the final word in making the determination under Art.39 and deciding on action under Chapter VII has come up before the ICJ in recent cases. Thus, in the Lockerbie case, Libya argued that a SC resolution 748 was invalid for the SC was not entitled to find a threat to the peace under

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[314] *Id*., at 552-560 [Emphasis added]

[315] IAN BROWNLIE, THE DECISIONS OF THE POLITICAL ORGAN OF THE UN AND THE RULE OF LAW, IN ESSAY IN HONOUR OF WANG TIEYA, DORDRECHT, NETHERLANDS; BOSTON, MASS., M. NIJHOFF PUBLISHERS, 91 (1994) AT 91-102; *see generally,* MOHAMMED BEDJAOUI, THE NEW WORLD ORDER AND THE SC, TESTING THE LEGALITY OF ITS ACTS, MARTINUS NIJHOFF, LONDON/BOSTON (1994).

[316] GRAY, *supra* note 9*,* at 12-13; *See also*, The High-level Panel Report, at 31. But some questions that the 'active role' so stated should not be overstated for the effectiveness of the measures, principally resolutions, are not yet satisfactory. *See for instatnce*, Glennon, *supra* note 289, at 626.

[317] Ruth Wedgwood, *Fiddling in Rome, America and the International Criminal Court*, 77 FOREIGN AFF. 20 (1998) at 20-25; *see also* Andreas Zimmermann, The Creation of a Permanent International Court, Max Planck UNYB 2, 169-268, (Armin Von Bogdandy & Rudiger Wofrum (eds.), 1998).

[318] *Id*.

[319] PRINCETON N. LYMAN, SAVING THE UN SECURITY COUNCIL, A CHALLENGE FOR THE UNITED STATES, MAX PLANCK UNYB 4 KLUWER LAW INTERNATIONAL, NETHERLANDS, 127-146, at 129 (J. A. Frowein and R. Wolfrum (eds.), 2000).

Art.39 so as to justify it in passing a binding resolution under Chapter VII.[320] And in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, the court was asked to pronounce on the validity of the SC arms embargo on the whole of the former Yugoslavia that had been imposed in SC's Reso.713, and to determine whether the embargo was invalid because it conflicted with the right of self-defense of Bosnia-Herzegovina under the UN Charter.[321] To date, the ICJ has avoided a categorical answer to the sensitive question as to whether it may allow judicial review of SC decisions. Commentators are divided as to whether it would be incompatible with the primary responsibility of the SC for the maintenance of international peace and security in order to ensure prompt and effective action by the UN under Art.24 of the Charter.[322]

One important point, which needs to be discussed is that the UN Charter considers that Chapter VII is up to an 'enforcement measures', for instance see Art.2 (7). The phrase 'enforcement action' is not defined in the UN Charter and has been the subject of some debate. The drafters of the Charter seem to have intended the phrase to include all coercive measures, regardless of whether or not they involve the use of armed force.[323] International practice, however, has been to interpret 'enforcement action' to include only military measures and not diplomatic or economic ones.[324] Noting that when the OAS decided to break off diplomatic relations with the Dominican Republic, and when it expelled Cuba from the Organization, 'the majority of member States assumed that the non-military sanctions were not enforcement actions' and this, from a systematic perspective, appeared a conclusive

[320] GRAY, *supra* note 9, at 13.
[321] *Id*.
[322] *See* Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the light of the Lockerbie case*, 88, AJIL 643 (1994) at 643-677.
[323] *See* Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of the American States*, 42 BRIT. Y.B. INT'L L. 175 (1967) at 186–87; Georg Ress & Jürgen Bröhmer, *Article 53*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. I, 854, at 860 (Bruno Simma (ed.), 2nd ed, 2002); John W. Halderman, *Regional Enforcement Measures and the United Nations*, 52 GEO. L. J. 89, (1963–1964) at 116–17, asserting that 'the non-military measures taken by the Organization of American States (OAS) against the Dominican Republic in 1960 and against Cuba in early 1962 fall readily within the ambit of 'enforcement action' as defined in the Charter.'
[324] *See* James Jr Hickey, *Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: The Case of Regional Organizations*, 10 *IUS GENTIUM* 77-137 (2004) at 78.

interpretation'.[325] This interpretation finds support in the fact that, under international law, states may take diplomatic or economic measures without first submitting the issue to the SC.

The above discussion would throw some light on the Chapter VIII authority of the SC, wherein it can to make use of regional arrangements or agencies in an enforcement action, in an effort to ensure international peace and security. As indicated above, the types of measures for which the SC employ such delegations are not watertight clear. Though states could take some economic and diplomatic measures in retaliation, some retain the view that it would make little sense if made without obtaining SC authorization. But states acting collectively could take those measures only after obtaining such authorization.[326]

The above-mentioned points represent the crucial roles and responsibilities of the SC as has been indicated under the Charter and, some others developed only through its practice.

4.2.1 Possible Measures by the Security Council

As highlighted in the preceding discussions, action by the SC can include the adoption of simple and clear resolutions requiring measures on the part of the offending government or group to curtail its aggressive or threatening acts, sanctions against the perpetrating government or group, or the authorization of a UN peacekeeping force to enter the territory. And, under Art.25 of the Charter, all members of the UN agree to accept and carry out its decisions without any inquiry.

The SC is expected to consider, by its own initiation or upon the application of others, and take the necessary measures where it believes that a situation would bring about international security disorder. And if the situation involved is supposed to have issues of legal nature, it should be referred to the ICJ as indicated under Art.36 of the Charter. This reference is made, as scholars described, only twice: during the Britain v Albania case where the SC under Res.22 (1947) advised the parties to take the dispute over the sinking of the British naval vessels in the Corfu Channel and, in 1967 under Res.395 (1967), it advised Greece and Turkey to submit their dispute over the Aegean Sea continental shelf to the ICJ.[327] The SC

[325] Ress & Jürgen, *supra* note 323.
[326] *Id*.
[327] DUGARD, *supra* note 2, at 488.

seldom follows such referral as it opts political settlements of disputes and also being deterred by the failure of the ICJ to accept such referral as a basis for compulsory jurisdiction.[328]

Through time, however, some critical developments forced the SC to take some measures which are not, at least, explicitly indicated under the Charter, including but not limited to peacekeeping operations by broadening the scope of events constituting 'threat to international peace and security'. Especially, in the post Cold War era, the SC explored new avenues for discharging its special responsibilities in the field of peace and security. Acting under Chapter VII of the Charter, the SC has gone as far as, *inter alia*, establishing a Compensation Commission for Iraq, a Demarcation Commission for the Iraq-Kuwait boundary (SC Res.687, 3 April 1991); two International Criminal Tribunals, for the former Yugoslavia (SC Res.827, 25 May 1993) and Rwanda (SC Res.955, 8 Nov. 1994); far-reaching Transitional Administrations in Kosovo (SC Res.1244, 10 June 1999) and, East Timor (SC Res.1272, 25 Oct. 1999).[329] Efforts have been made by some to show that these measures form part and parcel of the enumerative Charter provision, i.e., Art.41, and to that end, the competence of the SC to establish *ad hoc* international tribunals in the 1990s was upheld by the tribunal.[330]

The mostly raised issue, in this vein is, whether the SC can recommend or authorize humanitarian intervention by the UN forces as in the case of Bosnia-Herzegovina- Res.752 (1992) or, by individual states. This has been accepted positively, and currently, the issue shifted to a further argument that, let alone the SC, different international actors should be given the chance to react to grave humanitarian catastrophe.[331]

Apart from other substantive limitations, there is also the question: would not the measures, indicated under Chapter VII of the Charter, be limited by the requirement that they do not undermine the right of self-defense under Art.51? This question came up first in 1977 when

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[328] *Id*.
[329] Constantinides, *supra* note 230.
[330] Nico J. Schrijver, *The Future of the Charter of the United Nations*, Max Planck UNYB 10, Koninklijke Brill N.V., Netherlands, 1-34, at 22-23(A Von Bogdandy & R. Wolfrum (eds.), 2006); *Prosecutor v. Tadic (1996) 35 ILM 32,* in JOHN DUGARD, *supra* note 2, at 492.
[331] There is a wealth of literature on this subject. *See e.g.*, Simma, *supra* note 5; Cassese, *supra* note 14, and Dino Kritsiotis, *The Kosovo Crisis and NATO's application of Armed Force against the Federal Republic of Yugoslavia*, 49 ICLQ 330, (2000).

France argued that an arms embargo on South Africa might violate its right to self defense though it voted for the resolution.[332] This issue again arose in the debate over the compatibility of arms embargo over the whole of the former Yugoslavia with the right to self defense under Art.51.[333] On this issue, it seems that it is the discretion of the SC to consider the issue. For instance, when Rwanda asked the lifting of the armed embargo imposed on it in 1994, the SC lifted it as far as arms destined for the government were concerned.[334] The same was a precedent for the embargo against Sierra Leone.[335] But when embargos are imposed as a sanction, however, like in the case of Liberia and arguably in the case of Ethiopia/Eritrea conflict, the arguments for lifting the embargo, as declared unlawful by such States as it denied them their rights to defend themselves, were not successful.[336] Looking at such practices, one can say that the better position is that an arms embargo may affect the right to self defense but does not actually deny that right.

Generally, taking into cognizance all these possible measures and sanctions that are available to the SC so as to enforce the will of the 'world community', it is somehow possible to argue that the organ remains central and vital. However, skeptics claim that the SC sanctions in general, are losing their appeal for many reasons, especially when they remain in place for long periods without seeming to resolve the issue that prompted them.[337] This latter view was substantiated by the facts that its repeated resolutions against Iraq, Libya, Angola, Bosnia, and armed embargoes against Liberia and Sierra Leone, were ignored and violated.[338]

4.2.2 Threat to International Peace and Security

Currently, the scope and interpretation of the term 'threat to peace' has been drastically changed. In 1945 this referred to maintaining a 'negative peace' in the sense of the absence of

[332] Christine Gray, *Bosnia and Herzegovina, Civil War or Inter-state Conflict? Characterization and Consequences*, 67 BYIL 155 (1996) at 155-197.

[333] The last phrase of Art.51 indicated that '*the right of self-defense … 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*.'

[334] SC/Res/1011(1995) 16 August 1995, 3566th meeting.

[335] GRAY, *supra* note 9, at 107.

[336] *Id.*

[337] A, Bos, United Nations Sanctions as a Tool of Peaceful Settlement of Disputes, in International Law as a Language for International Relations, (1996) at 443 and *ff*.

[338] *See further* explanation on each cases, in Lyman, *supra* note 319, at 133-135.

the threat of war.[339] Accordingly, at the initial stage, the Council was primarily, if not exclusively, concerned with military threats to, or breaches of, the peace. However, through time a 'positive peace' –a legal order bade on the other global values reflected in Art.1 (2), (3) and (4) has evolved, and, hence, it has been considered that threat to peace and security do not only result from wars between and within states, but also from the spread of weapons of mass destruction, international terrorism, transnational organized crimes, infectious diseases, and could also result from a refusal to change a *status quo* widely considered to be intolerable, for e.g., the denial of the right to self-determination, and mass and flagrant violations of human rights.[340] These acknowledgements are said to emerge gradually and under the influence of normative resolutions as well as political pressure of the UNGA. The concept of the threat to peace is even stretched to cover, though not yet in the practice of the SC, the non-military sources of instability like issues of serious poverty and underdevelopment, and from serious environmental pollution.[341]

Such a practice is particularly true since the post Cold War era, and to put a scenario, the SC found the Iraq's non-compliance with the Council's resolutions and proliferation of weapons of mass destruction and long-range missiles to constitute a threat to international peace and security.[342] Once more, less politically charged and thus more typical, was its April 2003 finding that 'the continued flow of weapons and ammunition supplies to and through Somalia from sources outside the country,' despite a UN-declared arms embargo, constituted a threat.[343] Purely internal conflicts are also considered as posing such threats, and, to this end, in December 1992 under Res.794, the SC authorized a multinational non-UN force, United International Task Force (UNITAF) to use all necessary means to establish a secure environment for humanitarian relief operations. This is described as, 'it was the first time that

[339] Wellens, *supra* note 13.
[340] Schrijver, *supra* note 12.
[341] *Id*, at 10; *see also*, Note by the President of the Security Council on 31 Janu, 1992, Doc. S/23500, on non-military causes of threat to security. *See further,* the description of 'comprehensive security' in Report of the High-level Panel & In larger Freedom, paras.76-86.
[342] SC Res.1441, UN SCOR, 4644th meeting, UN Doc. S/RES/1441 (2002)
[343] UN Doc. S/RES/1474 (2003)

Chapter VII was used, not to authorize force against a wrongdoing state such as Iraq, but for humanitarian aims in a civil war'.[344]

While the SC has not yet set criteria for defining what constitutes a threat to the peace, a review of initial resolutions passed by the SC in response to particular situations may provide guidance about the conditions and combinations of conditions the Council perceives and defines as a 'threat to the peace'.[345] In reviewing all cases in which the SC has determined that a threat to peace existed, it first becomes clear that the circumstances of each case vary, though measures in some areas like Sierra Leone, Afghanistan, Haiti, Yemen, Rwanda does present clear patterns- where human right abuses have been the core issues.[346]

A review of some of the SC resolutions indicates that the following list of determining factors encompass the SC's primary reasons for determining that a 'threat to the peace' exists warranting its actions: the overthrow of a democratically-elected government; conflict among governmental bodies and insurgent armies or armed ethnic groups; widespread internal humanitarian or human rights violations; substantial outflow of refugees; and other cross-border problems (for instance, drug trafficking).[347] In these cases, no single factor was dispositive to its decision to intervene, but it considers the totality of the circumstances of each country's situation, case by case, in determining that a threat to the peace has existed.

Generally, the SC has been striving to cope up with the evolving threats which are not contemplated under the Charter provisions by introducing such dynamic interpretation of the concept 'threat to peace and security.' This extension has, at times, met some challenges, though till today a serious of such challenge is not confronted by the SC.

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[344] GRAY, *supra* note 9, at 222.

[345] Piper Rudnick Gray Cary, Threat to the Peace: A Call for the UN Security Council to Act in Burma, Report Commissioned By: The Honorable Vacláv Havel, Former President of the Czech Republic Bishop Desmond M. Tutu, Archbishop Emeritus of Cape Town Nobel Peace Prize Laureate (1984), (2005) at 44, available at http://www.unscburma.org/Docs/Threat%20to%20the%20Peace.pdf, visited on Feb.12, 2010.

[346] *Id.*

[347] *See* e.g., SC Res.1132, S/RES/1132 (1997) (Sierra Leone); SC Res.1076, S/Res/1076 (1996) (Afghanistan); SC Res.841, S/RES/841 (1993) (Haiti); SC Res.924, S/RES/924 (1994) (Yemen); SC Res.812, S/RES/812 (1993) (Rwanda); SC Res.788, S/RES/788 (1992) (Liberia); SC Res.668, S/RES/668 (1990) (Cambodia).

4.2.3 Insinuations of the Relaxed Interpretation of the Charter Provisions

Since the end of the Cold War the SC has become more active, and its decisions, largely improvised and inconsistent though they may be, have, for good or bad, profoundly affected international relations. Among other things, the Council's decisions have eroded conceptions of state sovereignty firmly held during the Cold War years, altering the way in which many of us see the relationship between states and citizens the world over.[348] This actions of the SC, referred to as 'quasi- judicial' and 'quasi-legislative' measures have caused considerable absurdity under the international law sphere.

The efforts of the SC, which are meant to create the adaptability atmosphere under the Charter system, are commendable, of course. Here, one can assertively say that the Charter system cannot reflect the existing realities, and the actions of the SC are responses to such gaps. But the problem is that the measures that have been adopted by the SC go so far as to challenge the already set principles, and usually remain inconsistent which would not help to draw something from them.

But when the SC finds some consistent ways of applying the Charter rules in implementing its responsibilities, and follow by broader international agreement about the meaning of the Charter's rules, then there would be no problem. Without such agreement, however, as a commentator explains, 'the UN Charter would mean whatever the SC's permanent members agree that it means acting together, it is fair to expect them always to be able to muster a majority of the Council's 15 members.'[349] As this could not be the intent of the Charter, mechanisms through which the challenges the SC is facing in tackling the persistent and evolving threats to international peace and security need to be developed.

4.3. The Status of the Security Council's Resolutions

How to understand, interpret and determine the scope of the resolutions[350] passed by the SC has been the subject of academic writings, though no significant and conclusive outcome has been recorded. The ICJ has once got the chance to look into such issues in the Namibia Advisory Opinion of 1971, where it asserted that:

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[348] MALONE, *supra* note 168, at 1.
[349] *See e.g.*, BOWETT, *supra* note 160, at 195-97; BROWNLIE, s*upra* note 3, at 331.
[350] Resolutions of the United Nations Security Council are available online at http://www.un.org/Docs .

'The language of a resolution of the Security Council should be carefully analyzed ... having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences'. [351]

This has been described as one of the very few authoritative guides to the interpretation of SC resolutions. In addition, once, the UN Secretary-General stressed that only the SC could determine the legality of actions in the no-fly zones: only the SC was competent to determine whether its resolutions are of such a nature and effect as to provide a lawful basis for the no-fly zones and the action taken to enforce them.[352]

Then, the point is what position should be given to the resolutions adopted by the SC, especially those under Chapter VII *vis-à-vis* international law. Here, there are contending views. While some consider them as overriding the international law, others refer to them as only indicative of evidence and declaratory of the existing laws or, at times, reflect the need for some new rules in the future. The proponents of the first view, taking into consideration the binding nature of the SC's resolutions and Art.103, which gives priority to the obligations under the Charter than any other international obligations, conclude that the SC resolutions can over ride international law; and they do.[353] In the Lockerbie cases, for instance, the ICJ considered, *prima facie*, that SC resolutions prevailed over the treaty obligations of the states parties to that dispute.[354]

Yet, by virtue of Article 103 of the Charter, binding SC decisions prevail *only* over treaty law, but not over customary law.[355] Nevertheless, the Council is empowered to derogate *temporarily* from rules of both treaty *and* customary laws, as long as it is acting under Chapter VII to maintain and restore international peace and security. This authority is inherent in the

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[351] Namibia Advisory Opinion, 1971 ICJ Reports 15, at 53.

[352] Christine Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, 13 EJIL 1 (2002) at 12, and also recorded at www.un.org/News/dh/latest/page2.html, visited on June 10, 2010.

[353] VAUGHAN LOWE, et al (eds.), THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, Oxford University Press (2008) at 37.

[354] *Id.*

[355] *See* El Erian, *The Legal Organization of the International Society*, in MANUAL OF PUBLIC INTERNATIONAL LAW, 79-80 (M. Sørensen (ed.), 1968); But, *see for opposing view*, Rudolf Bernhardt, *Article 103*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. II, 1292, at 1299 (Bruno Simma (ed.), 2nd ed, 2002).

very nature of enforcement action and implicit in Chapter VII itself.[356] Under no circumstances, however, may the Council act in a way which would defeat the other purposes and principles of the UN, or override any other rules of *jus cogens*.[357]

On the contrary, others took the view that SC legislation by resolution is not the optimal way to strengthen and create law-based global regimes that engender compliance through reciprocity and participatory decision-making.[358] By its nature, resolution is not the product of negotiations involving all affected states, as a treaty would be; nor does it benefit from the expertise and experience that would be contributed by many states in a multilateral negotiation.[359]

The proponents of the latter view argue that resolutions may authoritatively find what the law is, and such resolutions, declaratory of international law, can have an important effect in crystallizing and even progressively developing international law.[360] In this vein, resolutions may reveal and express contemporary tendencies of development of general international law.[361] If a resolution lays down a rule that is contrary to international law, it can lead to the loss by the relevant provisions of international law of their general or universal nature and can constitute the beginning of change in existing law.[362] Of course, as are observed, resolutions can accelerate the formation of custom, initiate, influence, or determine State conduct and *opinio juris,* and thereby generate State practices. Commenting upon the status of resolutions adopted by the UNGA, a scholar points out that:

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[356] *See* Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 ICLQ, 55 (1994) at 78; *see also*, Arangio-Ruiz, *On the Security Council's «Law-Making»,* 133 RIVISTA DI DIRITTO INTERNAZIONALE, 609 (2000) at 627.

[357] *See* CHITTHARANJAN FÉLIX AMERASINHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS, CAMBRIDGE UNIVERSITY PRESS, UNITED KINGDOM (1996) at 186, and, E. de Wet, *supra* note 285, at 187-191.

[358] John Burroughs, The Role of the UN Security Council: Nuclear Disorder or Collective Security, p.42 available at http://www.wmdreport.org/ndcs/online/NuclearDisorderPart1Section3.pdf, visited on July 12, 2010.

[359] *Id.*

[360] *See* STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW, SELECTED WRITINGS OF JUDGE STEPHEN M. SCHWEBEL, GROTIUS PUBLICATIONS CAMBRIDGE UNIVERSITY PRESS, (2004) at 502.

[361] *See for e.g.*, the preamble of UNGA Res.3232 (XXIX), '*Recognizing that the development of international law may be reflected, inter alia, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice*.'

[362] Schwebel, *supra* note 360.

