

DEMOCRATIZING THE U.N SECURITY COUNCIL:
AN APPRAISAL OF SOVEREIGN EQUALITY OF STATES

BY

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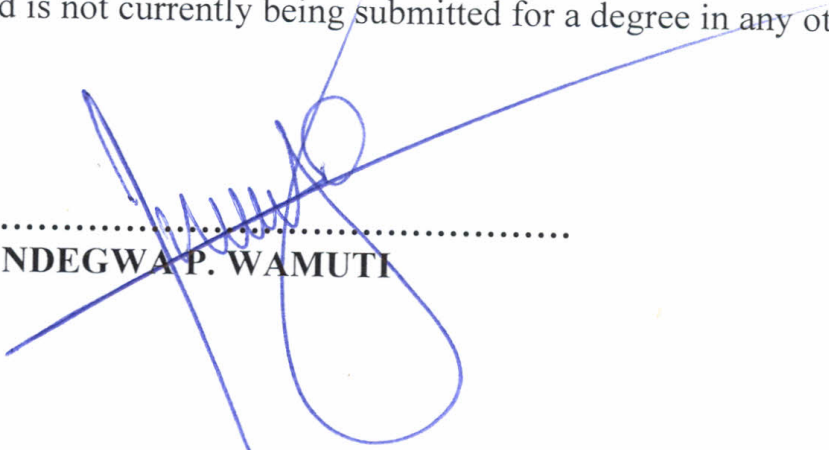
DECLARATION

I, **NDEGWA P. WAMUTI** do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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This thesis is submitted for examination with our approval as University Supervisors.

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DEDICATION

TO THE LATE SAMWEL NDEGWA MUCHIRI

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LIST OF ABBREVIATIONS AND ACRONYMS

ECOMOG	-	Economic Community Monitoring Group
ECOSOC	-	Economic & Social Council
ECOWAS	-	Economic Community of West African States
GA	-	General Assembly
IAEA	-	International Atomic Energy Agency
ICC	-	International Criminal Court
ICJ	-	International Court Of Justice
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for Yugoslavia
NATO	-	North Atlantic Treaty Organisation
NMD	-	National Missile Defence
NPT	-	Nuclear Non-Proliferation Treaty
OIC	-	Organization of Islamic Conference
PCIJ	-	Permanent Court of International Justice
RPF	-	Rwandese Patriotic Front
UK	-	United Kingdom
UNOMOVIC	-	United Nations Monitoring, Verification, and Inspection Commission
UNOMUR	-	United Nations Observer Mission for Uganda/Rwanda
UNSCOM	-	United Nations Special Commission
UNO	-	United Nations Organisation
USA	-	United States of America
USSR	-	Union of Soviet Socialist Republics

WMD

- Weapons of Mass Destruction

DEMOCRATIZING THE UN SECURITY COUNCIL.

AN APPRAISAL OF THE PRINCIPLE OF SOVEREIGN EQUALITY OF STATES

1.1 Introduction

This study approaches the issue from the “positivist” or “consent” theory of international law. According to this theory, the obligatory force of international law stems from the agreements between states. International law is binding on states because they have expressly or impliedly consented to be bound by it. States will to be bound is manifested in form of treaties and customary rules. From the positivist’s point of view, the Charter of UN is the “consent” between the UN member states. Further, state’s sovereignty is paramount. UN member states have absolute freedom of action except in so far as they have consented to limitations in conventional international law including the Charter of UN and customary rules of international law. *Pacta sunt servanda* is the fundamental norm and absolute postulate of international legal system from which international law derives its binding force and authority.

The Charter of UN is according to the positivist approach a treaty and the constitution of the UN. Under Article 7 of the Charter, the Security Council is one of the principal constitutional organs of the UN. Its powers are enumerated in Chapter V of the Charter. As a constitutional creature in international law, the powers of Security Council are circumscribed by the purposes and principles of the charter as set out in Articles.1 and 2 of the charter respectively. Additionally, by the rules of international law spelt out in the

entire body of the Charter. Acting outside the purposes or the principles of UN Charter would be a violation of the *pacta* or “consent”

At the end of 2nd world War, war weary UN founder members negotiated and established an organization with the principal purpose of maintaining international peace and security *inter alia*. To ensure prompt and effective action by the UN in maintaining international peace and security, the founders established the Security Council as a powerful organ but of limited membership. They conferred on it the primary responsibility of maintaining peace and security vide Article 24(1) of the Charter. The current permanent members of the Security Council happened to be the victors in World War II were naturally granted permanent membership therein in expectation that they would onerously shoulder the burden of maintaining international peace ad security.