'it is plain that not a phrase of the Charter suggests that the General Assembly is empowered to enact or alter international law… the Members of the General Assembly generally vote in response to political, not legal, considerations. The detailed analysis of the normative effects of the resolutions showed that they do not have legal effects, than exceptionally considered as declarations of what international law is in that area, and potentially form evidence of customary international law on a particular subject matter.' [363]

This is partly where the view of the latter proponents resides. However, remember the discussion provided under this paper elsewhere, where the fact that the resolutions of the SC passed, both under Chapter VII and Art.24, are considered as binding. To this end the resolutions seem to attain a relatively concert position. But, what if they clearly deviate from the clear laws and scope of the powers assigned to the SC? In this regard, the fact that the international system does not allow for any automatic review of the SC's decisions, is said not to rule out the possibility that, in practice, matters of *ultra vires* will be dealt with judicially, either indirectly or incidentally.[364]

In addition of the afore-raised questions, the length of time and generality of the resolutions have come to be sources of some prolonged debates. For instance, does a resolution for a certain action apply for other situations even if, they tend to be similar, or should we wait for the adoption of other resolutions? This issue has repeatedly been involved on legal literatures dealing with the Operation Enduring Freedom of 2003.[365] What position should be given to resolutions which are not confined in time and space, i.e., not directed to a specific state(s)? The next section would portray some clues.

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[363] Stephen M. Schwebel, The Effect of Resolutions of the United Nations General Assembly on Customary International Law, Proceedings of the 73rd Annual Meeting of the American Society of International Law (1979) at 301-302; *see also*, Schwebel, *supra* note 360, at 498 and *ff.*

[364] Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law*, 255 RECUEIL DES COURS 9 (1995) at 214–215.

[365] For further analysis of the effects of such resolutions, *see* Katie Peters, *International Law and the Use of force*, 4 (2) QUEENSLAND U. TECH. L. & JUST. J., 1(2004) at 1-14.

4.3.1 Appraising the Legislative Power of the Security Council

It has long been accepted that intergovernmental organizations (IGOs) cannot legislate international law.[366] However, in different legal literatures the SC has been referred to as a world legislator, for it has by means of its enforcement powers, has in fact replaced the conventional law-making process on the international level.[367] As has recently been noted, the SC has entered its legislative phase,[368] and for some, this phase began on September 28, 2001, with the adoption of Res.1373.[369] On the verge of the adoption of Res.1540, the President of the SC described the ongoing consultation process for this resolution as:

> "*The first major step towards having the Security Council, legislate for the rest of the United Nations' membership. Resolution 1373 had been the first step and that the Council would be needed more and more to do that kind of legislative work.*'' [370]

The SC has elaborated the content of Charter provisions on international peace and security by declaring the proliferation of WMD, as well as economic, social, humanitarian and ecological sources of instability, to be threats to peace, and enacted rules accordingly.[371] Although these subjects still leave many areas as to which the Council cannot legislate, eventually the question might arise as to whether the Council's appreciation of what constitutes a threat to the peace, and thus justifies the exercise of its special lawmaking

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[366] P.C. Szasz, *The Security Council Starts Legislating*, 96 AJIL 901(2002), at 901.

[367] *See, e.g.*, Talmon, *supra* note 15, and José E. Alvarez, *The UN's 'War' on Terrorism*, 31 INT'L J. LEGAL INFO., 238 (2003) at 241; Happold, *supra* note 15. *See also*, Szasz, *supra* note 366.

[368] Security Council resolutions that established the United Nations Compensation Commission and the two *ad hoc* war crimes tribunals for Yugoslavia and Rwanda, imposed disarmament obligations on Iraq, determined the Kuwait-Iraq border, declared the applicability of the Fourth Geneva Convention to the occupied Palestinian territories, and, generally, imposed any economic sanctions have been termed international legislation or legislative acts in literatures. *See for* e.g., Keith Harper, *Does the United Nations Security Council Have the Competence to Act as a Court and Legislature*? 27 N.Y.U. J. INT'L L. & POL. 103 (1994) at 126-129, and Frederic L. Kirgis, *The Security Council's First Fifty Years*, 89 AJIL 506 (1995) at 520 -522.

[369] Alvarez, *supra* note 291; The Representative of Costa Rica, referring to Resolution 1373, said, "In short, for the first time in history, the Security Council enacted legislation for the rest of the international community." UN Doc. A/56/PV.25, at 3 (2001). Though, there were number of Resolutions adopted by the SC which were directed on 'all states', the terminologies employed thereof, like 'condemn', 'urge', 'call upon', were not as such compelling and not considered as establishing new rules of international law. *See,* Szasz, *supra* note 366, at 902.

[370] Press Conference by Security Council President (Apr. 2, 2004), available at http://www.un.org/News/briefings/docs/2004/pleugerpc.DOC.htm, Visited on October, 12th 2010.

[371] Szasz, *supra* note 366, at 904. The SC has also adopted resolutions sanctioning non-State actors, e.g. against UNITA in Angola under SC Res.864, 1127 and 1279; and in 1994 sanctions were imposed against Bosnian Serbs for their refusal to accept the peace settlement for the former Yugoslavia- SC Res.942.

powers, is entirely unchallengeable.[372] Most importantly, for the purpose of this analysis, every operational decision it makes is an implicit interpretation of the Charter and other relevant laws, some *with potentially far-reaching legal consequences*.[373] More generally, much Council practice in the areas of peacekeeping, peace-building and peace enforcement gives content to the norms, and, on occasion, pushes the boundaries of what is deemed legally acceptable.[374]

What is more critical under the SC practice is its position following the September 11th terrorist attack against US, where it initiated a new practice by adopting binding resolution, Res.1378 (2001) under Chapter VII, was not directly related to a particular situation or country, and limited in time.[375] The resolution imposed a far-reaching set of obligations on all states to prevent them from providing terrorists a safe haven or any sustenance or support and denying any access to financial resources. In order to monitor the implementation of a packed of general anti-terrorism measures, the Council established the Counter- Terrorism Committee (CTC).[376] Some consider such general pronouncements, i.e., not in the specific situation of a particular conflict, but on the threat to peace as a result of the large-scale violation of human rights, international terrorism or the spread of what has no dramatically but correctly been called 'diseases of mass destruction' such as AIDS, as a new path of interpreting the law-if not creating the law.[377]

In a similar vein, the Council adopted general resolutions to prevent the proliferation of weapons of mass destruction, including a duty for states to refrain from providing any support to non-state actors to develop such weapons.[378] It is interesting to note that here the Council is taking on a quasi-legislative role. There is no clear indication under the Charter which entitles

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[372] *Id*.
[373] Oscar Schachter, *The United Nations Legal Order: An Overview*, in THE UNITED NATIONS AND INTERNATIONAL LAW, 1-19, at 9(Christopher Joyner (ed), 1997).
[374] Johnstone, *supra* note 30, at 452.
[375] Decisions or measures in the resolutions of the SC which are exclusively done with respect to particular conflicts or situations and, explicitly or implicitly, limited to accomplish that purpose, though directed to all states, cannot be considered as establishing new rules of international law. *See,* Szasz, *supra* note 366, at 902.
[376] *See* S/RES/1373 (2001) of September 28, 2001
[377] Szasz, *supra* note 366, at 901-904*; see also*, SC Resolution 1308/2000, concerning HIV/AIDS .
[378] *See*, S/RES/1540 (2004), 28 April 2004, which shows the SC applying its authority under Chapter VII.

the SC to engage or promote global-law making,[379] and by virtue of exercising or 'interpreting' its powers, it should not be able to enact or alter international law though the practice is quite to the opposite. The same position is indicated on whether the UNGA can have such a power.[380] It is worth considering that there are those who deny any practical significance of such an inquiry, and suggest that, whether the Council may in fact assume such far-reaching powers and enact legislation for the international community, is thus not just an academic question.[381] So far as the law is concerned, practice seems to be overtaking design, as the Council in various areas has effectively stimulated or, even undertaken on its own the development of international legal norms and institutions.

4.4. Peacekeeping, Peacemaking, Peace-building and Enforcement Roles

It was in response to the inability of the SC to take enforcement action under Chapter VII, the institution of 'peacekeeping'- a generic term used to refer to range of actions- evolved during the Cold War, [382] as the formal scheme of Chapter VII did not stand up to the pressure of the Cold War.[383] Neither the Charter nor the SC had clearly defined peacekeeping until recently and only in the 1990s written definitions and a conceptual framework began to develop.[384] The UN currently defines peacekeeping as a UN operation that 'with the consent of the conflicting parties, implements or monitors arrangements relating to the control of conflicts and their resolutions, or ensures the safe delivery of humanitarian relief.'[385] Some suggest that peacekeeping means whatever appears in the mandate for a peace support operation.[386] However, the scope for mandates of peacekeeping missions has been expanding ever since the ending of the Cold War, which is under explored.[387] To this end, peacekeeping is described as

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[379] It should be noted that Art.26 of the UN Charter lays the exception on regulation of armaments, where the SC can plan, engage in or promote global law-making in this area.

[380] Schwebel, *supra* note 360, at 499.

[381] Talmon, *supra* note 15, at 179.

[382] *See generally*, UN Publications, The Blue Hamlets: A review of United Nations Peacekeeping, 3rd ed, (1996).

[383] GRAY, *supra* note 9, at 195.

[384] Michele Griffin, *Retrenchment, Reform and Regionalization: Trends in UN Peace Support Operations by International Peacekeeping*, Vol.6, No.1, Routledge, 1-31 (1999) at 5.

[385] Report of the Office of Internal Oversight Services on the Audit of the Management Structures of the Department of Peacekeeping Operations. UN Document A/61/743, 14 February, New York: United Nations, 2007c.

[386] *Id.*

[387] Griffin, *supra* note 384.

being not static; there are as many types of peacekeeping operations as there are types of conflicts.[388]

What is important here is, however, the legal basis on which the operation is designed. This issue has remained debatable. Accordingly, some simply assert that there is no explicit legal basis for peacekeeping activities in the UN Charter.[389] Others claim that the authority for the UN's peacekeeping operations derives from the UN's responsibility for the maintenance of international peace and security in general (Preamble, Art.1 (1), 24 and 26 of the Charter);[390] found in the power of the UNGA to establish subsidiary organs, or under Chapter VI on peaceful settlement, or under Art.40 on provisional measures.[391] However, it has usually been referred to as 'the Chapter VI and half' operation.[392] The institution has evolved through the practice of the UN and its legality is no longer challenged by any State, even if no express reference to any of these is made in the resolutions establishing peacekeeping forces and the debate seems to be without practical significance.[393]

Apart from the afore-raised uncertainty, the mandate issue between the UNGA and SC has also been debated. In fact, in fulfilling its primary responsibility, i.e., maintaining international peace and security, the SC may adopt a range of measures, including the establishment of a UN peacekeeping operation. Though the UN Charter gives such a responsibility to the SC, and also tries to create division of power between the two organs, and under Art.11 and Art.12 strives to prevent possible clashes thereof, such a strict formulation has been eroded gradually.[394] In this regard, the Uniting for Peace Res.377 (V) of

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[388] *See* UN Secretary-General's Report: An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping, S/24111, Repertoire of the Practice of the Security Council, 1992. [hereinafter An Agenda for Peace].
[389] SHAW, *supra* note 6, at 1224.
[390] Department of Peace Keeping Operation (DPKO), Senior Leadership Induction Programme (SLIP) 19-23 January 2009, United Nations Headquarters, New York, Presentation by Ms. Patricia O'Brien.
[391] Bothe, *supra* note 22.
[392] Dag Hammarskjöld, the second UN Secretary-General, found a way to define it within the framework of the Charter, saying that peacekeeping falls under 'Chapter VI and a half' of the Charter, somewhere between traditional methods of resolving disputes peacefully (outlined in Chapter VI), on the one hand, and more forceful, less 'consent-based' action (Chapter VII), on the other. As quoted under UN Department of Peacekeeping Operations; 60 Years of United Nations Peacekeeping, May 2008, available at http://www.un.org/events/peace keeping60/60years.shtml, visited on April 20, 2010.
[393] GRAY, *supra* note 9, at 202.
[394] GRAY, *supra* note 9, at 200-201.

1950, adopted by the UNGA, has been described as a pioneer document.[395] This resolution, which reiterates the basic paragraphs under the preamble of the Charter and other core principles thereof, has empowered the UNGA to assume a role greater than originally envisaged under the Charter. Among other things it states that:

> "*. . . if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to maintain or restore international peace and security.*"[396]

For instance, the UNGA resolution 1000 (ES-1) of 5 November 1956, authorizing the establishment of the First United Nations Emergency Force (UNEF I) in the Middle East from 1956-1967, was adopted under the procedure established by the Uniting for Peace resolution.[397]

The practice of peacekeeping began in 1948 when the first UN military observers were deployed to the Middle East.[398] Between 1948 and 1997, the UN conducted 41 peacekeeping missions of increasing complexity.[399] During the Cold War, peacekeeping entailed the consensual 'post-truce interposition' of UN forces, which has also been labeled 'first generation' peacekeeping.[400] Following the end of the Cold War, the range of tasks assigned to UN peacekeeping operations has expanded significantly in response to shifting patterns of

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[395] Adam Roberts, *Proposals for UN Standing Forces: A Critical History*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, OXFORD UNIVERSITY PRESS, 99 (Vaughan Lowe, *et al*. (eds.), 2008) at 103.

[396] Uniting For Peace United Nations General Assembly Resolution 377 (V) A (1), 1950.

[397] The legality of this action of the UNGA has been upheld by the ICJ; *see* the Certain Expenses case, ICJ Reports 1962, 151. Since the deployment of the United Nations Emergency Force (UNEF) in the Middle East in 1956, it has been the SC rather than the UNGA which has established peacekeeping forces. ***See*** GRAY, *supra* note 9, at 200.

[398] United Nations Peacekeeping Operations Principles and Guidelines, (2008), p.20

[399] BRATT DUANE, ASSESSING THE SUCCESS OF UN PEACEKEEPING OPERATIONS; INTERNATIONAL PEACEKEEPING, Vol.3 (4) (1996) at 64.

[400] Griffin, *supra* note 384, at 2.

conflict and to best address emerging threats to international peace and security.[401] Indeed, since then, the UN peacekeeping has often combined with peacemaking, peace building and even peace enforcement in complex operations in areas of intra-State conflict.[402]

Although the practice of UN peacekeeping has evolved significantly over the past six decades, three basic principles have traditionally served and continue to set UN peacekeeping operations apart as a tool for maintaining international peace and security in consent of the parties involved in the dispute, impartiality, and non-use of force except in self-defense and defense of the mandate.[403]

Here, it is worth noting the distinction between the terminologies involved in such peace operations. Of course, it has been said that the boundaries between conflict prevention, peacemaking, peacekeeping, peace-building and peace-enforcement have become increasingly blurred, and peace operations are rarely limited to one type of activity, whether UN-led or conducted by non-UN actors.[404]

For instance, preventive diplomacy was action taken to avoid disputes from arising between parties, to control existing disputes from escalating into conflicts and to limit the spread of the latter when they occurred.[405] Conflict prevention activities may include the use of the Secretary-General's good offices, for preventive deployment or confidence-building measures. While peacemaking involves action to bring the hostile parties to agreement, utilizing the peaceful means elaborated in Chapter VI of the Charter.[406]

Peacekeeping is the deployment of a UN presence in the field and has occupied a somewhat ambiguous place between the diplomats and the democracy.[407] It is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in

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[401] United Nations Peacekeeping Operations Principles and Guidelines, (2008), p.16
[402] Griffin, *supra* note 384, at 3.
[403] United Nations Peacekeeping Operations Principles and Guidelines, (2008), p.31
[404] *Id*, p.18
[405] An Agenda for Peace, at 823. This report included definitions given to all the key world including peacekeeping, peacemaking, and peace enforcement.
[406] Bratt, s*upra* note 399, at18.
[407] Emel Osmançavuşoğlu, *Challenges to United Nations Peacekeeping Operations in the Post-Cold War Era*, 4 (4) Journal of Int'l Affairs, (1999-2000), www.sam.gov.tr/perceptions/Volume4/December**1999**.../cavusoglu.PDF, visited on July 12, 2010.

implementing agreements achieved by the peacemakers. Peace-building is action to identify and support structures that will assist peace.[408] While peace enforcement is peacekeeping not involving the consent of the parties, which would rest upon the enforcement provisions of Chapter VII of the Charter.[409] It involves the application, with the authorization of the SC, of a range of coercive measures, including the use of military force.

Today, the Department of Peace Keeping Operation (DPKO) has been established under the UN system and it has been doing a number of activities on such operations. The ever changing nature of conflicts, the question of legitimacy, impartiality issues, financial constraints, employment of double standards, at times, and absence of political willingness are some of the challenges facing this operation.[410]

4.5 Security Council's Inaction and/or Post Fact Actions in the Post Cold War Era

In an effort to draw the implications of the inactions of the SC and its *ex post facto* actions in certain cases, regard should be given to different considerations and, principally, the circumstances which prevailed during that particular act or inaction of the SC. This is, of course, a mind-numbing issue and a scholar described it as, 'assessing the practice of the political organs, determining whose voices count in assessing that practice and how to construe the silence or inaction of the Council, is a difficult task.'[411] Different scholars have interpreted such actions differently and we do not have a clear cut view of them until the SC itself revealed the mystery thereof. Under this chapter effort has been made to pinpoint, to the extent possible, what possible indications such issues might have.

4.5.1 Factors Underpinning Such Practices

Prior to looking at the intended objectives, it is critical to examine the possible factors which hindered the SC from taking actions necessary to ensure or restore international peace and

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[408] *Id*. *See also,* the establishment of the Peace-building Commission in 2006 under General Assembly resolution 60/180 and Security Council resolution1645 (2005), which intended to bring together all relevant actors, to marshal and sustain resources and advise on the proposed integrated strategies for post-conflict peace-building and recovery. *See*, the Report of the Commission on its first session, A/62/137–S/2007/458, 25 July 2007.

[409] *See* Report of the UN Secretary-General on the Work of the Organization, (1993), New York, at 96.

[410] *See generally*, Osmançavuşoğlu, *supra* note 407.

[411] Vera Gowlland-Debbas, *The limits of Unilateral Enforcement of Community Objectives in the Framework of the UN Peace Maintenance*, 11 (2) EJIL 361 (2000) at 377.

security. Among, the various causes which kept the SC inactive, in the case of perceived breaches of the UN Charter provisions on use of force unilaterally (by a state or some other regional actors like NATO) or, its 'biding resolutions/decisions', is the use or threat to use of veto power of the permanent members (cost paid for their responsibilities and capability to achieve the very purposes of the Charter),[412] or for the ponderous procedural requirements or bureaucracy.[413]

For instance, this was the case for the inaction of the SC during the intervention in Grenada by the US and OECS in 1983. Though the members of the SC condemned the act as 'flagrant violation of international law' the draft resolution of the SC failed to see the light of the day for the US used its veto power.[414] Also, NATO's air strike was not authorized by any resolution (probably by the fear of the USSR veto), but the SC overwhelmingly rejected the Russia's draft resolution that would have condemned the NATO bombing.[415] In addition, in most of the interventions considered under the second chapter of this thesis, the SC took no action principally for the veto of US or Russia. At times, in the SC, 'agreeing to disagree' has become a common strategy for over coming difference, often resulting in declarations on the meaning of a resolution after the vote, but some times, as with Kosovo in 1998 and Iraq in 2002, only postponing open clashes.[416]

The other critical factor which contributes to the SC's inaction is being indifferent for situations elsewhere by the permanent members where their interests are not involved, and/or applying double standards; and, hence, such members do not want to be obligated to act on security problems of lesser interest to them.[417] Not all stalemates in the SC are results of the uses of veto power but they may result from the stubborn pursuit of particular national interests, especially if practiced by a veto-wielding permanent member, or from a simple lack

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[412] Lyman, *supra* note 319.
[413] Roberts, *supra* note 29. The author further stated that viewing formal SC authorization as a *sine qua non* of military action poses a number of problems. Historically, because of such factors- inaction due to veto power, the SC has been more willing to define the ends of policy than to provide or authorize military means for attaining those ends.
[414] Hakimi, *supra* note 30, at 661-667.
[415] Wedgwood, *supra* note 14, at 358.
[416] *See* Michael Byers, *Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity*, 10 GLOBAL GOVERNANCE 165 (2004).
[417] Luck, *supra* note 29.

of interest in the international situation in question.[418] Indeed, lack of interest may prevent a situation from being inscribed upon the SC's agenda in the first place.[419]

In addition, though the member of the SC agreed that a situation needs the action of the Council, they might still disagree on the strategy to be employed, i.e. strategic dilemma, based on the differences of policy regarding the best way to safeguard international peace and security. This describes the basic strategic dilemma that states faced for example in Iraq's invasion of Kuwait, the removal of Aristide from power in Haiti, ethnic cleansing in Kosovo, or Iraq's failure to comply with weapons inspections.[420] When there is distributional conflict among the veto powers, no multilateral agreement exists that defeats the *status quo* (no action). It is also evident that the SC is a political organ, and taking this into cognizance some assert that it seeks political solution than condemning states when they violate the Charter rules or even its resolutions e.g. ceasefire resolutions, etc.[421]

Moreover, some commentators asserted that the SC functions this way with a view to recognizing or accepting the emerging new norms. To this end, it is stated that tolerance for unilateral action in the Post Cold War arena depends in part on a theory of security- what human goods are at stake, and whether forcible interference is necessary for their preservation.[422] As the system of international collective action requiring full concurrence may prove inadequate, a passive system of security, favoring inaction over action, can avoid the danger of provocation of one superpower by another, but prove unable to meet other

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[418] Vaughan Lowe, *The Iraq Crisis: What Now?* 52 (4) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, CAMBRIDGE UNIVERSITY PRESS, 859 (2003) at 867.