The founder members however failed to place checks and balances against the immense powers they had “by consent” conferred on the Security Council. Secondly, the provisions of the said “consent” were made static by naming the permanent members and subjecting amendments to the Charter to approval by the said permanent members. Consequently the Security Council remains a prisoner of the past with its membership, size, and voting rights reflecting the geopolitics of 1945. Its membership, size and voting rights have not changed to reflect today’s geopolitics and the growth of UN membership from the initial 51 to 191 as at the UN’s 60th anniversary.

Subsequent geopolitical changes created opportunities for major powers in the Security Council to use their unrivalled economic and military weight to appropriate the Security Council into a tool of their selfish foreign policies. Consequently, the Security Council often exercises Charter powers for purposes extraneous to the Charter and contrary to the principles thereof. To draw a parallel with municipal legal systems, the Security Council acts *ultra-vires* and or unconstitutionally. In the process, the Security Council illegitimately overrides or prejudices international law rights of member states. In particular, it fails to accord member states equality before the international law regime created by the Charter of UN. In this regard, Security Council permanent members abuse their constitutional inequality to commit unconstitutional inequitable actions.

The upshot of the combination of Security Council's constitutional powers and the Charter's static provisions is that the UN membership at large has lost control of the Security Council. Meantime, the same Security Council continues to interpret its mandate in the charter in a manner that appreciates its powers to greater unconstitutional levels.

In this predicament, the UN member states sitting as the General Assembly have repeatedly called for reforms in the Security Council. In the Millennium Declaration (GA/Res.55/27), the General Assembly passed a resolution reaffirming its central position as the main deliberative, policy-making and representative organ of the UN. The UNGA also committed itself to intensify its efforts to "reform the Security Council in all its aspects"

The UNGA's call for reforms in Security Council is an attempt to put the Security Council back to its constitutional place. In the constitutive document, members in Article 24(1) agreed that the Security Council would in discharging its duties be acting on behalf of the entire UN membership (not on behalf of the major powers). Additionally, they stipulated in Article 24(2) that in discharging its duties, the Security Council shall act in accordance with the purposes and principles in the Charter.

According to this study, member's proposals on reforms can be generalized into two approaches. To some, the solution is in democratizing the Security Council or making it more broadly representative of the entire UN membership. The others opt for introducing checks and balances to Security Councils powers. Both approaches to reforming the Security Council entail redrawing the "positivist's consent" between UN member states.

The study will examine the representative character, and democratic credentials of the UN Security Council as against the rest of the UN membership. It will investigate why the UN General Assembly being the chief deliberative, policy-making, and representative organ of the UN and on whose behalf the Security Council acts under Article 24(1) differs with the Security Council so much on policies issues to an extent of the General Assembly resolving to "reform the Security Council in all its aspects." The disparity questions the representative character of UN membership in the Security Council. In short, UN membership as the General Assembly would want the Security Council controlled from bottom up and not from top down.

With regard to constitutionality of some of the Security Councils' actions, the study will examine whether there are legal limits to the powers of the Security Council and what body if any, other than the Security Council is competent to demarcate the powers. A parallel is drawn between judicial review of administrative actions in the municipal law and the UN system. In municipal law, exercise of statutory powers for non-statutory purposes or in contravention of the statute is liable to be declared *ultra vires* and quashed by judicial organs of the state under their compulsory supervisory jurisdiction. Article 92 of the Charter describes the ICJ as the main judicial organ of the UN. However, Neither the Charter nor the Statute of the ICJ gives the ICJ compulsory supervisory jurisdiction over the Security Council competence. With regard to enforcement of the judgments of the ICJ, Article 94 (1) of the Charter binds all member states to comply with the judgments of the ICJ. However, in event of non-compliance by a member state, Article 94(2) makes enforcement discretionary on the part of the Security Council. The Security Council may request the ICJ for an advisory opinion under Article 96(1) of the Charter. However, such advisory opinions lack the force of a binding judgment and are not binding on the Security Council. The statute of ICJ does not provide for enforcement of its binding judgments at all.