[419] *Id*. Here what is interesting to note is that, when the interest of US involved in a particular situation, there is a possibility that the SC can act in the absence of harmony among the five veto powers. To this end Erik Voeten, suggests 'asymmetric outside options' (the bargaining power to influence decision outside the SC rooms), exactly the opposite conclusion from those who argue that unipolarity has killed the SC, by the superpower US (unipolarity) made multilateral actions possible in cases where bipolarity did not. The evidence for the latter view is that the most extensive UN authorizations of force were almost all in cases where the US either implicitly or explicitly threatened to act outside the Council. This is certainly true for the first Gulf War, Somalia, Haiti, Bosnia, Kosovo, and Afghanistan. Erik Voeten, Why no UN Security Council Reform: Lessons for and from Institutionalist theory (2005) at 300 available at http://www9.georgetown.edu/.../Multilateralism_and_Institutions_ chapter.pdf, visited on Sept.12, 2010; *See also* Erik Voeten, *Outside Options and the Logic of Security Council Action*, 95(4) AMERICAN POLITICAL SCIENCE REVIEW, 845 (2001) at 845-858.

[420] *Id*, at 299.

[421] *See generally*, Lyman, *supra* note 319.

[422] Wedgwood, *supra* note 14.

challenges truly threatening to international peace and security.[423] By the same token, the UNSG has been quoted stating:

> *'The SC should be involved in any decision to resort to the use of force. If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur…there are times when the use of force may be legitimate in the pursuit of peace.'*[424]

This is in line with a legal philosophy which asserts that the boundaries of law can be maintained on the basis of the autopoietic paradox of combining 'normative closure and cognitive openness', a compromise between the need for continuous adjustment of law to social development while maintaining the regenerative capacity of Normativity.[425] Thus, if States are to be permitted to use armed force without SC authorization, and outside the scope of the right of self-defense, the permission must take the form of a constitutional development within the Charter framework.

At times, the SC acts *ex post facto,* and this has also fetched, as legal scholars suggest, other justification apart from those causes which might hinder it during the occurrence of the action at issue, i.e., the appreciation of the third kind of de facto development to the Charter system.[426] Via different actions taken under the UN, like the notion of concurrence under Art.27 is said not to be affected by the abstention of the permanent member, and the UNGA's international peace and security recommendation, 'uniting for peace resolution', has also been tolerated. Hence, the multilateralism has assumed forms unanticipated in 1945.[427] Some consider such a development, i.e., '*post hoc legalization'* by the SC, to the Charter rules as not unknown to the Charter system.[428] The appreciation of this fact has led the SC to endorse actions which were initially taken without its permission. Hence, a *posteriori* legitimization of

[423] *Id.,* at 353.
[424] Gowlland-Debbas, *supra* note 411, at 374.
[425] Niklas Luhmann, 'The Unity of the Legal System', in G. Teubner (ed), AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY, W DE GRUYTER, NEW YORK (1988) at 20-21.
[426] Lowe, *supra* note 418, at 868; *see also* Wedgwood, *supra* note 14, at 354.
[427] Wedgwood, *supra* note 14, at 354.
[428] Lowe, *supra* note 418, at 868; *see also* Wedgwood, *supra* note 14, at 354.

unilateral action by means of SC resolution serves to remove any taint of illegality even in the absence of prior authorization.[429]

4.5.2 Selected Instances

Now, let us examine those instances which are considered to acquire the subsequent blessings of the SC. The notorious case is that of the Economic Community of West African States' (ECOWAS's) intervention in Liberia to ensure peace and security in the region and other humanitarian cases. Some scholars have interpreted the SC's commendations to constitute retroactive authorization for purposes of Art.53. This interpretation is convenient because it places the international response to the Liberian conflict within the legal framework of the UN Charter, but it is not completely honest.[430] Even if the situation in Liberia was referred to it as early as 1990, the SC took its first resolution only in 1992 which shows its usual reluctance for events in Africa.[431] When we see the SC resolutions, in fact, they do not authorize any enforcement action. For instance, Res.788/1992 invoked the Council's Chapter VII authority, but it did so only to impose the arms embargo and not to authorize the use of military force other than commending ECOWAS for its attempts to secure a peaceful settlement and did not for that matter mention ECOMOG, and the subsequent actions did depict so.[432]

However, subsequent resolutions including Res.866/1993 (establishing the UN observer force refers to ECOMOG as 'a peacekeeping mission already set up by another organization', and some other resolutions of the SC Ress.950/1994, 1014/1995, 1020/1995, 1041/1996 and 1116/1997 or simply, in almost all of its resolutions,[433] not only commended the ECOWAS's role but also called states to contribute troops for ECOMOG. What possible meaning should be given to such supports from the SC? At least, one can see the tolerated or absence of condemnation of the violation of the Charter rules.

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[429] Gowlland-Debbas, *supra* note 411, at 374.

[430] Hakimi, *supra* note 30, at 671.

[431] GRAY, *supra* note 9, at 294-297. Remember that the 1991 Council Presidential Statement 'commended' ECOWAS member states (which intervened militarily with ECOMOG) for their 1990 intervention in Liberia.

[432] Hakimi, *supra* note 30, at 667-673; *see also*, Sean D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER, UNIVERSITY OF PENNSYLVANIA PRESS; PHILADELPHIA (1996) at 345.

[433] Jermay Levitt, *The law on Intervention: Africa's path breaking model*, 7 (1-2) GLOBAL DIALOGUE, (2002) available at http://www.worlddialogue.org/content.php?id=330, visited on Oct.12, 2010. Levitt argues- it represented the first authentic case of humanization intervention in the post- cold war era.

The other scenario is the ECOWAS's intervention in Sierra Leone following the Coup of 1997 to overthrow President Kabbah, a democratically elected government,[434] and afterwards ECOWAS issued a formal statement indicating its objectives- reinstate the legitimate government, restore peace and security, and resolve refugee problem to be achieved to the worst via the use of force.[435] Though primarily, the SC was considering the peaceful efforts to settle the matter, later under Res.1132/1997, unanimously passed under Chapter VII, the intervention received *after-the-fact* praise from the SC principally by the inspiration from Nigeria.[436] The ECOMOG forces were then supplemented by the UN force (United Nation Observer Mission in Sierra Leone (UNOMSIL), under Res.1181/1998.

In addition, recently, following the crisis observed in Côte d'Ivoire,[437] when the unilateral measure was taken, the Council expressed 'its full support for the deployment in Côte d'Ivoire of the ECOMOG force, under Senegalese command, by 31 December 2002, as called for in the Final Communiqué of the Dakar Summit'.[438] And latter, under Res.1464/2003, the SC endorsed/ welcomed such deployment of ECOWAS forces in collaboration with French troops intervened in Côte d'Ivoire.[439]

So also the NATO's intervention in Federal Republic of Yugoslavia (FRY) has been labeled under this category. Arguments were initially made by NATO members to justify the threat or use of force against the FRY, on the basis of the wording of Res.1199 in which the SC declared that it was 'alarmed at the impending humanitarian catastrophe…' and that 'should the concrete measures demanded in this resolution and Res.1160/1998 not be taken, to consider further action and additional measures to maintain or restore peace and security in

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[434] GRAY, *supra* note 9, at 297 'During the Coup there were Nigerian and Guinean Troops basically on the consent of the Sierra Leone government, and by sending some more troops under the cover of EWOWAS these countries involved in the conflict.'
[435] *Id*.
[436] Schmitt, *supra* note 30, at 94; *see also* Levitt, *supra* note 433.
[437] For further legal analysis of the intervention *see*, Marten Zwanenburg, *Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations*, 11 (3) JOURNAL OF CONFLICT & SECURITY LAW, 483(2006) at 497-499.
[438] Security Council Presidential Statement, 20 December 2002, UN doc. S/2002/42.
[439] SC/RES/1464/2003, para.8

the area'.[440] Yet, Russia had explicitly stated that it had voted for the resolution because no measure of force was being introduced at this stage.[441]

But from over all considerations of the points made by the NATO member states, it can be asserted that they do not set forth a cohesive legal position to support the enforcement action in Kosovo, and avoided to base their view on a specific ground but on combination of facts[442] that in their mind justify the use of force.[443] This multi-factored approach is considered pragmatic; by not addressing the basis for their action in international law, the NATO states avoided articulating a position that would weaken the traditional constraints on the use of force and thereby minimized the precedent-setting effects of their action.[444]

Not interested with the actions of NATO, Russia prepared a draft resolution condemning such acts, though the SC voted twelve to three to reject the draft resolution introduced by Russia, Belarus, and India condemning NATO's action.[445] The resolution was not expected to survive a SC vote, but the scale of its defeat was politically significant, for it meant that the international community[446] was overwhelmingly unwilling to condemn NATO for taking an enforcement action outside the parameters of the UN Charter.[447]

In reso.1244/1999 the SC decides on the deployment in Kosovo under UN auspices and in close coordination with it, of international civil and security presence having a clearly defined mandate. The authorization in para.7 to member States and relevant international

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[440] Gowlland-Debbas, *supra* note 411, at 373.
[441] *Id*.
[442] Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 ASIL PRoc.301, (2000) at 301. Here these factors are said to include: the failure of the FRY to comply with the Security Council's Chapter VII mandates, the exhaustion of efforts to settle the conflict without resort to force, the threat to peace and security in the region, and the danger of a humanitarian disaster in Kosovo.
[443] Hakimi, *supra* note 30, at 675.
[444] *See* Johnstone, *supra* note 30, at 468–469. It notes that the United States, Germany, and other European countries were concerned about the potential precedent-setting effects of the NATO action.
[445] Hakimi, *supra* note 30, at 677; Judith Miller, Conflict in the Balkans: The United Nations; Russia's Move to End Strikes Loses; Margin Is a Surprise, N.Y. TIMES, Mar. 27, 1999, at A7, available at http://query.nytimes.com/gst/fullpage.html?res=9507E0D91230F934A15750C0A96F958260, visited on Oct.02, 2010.
[446] This paper uses the phrase 'international community' to refer to the whole range of actors that participate in the international legal process, including intergovernmental organizations, non-governmental organizations, and the media. For a discussion on the breadth of the international community, *see* Michael W. Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EJIL 3, (2000) at 13.
[447] Hakimi, *supra* note 30, at 680.

organizations' to establish the international security presence in Kosovo and to endow it with 'all necessary means to fulfill its responsibility' is closely circumscribed and the responsibilities clearly define under para.9. The resolution also incorporates, in its annexes, the General principles on the Political Solution of the Kosovo crisis agreed upon by the foreign ministers of the Group of Seven and Russia in Bonn on 6th May 1999 and accepted by FRY, as well as refers to them in the preamble and paras.1 and 2, as the basis for a political solution to the Kosovo crisis. A link is also made in the annexes between acceptance of these principles, the Rambouillet accords and NATO's suspension of military activity.[448]

Seeing the synergy between NATO and UN during the Kosovo crisis, and the seeming resemblance between the NATO threat and the sense and logic of the SC Ress.1160 and1199 of 1998, combined with the failed draft resolution of 26 march 1999 and the silence of the UNGA, and Res.1244/1999, which welcomed and endorsed the agreement between NATO and Yugoslavia, one can rightly suggest that the SC made a *post hoc* legalization of the use of force by NATO.[449] On the contrary, some commentators suggested that the SC's clear reaffirmation of the principle of territorial integrity in Res.1244 brings us back to the prohibitions under Art.2 (4), and the SC debates during the adoption of the resolution do not give any indication of the endorsement of the NATO military operation.[450] A number of states welcomed the resumption by the Council of 'its legitimate role in the Kosovo crisis,' the enhancement of 'the Council's credibility' and renewed 'international confidence in a rules-based collective security system'.[451] Accordingly, the SC only made the principles as though they were its own with out legitimizing the NATO's actions; and if it had intended to legitimize such threat or use of force by the NATO, it would have been in violation of the 1969 Vienna Convention on the Law of Treaties (Art.52) and the established *jus cogens* norm

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[448] Gowlland-Debbas, *supra* note 411, at 374-75.

[449] Johnstone, *supra* note 30, at 465-466. *See,* however, Simma, *supra* note 5, at 11-12. He concluded that though there existed a remarkable satisfaction on the part of the Security Council, the political organ, this would not warrant a positive conclusion especially in light of what Russia did in the fall of 1998. But, Bruno Simma's position may be benevolently challenged especially taking in to consideration SC's Res.1244/1999.

[450] Gowlland-Debbas, *supra* note 411, at 375-377. Some states condemned it (Malaysia, Namibia, China, Russia, and India) while others were understandably reluctant to vote for the resolution condemning NATO because it could be seen as condoning the gross violations of human rights by the FRY or that it would give a wrong signal to President Milosevic.

[451] *Id*.

of international law on the use of force.[452] This caution of the SC, forced some legal scholars to hold the view that the Kosovo intervention presents the curious picture of Council authorization before and aft, while dodging the NATO bullet.[453]

Argumentatively, the recent incident, where the SC is considered to retrospectively ratify a situation which resulted from the violation of the Charter rules, is the 'invasion or occupation' of Iraq in 2003 by the Collision force (US and its allies). Since, the Iraq's invasion of Kuwait, there were numerous resolutions adopted by the SC requiring Iraq to comply with a number of obligations including, but not limited to, respecting Nuclear Non-Proliferation Treaty obligations and full co-operation with the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), established by Res.1284 (1999).[454] However, Iraq has been found in violation of the obligations set under numerous resolutions of the SC.[455]

Prior to such intervention, the US President Bush was quoted stating that, 'Iraq's regime defies us again; the world must move decisively to hold Iraq to account ... Are Security Council resolutions to be honored and enforced? Will the United Nations serve the purpose of its founding, or will it be irrelevant?'[456] Then, US and UK argued that Res.1205 implicitly revived the authorization of the use of force contained in Res.678.[457] The matter was debated at the 3930th meeting of the SC on 23 September 1998, when the majority of states speaking in the debate argued that the use of force by the UK and the US under the purported authorization of Resolutions 678, 1154 and 1205 was unlawful.[458]

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[452] Gowlland-Debbas, *supra* note 411, at 376.
[453] Lowe, *supra* note 418, at 358.
[454] *See generally*, James Cockayne & David M. Malone, *The Security Council and The 1991 and 2003 Wars in Iraq*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, OXFORD UNIVERSITY PRESS, 384 (Vaughan Lowe, *et al*. (eds.), 2008) at 385-405.
[455] *Id*.
[456] General Assembly official records, 57th session: 2nd plenary meeting, 2002, p.8; *see also*, Colin Keating, *The United Nations Security Council Today: Implications for Canada's Membership*, Executive Director, Security Council Report, New York, Address at IDRC, on 19 February 2010, at 4, available at http://www.idrc.ca/en/ev-150899-201-1-DO_TOPIC.html, visited on Sept.12, 2010. Here, the fact that "a harsh philosophy that 'you are with us or against us', left many friends frustrated and, the Security Council in a parlous state" has been revealed.
[457] Rabinder Singh QC & Alison Macdonald, Legality of Use of force against Iraq, (2002) at 28, available at http://lcnp.org/global/IraqOpinion10.9.02.pdf, visited on Sept. 18, 2010.
[458] *Id*; *see also*, Peters, *supra* note 365, at 5-10.

When we see the preamble of Res.678, the resolution adopted by the SC out of the feeling that the response of Iraq to all the previous resolutions and measures it has taken, had not been satisfactorily observed. This resolution had given Iraq the grace period so that it would perform all the required actions, and if it had failed to do so, it had called all member states to use 'all the necessary measures' to uphold and implement Res.660/1990 (adopted unanimously the SC, condemned the invasion and called for an immediate and unconditional withdrawal of it from Kuwait) and to restore international peace and security in the area.[459] This resolution has been adopted specifically for the action of Iraq against Kuwait, and had the sole aim of restoring the sovereignty of Kuwait,[460] it does not in is self show further implications.

In addition, Res.687 which brought to an end military action against Iraq during the Gulf War has called for a number of issues, and among others 'of cease-fire respect' by Iraq.[461] Moreover, Res.688, has condemned the observed human right abuses 'the consequences of which threaten international peace and security' and insisted that Iraq allow immediate access by international humanitarian organizations to those in need in the country.[462] It was not passed under Chapter VII and did not expressly or implicitly authorize the use of force.[463] Iraq's obligations were further amplified in a series of resolutions passed after Res.688. Among these, in Res.707, the SC noted Iraq's 'flagrant violation' and 'material breaches' of Res.687.[464] It considered that these constitute a 'material breach of the relevant provisions of that resolution which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region'.[465]

So also in Res.949, it stressed again that 'Iraq's acceptance of Res.687, adopted pursuant to Chapter VII of the Charter, forms the basis of the cease-fire' and that 'any hostile or provocative action directed against its neighbors by the government of Iraq constitutes a threat to peace and security in the region', while 'underlining that it will consider Iraq fully

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[459] *See* S/RES/678/(1990), at its preamble and para.1and 2; and S/RES/660(1990), at para.2
[460] Rabinder & Macdonald, *supra* note 457, at 25.
[461] *See* S/RES/687/(1991).
[462] S/RES/688/(1991).
[463] CHRISTINE GRAY, AFTER THE CEASEFIRE: IRAQ, THE SC AND THE USE OF FORCE, BYIL 135, (1994) at 162.
[464] S/RES/707(1991), at para.1
[465] S/RES/707(1991), at para.1

responsible for the serious consequences of any failure to fulfill the demands in the present resolution.'[466]

This demand was repeated in a number of SC resolutions including Ress.1051, 1060, 1115, 1134, 1137 and 1154.[467] The latter resolution states that the SC is 'determined to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under Res.687 and the other relevant resolutions'.[468] Significantly, the SC 'stresses that compliance by the government of Iraq with its obligations, repeated again in the memorandum of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and the IAEA in conformity with the relevant resolutions is necessary for the implementation of Res.687, but that any violation would have severest consequences for Iraq.'[469]

On 5 August 1998, Iraq suspended co-operation with the Special Commission and the IAEA and under Res.1194, the SC stated that this 'constitutes a totally unacceptable contravention of its obligations under Res.687…'[470] This condemnation was repeated in Res.1205, which also demanded that Iraq co-operate fully with the Special Commission, and in which the SC again remained 'actively seized of the matter.'[471] Res.1441/2002 as discussed under chapter four the thesis, also stated that the SC has given the final opportunity for Iraq to comply with its obligations. From all such considerations, the assertion that, the Operation Iraqi freedom was justified, for such resolutions justify the renewed use of force under Res.678, and have given green light to attack Iraq if it did not live up to such obligations, without further authorization from the SC,[472] do not seem tenable.

Eventually, in May 2003, the SC had 'recognized' the responsibilities of the occupying powers as *de facto* rulers of Iraq, addressing them as 'the Authority,'[473] and this had been considered by some as *ex post facto* authorization of the Coalition and a state of affairs that

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[466] S/RES/949(1994).
[467] *See* SHAW, *supra* note 6, at 1262-1265.
[468] S/RES/1154/(1998), at preamble para.2.
[469] Rabinder & Macdonald, *supra* note 457, at 22.
[470] S/RES/1194/(1998), at para.1.
[471] *See generally*, S/RES/1205/(1998).
[472] Gowlland-Debbas, *supra* note 411, at 372.
[473] S/RES/1483/(2003)

had been brought about by means of a violation of the UN Charter.[474] Others, generally commenting on such trends of the SC that as a political organ entrusted with the maintenance or restoration of peace and security rather than as an enforcer of international law, will, in many instances, have to accept or build upon facts or situations based on, or involving, illegalities and it does not necessarily amount to authorization by the SC for enforcement action *per se*.[475]

In each of the afore-discussed cases, except for that of the Grenada situation where reaction was to the negative, it has been indicated that the international community tolerated or condoned the deviation from the Charter system.[476] Accordingly, some scholars tend to conclude that international practice in this area, therefore, is informed, not only by the Charter system, but also by some other set of normative principles.[477]

4.5.3 Implications of Such Behaviours

Here in above, we have seen some of the repeatedly uttered causes or grounds for the inactions or subsequent to the fact 'legitimizations' of the SC, and some critical events which involved these issues. Then remains the questions: What effect should be given to such facts at hand? Can we raise the question of the role of the SC in the development of international law?[478] Does this process constitute a desirable second best to having an explicit standard? In and endeavor to get the real meanings thereof, different interpretations have been attached to such phenomena.

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[474] Cockayne, *supra* note 454, at 402). However, most commentators are in agreement that the resolution had no impact whatsoever upon the lawfulness of the use of force, and several Council members made clear that their votes in favor of Res.1483 should not be interpreted as acceptance of the legality of the use of force. The law of occupation (of course the mandate given to the 'authority' is far broader than those rules for occupants), being part of *jus in bello*, applies regardless of whether the use of force that resulted in the occupation was legal. *See generally*, Frederic Kirgis, *Security Council Resolution 1483 on the Rebuilding of Iraq*, ASIL INSIGHTS, May 2003, available at http://www.asil.org/insights/insigh107.htm, visited on Sept.12, 2010; Carsten Stahn, *Enforcement of the Collective Will after Iraq*, 97 AJIL 804 (2003) at 817-818; Alexander Orakhelashvili, *The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law*, 8 JCSL 307 (2003) at 310-311, and Mohamoud Hmoud, *The Use of Force against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL ILJ (2004) 453.

[475] Simma, *supra* note 5, at 11.

[476] Hakimi, *supra* note 30, at 678.

[477] *Id*.

[478] Gowlland-Debbas, *supra* note 411, at 377.

The first approach taken towards such situations is that they do have significant implications in the development of international law and even the Charter system.[479] Such development, however, is presented in different ways by the scholars. Some simply assert that the SC acts that way in the cases of the violations of the Charter rules and of its own binding resolutions, to make sure that the developments under international law, States practices, and emerging norms are compressed to the Charter system.[480]

Here the consideration is that, taking into cognizant of the observed developments, looking at the tolerance and support of international community, which is notoriously fickle in protecting international norms, depending on the substantive interests at stake, the circumstances surrounding the lack of authorization, and the characteristics of the acting body, and considering it as the best available option for managing the international community's varied interests,[481] the SC has been developing the scope of the Charter. As indicated previously, such developments are not unknown to the system. Accordingly, the silence or subsequent actions, some times described as retrospective condo-nation (or at least, non-condemnation), by the SC in such occasions is regarded as a third kind of *de facto* development of the Charter system.[482]

Of course, during the adoption of Res.377 by the UNGA, it has been hinted that the failure of the SC to discharge its responsibilities on behalf of all the member States, does not relieve the member States of their obligations or the UN of its responsibility under the Charter to maintain international peace and security; and does not deprive it to act in consideration of such issues. Recently, the High level Panel recommended that though principally it is a must to look for the SC authorization, specifically for 'regional organizations', and it goes to recognize that in some urgent cases that authorization may be sought after such operations have commenced.[483] Accordingly, broadening or such *de facto* development of the Charter system has been used as a device- the second best alternative- to keep the viability of the Charter system. This view is, however, not taken by the SG in the in

[479] *Id*, at 374; Lowe, *supra* note 418, at 868; *see also* Wedgwood, *supra* note 14, at 354.
[480] *See generally*, Constantinides, *supra* note 300.
[481] Hakimi, *supra* note 30, at 680.
[482] Lowe, *supra* note 418, at 868.
[483] High-level Panel Report, para.272 (a).

larger freedom report nor in the 2005 submit out come report. Though the SC and other UN organs have recently sought to reinvigorate the role of regional arrangements in peace and security matters, the understanding persists that any regional enforcement action must be authorized by the SC.[484]

Some scholars in this same category, implying legal implications positively, have come up with a slightly different idea of such a development, i.e., not under the ambit of the Charter provisions but under the rubric of international law and, hence, suggested the co-existence of the 'operational system'[485] tolerating the unilateral interventions, and the Charter system.[486] It is evident from the practice of the SC that it discreetly acquiesce deviations from the Charter norms to satisfy their broader legal and policy interests, while at the same time taking steps to endorse its mandate. So long as the SC remains ineffective in satisfying the international community's substantive legal interests, the operational system will and should continue to coexist with the Charter system, and its subsequent actions are the manifestation of such demands.[487]

In the events of tolerated deviation, however, no actor acknowledges explicitly that it is participating in or tolerating a deviation, and instead, international actors, at times, resort to a variety of techniques to maintain the integrity of the Charter rule as setting forth the rule of decision-making and to suppress acknowledgement of the operational system.[488] Others act as if the action raises no questions under that system, and still others publicly endorse the Charter system even as they decline to enforce it in the particular case before them.[489]

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[484] *See, e.g.*, S.C. Res. 1631, U.N. Doc. S/RES/1631 (Oct. 17, 2005) (urging regional arrangements to contribute to conflict prevention and crisis management, "consistent with Chapter VIII of the United Nations Charter," and reiterating the primacy of the Security Council on matters relating to international peace and security); Press Release, United Nations, Regional Organizations to Agree on Stronger Partnerships in Facing Peace, Security Challenges, U.N. Doc. PI/1668 (Jul. 21, 2005), at http://www.un.org/News/Press/docs/2005/pi1668.doc.htm, visited on June 15, 2010.

[485] This refers to the situation where international actors may tolerate or even condone deviations from that rule in order to satisfy broader legal and policy interests. In these instances, international actors deem the deviation to be legitimate or appropriate despite the inconsistency with the Charter text. *See* Hakimi, *supra* note 30, at 679.

[486] *See generally*, Hakimi, *supra* note 30.

[487] *See* NICO KRISCH, UNILATERAL ENFORCEMENT OF THE COLLECTIVE WILL: KOSOVO, IRAQ, AND THE SECURITY COUNCIL, MAX PLANCK 3UNYB, 59-103 (Jochen Frowein and Ruediger Wolfrum, (eds.), 1999); *See also*, Hakimi, *supra* note 30, at 644.

[488] Hakimi, *supra* note 30, at 643.

[489] Hakimi, *supra* note 30, at 649.

For some others, inaction of the SC, and tolerating or accepting the deviation as legitimate action, which cannot be included under the ambit of the Charter rules, is the price paid for being pragmatic to the objective realities, as coming to closure on SC resolutions, dealing with serious crises and moving toward either sanctions or the use of force is already an agonizingly slow and often tendentious process.[490] In such cases, the willingness of a state to 'go it alone' helps solve the free-rider problem in the production of public or collective goods, and yet, generally states are only willing to do this if they are granted leeway in executing the intervention.[491] The SC cannot actually prevent individual states from going it alone in the absence of its blessing; and as such, the SC cannot simultaneously restrict military interventions by outside actors to unambiguous uses of self-defense and be effective at maintaining peace and security.[492]

The Council's failure to condemn or otherwise disapprove occasional use of force allegedly carried out to 'enforce the collective will' might be seen as adding to the validity of arguments that such unauthorized interventions 'are exempted from legal disapproval and sanctions, because their outcome meets an internationally recognized and collectively defined community interest, and/or because the new *status quo*, produced by the use of military force, requires further common action'.[493] This argument is in line with the traditional wisdom of legal theory that where substantive law cannot bring about a sufficient degree of legal certainty, procedural rules must be used to obtain results which are socially or politically acceptable.[494]

In this regard, it has been propagated that international law, particularly customary rules, develop in response to the needs of the real world, not as an abstract system.[495] In the same vein, international law has sometimes to modify its reactions to the consequences of successful violations of its rules to take into account the exigencies of reality.[496] Accordingly, arguably, the afore-raised operations signaled the international community's tacit approval of

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[490] Lyman, *supra* note 319, at 127-138.
[491] Voeten (2005), *supra* note 419, at 290-98.
[492] *Id*, at 298.
[493] Stahn, *supra* note 474, at 818.
[494] Micheal, Bothe. *Terrorism and the Legality of Pre-emptive Force*, 14 EJIL 227, (2003) at 239.
[495] Lowe, s*upra* note 418, at 863.
[496] SHAW, *supra* note 6, at 500.

interventions for various considerations including humanitarian purposes or considerations, and the SC should respect or follow such trends to retain its relevance in their eyes.[497] Obviously, these actions of the SC might help to appreciate the fact that the UN Charter paradigm has been some how modified, and the proposed reform to the system will have some space to these issues.[498]

Contrary to the above views, some point out that the legal implication that can be drown from the tolerance or subsequent approval of the SC is 'a negative one' for it presupposes the rejection of Charter rules or, at least, considering them as outdated strict rules and that the need for subsequent development of laws in the area, is indispensable.[499] The SC sees its writ, adopted in pursuance of the Charter rules, ignored in one conflict situation after another. Being dominated by the western interests, and remaining relatively indifferent to crisis elsewhere, it has portrayed the need for further reform to salvage the non functionality of the collective security scheme.[500]

To the other extreme, there is a position held by some prominent scholars which firmly stated that legal implication should not be attached to such practices of the SC. The approach does not categorically rejected possible developments but so strict in such considerations.[501] For instance, it is asserted that the SC through its actions (*less likely through inaction*), may stimulate developments in general international law.[502] Such *post hoc* efforts of the SC at legalization should not be accorded much respect, especially in the context of a major war where prior efforts to obtain a mandate for the use of force were not endorsed by the SC even

[497] *See for instance* Schmitt, *supra* note 32, at 94.
[498] *See* The High-Level Panel Report, which has been the source of many recent proposals concerning UN reform, and it has also been a focal point of discussion concerning the law that *ought to* govern the use of force in international law.
[499] *See* Lyman, *supra* note 319.
[500] *Id*.
[501] Michael Wood, The UN Security Council and International Law; Hersch Lauterpacht Memorial Lectures, held at the Lauterpacht Center for International Law, University of Cambridge, (7th -9th Nov.2006), at 6, available at http://www.lcil.cam.ac.uk/lectures/2006sir michaelwood.php, visited on Sept.12, 2010. Why a certain action was taken by the SC should be taken into consideration, whether it was done out of political pressures, legal beliefs, and the like.
[502] *Id*, at 2. [Emphasis added]

in the face of major diplomatic pressures mounted by Washington in the several months prior to the Iraq War.[503]

The practices under consideration are regarded as being deviant to the Charter norm as the causes for the inactions at the required points are not mostly related to external factors but internal to the permanent members; and such a deviant practice by an organ, *ultra vires* acts of the creature, can be given no such effect, as this organ is not entitled to change the international as well as Charter rules.[504] In a consent-based system, a deviant practice by the creators of an organ such as the SC leads to the question of whether those creators-states- continue to consent to the limits the system imposes.[505]

Here, there is a belief that the existing rules are adequate to accommodate recent threats, hence, whatever else may have changed on 11 September 2001, for instance, by the acts of the SC, international law has not.[506] Accordingly, the fact that the SC does not condemn a use of force cannot normally be taken as evidence that the SC or states, consider it lawful, and there is nothing called as 'implicit or implied authorization to use force by the SC.[507] In addition, it is occasionally suggested that the SC, by assisting to bring a conflict to an end, or by assisting at the post-conflict stage, has retrospectively endorsed the original use of force as lawful, but this has not been accepted by this approach.[508]

Moreover, there are some other implications which can be deduced from such practices: such as the erosion of the SC's credibility and ability to perform its obligations;[509] as it is a

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503 Falk, *supra* note 12. He indicates that, it may be worth recalling the vigorous US Government objections to the Vietnamese intervention in Cambodia, and subsequent occupation, which disrupted the Khmer Rouge genocide. The American position repudiated the humanitarian considerations, emphasizing the Vietnamese violation of Cambodian sovereignty, urging immediate withdrawal despite the risk of regenerating a genocidal regime.'

504 Glennon, *supra* note 289, at 631.

505 *Id*.

506 *See for instance* Wood, *supra* note 501, at 5. In addition, here, the view which considered that, there has come an Art.51 and half, which appears to suggest that self defense 'authorized' by the SC is wider than the Art.51 self defense, has been rejected as baseless, at 6.

507 Wood, *supra* note 501, at 9.

508 *Id*.

509 Lyman, *supra* note 319, at 133 and *ff*. Remember also the discussion under Charter three of this thesis indicating the decline in the relevance and respect for the SC resolutions at some instances.

political organ it usually seeks a political solution;[510] the absence of political willingness of the permanent members not legal problems - as the slow and inadequate response to events in Darfur in Sudan since 2003 (as earlier in the case of Rwanda) has demonstrated.[511] These implications resulted in erosion of creditability or weakening of the collective security system introduced under the Charter system and showed the domination of the system by the western interests.[512]

Generally, though it is hard to specifically indicate what the SC has had at the back of such practices, it can be said that the afore-discussed pertinent legal and extra-legal considerations can be fetched taking into consideration diverse circumstances that prevailed during a specific incident.

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[510] Nico Krisch, *The Security Council and The Great Powers*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, OXFORD UNIVERSITY PRESS, 133 (Vaughan Lowe, *et al*. (eds.), 2008) at 143; *see also* GRAY, *supra* note 9, at 197.

[511] Gray, *supra* note 290, at 96.

[512] Ian Johnstone, *US-UN Relations after Iraq: The End of the World (Order) As We Know It?* 15 (4) EJIL, 813-838, (2004) at 821.

Chapter Five

5. The Emerging Hierarchy of Norms and Legal Obligations

The contemporary international system presents an array of circumstances in which the use of force is seen as both necessary and proper. Indeed, a number of challenges intended to curb proliferation of arsenals, protect nationals, curtail gross human rights violations, or counter terrorism, and some other threats, have contributed for the emergence of new norms. In addition to the afore-stated issues, the doctrines of 'achieving a greater end'[513] and 'Pro-Democratic Paradigm'[514] have come into being in the international order. Inspired by the development of greater values in the fields of human right, democracy and good governance, the international community is becoming increasingly intolerant of atrocious crimes committed on a scale that imperils whole societies, and of rulers who deny their own people, typically with repressive measures, the right to fair and representative government. Generally, it is explained that the today's international peace and security agenda is influenced more by a humanistic orientation.[515]

Then the issue remains to be seen if these new norms become part of international law. Here is where a host of questions arise. On one hand, they have been seen as either violating, or moving beyond, or reinterpreting the two principally accepted legal grounds for the use of force: use of force in self-defense and, by or under the authorization of the SC. On the other hand, doing justice, irrespective of what the existing laws declare, should be given the utmost regard. These views have left international lawyers in dilemma and scholarly debates have been rife on such issues today more than ever.

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[513] Gregory, *supra* note 218, at 485. Invention of Panama by the US in response to different 'illegitimate' acts done by Manuel Noriega of Panama and his 'hostile' declarations on US, and the US and the multinational coalition invasion of Iraq in 2003 could be cited as relevant practices which would place some precedent to this doctrine. Though these actions have been severely criticized, he said, they have established a principle that cannot be overlooked or easily dismissed.

[514] *See* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992). Here, it is proposed that in an extreme point of view the paradigm authorizes force against illegitimate governments (non-democratic) to bring the citizens of that country into the democratic world community. Remember also that the SC has authorized a regime change by force in Haiti in 1994 where a military junta illegally seized power.

[515] Kapil Kak, *Humanitarian Intervention and the Changing Role of the UN, Strategic Analysis,* 24(7) A MONTHLY JOURNAL OF THE IDSA, 1235 (2000) at 1238.

Broader and realistic views have been attaining significant considerations. To this end, some consistently argue that the higher and grander goal that has eluded humanity for centuries, the ideal of justice backed by power, should not be abandoned so easily.[516] Achieving justice is the hardest part; revising international law to reflect it can come afterward, and if power is used to do justice, law will follow.[517] To ignore objective conditions is perilous; to hide behind historical inevitability is tantamount to moral abdication.[518] International problems must be tackled on a case by case basis as components in a geo-strategic equation and moralistic or legalistic approaches fail to identify the particular characteristics of each international problem and thus lure one into failure, since they tend to lead to the exchange of a lesser evil for a greater one.[519] Having taken these strong assertions into consideration, the purpose of this chapter is to address some of these issues, and weigh their stand *vis-à-vis* the Charter system.

5.1 Unilateral and Preemptive Use of force Against Terrorism: US Practice in Perspective

Before stepping into analyzing the possibility of use of force in self-defense against terrorism, it is pivotal to consider terrorism independently and the responses that have been given to such incidents. Terrorism[520], unlike many, even most, international peace and security issues that surface on the Council's agenda, has the rare quality of generating an apparent universality in perception of the threat, and consequently bringing about a united response.[521] In the context of the Cold War, terrorism was not a pressing high priority issue on the agendas of the major

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[516] Glennon, *supra* note 24, at 7.
[517] *Id*.
[518] *See* Henry Kissinger, White House Years, Boston, Little, Brown and Co., (1979) at 55, available at http://www.alibris.com/search/books/qwork/7202679/used/The%20White%20House%20Years, visited on July 12, 2010.
[519] Nicolas K. Laos, *International Security in the Post-Cold War Era*, 4 (4) JOURNAL OF INT'L AFFAIRS, (2000) at 4.
[520] The meaning and scope of this term varies and a comprehensive understanding on the issue is yet to emerge despite the fact that we have had different conventions; available at, http://www.un.org/terrorism /instruments.shtml, visited on June 15, 2010.
[521] Jane Boulden, *The Security Council and Terrorism,* in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, OXFORD UNIVERSITY PRESS, 608 (Vaughan Lowe, *et al*. (eds.) 2008) at 608 and *ff.*

powers. The SC's post-Cold War willingness to deal with issues of international peace and security broadly defined extended also to terrorism.[522]

There were different terrorist actions all over the world though they failed then to attract considerable international attention, despite the SC at times, condemned or took some actions in response to terrorist acts.[523] The attack on Israeli athletes at the Munich Olympics in September 1972 provides a vivid symbol of the arrival of terrorism as an issue of international attention.[524] In response to the bombings of the US embassies in East Africa, Council members imposed sanctions against the Taliban regime in Afghanistan.[525] And forthwith, the Council unanimously adopted Res.1269, condemning 'all acts, methods, and practices of terrorism as criminal and unjustifiable, regardless of their motivation'.[526] Here it appears that the SC begins to shift from a case-specific approach to terrorist incidents to that are more broadly based.

More crucial is the SC's response to the 9/11 attack of terrorists on the World Trade Center and on the Pentagon (US). Then, the Council passed a resolution condemning the attacks and recognizing the right to self-defense.[527] And, again swiftly, the SC adopted Res.1373 which is more substantive and comprehensive in its scope.[528] These measures enabled some to consider that the events of 9/11 clearly constituted an armed attack that required a military response in self-defense. Hence, in Res.1368 and 1373 of the SC reaffirmed the inherent right of individual and collective self defense and expressed the latter's determination to combat, by all means, threats to international peace and security caused by terrorist acts.[529] Of course, Res 1373, has departed from the usual Council language that *calls on* states or *requests* that states undertake certain measures, to indicate that the Council '*decides that states shall*' implement some measures. Apart from the SC, different international actors including the UNGA and G7 have

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[522] *Id*, p.610; *see also,* Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, DENV. J. INT'L L. & POL'Y, 653 (2008-2009).

[523] See e.g., SC Res.286 of 9 Sep. 1970 which calls on member states to take measures to prevent hijacking; SC Res.731 of 21 Jan. 1992 and SC Res.748 of 31 Mar. 1992 which were meant to compel Libyan compliance with the criminal investigation relating to the bombings of the Pan Am and UTA flights and end Libyan support of terrorism more generally.

[524] Boulden, *supra* note 521, at 609.

[525] SC Res.1267 of 15 Oct. 1999.

[526] SC Res.1269 of 19 Oct. 1999.

[527] SC Res.1368 of 12 Sep. 2001.

[528] SC Res.1373 of 28 Sep. 2001.

[529] Taft, *supra* note 158, at 660.

been taking some reactions to terrorism, and within the UN system, different commissions working on international terrorism have been established.[530]

These and other resolutions of the SC, among others, have been used by states, principally, the US, to justify the declaration of global war against terrorism. For the discussion at hand, however, the implications of the two resolutions, *vis-à-vis* the right of a state to act in self defense (declare war) against terrorism, take the lion share.

Ordinarily, acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Art.51 of the UN Charter. But if large scale acts of terrorism of private groups are attributable to a state, they are armed attacks in the sense of Art 51.[531] And, as Art.2 (4) only governs the use force between states 'in their international relations', anti-terrorist forces could be used as long as it did not concern the scope of states' international relations. However, the extraterritorial use of force against terrorists has faced almost insurmountable hurdles and this is one sphere where the traditional laws are put under pressure. In undertaking operational counterterrorism, decision makers are increasingly faced with the dilemma: whether an action, responsive or preventive, can be taken even if it violates the sovereignty of another state.[532]

Ever since 1945, states have used force against terrorist threats; yet their practice for a long while was sparse, and typically critically received by the international community,[533] though current practices and contemporary international law has come, arguably, to recognize a right of self-defense against terrorist attacks even where the situation cannot be attributed to another state under the traditional tests.[534] The fact that self-defense can be used against armed attacks by non-state actors was admitted in principle, but only under narrow conditions, when we see the ICJ rulings and UNGA's definition of Aggression.

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[530] Boulden, *supra* note 521, at 609-610.
[531] *See* Randelzhofer, *supra* note 127, at 802.
[532] Guiora, *supra* note 23, at 673.
[533] Tams, *supra* note 210, at 581.
[534] In 1998, in response to attacks on US embassies in Kenya and Tanzania, the United States bombarded Sudan for its tie with terrorists, and a terrorist base in Afghanistan; in 2000 and again in 2004, Russia asserted a right to respond extraterritorially against Islamic terrorists; in 2007, following attacks by Chechen rebels, it conducted air strikes against Chechen bases in the Pankisi Gorge in Georgia; in March 2008, Colombian forces moved into Ecuadorian territory in pursuit FARC rebels (which it considers a terrorist organization). These incidents were followed with different criticisms.

Disagreement has been voiced about whether terrorist attacks give rise to the right of self-defense. Literally, what Art.51 requires is an 'armed attack' and it does not restrict it to come from states. The ICJ in the Nicaragua case, as indicated previously, concluded that attacks exerted by non-state actors could constitute armed attack by considering the 'nature and extent' of such acts. It further followed the inter-state approach of Art.51 and called for rules of attribution 'effective control test', so that the victim state will be entitled to self-defense.[535] It appears that unless acts of terrorists are not attributed to states, we cannot talk of self-defense and, in those cases it is a must to resort to the SC system,[536] though as indicated earlier it can be argued that self-defense is available against armed attacks even if these attacks cannot be attributed to the territorial state.