If there is no arbitrator on the Security Council's competence, the Council may assume jurisdiction in excess of that conferred on it by the consensual relationship established by the UN charter. In that event, what legal recourse is available to a member state whose international law rights are illegitimately overridden by *ultra-vires* actions of the Council?

In the attempt to answer these questions, the study examines the legal relationship, between the Security Council and the ICJ as well as the UNGA.

The study is confined to the state of affairs as at 31 December 2004. It ends by contributing proposals to the ongoing debate on reforming the Charter of UN and in particular, democratizing the UN Security Council.

CHAPTER 1

ON STATE, SOVEREIGNTY, AND EQUALITY OF STATES BEFORE INTERNATIONAL LAW

1.1 Introduction to Chapter 1

The theme of this study is in part captured in the UN Millennium Declaration.¹ In the said Declaration; the UNGA reaffirmed its commitment to the purposes and principles of the Charter of UN. It noted that the said purposes and principles in Articles I and 2 of the Charter have proved timeless and universal. In the resolution, the GA's reaffirmed its central position as the chief deliberative, policy making and representative organ of the UN. It, also committed itself to intensify its efforts to achieve a comprehensive reform of the Security Council in all its aspects to enable it play its aforesaid role effectively.

According to the UN Secretary General in his report titled "In larger Freedom", submitted to the 59th session of the GA, the GA's agitation for reforms in the Security Council aims at making the Security Council more representative of the entire UN membership.² In the report of the *International Commission on Intervention and State Sovereignty*, the issue of making the Security Council more representative was approached as one of "the democratic legitimacy of the fifteen member security council". In the said report, the Commission states that one of the greatest themes that

¹ UNGA Millennium Declaration: RES/55/57 Art.3.

² "In larger Freedom: Towards Development, Security and Human rights for all." Report of the Secretary General. Submitted to the 59th session of the GA/59/2005, p.41.

emerged in its deliberations was the democratic legitimacy of the fifteen members Security Council.³ The commission further observed that the Security Council cannot claim to be representative of the realities of the modern era so long as it excludes from permanent membership countries of major size and influence particularly from Africa, Asia, and Latin America.⁴

The clamor for a broader representation and democracy in the Security Council is founded on the principle of sovereign equality of states enshrined in Art. 2(1) of the Charter of UN.⁵ The principle simply states that, “The organization is based on the principle of sovereign equality of its all its members”.

The principle interconnects three concepts of international law namely, state, sovereignty, and juridical equality of states. To comprehend the conceptual basis of the GA’s claims for broader representation in the Security Council, one must begin with individual state’s conception of its statehood, its sovereignty, and its relationships with other states as an equal. I will therefore analyze each of the three concepts starting with statehood.

1.1.1 Statehood

Article: 1 of the *Montevideo Convention on the Rights and Duties of States* provides that:

³ “The Responsibility to Protect”, Report of the International Commission On intervention and State Sovereignty.para. 6.19

⁴ Ibid. para 6.2

⁵ Encyclopedia of Public International Law. Published under auspices of Max Planck Institute for Comparative Law under direction of Rudolph Benhardt, p.682.

The state as a person of international law should possess the following qualifications: a permanent population, a defined territory, government and capacity to enter into legal relations with other states.

The Convention was signed in Montevideo City in Paraguay on the 26th December 1933.

The qualifications set out in the Convention are important because they are now widely accepted as the criteria of statehood. The status of entities that do not satisfy this criterion of statehood becomes questionable in international law. Consequently, they may not be able to claim the rights and duties reserved for states by the Charter of UN. Under Article: 3 of the Charter, membership of UN is reserved for states only. For this reason, I will briefly examine each of the aforesaid requirements separately.

1.1.2 A Defined Territory

It is not mandatory for a state to have exactly defined and undisputed boundaries before, or after becoming a state. In the case of *Deutsche Continental Gas-Gesellschaft v. Polish State*, it was held that it is enough that a state has a territory that is sufficiently consistent even though its boundaries may not have been clearly defined or accurately delimited.⁶

There is no maximum or minimum limitation to the size of the territory that a state should occupy. Territorial disputes, as the one between Ethiopia and Eritrea, cannot deny a state its statehood. It is not in doubt that both Ethiopia and Eritrea are states despite their territorial disputes. The same cases applies to Israel which has had running territorial disputes and at times wars with its Arab neighbors most of whom have never even recognized Israel's right to exist.

⁶ (1929) AD p.15.

1.1.3 A Permanent Population

Article: 1 of the *Montevideo Convention* refers to a permanent population. A permanent population connotes a stable community on whom the state exercises its jurisdiction. As a matter of evidence, it is difficult to see how one can establish a claim of statehood without evidence of an organized community occupying the territory. Article: 9 of the *Montevideo convention* provides that the jurisdiction of states within the national territory applies to all the inhabitants. For want of a population, a territory like Antarctica cannot qualify as a state.

However, the requirement of a permanent population does not mean that there cannot be migration of populations between the territorial boundaries of states. It does not even require that there be a fixed number of inhabitants. In the 1975 cases of *Western Sahara*, it was ruled that though the region is occupied by the nomadic tribes who freely roam across the desert without regard to territorial boundaries, their link with that territory was such that they could be regarded generally as its population.⁷ The *Montevideo Convention* however does not address situations where the population is not indigenous to the territory.

1.1.4 Effective Government

The requirement of an effective government connotes a stable political community supporting a legal order in a certain territory. The existence of an effective government

⁷ ICJ Rep. (1975) p.12.

with centralized administrative and legislative organs is the best evidence of a stable political community.

However, once a state has been formed, civil wars and or break down of law and order will not affect the state's international legal personality. A good example here is Somalia which has remained without an effective central government for over 10 years yet its statehood is not questionable.

1.2.1 Capacity to Enter Into Legal Relations with Other States

The state's capacity to carry international relations independently with other states arises from its independence from authority of any other state. A state cannot be regarded as a state if it is under direct or indirect control of another state. The now defunct Bantustans of Transkei and Bophuthatswana created by South Africa inside South Africa failed to acquire statehood because they remained dependent on South Africa for all their international relations. Independence may be said to be the decisive criterion of statehood. In the *Austro-German Customs Union* case, the PCIJ stated that political support and foreign aid are not envisaged in this requirement.⁸ The requirement has more to do with legal independence as opposed to factual autonomy. Thus a state will not exist if it is under the lawful sovereignty of another state. Hong Kong, which was for 150 years under the lawful sovereignty of Britain, could not claim to be a state. In this context, states with legal independence have the legal capacity to enter into legal relations with other states on their own behalf as a matter of right. Whether they are compromised

⁸ *Austro-German Customs Union* case. PCIJ Rep. Series A/B, No.41 (1931).

at the practical level in the exercise of that right is irrelevant. Often, legal independence arises from the factual independence. A good example is the successful secessions of Bangladesh from Pakistan and declarations of independence by the former Soviet republics as well as the colonies, which gained their independence by force.

Once an entity has satisfied the outlined indicia of statehood, it can lay claims to statehood.

1.2.2 Recognition of States and Governments

According to the Institute of International law, recognition of a new state is:-

...the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organized, independent of any other existing State and capable of observing the obligations of international law , and by which they manifest therefore , their intention to consider it a member of the international community.⁹

Recognition of a state or government may be *de jure* or *de facto*. De facto recognition mainly occurs when in the opinion of the recognizing state, that other state lacks stability and permanency or does not possess all the essentials required under international law for its effective participation in the international affairs but fulfills these requirements in fact. The recognizing state may then recognize the other provisionally at times with reservations. In *de jure* recognition, the recognizing state formerly acknowledges that that other state has fulfilled all the attributes required for its effective participation in the international community. A good example of both *de facto* and *de jure* recognition is in the UK's *de facto* recognition of the Soviet Union on 26th March 1921 and the subsequent *de jure* recognition on 1st February 1924.

⁹ Article 1 of the Resolution adopted at Brussels on April 23, 1936 in 30 Ajil, p.185.

1.2.3 Declaratory Versus Constitutive Theories of Recognition of States and Governments

There are two conflicting schools of thought on the effect of recognition of a state. There is the constitutive theory on the one hand and declaratory theory on the other.