Among those who propose that major terrorist attacks, whether or not they are clearly linked to a particular state, may constitute 'armed attack' and therefore, by implication, may justify a military response, some are concerned with the difficulties relating to the consequences that flow from such a position, as the following four considerations suggest:

> *'It is not always possible to be sure from whence an attack came, or which, if any, state or states bear responsibility for it; the exact nature of a state's responsibility for a terrorist attack may be complex and debatable. Is a state responsible when it tried, but ineffectually, to stop activities within its borders? Or when a small faction of the government has got out of hand and encouraged activities of which the rest of the government disapproves? Even if a victim state is fairly sure which state is responsible for the attack, the evidence that can be presented in public at the time may be incomplete and it may be unconvincing to third parties; and the historical record of wars against alleged sources of terrorism is not strong. Cases that give grounds for doubt about any kind of blanket approval of military*

[535] This standard has been criticized by the International Criminal Tribunal for Yugoslavia in the *Tadic* case and here an 'over all control test' was adopted. The ILC in its work on state responsibility, the UNGA's Res. 2652(XXV) 1970 and 49/60, 1994, adopted some relaxed and elaborated rules impute such acts.

[536] Geir Ulfstein, 'Terrorism and the Use of Force', 34 (2) SECURITY DIALOGUE, (2003) at 153-168. In connection with acts of terrorism, the Security Council has taken some sanctions. In a number of occasions especially post 9/11 attack it has stated that acts of terrorists constitutes threat to international peace and security- *see* Res.1368,1373,1377,1378 of 2001. *See also* In larger Freedom.

action in purported response to terrorist attacks include Serbia1914, Lebanon1982, and Iraq 2003.'[537]

For these critical reasons, the conclusion is that though the concept of 'armed attack' is accepted as encompassing certain types or patterns of terrorist attacks, that in itself should not be taken as an automatic license to respond militarily and, any argument for military action needs to be made carefully in each case.[538]

Considering the international reluctance to explicitly condemn the US's attack against Afghan, Christine Gray goes so far to suggest that the massive state support for the legality of US claim of self-defense against terrorists could constitute instant customary international law and an authoritative re-interpretation of the Charter rules however radical the alteration might be.[539] Prof. C.J. Tam argues that the more convincing way to accommodate the new practice is to opt for an inter-state approach of self-defense and recognize the existence of special rules on attribution of terrorist activities taking into consideration the relation between terrorist groups and host states, most closely resembling international rules against aiding and abetting illegal conduct.[540] It will also be pragmatic to opt for a view that a state ought, in certain instances, to be able to use force if another state does not have the will or ability to address acts of terror originating from its own territory.[541]

Based on these points, the effects the two resolutions have on self-defense remain contentious. On the back drop of this, there comes a scholarly debate regarding the stand of Res.1368 adopted by the SC in the aftermath of the 9/11 attack, on whether it has authorized the US's right to self defense against such an attack, and even its mandate to do so for the right under

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[537] Wilmshurst, *supra* note 23, at 23-24.
[538] *Id*.
[539] GRAY, *supra* note 9, at 604.
[540] *See however*, Kimberley N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20(4) EJIL, 1049, (2009) at 1057-1058; Federico Sperotto, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20(4) EJIL, 1043, (2009) at 1043-1048. Though they agree that the threshold for attribution is evolving downwards, they criticized him for intending to resuscitate a long- rejected basis of attribution; aiding and abetting or complicity, doing some mischief to the secondary rules of state responsibility.
[541] Ulfstain, *supra* note 536.

Art.51 does not call for its approval.[542] Accordingly, some scholars have suggested that the resolutions made a difference for:

> '*Both resolutions reaffirmed the inherent right of individual or collective self-defense as recognized by the UN Charter, under Article 51; 1373 emphasized that any further acts would be considered threats to peace and security; both 'implicitly' recognized that the September 11 attacks constituted an attack on the United States, under Article 51; and according to 1373, members are obligated to create the prescribed legal framework in its national laws and institutions to combat terrorism, and to co-operate fully with other states on a global scale in this effort … thereby establishing an international legal framework to combat terrorism.'*[543]

This recognition of the right to self-defense represents the equivalence to a hand over to the US to engage in 'war on terrorism' with out any form of Council's oversight. On the contrary, other scholars argue that while the resolutions recognized and reaffirmed the right of self-defense, they ultimately do not facilitate nor articulate a broader reading of self-defense. For instance, for Greg Maggs:

> *'The resolutions did not say what the right to self-defense entails. Most particularly, they did not say that al-Qaeda had committed an 'armed attack' for the purposes of Article 51 and that US had a right to act in self-defense in response to the attack by al-Qaeda. Accordingly, the war against Afghanistan was called at most preventive and at worst reprisal by some.*' [544]

Generally, whether the resolutions are simply reiterating the right already incorporated under the Charter or introducing new set of guidelines regarding self defense, particularly a pre-emptive one, is not clear.[545] This assertion is substantiated by the view that while existing

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[542] Nabati, *supra* note 8, at 791.

[543] *See,* Curtis A. Ward, *Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council*, 8 J. CONFLICT & SECURITY L. 289 (2003) at 293-394.

[544] Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the UN Charter and What the United States can do about it*, 4 REGENT J. INT'L L 149 (2006) at 165 -166.

[545] Jane Boulden, *supra* note 521, at 622-623. Taking in to consideration the London and Madrid bombings, it asks, what sorts of responses qualify as self-defense and at what point does the use of force become something other

international law grants states a fundamental right to self-defense the existing limitations the Caroline Doctrine, UN Charter Article 51 and SC Resolutions 1368 and 1373 do not provide a sufficiently clear guideline regarding when a state may act.[546] Accordingly, the existing 'laws' do not address when a state may take preemptive or anticipatory action against a non-state actor, and thus does not provide an actionable guideline for modern-day armed conflicts.

The '*strict scrutiny standard*' has been suggested by a scholar, to meet such challenge and this standard enable states to operationally engage a non-state actor earlier, predicated on intelligence information that would meet admissibility standards akin to a court of law, to re-phrase the statements:

> '*The strict scrutiny test seeks to strike a balance enabling the state to act sooner but subject to significant restrictions. The ability to act sooner is limited, however, by the requirement that intelligence information must be reliable, viable, valid, and corroborated. The strict scrutiny standard proposes that for states to act as early as possible in order to prevent a possible terrorist attack the information must meet admissibility standards similar to the rules of evidence. Adopting admissibility standards akin to the criminal law would seek to minimize operational error. The intelligence must be reliable, material, and probative.*'[547]

5.1.1 Traditional Requirements vis-à-vis the Potential Danger of Terrorism

Following the 9/11 attack, where terrorists with barbarous mentality callously killed over 3000 civilians, the US announced, seemingly encouraged by the SC resolutions adopted in the aftermath of the attack, the National Security Strategy 'NSS'[548] which is described by some as the most egregious example of preemptive use of force- the infamous Bush doctrine.[549] This among other calls for the adoption of the concept of imminent threat to the capabilities and objectives of today's adversaries. As terrorists do not take a 'wait and see' position and attack

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than self-defense over time? And as the use of force is not always a viable option, he indicated that, like the debate around the use of force in pursuit of humanitarian goals, a debate about the meaning and implications of self-defense, especially as it relates to efforts to deal with terrorism, needs to occur.

[546] Guiora, *supra* note 23, at 673.
[547] *Id*, at 48.
[548] NSS- US (2002), *supra* note 26, at 23.
[549] *See* Arend, *supra* note 17.

us in a conventional means, it opted to develop a more prudent strategy. It endorsed the view that the greater the threat posed by these adversaries, the more compelling the case for taking anticipatory action. It goes further and asserts that the use of force against terrorists, even if the uncertainty remains as to the time and place of their attacks, can be justified based solely on their doctrines and past practices.[550] At the 2002 West Point Commencement, the President indicated that 'not only will the US impose preemptive, unilateral military force when and where it chooses, but the nation will also punish those who engage in terror and aggression and will work to impose a universal moral clarity between good and evil.'[551]

This policy of the US, which has preached for preemptive use of force, has provoked some doubts and inquiries. Some simply, accept the policy as valid by refraining from reacting to it and/or indicating that, from experiences gained over the years, a state must act preemptively in order to either deter terrorists or, at the very least, prevent terrorism.[552]

This has been rejected by some as having no legal basis,[553] and it does not indicate the authority on which the US can make such a declaration.[554] It has also been indicated that the policy is flawed in a number of cases: it has claimed for adapting the 'imminent threat' requirement to the present day needs, without explaining what the term means[555], and it is not clear whether it has been impliedly referring to the traditional cases, in fact no indication is still made about necessity and proportionality requirements. It is also blamed for presenting an incomplete analysis of the relevant norms, and treats the permissible temporal scope of self defense as a matter of settled law without considering an ongoing scholarly and international debate concerning when force may first be used.[556]

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[550] NSS- US (2002), *supra* note 26, at 23; *see also* Bobbitt, *supra* note 258.

[551] President Bush spoke of 'preemption' in a speech on combating terrorism at West Point in May 2002, as quoted in O'Connell, *supra* note 6, at 18; the same view has been enshrined in the NSS - US (2002), *supra* note 26, at 22.

[552] Guiora, *supra* note 23, at 672.

[553] The Legality of Using Force against Iraq, Memorandum by Christopher Greenwood, CMG, QC, 24 Oct. 2002, www.parliament.the-stationery-office.com/pa/cm/cmfaff.htm., visited on April 21 ,2010.

[554] Christine Gray, *International Law and the Use of Force* (2000), as cited in Chris Bordelon, *The Illegality of the US Policy of Preemptive Self-defense Under International Law*, 9 CHAPMAN L. REV. (2005-2006) at 114.

[555] *Id.*

[556] *Id.*

Hence, the effort to reconcile unilateral use of force to the Charter system requires a far more difficult adjustment of the traditional rules, and is proving to be much more controversial. It is known that respecting the customary rules on the unilateral use of force depends significantly on the analysis of the availability, timing, and permissible scope of the use of force in self defense. The problem in the issue of preemptive use of force so adapted by US is that it does not enable us weigh the action *vis-à-vis* the stringent traditional law requirements: the action must pass the 'necessity' and 'proportionality' tests. The necessity and proportionality requirements were discussed elsewhere in the paper, and there, it has been shown that, as developed in the Caroline case, it leaves no room for relaxed interpretations and the action must be: instant, overwhelming, and leaves no choice of means and no moment for deliberation; and that the action was neither unreasonable nor excessive. Accordingly, preemption under customary law requires, at least, that the attack should be much more realistic and definite- 'must be an actual threat of an attack' than mere predictive and preventive one.

But for the current preemption cases, the mere existence of 'terrorists' necessitates the action, as the means and mechanisms of their attacks are usually unconventional, and involve covert operations. The state acting preemptively is making a subjective determination about future events and needs to make a subjective determination about how much force is needed for preemption. Accordingly, how can one establish that such measures are made out of necessity meeting the element of imminence, and also what measure can be used to assess proportionality against a possible attack?[557] It is true that the customary rules do not expect a nation, it is safe to suppose, to willingly sit by while another prepares its doom, but call for greater certainty, which cannot easily be met in the case of war against terrorism.

5.1.2. The Current Practice

Today, it is a public secret that, basing their logic on the SC resolutions calling for the right of self defense, and the NSS of the US and its allies have been conducting a world wide campaign or 'war' against terrorism. Secretary General Annan confirmed that the US led coalition 'set

[557] O'Connell, *supra* note 6, at 19.

their current military action in Afghanistan in that context.[558] Even the recent Iraq war has been described as a continuation of the global war on terrorism. This can be fetched from the eloquent and carefully articulated statements of the US President, as quoted by Richard, where he described the military operations as '*a battle'* rather than as '*a war'* in the aftermath of the measures against Iraq, sub-summing the attack on Iraq within the wider, ongoing war against global terrorism, and implying that the undertaking should be seen as an element in the antiterrorism campaign launched in response to the September 11 attacks.[559] The measures that have been adopted to fight terrorism by a number of countries are escalating, posing doubt on other normative values particularly human right issues. It seems that no regard is accorded to the debates on this area.

International scholars are of the view that, in the context of contemporary threats, imminence cannot be construed by reference to a temporal criterion only, but must reflect the wider circumstances of the threat; and, to use force preemptively, there must exist a circumstance of irreversible emergency: taking in to cognizance, the gravity of the threatened attack; the capability of the actor; and the nature of the attack, including the possible risks of making a wrong assessment of the danger.[560] Such determination by a state, though not expected to stick into the traditional requirements, must be made in good faith and on grounds which are capable of objective assessment, and as reasonably be achieved, the evidence should be publicly demonstrable as evidence is fundamental to accountability, and accountability to the rule of law.[561]

As with other issues of international peace and security, the SC action on terrorism ultimately works as a facilitator and supporter of state action, not as a substitute or alternative to it. As such, its ability to have an impact on terrorism is inextricably tied to the ability of member

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[558] Press Release, United Nations, Secretary General Repeats call for Global Response to Terrorism, Urging Moral Struggle Against 'An Evil That Is Anathema to All Faiths,' UN Press Release SC/SM/8013 (Nov. 6, 2001), available at http://www.un.org/News/Press/docs/2001/sgsm8013.doc.htm, visited on Sept 15 ,2010.
[559] Falk, *supra* note 12, at 593.
[560] Wilmshurst, *supra* note 23, at 9.
[561] *Id*.

states to develop an effective, functional counterterrorism strategy based on an accurate, in-depth understanding of its causes and nature.[562]

5.2 Use of Force for the Protection of Nationals and Humanitarian Purposes

5.2.1 Protection of Nationals

Under customary international law protection of nationals is clearly regarded as lawful to use force to protect nationals and property situated abroad, and many incidents can occur to demonstrate the acceptance of this position.[563] Since the adoption of the UN Charter, however, it has become rather more controversial. There are those who take the broader view of Art.51 accepted the possibility of such protection[564] while those who perceive Art.51 as excluding the customary law-right deny such an operation[565] as the 'territorial integrity and political independence' of the target state is infringed, and that 'an armed attack' could only occur against a state, not against individuals abroad within the meaning of Art.51.

Of course, as indicated elsewhere, the Charter itself reckons customary rights on the issue of use of force. When we see subsequent practices of states, it can possibly be argued that the right of a state to rescue its nationals is unaffected by the UN Charter. For instance, this justification is one of several grounds invoked by the United States in relation to the use of force against Panama in 1989.[566] It did same, when attempting to liberate the American hostages in Tehran in 1980. In addition, Israel conducted the Entebbe Operation in Uganda in 1976 to rescue its hostage citizens.[567] And recently, a British military action to rescue peacekeepers in Sierra Leone in 2002 can be a good scenario.[568] In this regard, the response of the SC is not consistent. At times, it condemns such operations, though not specifically calls it

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[562] Jane Boulden, *supra note* 34, p.623.
[563] DUGARD, *supra* note 2, at 513.
[564] *See generally* BOWETT, *supra* note 160, at 87-105; Franck, *supra* note 93, at 76-96.
[565] *See generally* BROWNLIE, *supra* note 3, at 289-301.
[566] BRAWNLIE, *supra* note 3 at 10. He also cited Dr. Christine Gray asserting 'examination of the practice indicates that few states accept a legal right to protect nationals abroad.'
[567] This particular rescue operation is said to meet the traditional requirements, imminent danger of injury to nationals, failure or inability of Uganda, and the measure was confined only to protecting nationals. *See* DUGARD, *supra* note 2, at 514. The SC debate in this case is inconclusive.
[568] *Id.*

as such but only as a measure in self-defense, while, at times, it refrains from reaction for different reasons.[569]

Generally, though such actions have raised little protest, it is difficult to extract from the contradictory views expressed in these incidents the apposite legal principles. Such practices accompanied, at times, by protest, together with a widely held conviction that a state has a right, and of course 'a duty' to protect the life of its nationals, may be considered as creating another exception to Art.2 (4) which cannot comfortably be placed under the scope of self-defense as stipulated under Art.51. A scholar, considering the principle of saving the threatened lives of nationals *vis-à-vis* the sovereignty and territorial integrity of states, concludes that 'it is preferable to accept the validity of the rule in situations somehow inline with the rules laid-down in the Caroline case.'[570]

5.2.2 Humanitarian Intervention

Initially, intervention (before being called unilateral humanitarian intervention) was intended as a means to protect one's own nationals abroad,[571] and also on a number of occasions before 1945, states intervened in other states to salvage non nationals where their treatment was so outrageous that it 'shocked the conscience of mankind'.[572] During the Cold War, state interventions on foreign territory were justified under the right to self-defense and/or combination of other motives, not under a general right to intervene on humanitarian grounds, though after the end of this period, states began approaching humanitarian intervention as a way to protect other states' nationals and have increasingly relied on Chapter VII of the UN Charter, significantly broadening the scope of the doctrine of humanitarian intervention, in line with peacekeeping operations.[573]

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[569]The moment Israeli attacked the Palestinian Liberation Organization's Headquarters in Tunisia in response to the killings of three Israeli citizens the SC condemned such an attack rejecting that fear of future attacks do not entitle to make use of the right under Art.51. *See* Gregory, *supra* note 218, at 474.
[570] SHAW, *supra* note 6, at 1145.
[571] Daphne, *supra* note 1, at 52.
[572]The frequently cited scenario is France's intervention in Syria in 1860-61 to protect the Maronite Christians from further massacres. In this regard, Falk stated that though this act is challenged by China and some Asian countries as a violation of Art.2 (7) of the UN Charter, after Cold War there is increased degree of support for such intervention under the UN System. Grotius endorsed such right in 1625 in *De Jure Belli ac pacis* 2.25.8. Falk, *supra* note 12, at 596.
[573] Daphne, *supra* note 1, at 53-54.

Despite these perceived phenomenons, the issue of humanitarian intervention is not dealt within the UN Charter. There is no comprehensive definition for the term 'humanitarian intervention', but a relatively agreeable one reads: [574]

> *'…the threat or use of force across state borders by a state or group of states aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.'*

Generally, the term is used in operations where a state or states have intervened territory of another state because of gross violations of human rights, to set free hostages, or for the purpose of delivering humanitarian aid. The practice from the very outset was criticized as legitimizing interference in another state's internal affairs, contrary to well-entrenched principles of international law, especially by China and other Asian countries, despite the existence of some gloomy picture in support of it by others.[575] Accordingly, today's regime of humanitarian intervention (especially a unilateral one) is that of a chiaroscuro, somewhere between dawn and dusk. And, a more liberal term 'responsibility to protect' than humanitarian intervention has been introduced to lessen the friction observed specially, respecting territorial sovereignty.[576]

Though the UN system is said to play a more active and greater role since the end of the Cold War era, it is more insistently attacked for doing too little, as in Bosnia and Rwanda, than in doing too much in this regard.[577] As per the broader scope of the power conferred on the SC by the Charter, the SC can, arguably, authorize such humanitarian intervention. Whereas the absence or presence of UN authorization had little bearing on the use of force in the Cold War period, the absence of such authorization is now widely lamented and appears to affect the

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[574] J. L Hoizgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION; ETHICAL, LEGAL AND POLITICAL DILEMMAS, CAMBRIDGE UNIVERSITY PRESS (Hoizgrefe & Keohaneceds , 2003) at 18.

[575] *Id*; *see also*, GLENNON, *supra* note 17.

[576] For detailed analyses on Responsibility to Protect (R2P), *see* André Stemmet, *From Rights to Responsibilities; The international community's responsibility to protect vulnerable populations*, 12(4) AFRICAN SECURITY REVIEW (2003) at 117-124; and Susan Harris Rimmer, *Refugees, IDPs and the R2P doctrine*; Paper prepared for Protecting People in Conflict & Crisis: Responding to the Challenges of a Changing World, Oxford, (22nd – 24th Sept. 2009), available at http://ssrn.com/abstract=1519602, visited on Sept.10, 2010.

[577] For useful overviews of this trend, *see* MURPHY, *supra* note 432; and *see also* Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society, Oxford University Press, Oxford (2000).

depth and breadth of multilateral co-operation in a non-trivial manner.[578] But, what if such intervention is effected without the prior authorization of the SC? The best scenario is the Kosovo incident and the legal debates have not yet been resolved. The true crescendo in this debate was reached with the publication of Bruno Simma's article on the legal aspects of the NATO intervention. Here, it is worth noting that the Clinton administration issued no legal justification for using force in Kosovo, and it also did not argue for changing the law or institutions of the Charter either. But State Department officials made clear, as soon as hostilities ended, that the US did not support a 'general right of humanitarian intervention'.[579] And generally, there are three views revolving on the legality/legitimacy of such intervention: the Realist, Zorro principle, and Classist/legalistic.

The *Realists* are those who advocate that such an intervention is legal and permissible. Here, they argue that there is no violation of Art.2 (4), as humanitarian intervention is not action against 'territorial integrity or political independence of any state', or 'contrary to the objectives of the Charter'.[580] Again, Art.51 is also commonly used as part of an argument for humanitarian intervention, stating that the intervention is an action taken in self-defense on behalf of the people. These arguments, however, seem far to be more plausible.