The declaratory theory argues that a state exists independent of recognition by other states. Consequently, that recognition by the other states amounts to an acknowledgment of a pre-existing status of statehood. According to the declaratory theory, recognition cannot confer or deny statehood if the entity in question factually satisfies the indicia of statehood. In the *Tinoco Concessions* case, the arbitrator found that non-recognition for any reason could not outweigh the evidence that disclosed de facto character of Tinoco Government according to the standard set by international law.¹⁰ This reasoning applies to recognition or non-recognition of States.¹¹

On the other hand we have the constitutive theory that argues that international legal personality is conferred by the operation of international law. Recognition is seen as a prerequisite to statehood. Recognition is said to constitute the state. In the *International Registration of Trade-mark (German)* case, a West German National Court ruled that the Trade-mark originating in East Germany was not entitled to protection under

¹⁰ *Great Britain vs. Costa Rica Arbitration* (1923) IRIAA p.369.

¹¹ Brownlie, (1990) *Principles of International Law* 4th ed. p.89.

International Conventions of 1883 and 1934 in West Germany.¹² This was on the ground that West Germany did not recognize the Statehood of East Germany. In the wording of the judgment:

An entity which actually exists does not thereby become a state in the international law without some form of recognition of its existence. Recognition of statehood is essential to international personality.

The prevailing view is the declaratory theory. It is reflected in the *Montevideo Convention on the Rights and Duties of States*. Article 6 thereof provides that:

The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other state with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

And Article 3 of the Convention provides that:

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

This is also in line with the *Estrada* doctrine. Mr. Estrada the founder of the doctrine argued that issuing of declarations to grant recognition is an insulting practice because it offends the sovereignty of the other nations as well as amounting to passing a judgment upon the internal affairs of that nation.¹³

Article:4 of the Charter of UN introduces its own perspective of recognition by providing that membership in the UN is open to all peace loving states which accept the obligations as contained in the Charter and which in the judgment of the organization , are able and willing to carry out these obligations. The Charter recognizes that there are

¹² (1959) ILR p.28.

¹³ Whiteman, (1963) *Digest of International Law* Vol.2 p.85-86.

instances where a state may be unable to carry out the obligations of the Charter. However this provision does not violate the declaratory theory or Article 3 of the Montevideo Convention since the Charter refers to such incapable states as states nevertheless. The Charter of UN makes no reference to recognition of states by other states.

One can confidently assert that the UN subscribes to the “declaratory” theory as propounded by the Article 3 of the *Montevideo Convention on the Rights and Duties of States* and the *Estrada* doctrine.

1.3.1 Sovereignty

Norms of sovereignty are enshrined in the *UN Charter*. Article 2 (4) prohibits threats or use of force against the territorial integrity or political independence of any State while Article 2(7) sharply restricts intervention in matters which are essentially within the domestic jurisdiction of any state.

In the context of Articles: 2(4) and 2(7) of the UN charter and international law at large, sovereignty is both external and internal. This is because sovereign authority is exercised not only within the territorial borders but also with respect to outsiders, who may not interfere with the sovereign’s governance.

Since the *Treaty of Westphalia* in 1648, the state has been the holder of external sovereignty. After the said treaty, interference in other state’s governing prerogatives

became illegitimate. According to Allan James, the concept of sovereignty in international law most often connotes external sovereignty i.e., a state's freedom from outside interference with its basic prerogatives.¹⁴ In this regard, international organizations including the UN constitute an assemblage of states where sovereign states transact and interact.

1.3.2 Meaning of Sovereignty

There are varying conceptions of sovereignty. In the study of "democratizing the UN Security Council," this work will be guided by classification of conceptions of sovereignty into "realists" and "liberal" views.

According to Ann-Marie Slaughter, the traditional "realist" view is that sovereign power resides in the sovereign States.¹⁵ The realist view has dominated international law and politics since the *Treaty of Westphalia* in 1648. To the Realist, states are the sovereign actors in the international system and the inter-State relations that define the international order are fundamentally anarchic, defining a Hobbesian state of nature in which no Leviathan imposes order on these individual sovereigns. To the realist, it is precisely the absence of the Leviathan that makes the states sovereign. Power is the operative currency in the system of sovereign states. The capacity to wield power is marked most fundamentally by the ability to exercise control over a human community in a physical territory.

¹⁴ James A, "The Practice of Sovereign Statehood in Contemporary International Society" *Political Studies* 47, No.3 (1999) 462-464.

¹⁵ Slaughter A "International Law in a world of Liberal States", 6 *EJIL* (1995) p. 503-507.

The “realists” views are exemplified by Jean Bodins concept of the sovereign. He wrote *De La Republique* in 1576 during a time of civil war in France. He viewed the problem of order as central and did not think that it could be solved through the then outdated notions of segmented society. To him, order could prevail only through a concept in which rulers and the ruled were integrated into a single, unitary body politic that was above any other human law, and was infact the source of the human law itself. To him, only a supreme authority within a territory could strengthen a fractured community. Bodin however thought that the body that exercised sovereignty was bound by natural and divine law, though no human law could judge or appeal to it. Further, that the form of government that exercised sovereign powers could legitimately vary among monarchy, aristocracy, and democracy though he preferred monarchy. Whatever the sovereign body looked like, it was not subject to any external human law or authority within its territory.¹⁶

Thomas Hobbes an English philosopher also wrote during at a time of civil war. He also arrived at the notion of sovereignty as a solution. For Hobbes, the people established sovereign authority through a contract in which they transferred all of their rights to the Leviathan which represented the abstract notion of state. The will of the Leviathan reigned supreme and represented the will of those who had alienated their rights to it. Like Bodins’ sovereign, Hobbes Leviathan was above the law. A mortal god unbound by any contractual obligations with any external party. However, unlike Bodin, Hobbes sovereign was not limited by natural divine or customary law. To Hobbes, there was only

¹⁶ Philpot, “Sovereignty” in *Stanford Encyclopedia of Philosophy*, p.8.

the command of the sovereign ruler, emanating from his will, and the obligation to obey it was absolute.¹⁷

On the other hand, there is the “liberal” view of sovereignty. To the “liberal” view, the primary actors in the international stage are not the solid units of territorially bounded states, but rather individuals and groups operating in both domestic and transnational society. It is an institution centrally defined not by its capacity to wield unlimited ‘sovereign’ power over those found within its borders, but by its ability to represent the interests of a defined population and to act on their behalf. In this school of thought is Jean Jacques Rousseau. Rousseau saw the collective people within the state as the sovereign ruling through their general will.¹⁸

In constitutional government, it is the people ruling through a body of law that is sovereign. Normative liberal theory of sovereignty implies that the people have untrammelled power, the unappeasable power to constitute different agents of their choosing for different purposes and different circumstances.

Wolff in his book *The Conflict between Authority and Autonomy* defines sovereignty as “Supreme authority within a territory”. The “authority” is what Wolff sums up as the right to command and correlatively the right to be obeyed.¹⁹

¹⁷ Philpot *supra*. p.9.

¹⁸ Philpot (2001) *Revolutions in Society: How Ideas shaped modern international relations*. Princeton NJ: Princeton University Press p.167.

¹⁹ Wolff (1990) *The Conflict between Authority and Autonomy* Oxford, Basil Blackwell p.20.

The term "right" connotes some legitimacy. A holder of sovereignty derives authority from some mutually acknowledged source of legitimacy. This could be natural law, a Divine mandate, hereditary law, a constitution, or even international law.

The liberal view shifts the inquiry into the sources of any international order from the rights of the state as an end to itself to the modes and accuracy with which the State as an agent represents the social interests of its subjects.

Existing states embody to a greater extent, these competing conceptions of the sources of their own power. They can be roughly divided into states whose governance philosophy stems from the Liberal tradition, whose claim to sovereignty is derived from this explicit or implicit agency relationship to those they claim to represent. The Liberal state is characterized by the presence of some form of representative government secured by separation of powers, constitutional guarantees of civil and political rights, juridical equality and a functioning judicial system dedicated to the rule of law i.e. the democratic States. Realist States are marked by absence of these features. States led by military juntas, dictators, executive kings fall in this category. Rousseau's liberal view of sovereignty is favored today.