The second group, advocating '*Zorro principle*', are those who consider it illegal but legitimate. Some scholars, including Bruno Simma, suggested that it is illegal but necessary, in their terms; 'only a thin red line separates NATO's action on Kosovo from international legality.'[581] Antonio Cassese too, though believed that such acts are contrary to the wordings of the UN Charter provisions, argues for it affirmatively by asserting the fact that there has been emerging customary international norms which would legitimize the use of force in cases where there exist large-scale atrocities of mankind, and actually commends the action to be undertaken upon the fulfillment of some strict conditions.[582] Here, one might question the

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[578] Voeten (2005), s*upra* note 419, at 288.

[579] *See* evidence regarding the official US position on humanitarian intervention, in Mary Ellen O'Connell, *Authority to Intervene, International Legal Challenges for the Twenty-First Century*, Proceedings of a Joint Meeting of the Australia and New Zealand Society of International Law and the American Society of International Law 303, (June 26-29, 2000); *see also* Christine Gray, *supra* note 352, at 1-19.

[580] *See* Humanitarian Principles Training, available at http://coe-dmha.org/Unicef/HPT_Session3Intro.htm.

[581] Georg Ress, *The Interpretation of the Charter*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OXFOD UNIVERSITY PRESS, VOL. I, 13, at 22 (Bruno Simma (ed.), 2nd ed, 2002).

[582] *See* Cassese, *supra* note 14, at 23-30.

'illegal but legitimate' distinction, i.e., when is an action unlawful can, at the same time, be legitimate? The proponents of this principle assert that, 'it might be and it sometimes is, legitimate, to disregard the law to meet changing demands.'[583] This classification as per the writer's view adds absurdity than shading light on the already contentious issue.

The third, *Classist or legalistic* approach, propagates the view that it constitutes illegal intervention, by sticking on the literal meanings of the Charter provisions.[584] This has been to some extent buttressed by the ICJ when, in the Nicaragua case, it asserted that 'in the absence of any justification unequivocally provided in the Charter the use of force could not be the appropriate means to monitor or ensure respect for Human Rights.'[585] Later the ICJ took a lenient view and ruled that in the face of genocide, the right of states, or collectivities, to counter breach of human rights most likely becomes an obligation.[586]

Accordingly, one cannot, with a relative ease, say such interventions are 'legal or illegal' under the Charter system taking in to consideration the views raised above. So, one may tend to resort to see what the customary international rules provide. Here again, the problem, is that we do not have consistent state practices. When we see the Indian intervention in East Pakistan in 1971 and the Tanzanian intervention in Uganda in 1979 we can say that *neither* of these countries has justified their cases on this basis.[587] Despite the flux of practices seen under these events, at best, one cannot say they are unambiguously illegal for there was some tolerance on the part of the SC and international community (the euphemism of the US and Western Countries)[588] regarding such interventions.[589]

So, the 'legal or illegal' dichotomy should not be over emphasized, and we need to see the gray area of normatively in between the two.[590] The 'concept of opposability' can rightly be

[583] Alain Pellet, *Brief Remarks on the Unilateral Use of Force*, 11(2) EJIL, 385 (2000) at 385-392.
[584] *See for e.g.*, *Id*, at 388.
[585] Nicaragua case, ICJ Reports 14 (1986) para.268.
[586] Bosnia-Herzegovina v. Yugoslavia case 1996. It is not clear what effect such an interpretation of the court has, and of course whether we can extend it to other instances of gross human right violations.
[587] DUGARD, *supra* note 2, at 515.
[588] Kak, *supra* note 515, at 1236.
[589] DUGARD, *supra* note 2, at 515.
[590] This view has been introduced on this issue by Shinya Murase. *See* Murase, *supra* note 155.

taken in to consideration to deal with such happenings, like the unilateral measure[591] taken by NATO against Yugoslavia, which has also been bolstered by the ICJ precedents.[592] As Shinya argues, the most striking aspect of a unilateral measure is the fact that it is taken in a situation where there is a *lacuna* in international law, where the law is emerging or undergoing change.[593] This could be salutary in our effort to come up with a solution to such ambiguous normative events. Of course, the principle of opposability so proposed, as he stated, has got some strict elements; effectiveness of the measure, legitimacy and subjective 'good faith' requirements.[594] Accordingly, when we are confronted with such phenomenon for which we cannot fetch a legal ground under the realm of the UN Charter, we need to be pragmatic and should accept the shift of the applicable law and consider such issues under the rubric of general international law.

5.2.3 Weapons of Mass Destruction (WMD)

These days, the danger of chemical, biological and nuclear weapons increases because of the difficulty of prohibiting them, and for they are easy to produce, in many cases; all that is needed is a rudimentary laboratory in a bathroom.[595] Indeed, customary international law starting with the St Petersburg Declaration prohibits the use of weapons causing unnecessary sufferings.[596] Nuclear weapons are likely to cause unpredicted and unnecessary sufferings. WMD poses threats unanticipated by traditional international law, which was not envisioned in the Charter framework as it has not seriously been on the mind of the delegates while drafting the UN Charter[597] and, of course, the Charter is a pre-atomic document.[598] However, the reality

[591] It has been argued that the NATO's action was a '*Unilateral Measure'* which is different from a unilateral act. Murase, *supra* note 155, at 6. He explained that a unilateral act is a juridical act whose conditions and legal effects are clearly defined in the established rules of international law, whether by customary law or treaty law, and thus is presumably based on the prior consent of the States concerned. By contrast to a unilateral act, a *unilateral measure* is an action taken by a State, a group of States or in some cases an international organization with external or extraterritorial effects, and is based on *urgency and equity*. With regard to *unilateral measures*, the ICJ has rendered judgments on the basis of opposability rather than legality in several cases. (Emphasis added).

[592] For instance ICJ resorted to the principle of opposability in the *Fisheries* case in 1951, in more detailed manner in the *Fisheries Jurisdiction* case in 1974, and in its ruling in the *Teheran Hostage crisis* case.

[593] Murase, *supra* note 155, at 7.

[594] *Id*.

[595] Nicolas K. Laos, *supra note* 7, p.6.

[596] St. Petersburg Declaration of 1868 or in full 'Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight' is an international treaty agreed in Saint Petersburg, Russian Empire, November 29 / December 11, 1868.

[597] Arend, *supra* note 17, at 97.

today shows the inverse and the international community might reasonably conclude that the acquisition of a single nuclear weapon by a non-nuclear weapon state constitutes a threat to peace or a breach of the peace.[599]

In the same vein, the UNGA unconditionally condemned the use of nuclear weapons in Res.1653 (XXI) of 21 Nov.1961 and in Res.984 of 11 April 1995.[600] In addition, the SC in 1991 had determined that Iraq's possession of WMD threatened international peace and security.[601] Then what logically follows is in what manner this threat should be tackled. To this question, there are diverse responses which are compatible to the Charter system and some others challenging the already set rules thereof.

In this case too, the authority of the SC to make use of all the necessary measures available to it is not generally contested by legal scholars.[602] As indicated above, it has decided that such WMD poses threat to the international peace and security and it would be a remiss if its responsibility to work on disarmament under the Charter is not to be remembered. Accordingly, it has passed different resolutions in this area to say the least against Iraq. In line with this, disarmament thus became a centerpiece of Res.687, with the Council establishing 'the most intrusive system of arms control in history'.[603] And among the serious responses of the SC is Res.1441 on Iraq, adopted in November 2002, under tremendous pressure from Washington.[604] The resolution found that Iraq had been and continued to be in 'material breach' of its disarmament obligations but afforded it one '*final opportunity*' to meet its disarmament obligations, through an enhanced inspection regime and ambiguously threatened '*serious consequences*' for Iraqi non-compliance.[605]

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[598] John Foster Dulles, *The Challenge of Our Time: Peace with Justice*, 38 A.B.A. JOURNAL, 1066, (1953) at1066-68.

[599] David Sloss, *Forcible Arms Control; Preemptive Attack on Nuclear Facilities*, 4 CHI. J. INT'L. L. 39, (2003) at 44. And of course the Treaty on the Non- proliferation of Nuclear Weapons in 1970 and its monitoring body the International Atomic Energy Agency are working towards the further development of WMD.

[600] Kaczorowska, *supra* note 183, at 401.

[601] Cockayne, *supra* note 454, at 394.

[602] *See* However, the discussions under the third and fourth chapters for some critics and recommendations with regard to certain limitations.

[603] Cockayne, *supra* note 454.

[604] *Id*, at 398.

[605] *Id*, at 394.

More contentiously, the existence of WMD has been asserted as justifying the use of force against those who possess them even preemptively. The infamous case in this regard is the *Osirak* incident where Israel bombarded Iraq's nuclear reactor in 1981. This action, though unanimously condemned by the SC,[606] some scholars argued that the Israeli attack was not in violation of Art.2 (4) for Israeli attack was neither directed to territorial integrity nor political independence of Iraq, and nor was it otherwise inconsistent to the purpose of the Charter.[607] Also, on multiple occasions, the US and UK put forward Iraq's development and possession of WMD as one of the legal justifications for Operation Iraqi Freedom- their combined attack on Iraq.[608]

In both cases, the problem lies still on the issue of preemption.[609] Should, and when, the preemptive use of force be allowed for alleged threat of WMD? Is a mere possession of such weapons sufficient or a hostile intent or 'rogue nations' test be added? Some scholars argue that the mere possession of WMD or, even the attempt to possess them, not just by Iraq and North Korea, but by any state, including Russia and the US constitutes threat to the peace and security, and would entitle the preemptive use of force.[610]

In the same vein, the WMD issue also plays a prominent role in US policy pronouncements, including the National Strategy for Combating Terrorism articulated by the Bush Administration in 2003. The NSS adopted a right to preemptive attack for tackling problems associated with WMD, and further stated that the old requirement of necessity may not always make sense. Some jurists say the US cannot lawfully conduct a preemptive attack against a rogue nation's nuclear weapons development facilities under the UN Charter, and the US can do so but only under the new and controversial expansion of existing law.[611]

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[606] SC Res.487 of 19 Jun. 1981.

[607] *See* D'Amato, *supra* note 182, at 584-88.

[608] *See generally*, Cockayne, *supra* note 454, at 384- 404.

[609] The best rational for preemptive attacks is that states have an inherent 'right to life' which prevents the random annihilation of their populations from weapons of mass destruction in the hands of unstable regimes. *See* Michael Lacey, *Self-defense or Self-denial: the Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L REV, 293 (2000) at 294.

[610] *See e.g.*, John W. Lango, *Preventive Wars, Just War Principles, and the United Nations*, 9 THE JOURNAL OF ETHICS, CURRENT DEBATES IN GLOBAL JUSTICE, 247 (2005) at 248.

[611] *See generally*, Gregory, *supra* note 218.

If counter WMD operations comport with the requirements of self defense, they are normatively proper. In particular, there must be a high degree of certainty that such weapons will be used against the state countering them, and the counter-WMD operations can occur only during the last viable window of opportunity to prevent attack; and operations against a speculative threat or those that ignore viable peaceful alternatives for resolving the threat are illegal.[612] But, the sensitivity that the last window of opportunity to prevent the use of WMD may close long before that intended use was to take place, especially if transfer of the weapons to a terrorist group is underway, has been asserted as a considerable threat to stick into the old fashioned strict formulations stated earlier.[613]

As discussed in the Third Chapter of this thesis, international law in this area, as it stands, is inadequate, and no clear legal standard has yet emerged to determine preemptive use of force. Anne- Marie Slaughter in her article entitled: ‘A duty to protect’ stressed that UN Charter rules need to be rewritten or, at least, amended so as to tackle a possible terrorist attack using a nuclear or biological weapons/WMD, but only under the mandate of the SC.[614]

5.3 Regional Development: The African Union Constitutive Act

The UN Charter contemplates that the UN will be assisted by regional arrangements in the quest for international peace, provided that their activities are consistent with the purposes and principles of the Charter. But regional arrangements like African Union (AU) are only called to picture under the auspice of the SC as per Art.53 of the Charter. What has appeared as anomaly is what is provided under Art.4 (h) of the Constitutive Act of AU which entitles the Union to intervene in its member states.[615] Then what follows is how we go about to see it in light of what is provided under the Charter. Different views have been proposed in this regard. This intervention appears to be in violation of Art.2 (4) for there is no indication under

[612] Schmitt, *supra* note 30, at 95.
[613] *Id*.
[614] Anne-Marie Slaughter, A Duty to Prevent, available at http://www.princeton.edu/~slaughtr/Articles/Slaughter_Feinstein.pdf, visited on April 15, 2010.
[615] Art 4(h) provides the right of the Union *to intervene* in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. *See* the amendment to this provision under ‘Protocol on Amendments to the Constitutive act of the African Union, adopted by the 1st Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003’ adds situations for intervention ‘*serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.’* [Emphasis Added].

Art.4 (h) of the Union's act that intervention would be effected at least upon the SC's authorization. Weigh in light of Art.103 of the Charter, which prohibits members from consenting to contrary obligations to Charter norms, the validity of Art.4 (h) is questionable.[616]

It has been indicated that the less effectiveness of the international peace and security scheme under the Charter system in preventing armed conflicts and human sufferings in Africa and the UNSC's lack of interest or slow response to conflicts in Africa, inspired the notion of 'African solution for African Problems'[617] which resulted in the adoption of a path breaking model of interventionism at least in grave instances under Art.4 (h), and is the greatest driving force in the development of the doctrine of Humanitarian intervention.[618] Accordingly, by strengthening the right of humanitarian intervention under customary international law, it added significant weight to the development of the corpus of international law.[619] The fact that the Charter system has been compromised under Art.4 (h) has also been substantiated by the Protocol establishing the African Union Peace and Security Council (AUPSC) which provides a *primary responsibility* for promoting peace, security and stability in Africa.[620] Of course, taking into consideration the factors that led the Union to adopt such rules, the reference to UNSC's primary responsibility for the maintenance of international peace and security only appears to be appeasing.[621]

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[616] On such regional arrangements *see also*, Bernhardt, *supra* note 355, at 1297. 'Where the validity of interventions, at least when there was no the consent of *de facto* or *de jure* government is not attained prior to intervention, has been rejected.' *See however*, Brownlie, *supra* note 32, at 10. 'The use of force by regional arrangements is not limited to the concept of self-defense but extends to mere threats to the peace of the region.'

[617] Jeremy Levitt, *The Peace and Security Council of the African Union: The Known Unknowns*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 109 (2003) at125-126. 'The AU Leaders being conscious of the debacles in Somalia and Rwanda, decided not to bind themselves to rules and systems that have failed Africa, or the policy prescription of certain powers.'

[618] Levitt, *supra* note 433.

[619] *Id*, at 58.

[620] *See* Art.16 (1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, 9 July 2002.

[621] This is stated in an interview with Dr. Admore kambudzi, Head, Peace and Security Council Secretariat (PSCS), Peace and Security Directorate, on December 10, 2010. The position of the Union is explained by him as a self-guiding one, i.e., the Union does not look for the SC authorization and it does not wait the consent of the state against which the decision for intervention is made. He reveals that the Union is determined to take effective actions to solve the problems that Africa faces.

On the contrary, it is argued that Art.4 (h) is not in contradiction with Art.2 (4) of the Charter for the intervention under Art.4 (h) is consensual, and when the Union secured consent of a state against which intervention is sought, then it will not violate the UN system.[622] And, Art.53 requires the existence of some decisions by the SC as it is an enforcement mechanism, accordingly, the regional mechanism should not be said to violate such a rule.[623] Hence, the interventionism introduced under the AU act is not a deviation from the global system.

It is the view of the author that, Art.4 (h) discussing the 'right of the Union to intervene' which presupposes the absence of consent of a State, and the optional recourse to the UNSC 'when necessary' under Art.17 (2) of the Protocol establishing the AUPSC, there is arguably a slight shift from the norms of the Charter system. This should be appreciated not only as a response to the afore-mentioned factors, but also as the recognition of the evolving scope of security concerns and human right values. However, the practice involving Art.4 (h) has not been significantly developed.

5.4 The Ethiopian Experience

Here only a shallow analysis is provided to simply picture out Ethiopia's current stand on the international law regime dealing with the use of force. In this regard, the critical issue is

[622] In this regard, David Wippman indicates, though argues differently, that there are some scholars who tend to suggest that the doctrine of freedom-to-contract for states justify Art.4 (h), and conversely portray that there are also contenders to this view insisting on the supremacy of *jus cogens* norm to such sovereignty right of states. He has, however, maintained a unique view of 'double consent' requirement, i.e., a state can rightly consent to such a treaty law and, such consent also be maintained during the intended intervention – 'contemporaneous consent', and in this sense Art.4 (h) is justified under the Charter system. *See generally* Wippman, *supra* note 60. However, this view can respectfully be challenged. First, as per Art.103 of the UN Charter and taking into consideration the prevalent position, the principle on the prohibition of use of force has attained a status of *jus cogens* and such treaty provision might not pass a stringent test to set aside such a norm. In addition, if this might be what is contemplated by the drafters of the Act, they would have clearly indicated under Art.4 (h). In addition, in a situation where there is no a legitimate and recognized government which can exercise an effective control in a particular State and capable of giving a valid consent, or in situations of failed States, how can the Union exercise its right under this article without disregarding Art.2 (4) of the UN Charter? If it should wait the rather remote SC authorization, the paradigm shift it has introduced to ensure a prompt response to problems in Africa will not be served any better than what was there previously. Generally, the grand purposes of the AU Constitutive Act might be defeated by such interpretation.

[623] It is a pre-requisite to take action under Art. 53 of the Charter to make a decision under Art. 39 of the same and, the latter Article only talks about issues which constitutes 'threat to international peace and security' and does not consider 'genocide, war crimes and crimes against humanity' which are referred under Art. 4 (h) of the African Union Constitutive Act. Accordingly, no contradiction can be drawn between Art. 53 of the Charter and Art. 4(h)'s intervention. This argument has not, however, noticed the fact that in a number of binding UNSC resolutions and also in decisions of ICJ (regarding genocide) the grounds of intervention enumerated under the African Constitutive Act have been considered as constituting 'threat to international peace and security'.

Ethiopia's attack/intervention against Somalia in 2006. The context of the conflict is informed by a number of factors including: Union of Islamic Courts' (UIC) vision of a 'Greater Somalia' that aspires to integrate Ethiopia's Somali-speaking Region of Ogaden into main land Somalia, which Ethiopia's political independence and territorial integrity; threat of terrorism and extremism on the one hand and, the UICs' claim that Ethiopia is interfering in Somalia's internal affairs on the other.[624] It is also evident that events that culminated in a full scale conflict between Ethiopia and the UIC on 24 December 2006 were preceded by other actions which involved the States neighboring Somalia, mainly, Eritrea and Ethiopia.[625]

The Ethiopian government justified its attack principally on its inherent right of self-defense and, of course, qualified as counter-intervention, with out however sustaining actual armed attack as is contemplated under the UN Charter, and invitation[626] of the Transitional Federal Government (TFG).[627] The Union of Islamic Courts (UIC), as Prime Minister Meles said, is known for being closely linked with *Al-Itihad-al-Islamia*, a terrorist organization, and has posed threat to Ethiopia.[628] It was prior to the Ethiopia's involvement in the war in the support of the TFG that the leader of the UIC had declared that 'Somalia is in a state of an all-out-war with the Ethiopian Occupiers' and called Somalis to join the holy war(jihad) against 'Ethiopian aggression'.[629] Soon after such declaration, the Ethiopian Prime Minister publicly announced that Ethiopia has taken self-defensive measures against UIC and other foreign terrorist groups.[630]

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[624] Awol Kassim, *Counter-Intervention, Invitation, Both, or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia*, 3 (2) MIZAN LAW REVIEW 201, (2009) at 202.

[625] *See* Report of the Monitoring Group on Somalia Pursuant to Security Council Res.1587(2005), S/2005/625, para-8, 25; Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1676(2006) paras-6, 7, 10, 11, 18, 19. In deed the 2006 incident was labeled by some as a 'proxy war' between Ethiopia and Eritrea. *see e.g.,* Joe De Capua, Is Somalia a Proxy War between Ethiopia and Eritrea? 27 July 2007, available at http://www.voanews.com/english/archive/2007-07/20070727voa27.cfm?CFID=180858569&CFTOKEN=25050208&jsessionid=6630a78416705b0a7ed576c30677e6925769, visited on April 23, 2010.

[626] Most qualified publicists in international law usually recognize intervention upon invitation. *See for instance* BRAWNLIE, *supra* note 3 at 317, and SHAW, *supra* note 6, at 1042.

[627] *See for instance*, Awol Kassim, *supra* note 623, at 202-203.

[628] *See* Meles Zenawi, Prime Minister of Ethiopia, press conference, available at http://www.ethioembassy.org.uk/Archive/PM%20Meles%Zenawi%20Press%20Conference%20/06.html, visited on April 20, 2010.

[629] Emannuel Fanta, Regional Coordinator for Great Lakes Conflict Early Alert Report Analysis: Ethiopian intervention in Somalia in context, at http://www.bloggernews.net/14238, visited on April 20, 2010.

[630] *See*, Report of the Secretary General on the situation in Somalia to the SC, (S/115/2007, 28 Feb.2007, para.5.)