1.3.3 The Changing Paradigms of Sovereignty

The narrow historic definitions of sovereignty as the supreme authority in a territory with corresponding right to non-intervention by other states and non-state entities are no longer applicable today. In the field of human rights, the various, treaties, conventions, and declarations which have come to bind states since the 2nd World War have

effectively removed issues of human rights from the domestic jurisdiction of individual states. Dr. Kindiki in his book *Humanitarian Intervention and State Sovereignty in Africa* observes that the fundamental rights and freedoms of the individual are now the concern of the international community as a collectivity. The jurisprudence proceeds to observe that unlike in the past when human rights issues were treated as matters “essentially within the domestic jurisdiction of states” , human rights issues are today an established part of international law with an institutional structure – including substantive definition of human rights and enforcement mechanisms of universal application. He notes that there has been a massive internationalization of human rights.²⁰

These developments necessitate a review of the concept of sovereignty. They also raise the issue of the extent to which sovereignty can be limited without losing sovereignty altogether. Today, there are many consensual limitations of sovereignty brought about mainly by developments in international human rights law, integration of States, globalization and other developments in international relations. These developments have remarkably eroded the old notions of sovereignty.

With regard to human rights, it was in 1948 that the vast majority of states signed the *Universal Declaration of Human Rights*. The signatories thereto committed themselves to respect over 30 separate rights for individuals. However, as the declaration was not binding on the states, it left states sovereignty on matters of human rights intact. Nevertheless, it was a step towards tethering the human rights to international obligations

²⁰ Kindiki (2003) *Humanitarian Intervention and State Sovereignty in Africa: The Changing Paradigms in international law*, Eldoret: Moi University Press p.45

touching on the sovereign states internal affairs. Since then, the human rights have come to enjoy stronger legal status. For instance, the arbitration mechanisms of the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* significantly curtail member States' freedom to violate the human rights protected there under.

The *Genocide Convention* signed on 9th December 1948 on the other hand commits signing states to refrain from and punish genocide. In the mid-1960's, two covenants the *Covenant on Civil and Political Rights* and the *Covenant on Economic, Social, and Cultural Rights* legally bound otherwise sovereign states to respect the human rights of their people.

However, it was not until the 1990's that the international community backed the domestic human rights responsibilities with military enforcement and judicial procedures against sovereign states. In a series of episodes, the UN and other international organizations endorsed political action usually involving military force that most states would have previously regarded as illegitimate interference in internal affairs of a sovereign state. The actions have involved military operations to remedy an injustice within the boundaries of a State. The salient features of these actions are that they usually lack the consent of the government of the target state. Yugoslavia, Kosovo, Somalia, Rwanda, Haiti, Liberia are some of the examples. Although the legitimacy of individual interventions is questionable in some cases, what has become known as humanitarian interventions enjoys growing support by the international community.

Both Hobbes and Bodin had envisioned a sovereign that was not accountable to any other human authority. The sovereign states were for a long time not answerable to any other human authority. In the modern world, however, the unlimited sovereignty has been rolled back to an extent that gross abuses of human rights by the sovereign have been criminalized. Therefore, the sovereign no longer wields unlimited powers over the human rights of its subjects. The sovereign is answerable to human authorities such as the International Criminal Court and or International Criminal Tribunals established by UN Security Council. Genocide, crimes against humanity and the like are all international crimes that can be committed by the sovereign against its own subjects.

As this study goes on, some former political and military leaders in Rwanda are currently incarcerated in the Detention Facility of the *International Criminal Tribunal for Rwanda* charged with orchestrating the 1994 genocide against their Tutsi subjects. Former President Slobodan Milosevic of Yugoslavia is also standing trial in the International Criminal Tribunal for the former Yugoslavia at The Hague, Netherlands for his atrocities against Kosovo population of Albanian descent. International law and the international community are slowly legitimizing humanitarian interventions. International human rights laws have therefore eroded the hitherto unlimited power of the sovereign over its subjects.

The other aspect of erosion of state sovereignty has been global interdependence, global interconnection, and integration of states, in short, globalization. In the case of European

integration, the process started in 1950 when six States formed the *European Coal and Steel Community* under the *Treaty of Paris*. The community established joint international authority over the coal and steel industries of these six countries. The authority entailed executive control through a permanent bureaucracy and a decision making Council of Ministers of foreign ministers of each state. This same model was expanded to a general economic zone in the Treaty of Rome in 1957. The integration widened by a judicial body, the *European Court of Justice*, and a legislature, the European Parliament a directly elected Europe-wide body. The institution now consists of 25 members. Its powers have also been deepened by the *1991 Maastricht Treaty* into the European Union. However, the European Union does not dissolve the states. Rather, it pools important aspects of their sovereignty into a supranational institution in which their freedom of action is constrained in the areas governed by the treaty. Closer home, we have the *East African Customs Union* which has constrained the member states sovereign rights to levy import duties. The net effect of globalization is that decisions on matters of trade such as price controls, tariff and non-tariff barriers to movement of goods and labor are no longer the preserve of the state. Despite their sovereignty, policy and executive decisions on such matters are made by the international organization of which such states are members and rammed down the thoughts of the member states. An illustration here is the COMESA treaty which enjoins member states not to impose tariff or non-tariff barriers to free movements of certain industrial and agricultural commodities in the COMESA region. The most visible effect of the Kenya's COMESA obligations is that the Kenya government has been unable to protect its ailing sugar industry by the traditional methods of prohibitive import duties and sugar importation licenses.²¹ With