The SC noted the existence of interventions in the internal affairs of Somalia by several countries and urged all parties to refrain from 'every hostile action' which could further exacerbate the already volatile security situation in Somalia.[631]

Previously during the *Ethio-Eritrean* war (from May 1998 to June 2000) which cannot neatly fit to the self-defense notion as per the UN Charter, the Ethiopian government tried to justify its action based on this exception. Accordingly, one can rightly conclude that Ethiopia has adopted a relatively relaxed view of the right to use force in self-defense.

5.5 The UN Charter System and Contemporary Trends of Interventions

It has been indicated that there are recent developments which are some how at odds with the Charter system as they were not contemplated by the then drafters. It goes with out saying that the issues of self-determination, humanitarian intervention, protection of nationals, war on terrorists and against rogue states, having or developing WMD- possibly preemptively, and the like put a massive pressure on the Charter framework. In response to these perceived strains, different outlooks have been enshrined.

Currently, at one extreme, we have the view which advances the capability and flexibility of the Charter rules to deal with all the new and genuine security imperatives as well as changing values, including a shifting balance between the sovereign rights and the responsibilities of the world community.[632] On the other apex, there are those who allege that the Charter Framework, for all practical purposes, is dead.[633] In between are those who have taken the view that still the Charter system can be safeguarded via the positive and constructive interpretations of the rules thereof, but these need to be made carefully not to disregard the legal framework, public oppositions, and governmental resistance; otherwise, the Charter system will be in a shambles before much longer.[634] Apart from the discussion on such views

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[631] UNSC Res.1725, 6 December, 2006, under its preamble, para2, 'calls upon all parties inside Somalia and all other States to refrain from action that could provoke or perpetuate violence and violations of human rights, contribute to unnecessary tension and mistrust, endanger the ceasefire and political process, or further damage the humanitarian situation.'
[632] *See* Schachter, *supra* note 18.
[633] *See for instance*, Arend, *supra* note 17, at 101.
[634] Falk, *supra* note 12, at 598.

under Chapter three of this paper with regard to preemptive use of force, some more points, with their respective implication, have been considered under the subsequent sub-sections.

5.5.1 The Legalist/Classic Approach

This approach has categorically rejected any consideration for extending the Charter rules on the use of force, particularly the inclusion of 'anticipatory or preemptive' use of force in self defense before an armed attack occurs, irrespective of any changes observed in the international plane.[635] Interventions are generally banned under Art.2 (4). For them, the UN Charter's prescription with respect to the use of force is essentially binary: either a use of military force is in self-defense, as that concept is conceived in the Charter, in which case it is lawful, or it is not, in which case it is unlawful.[636] As for the right to resort to military measures in self-defense, it materializes only when the state invoking it has suffered an 'armed attack', a stricture that does not even extend to the Caroline doctrine of anticipatory self-defense.[637] Being convinced that the Charter system does not allow preemptive use of force, some go to consider, however, that it does not prohibit striking back in a proportional manner against the 'main danger' after the actual armed attack has occurred.[638]

This view has also been confirmed by the UNGA in the resolution incorporating the outcome of the World Summit in September 2005.[639] Here, it has stated that the relevant provisions of the UN Charter are sufficient to address the full range of threats to international peace and security, and has reaffirmed the authority of the SC to mandate coercive action to maintain and restore peace and security. This outlook has been criticized for not dealing with a question as to when it is lawful for a state to use force in the exercise of its inherent right of self-defense.[640] And of course, it is unthinkable to assert that the UNGA has all forgotten its own

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[635] Remarks by different legal scholars in American Society of International Law; Self-defense in an Age of Terrorism, 97 ASIL Proc. 141,(2003), at 147-152.

[636] Reisman & Armstrong, *supra* note 18.

[637] *Id*.

[638] Gregory, *supra* note 218, at 495.

[639] UNGA, the 2005 World Summit Out come of 16 Sep. 2005,UNdoc.A/Res/60/1 of 24 Oct. 2005, para.79; *see also* The High-level Panel Report & In larger Freedom.

[640] Wilmshurst, *supra* note 23, at 2; Christian Tomuschat, Uniting for Peace, United Nations Audiovisual Library of International Law, (2008) at 3, available at http://www.un.org/law/avl, visited on Oct. 20, 2010. Tomuschat suggested that albeit the shifting of responsibilities to the General Assembly as per UNGA Res.377 may not be consistent with the original intentions of the drafters of the Charter, it is today fully accepted that emergency special sessions have become an integral part of the legal order of the United Nations.

Res.377/1950 under which it has assumed some power to decide on the use of force which in fact is not contemplated by the Charter. Previously, it has also been indicated that the ICJ and SC took restrictive interpretation of Art.51, albeit their current stand, especially of the SC may not necessarily signify so.

The principal concern of the proponents of this view is that, replacing 'the old and a formal system' with 'newly emerging norms having a set of vague, half-formed, *ad hoc* principles' can be dangerous. And, re-interpretation of the law of the Charter would dilute and confuse its normative prohibitions. What a scholar indicated in 1987 remained the case today:

> *'In our decentralized international political system with primitive institutions and under-developed law enforcement machinery, it is important that Charter norms, which go to the heart of international order and implicate war and peace in the nuclear age- be clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events. Extending the meaning of 'armed attack' and of 'self-defense,' multiplying exceptions to the prohibition on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order established in the wake of world war.'* [641]

5.5.2 The Core Interpretist Approach

This view, rejecting the position that the Charter system does not incorporate the right to preemptive use of force, asserts that in preserving the 'inherent' right of self-defense, Art.51 of the Charter codified the then existing customary international law of self defense which includes the right to anticipatory self defense.[642] In this category are also those who propagate that Art. 51 did not incorporate, the doctrine of anticipatory self-defense, even though that doctrine may have reemerged as a rule of decision due to state practice over the past sixty-some years.[643] An invasion by one state of another state to rescue nationals or to prevent a

[641] Louis Henkin, *Use of Force: Law and U.S. Policy*, in INTERNATIONAL LAW AND THE USE OF FORCE (Might V. Right, 1989) at 69, as quoted in O'Connell, *supra* note 6, at 16.
[642] Nabati, *supra* note 8.
[643] Gary, *supra* note 290, at 91.

humanitarian catastrophe should not be seen as harming the territorial integrity or political independence of a state; nor as contrary to the purposes of the UN, and Pro-democratic invasions could be legal under Art.2 (4).[644] Generally, for this approach, the Charter system is flexible enough to accommodate the developments through the rule of positive and constructive interpretation which would take in to cognizance the prevailing situations.

For them, it is not the Charter system that is in disarray, providing sensible grounds for declaring the project of regulating recourse to war by states, a failed experiment that should now be abandoned.[645] It is rather leading states, and above all the US, that need to be persuaded that their interests are served and their values realized by a more diligent pursuit of a law-oriented foreign policy.[646] In addition, the Charter system is described as not a legal prison that presents states with the dilemma of adherence (and defeat) and violation or disregard (and victory). Rather, adherence is the best policy, if understood against a jurisprudential background that is neither slavishly legalistic nor cynically nihilistic.[647]

To this end, the law can be stretched as new necessities arise, but the stretching must, to the extent possible be in accord with procedures and norms contained in the Charter system, with a factually and doctrinally persuasive explanation of why a particular instance of stretching is justified. Accordingly, by reading Arts.2 (4) and 51, in line with the customary norm defined under the Caroline case, and relaxing the traditional requirements thereof, one can look for a wriggle room to include preemption under the ambit of the Charter system.

5.5.3 The Realistic Approach

For this perspective, however, rather than adopting the unintended meanings of the Charter provisions and, even when, one cannot cover all sorts of challenges the Charter regime has faced- like humanitarian intervention and protection of nationals; it is better to look for other pragmatic solutions.[648] This position, partly, of course less persuasively, insisting on the fact that an 'imminent threat requirement' is not a long established norm as a hortatory tone

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[644] *Id*, at 95.
[645] Falk, *supra* note 12, at 598.
[646] *Id*.
[647] *Id*. To this end, Falk stated that 'My legal constructivist position is that the United States (and the world) would benefit from a self-imposed discipline of adherence to the UN Charter system governing the use of force.'
[648] Bobbitt, *supra* note 258.

bespeaks the fact that states regularly flouted this rule,[649] and that subsequent state practice has overtaken both the imminence requirement and the armed attack requirement,[650] and tried to relax (or bypass) the realm of using force unilaterally under the Charter system.

Here, it proposed that the best way out to deal with the prevailing perplexities is accepting the emerging norms though they may not squarely fit to the existing Charter frameworks. In addition, the 'principle of opposability' for actions qualified to be *unilateral measures,* has been proposed.[651] This approach, at the extreme, takes the view that the Charter system is completely at odds with the recent realities, and it is dead.

Some scholars, particularly sticking to the relevance of the Charter system, argue that such a position lacks a clear legal footing under the text of Art.51 and, even the historic practices, especially after the Charter regime, which shows a slight paradigm shift. [652] Some scholars further assert that exercising preemptive self defense, for instance, especially against the 'unseen enemy', is extraordinarily difficult and fraught with enormous risks and dangers. In addition, this group has failed to indicate the allegedly emerged/emerging norms and a well formulated guidelines and rules. Generally, questions such as: what rules on the use of force should be adopted? And what changes should be introduced to the Charter framework have not been scrutinized.

Accordingly, this approach though calling for the greater emphasis on the current realities and practices, which are not consistent and crystal clear by themselves, and categorically rejecting the old set of provisions under the Charter, has not yet won the minds of international scholars, and states alike.

5.6 Prudential Appraisal of the Contemporary Trends of *Jus Ad bellum*

It has been clearly indicated that the coming into picture of the UN Charter has transformed the legal framework pertaining to the use of force in international relations. It was all concerned about repressing any possibility in which States might get involved into war, and hence,

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[649] *See* David Rivkin, *et al*, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Preemption and Law in the Twenty-First Century*, 5(2) CHI J INTL L 467 (2005) at 469.
[650] *See* Michael J. Glennon, *How International Rules Die*, 93 GEORGETOWN L J 939 (2005).
[651] Murase, *supra* note 155.
[652] *See* The explanation given under footnote 259 of this thesis.

provided a general ban on the use of force by states, except under the right to self defense, and by way of the SC authorization. However, through time the Charter provisions, on intervention and use of force, are found to be strict and in disarray with the observed peace and security concerns, and actors in this regard, as well.[653]

Through the practices of the UNGA and SC, at times, the Charter rules that strictly limit international intervention in local conflicts i.e. 'domestic matters', are somehow abandoned. Principally, since the early days of the Charter, the issue of self determination was accepted as forming an independent exception to the Charter regime.[654] The argumentatively universal status of human rights, calling for their respect, protection and promotion world wide and related developments like peacekeeping operations, have also come about as challenging the Charter norms. In line with this, a scholar points out that, as the twentieth century fades away, so, too, does the international consensus on when to get involved in 'another State's affairs'; and the death of the restrictive old rules on peacekeeping and peacemaking, under which most bloody conflicts were simply ignored as 'domestic matters' should not be mourned.[655]

These factors and concerns for greater security scheme than the state centric one have let the international community and the SC, as well, to be less sensitive to the observed interventions, even unilateral ones. Events, since the end of the Cold War, starkly show that the anti-interventionist regime has failed to keep pace with modern notions of justice, and they have done so in favor of a vague new system that is much more tolerant of military intervention but has few hard and fast rules.[656]

Then the question, how should the international system respond to such changes remained crucial. Here, seemingly, the deadlock comes. Some hold the apparently prevalent view that

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[653] *See* Gary, *supra* note 290, at 86-88; Luck, *supra* note 29, at 61-70; and International Commission on Intervention and State Sovereignty, The Responsibility to Protect (Ottawa: International Development Research Centre) (2001), at 3.

[654] *See* HEATHER WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS, CLARENDON PRESS, OXFORD (1988).

[655] Glennon, *supra* note 24, at 2.

[656] *Id. see also*, Jeremy Greenstock, *The Security Council in the Post-Cold War World*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, OXFORD UNIVERSITY PRESS, 248 (Vaughan Lowe, *et al*. eds., 2008) at 249.

irrespective of the observed changes and their pressure on the Charter system, it can accommodate and withstand the said pressures.[657]

On the other hand, some prefer the reconsideration and consolidation of new international rules in this area.[658] They do not hesitate that the Charter rules, which only considered the narrower array of the concept, are out of date, and that the principles of justice dictates the need to set them aside. The concern is the potential cost of replacing the old with newly emerging rules. Untested and only emerging rules may have unexpected consequences, and justice formed on the fly may come to be resented. This question remains brainteaser. However, seeing the most horrible incidents involving but not limited to the Rwanda Genocide, the Yugoslavian humanitarian crisis, and the 9/11 attack, one can rightly conclude that the failings of the old system are so disastrous that little will be lost in the attempt to forge a new one.[659]

As can be inferred from the position of States involved in the use of force, one can simply conclude that they usually prefer to justify their actions under the Charter rules even if they know that their acts may not pass the thresholds under the Charter. This reference has contributed its share in unsettling the emerging norms. A critic to this view provides that openly breaking the law is much less dangerous than only pretending to comply with it, since disingenuous, disguised violations undermine the open debate on which legal reform and the law's legitimacy depend.[660]

It is also true that, challenging a law is not synonymous to challenging the rule of law. Quite the contrary, as a commentator describes, 'challenging an unjust law (as NATO has done with the Charter) can actually reinforce the legal regime.[661] Accordingly, international justice can, in fact, be pursued *ad hoc* without a fully functioning legal system in the sense of what NATO and the US have recently set out to do.

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[657] Schachter, *supra* note 18, at 101.
[658] Bobbitt, *supra* note 258.
[659] Glennon, *supra* note 24, at 3.
[660] *Id.*
[661] Id, at 4-7. Here, it is suggested that if power is used to create the phenomenon of justice, then law will follow the step in creating a normative order even though this postulate is debatable.

What alternative should be done, taking into consideration, the non existence of strict need for new set of rules on *jus ad bellum*, on one hand, and the aspiration to have new set of rule governing *jus ad bellum*, on the other? The writer is of the view that, to some extent the Charter rules can be, on a case by case basis, interpreted and constructed to allow the international actors, especially the SC, to deal with the emerging 'unconventional' threats. In addition, for considering the legal status of incidents, like in the case of Kosovo, a shift to the general international law realm than sticking to Charter norms only, would help to solve some problems. Again, when the SC, for whatever reason, fails to respond, there should be a way out for the concerned bodies to deal with situations. These would, to some extent, relieve the Charter system from the stated pressures and would contribute a lot in enhancing the will of the international community, in the era where taking any sort of reform to the Charter system like creating *new system of collective security*, remains in vain.

5.7 Challenges and prospects

5.7.1 Challenges

The emergence of the afore-discussed new norms, concerns and threats, such as terrorism and possession of WMD, which potentially call for extra-Charter measures are at the heart of all the challenges international law, in general, and the Charter system, specifically, have been facing. This has been evidenced in recent times by states, international tribunals and international organizations proposing[662] and, at times, actively resorting to action that goes beyond the narrow exceptions recognized in the Charter, which predominantly portrays the realities of its age, and anomaly to the international system. Of course, these happenings are not plainly covered by the existing international law rules governing use of force, and require pragmatic solutions unavailable hitherto.

Today, the international system lacks coherence and definition; mistrust among the member states abounds, and leadership is neither given nor accepted gracefully or gratefully.[663] Even if the Charter system has restricted resort to unilateral use of force, the practice appeared

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[662]The new doctrine of preemptive self-defense requiring relaxed standards of necessity/imminence, and proportionality; self-defense against terrorists,/non state actors/; and adoption of intensified rules of attribution to establish state responsibility are some of the proposed way outs to do away with the current challenges exerted on the global community.

[663] Luck, *supra* note 29, at 84.

differently. Unilateralism (actions taken with out the authorization of the SC) has been intensified but in almost all cases such interventions neither were justified on emerging norms such as humanitarian intervention, intrastate conflicts, changing nature of contemporary threats and the need for pre-emptive use of force in self-defense or the like, nor do states deny the applicability of Charter provisions. As such, unilateralism has come as a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested since the establishment of the UN and warned of the demoralizing consequences for global stability and the international rule of law.[664]

Unilateral measures, especially those made after the post cold war era, which are not in conformity with the Chatter rules *per se*, have been bounded with inconsistencies of the justifications produced for their validity.[665] Among others, they call for humanitarian concerns and increased risks of security in its broadest sense, preemptive self defense against states and non-state actors such as terrorists, protection and enforcement of collective goods and the like, while insisting at times as though they act with in the ambit of the Charter norms. This absence of consistency on the part of international actors, including the SC, and, at times, the missing or uncertainty of *opinio juris* become central problems not to irreproachably build on new customary norms. And in most cases, no one can know the principal reason why such actors behave as they do, and these actors, like individuals, act for many reasons, some of which can barely be discerned let alone identified as 'primary.'[666] This has also posed its shadow on an effort to come up with groundbreaking set of new norms in this area.

As it has been scrutinized in this thesis, the jurisprudence of the ICJ and the works of some known publicists tend to follow the strict interpretation of the Charter provisions, and thus, hindered the possible development and acceptance of new norms. Again the principle *ex injuria jus non oritur* (law cannot originate in an illegal act) was affirmed by the ICJ Nicaragua case where it held that 'instances of a state's conduct inconsistent with a given rule

[664] UN Press Release, SG/SM/8891, GA/10157, 23 September 2003.
[665] *See generally*, Krisch, *supra* note 487.
[666] Glennon, s*upra* note 289, at 617.

should generally be treated as breaches of that rule, not as indications of the recognition of a new rule'.[667]

This has been further concretized by the report of the Secretary General's High-Level Panel on Threats, Challenges and Change, which in its effort to look for the law that ought to govern the international use of force, ruled out the need to reinterpret or rewriting of Art.51,[668] though it is said to take a radical and controversial view of the right of self-defense, in line with that of certain developed states rather than that of the rest of the world.[669] The report inconsistently asserts that it is 'well-established' that Art.51 allows preemptive forcible action in the face of an imminent threat, and 'a relatively new emerging norm, one that is precious but not yet deep-rooted', a view which is not included in the 2005 World Summit Outcome Document, and the latter also comes up with a mixed result as regards collective security and the use of force by positive reaffirmation of the Charter scheme and at the same time indicating that there could be no new agreement on general rules on the use of force because of continuing differences between states.[670]

In any of the internationally perceived incidents have states neither waited to be attacked before defending themselves nor waited until a developing threat became imminent. So it is clear that a significant number of violations against Art.51 have occurred, and giving due weight to this profligate practice, the concern of how should Art.51 be interpreted remained contentious. As there are too many security consumers in the world today and too few security producers, the SC cannot, pragmatically thinking, prevent 'unwanted' uses of force, and nothing useful can be put in its (SC's) place.[671]

Specifically related to the SC as well, there are number of challenges that have been witnessed. The SC, which is endowed with the power and primary responsibility to maintain international peace and security, is adopting wide range resolutions since the end of the Cold

[667] Nicaragua case, ICJ Reports 14 (1986) para.98. *See also* Gordon *supra* note 19, at 273, lagging behind actual practice is too subjective and fragile a criterion to replace the formal evidence of withdrawal of state consent as an indicator of the continuing force of treaty obligation.
[668] *See* The High-level Panel Report.
[669] Gary, *supra* note 290, at 97.
[670] *Id*. at 96-98.
[671] Glennon, *supra* note 289, at 639.

War era, which are general in their terms and scope, and not confined by time and space, as well. But, in the situations where the interests of a permanent member involved or the members are less interested, the use of veto power has been defying its primary responsibility. At times, the specific procedure or strategy to be employed for a specific situation also resulted in stalemate. Thus, it has been inactive in a number of occasions and failed to meaningfully act even in extreme cases such as Rwandan and Yugoslavian situations.

The rules regulating use of force are proved to be vague and ambiguous. Thus absence of a clear and meaningful standard that would more likely help to ensure a State's conduct is in contravention of its elements, has made it difficult for the SC to properly identified, condemned, and/or punished unilateral acts.[672]

In addition, though the possibility of expanding its mandate under the Charter is not generally set aside, the SC has been criticized, at times to exceed the Charter limits when it has tried, for instance, to consider some incidents as constituting 'threat to international peace and security' and being considered as 'quasi international legislator' and 'quasi-judicial organ'. As explained earlier, there has been much discussion of possible limitations on the SC, its reform and of the need to ensure principled decision-making. There are some suggestions that the SC should adopt some criteria of legitimacy to govern its decision-making on the use of force and, in addition, it should also be sought to be more representative and indicative of the current world reality, though such efforts have failed to succeed.[673]

Questions have also been raised over the constitutional relationship between the SC and regional organizations under Chapter VIII of the Charter, and in particular as to the proper scope of enforcement action by regional organizations under Article 53. Bearing in mind the prevalent tolerance by the SC of the use of unauthorized military actions by different 'regional actors' and the underlying absurdity on the interplay between these organs, there have been suggestions that the practice has bypassed the Charter norms. Hence, over the last

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[672] David A. Sadoff, *Striking a Sensible Balance on the Legality of Defensive First Strikes*, 42 VAND. J. TRANSNAT'L L. 441 (2009) at 446.

[673] *See generally*, Thomas G. Weiss, *The Illusion of the UN Security Council Reform*, 26(4) THE WASHINGTON QUARTERLY, 141 (2003).

sixty years the Charter scheme has never been implemented in the manner that a literal reading of the text might suggest.[674]

For the lack of consensus on establishing a standing UN army as contemplated by the Charter, where military force has to be used in the UN's name, it has usually been applied by *ad hoc* coalitions of states rather than by UN-directed forces. In practice, effective action has depended on the decision of the strongest nation states to contribute resources under their own national criteria which has in turn eroded the credibility and relevance of the SC.[675]

Despite the Charter system and the SC are proved to be inadequate; efforts to rectify such failures such as the reform efforts have become out of reach, and no such possibility is simply foreseeable; and the observed lack of political willingness, and absence of democracy, in the sense that the SC is not transparent and representative (western dominated); some still insisted that neither the failure of the SC, nor the Cold War, nor the birth of many new nations, nor the development of terrible weapons, suggests that the Charter should now be read, for example, to authorize unilateral force even if an armed attack has not occurred.[676] These factors have been blurring the effort of reckoning and adopting new international principles based on consistent, though not strictly, practices of international actors.

5.7.2 Prospects

There have been different positive efforts made to elaborate the Charter framework regulating the use of force in general. The incorporation of some principles by either broadening the meanings of the provisions or, recalling the very objectives and principles of the Charter which would be seen as exceptions to the general ban on the use of force, such as in the cases of self-determination is the perceived progress. Some scholars considered the UN Charter as 'a runway from which change takes off', i.e., a legal basis for an extremely dynamic and comprehensive development of international law in many fields.[677]

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[674] Gray, *supra* note 290, at 91.
[675] Greenstock, *supra* note 656, at 250.
[676] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY, COLUMBIA (2ND ED 1979) AT 141.
[677] Schrijver, *supra* note 330, at 31 & 34.

There are also indications that, the UNSC can be understood as an institutional solution that addresses the inherent conflict of interests that arise in interpreting the provisions of the Charter dealing with use of force,[678] and if adhered to it will solve the observed blatant States practices making their own exceptions. In addition the acceptance of the amplified powers of the SC which would enable the system remains functional by effectively tackling the challenges is an indicative of a better future. In this vein, peacekeeping operations, principally started as a secondary role of the UNGA, has become the principal mechanism that the SC has been using to deal with situations it has considered as a threat to international peace and security.[679]

Apart from extending its Charter powers, the SC has refrained in a number of occasions to condemn unilateral efforts taken to address different current concerns, and threats, and at times commended them. Moreover, when ECOWAS intervened in Liberia; US, UK and France in Iraq; and NATO in Kosovo, the community of states and, international community alike, have shown a clear departure from their previous position of strict compliance with the norm of non-intervention. Of course, as stated earlier International community is notoriously fickle in changing international norms.

The fact that all States should seek SC authorization to use force is not a time -honored principle, has also been recognized by the High Level Panel report,[680] and indicated that subsequent authorization can be possible,[681] which would contribute to the concretization of the practices.

There are also some efforts made to look into other international law principles not incorporated under the Charter system as such, such as principles of opposability, and acting 'in conformity with the principles of justice and international law'.[682] Rejecting insistence on the Charter rules only, it has been stated that,

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678 Voeten (2005), *supra* note 419, at 295.
679 GRAY, *supra* note 9, at 202.
680 *See* The High-level Panel Report.
681 The High-level Panel Report, para.272 (a).
682 *See* The UNGA world summit 2005 report on the use of force.

"*If one gives unduly high status to the UN Charter, I am afraid that it may invite a paradoxical result of risking the very life of the Charter, which I would call the 'Titanic paradox', named after that wonderful Hollywood movie*."[683]

Though significant step has not been yet taken, the efforts that have been underway to reform the SC so as to make it more representative, acceptable to all and effective can also be seen as a positive sign to salvage the collective security scheme that has been under immense pressure. These all stated facts would enable one to prognosticate positive developments in the international law sphere regulating the use of force.

[683] Murase, *supra* note 155, at 5.

Chapter Six

6. Conclusion and recommendations

This thesis sets out specific conclusions and recommendations under each theme discussed above. Below is a summary of what has come out and what should be done.

6.1 Conclusion

International law on the use of force has been and continues to be in a constant ebb and flux of change. Basically, law is not an aim *per se*, as we are used to thinking of the law as a set of fixed rules, though we know that the rules are only a snapshot of the law as it stands at a given moment. Thus, its adaptability matters most. Accordingly, the rules of international law on this matter need to be adaptive and pragmatic to the objective realities.

Though recourse to use of force for different reasons has been practiced by states since antiquity, subsequent developments, coupled with the cognizance of the devastating consequences of use of force, has forced the international community to think of mechanisms to curb this sort of discretion. To this end, the just war theory, general principles of law common to nations, customary rules and some international conventions, which were meant to outlaw recourse to 'war' and strengthen the normativity of such a ban, were developed. All such efforts are said to culminate under the UN Charter, a pioneer normative instrument establishing a general architect of the international framework regulating use of force. Particularly, upon the adoption of the UN Charter, a kind of new paradigm, i.e., from the traditional discretionary scope to a narrower and regulated sphere, was launched. The quintessential notions of global peace and human security, if not sanctity, have been accorded prominent significance and, are made the cornerstone of this distinctive international treaty, the UN Charter.

The Charter includes exceptions: the Collective Security scheme under the SC and, the self-defense. Unfortunately, the Security architecture so devised was quickly overtaken by the Cold War thereby freezing to a greater extent. And, states began to take a glimpse to unilateral actions. To make things worst, a clear understanding on the interplay between the Charter rules and customary norms, especially on issues of self-defense, not yet reached.

Of course, form the very outset, the doctrines incorporated under the Charter itself attracted considerable conceptual debates and frictions. For instance, the use of the expression 'use of force' was confused with some severe economic measures. In addition, conditions that should be met to act in self-defense under Art.51 of the Charter are not watertight clear. What 'armed attack' means and who the authors of such an attack are not defined. If it is a must that the attack comes from a state, then what standard should be employed to attribute indirect actions of a state is the question that follows. Currently, the trend seems that if a state is unable or unwilling to protect such attacks from its territory, the victim state can take a self-defense measure. Though, this right lasts only until the SC takes 'necessary measures', the precision as to what 'necessary measure' and in whose eyes or standard should the measure be so considered, is not settled. The Charter also does not explicitly recognize anticipatory (preemptive) use of force, permissible under customary international law, hence, shows a slight shift from the pre Charter order. Accordingly, a resort to unilateral use of force under Art.51 as well as customary international law has been subjected to controversial and rigorous conditions.

The test of time has revealed that the Charter system has some lacunas and invites critical concerns. It generally deals with traditional subjects of international law and conventional threats. Hence, it does not regulate intra-state security threats and, unconventional actors and threats. For instance, unilateral use of force for humanitarian purposes in cases of civil conflicts, against non-state actors or terrorists, for rescuing nationals, and tackling the threat posed by WMD, may not be justified under the Charter system. Other self-help measures, retorsion and reprisal have also been employed by states, at times in a manner inconsistent with the Charter system.

Noticeably, during the Cold War era, there were a number of unilateral interventions, which are basically made in contravention to the Charter norms, but the SC was only a watching witness or an onlooker though it is mandated to take action against the recalcitrant states. As non observance of an obligation has led it to fall in to desuetude, the same conclusion could apply to the use of force rules under the Charter, which have been violated 'even more times by even more states from even more regions for even more years'. Of course, it is the age-old

characteristic of international law that ‘violations of law can lead to the formation of new law’ and State practice is a valid way of changing the law.

Despite some explanatory efforts made to clarify the Charter rules, no meaningful consensus on the clear meanings and scopes of Charter provisions regulating use of force is reached. The historical record of violations of the Charter norms by states has been a revealing one. It has been argued that the Charter framework does not reflect the existing international law norms in this sphere and has failed to keep pace with the observed changes. This fact has also been indicated by different studies, and even the UN commissioned working groups.

The study has found out that it is basically upon such considerations and, of course, following the end of the cold war period that the SC has assumed a relatively active and greater role in the maintenance of international peace and security. Currently, the sphere for intervention by the SC is dramatically widened. First, the question of what constitutes a matter of international peace and security was stretched from the original understanding that applied only to conflicts between sovereign states to include internal conflicts and civil wars. Secondly, the scope for SC action was also expanded to cover the actions of individuals. And thirdly, the SC also began using its powers to bind all states by imposing substantive international legal obligations of a generic nature.

The authority of the SC to use force under the rubric of maintaining international peace and security appears to be elastic and often discretionary. It can recommend or decide to take measures under Art.40, 41 and 42. In addition, the Charter system favors Collective Security system than unilateral efforts. The SC, under the umbrella of its broad mandate can respond to some of the contemporary challenges the world has faced. The best scenario in this respect can be peacekeeping operations that have currently been prevalently practiced to deal with range of threats to international peace and security including intra-state affairs. Peacekeeping operations, though alien to the Charter rules, have been the principal means employed by the SC and, have been greatly revamped via the robust peacekeeping operations to the realm of peace-enforcement so as to meet demands of the day. Historically, the SC is not generally willing to decide on whether an act of aggression has occurred even if it has received such

grievances. This shows its reluctance when it comes to situations which demands forcible measures, and as such only in few incidents that use force have been authorized.

The SC has adopted a number of contentious resolutions. For instance, Res.687 (1991) which establishes a Compensation Commission for Iraq and a Demarcation Commission for the Iraq-Kuwait boundary, the two resolutions establishing International Criminal Tribunals, for the former Yugoslavia Res.827 (1993) and Rwanda Res.955 (1994), and Res.1244 (1999) for Transitional Administrations in Kosovo are some scenarios where the legal mandate of the SC has been put in debate. In addition, it has adopted resolutions of general content and applications which labeled different situations as constituting threat to international peace and security. In this regard, Res.1373 (2001) adopted by the SC following the September 11th terrorist attack against US, Res.1378 (2001) adopted under Chapter VII, and Res.1540 are not directly related to a particular situation or country, and limited in time.

The challenges to the SC resolutions sometimes reached the attention of the ICJ. For example, in the Lockerbie case, Libya argued that Res.748, which compels it to cooperate for criminal investigation, was considered invalid since the SC was not entitled to find a threat to the peace under Art. 39 so as to justify it in passing a binding resolution under Chapter VII. Also, Yugoslavia challenged Res.713, and asked the ICJ to determine whether or not the embargo was invalid because it conflicted with the right of self-defense of Bosnia-Herzegovina under the UN Charter. However, the ICJ has categorically rejected ruling on the validity of such SC resolutions. Accordingly, the status, scope and meanings of the resolutions adopted by the SC, especially when members consider it an *ultra vires* act have appeared unclear. This has led some to assert that the SC is becoming the ‘world legislature.’

Despite taking some encouraging measures, the SC has failed to act in several occasions. Different factors can be enumerated to its failures. The veto power holders of the SC members unreasonably restrain the possible measures that it could have taken. In addition, there are some political (employing double standards) and other economic factors which have hindered it from taking active measures, the principal case being that of the SC’s failure to take necessary measure in Rwanda in 1994. At times, strategic dilemma to effectively deal with a given situation left the permanent members of the SC in deadlock.

It is also the case that the SC takes some subsequent or post fact measures that have been interpreted as conferring '*post hoc* authorization'. This has been the case under Res.1483 (2003) which recognizes the responsibilities and mandates the occupying powers in Iraq, Res. Res.1244 (1999) which welcomed and endorsed the agreement between NATO and Yugoslavia, one can rightly suggest that the SC made a *post hoc* legalization of the use of force by NATO, and Res.1132/1997 for Sierra Leone, and Res.866 (1993) and following resolutions concerning Liberia also endorsed the ECOWAS/ ECOMOG's military measures.

The esoteric implications of such inactions and subsequent ratification of actions, which are otherwise inconsistent with the Charter norms, can be categorized as legal and extra legal factors. Among other things, the legal implications seem to be the recognition of the evolving new norms and development of international law (particularly customary rules), and the demand to respond to the observed threats which are not covered by the Charter rules. In this vein, it is an effort to leave up to the needs of a legal philosophy which asserts that the boundaries of law can be maintained on the basis of the autopoietic paradox of combining 'normative closure and cognitive openness'.

It can also be considered as a price paid to maintain the integrity of the Charter System by subsequently attaching UN names to the unilateral measures. In addition, the silence, in action, *de facto* tolerance and/or ratification of unilateral measures by the SC would evince a telling gap between the formal and operational code of state behavior and incite cynicism about the effectiveness of legal restraints on the use of force. Moreover, the absence of guiding rules for decision making process and ensuring transparency can possibly be inferred.

Looking into the extra legal considerations, such practices depict the erosion of the SC's credibility and ability to perform its obligations. It also shows the inclination of this organ as usually seeking a political solution to problems than sticking to pure and simple legal provisions. In addition, the absence of political willingness of the permanent members to act in cases where their interests are not involved, and the domination of the SC by pro-western values can be cited as a back ground motives. So also, the need for democratic and geographical representation in the SC, which would ameliorate the facts of abusing powers by the permanent members of the SC, can be drawn.

Inspired by the development of greater values in the fields of human right, democracy, good governance and generally doing justice, the international community is becoming increasingly intolerant of atrocious crimes. The notion of security has also been broaden to a general humanistic approach. This can be inferred from responses prevailed at the international level during different incidents including the use of force against Iraq, Kosovo, and some regional interventions. The view of protecting nationals abroad has also been recently attracting considerable support. In the area of humanitarian protection, the International Commission on Intervention and States Sovereignty proposed a guiding principle that states are under a duty/ responsibility to protect the lives, liberty, and basic human rights of their citizens. If they fail or are unable to carry out this responsibility, the international community has a responsibility to step in. The same should go for a similar guiding principle to govern responses to a new generation of threats to global security.

African regional mechanism took a pivotal step in the codification of interventionist attitude to deal with atrocious crimes though the measure remains in contravention to the Charter. States, including Ethiopia, as well practice in a manner deviant to the Charter system and some start to preach the significance of such departure. Principally, the US has introduced a doctrine of 'preemptive use of force' with relatively relaxed and subjective preconditions so as to defend itself against 'unseen enemies- terrorists' and some 'rogue states'. The doctrine calls for the adaptability of the traditional standards of necessity, imminence and proportionality to the current potential danger and capabilities of actors. Of course, the security threats facing individual nations and the world at large, in an era of both terrorism and the proliferation of nuclear and biological WMD require a proactive rather than reactive set of responses.

Today, taking in to consideration the ever expanding nature of international law; the evolving norms, concerns and threats, and observed practices, members of the international system have rejected the philosophical underpinnings of the Charter paradigm. Hence, it can be concluded that the international security architecture has been limping. This is substantiated by the report of Secretary General's High Level Panel on Threats, Challenges and Change, the fact that both states and collective security mechanisms have failed to tackle the current dangers and calls for complementing the UN normative framework on use of force. However,

this understanding has attracted considerable debates. Some are with the view that notwithstanding these challenges and limitations, the Charter system can accommodate such developments, and some calls for a careful and controlled extension of the Charter rules, for instance, that of the self-defense to meet the international political landscape of the 21st century. While others, simply reject the Charter system and aspire for new set of rules.

As it stands, the current international order is imperfect and real threats do exist, but dealing with these threats in an unjustified way threatens the international order to an even greater extent. For instance, the SC is not functioning as it is supposed to. And where the SC fails to accurately reflect the views of the broader community, that community may acquiesce in action by other means, circumventing the procedural impediments of the UN Charter in order to satisfy its substantive demands. This situation, described as the operational system, allows the international community to achieve its immediate substantive interests when the Charter mechanism fails.

The study has indicated that considering some relatively relaxed conditions on case by case basis should be adopted, though no need for complete rejection of the Charter system is yet to be observed. Apart from the Charter framework, it is a must to consider the issues of use of force under the rubric of general international law where we can have some tangible solutions. Taking in to account prevailing state practices and current developments, a relatively smooth threshold need to be adopted to attach normativity to evolving 'customary norms' dictated by promoting justice and human well beings.

As observed earlier, there are some encouraging moves towards having rules that would tackle the observed problems. However, the absence of consistency in the proposed principles and state practices has made it impractical to make them see the light of the day. There are also concerns that the introduction of some modification or Changes to the already set and tested normative principles would cause some evils. Among other things, the price for such alteration or change is not clear. Again, it is difficult to adopt rules which are simultaneously systematic in approach, comprehensive in scope, and functional in operation.

Accordingly, to maintain vibrancy and resiliency of the international security scheme, and to assure the stability necessary for orderly behavior, it is must to have a dynamic normative system that facilitates for the competition of values, views and actors. To this end, with out considerable hesitation, the developments observed need due consideration not to find ourselves in a disrupted world in the near future. Of course, to some extent the Charter rules can be, on a case by case basis, interpreted and constructed to allow the international actors, especially the SC, to deal with the emerging 'unconventional' threats. In addition, for considering the legal status of incidents, like in the case of Kosovo, a shift to the general international law realm than sticking to Charter norms only, would help to solve some problems. Again, when the SC, for whatever reason, fails to respond, there should be a way out for the concerned bodies to deal with situations. These would, to some extent, relieve the Charter system from the stated pressures and would contribute a lot in enhancing the will of the international community, in the era where taking any sort of reform to the Charter system like creating *new system of collective security*, remains in vain.

6.2. Recommendations

To enable the international system address the entire stymie issues the international community has been facing in the realm of international peace and security matters, the following recommendations are forwarded. The order in which they are presented should not be considered as expressions of levels of significance for all are equally important and complementary.

1. If international law is to promote international stability, the normative framework for the recourse to the use of force must be as limited and objective as possible. The importance of a restrictive *jus ad bellum* for international order is not questionable. Accordingly, the recent flimsy structure of Collective Security system must be re-considered.

2. Eliminating the interpretation problems and some conceptual loopholes observed under the Charter framework should be remedied. In particular, the meaning of Art.51 and the nature of 'armed attack' thereof should be clarified by either the ICJ or at UNGA. And, based on the observed prevalent practices, several categories of action that may give rise to the right of

self-defense including preemptive attack and indirect aggression should be reckoned as attaining the significant normative stage.

3. Rather than confining the international law framework regulating the use of force to the Charter system, it would be pragmatic to mull over it under the rubric of general international law. Such consideration enables us to avoiding a dichotomy principle 'legal or illegal' and, opens the way to consider other international law principles such as the 'principle of opposability' which would help justifying some anomalous measures.

4. In addition, relaxing the traditional stringent requirements for anticipatory or preemptive use of force by taking into consideration the capabilities of the adversaries contributes to ensuring the viability of the Charter system. Waiting an 'armed attack' in its literary and strict sense might be more dangerous than allowing, for instance, pre-emptive use of force against unconventional actors.

5. Having a clear stand for attributing measures of non-state actors and, on measures to be taken when states indirectly participated in different situations, is crucial. States have been considering that when a host state is unwilling or unable to cooperate in case the demand comes or where a need for the protection of nationals, attacking terrorists, and the like, or for states-sponsored terrorism, there should exist a room for self-help measures.

6. Considering the revision of the Charter framework regulating the use of force so as to accommodate the contemporary 'unconventional actors' and, the changed nature of international conflicts such as civil and mixed conflicts, is central.

7. The SC, which is the principal organ of the UN, should be able to give swift responses to international repercussions. To this end, it should set aside employing double standards and other secondary considerations whether political, interest based or economic ones. The clear and objective guidelines for decision making should be adopted by the SC. To ensure prevalence of democratic and geographical representation, the seemingly impossible but only requiring the willingness and reasonable of the SC permanent members, well considered reform of SC should be re-considered so as to enable it fulfill its roles and responsibilities.

8. The making use of veto power, justified on the responsibilities such permanent members assume under the Charter, should not be ridiculous. For instance, a country with a low general willingness to contribute to global public goods should not be able to block resolutions out of private concerns. The changing and ever increasing role of countries, such as Japan and Germany, in promoting international peace and security should be considered.

9. If a particular incident were to arise in which states claimed that force should be used either to correct an injustice or to promote a global good, the SC should be the most appropriate body to consider the issue. In case the SC fails to act in such situations while the international community believed the necessity of an action, a way out should be put in place. This could be made by blessing the regional efforts and/or unilateral measures under strictly regulated standards. The problem is that there are no refined set of rules regulating such options. The recent developments shown by the AU, in this regard, are worth mentioning.

10. The status, scope and meanings of the SC resolutions should be clearly identified. The SC should clearly indicate the areal and temporal applicability of its resolutions. In addition, some acts of the SC, such as the interpretation of the 'threat to peace and security' clause, should be weighed against the Charter limitations of its powers.

11. Due consideration should also be attached to the implications of the SC's inaction, tolerance and subsequent legalization of unilateral interventions. Basically, the implied developments of international law in such behaviors need to be emphasized and, it would shed light on the gloomy evolving norms and strengthen efforts to draw clear and viable rules.

12. Now is the time that the observed paradigm shift, particularly starting the 1990s, should be met with international law responses as state practices are the valid ways of changing international law. Above all, refining emerging set of rules on the use of force with normative value in line with the changed world reality and observed variance is of pivotal importance. The rules to be introduced either in customary or treaty form, should meet the fundamental attributes of the ideal legal standards in terms of clarity, flexibility, comprehensiveness, and objectivity. They should address current security realities, ensure legitimacy of international law, strengthen the SC's credibility and diminish prospects of resort to unilateral measures.

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