²¹ The COMESA Treaty

these developments in international Human rights law and integration of states, the concept of a sovereign as “the supreme authority within a territory” cannot hold. Sovereignty needs to be redefined to incorporate this erosion of the sovereign's powers.

1.3.4 Effects of Limitations on Sovereignty

Treaties like the Charter of UN have an effect of placing limitations on exercise of sovereignty. In a study of democratizing the UN Security Council, sovereignty, and Statehood, it is necessary to determine how far limitations on the sovereignty of a State may extend without extinguishing its character as a State in international Law. States can voluntarily surrender their Sovereignty, for example, by joining a Federation, but precedents suggests that such acts do not automatically forfeit statehood. Legal dependence in International law may limit sovereignty, but not destroy it. This is demonstrated by the dependency of certain States within the EU on financial subsidies from the other member states through the medium of the Brussels commission. However, if a treaty stipulates that a state is economically and politically dependent on another state, a legal dependence is established, which could quantitatively diminish independence to such a degree that sovereignty is directly threatened. Sovereignty can be limited by practical necessity or by treaty. A state that renounces its sovereignty may depending on the extent of the renunciation, lose its statehood.

International law, however, has twice provided that the right of a state to so limit its sovereignty by entering into certain treaty obligations may be prohibited. The effect of Article 88 of *The Peace of Saint Germain* of 10 September 1919, was that Austria's

in certain respects be dependent upon another power. The control, for instance, of foreign affairs, may be completely in the hands of a protecting power, and there may be agreements or treaties, which limit the powers of the sovereign even in internal affairs without losing sovereign Power.²⁴

Even if a State has partially cut off its competence by conferring certain powers either on international organs, or even on a foreign State, and if for all other matters it maintains the competence to act in an autonomous way, international politics will admit that Sovereignty exists.

In conclusion, the historical conceptions of sovereignty as the unlimited authority within a territory have been replaced by broader concepts which admit sovereignty, even when exercise of sovereign powers is substantially limited. International law recognizes limitation of the exercise of sovereignty but not limitation of sovereignty itself. Sovereignty may be limited in a quantitative but not a qualitative sense. The State remains independent as long as it has not legally abandoned its independence to any other State. On the other hand, a body that is subjected to international Law through the intermediary of a foreign State is not a sovereign State under international Law.

²⁴ Starke J G, (1967) *An Introduction to International Law* London: Butterworths p.86

1.3.5 Conclusion on sovereignty

The old concept of the sovereign as the supreme authority within a territory has over time met legal and institutional circumscriptions. This is particularly in the area of human rights, integration of states, and globalization.

These developments have extensively abridged the powers of the sovereign state. Supranational organizations set binding fiscal policies of their member states while international criminal Tribunals try and punish sovereigns who perpetrate genocide and crimes against humanity in their domestic jurisdiction. Accordingly, sovereign states are now accountable to external institutional superiors in these matters.

Consequent to these circumscriptions of the sovereign state, modern philosophers have sought to remove the element of supremacy from the concept of sovereignty while others have tried to extinguish the concept of sovereignty altogether.

Bertrand de Jouvenel in his book *Sovereignty: An Inquiry into the Political Good*, acknowledges that sovereignty is an important attribute of modern political authority needed to quell disputes within the State and to muster cooperation in defense against outsiders.²⁵ But he abhors the modern concept of sovereignty be it constitutional, parliamentary, or individual which he says creates a power who is above the rules. A power whose decrees are to be considered legitimate simply because they emanate from his will. Though not calling for abrogation of the concept of sovereignty, Jouvenel holds

²⁵ Jouvenel B. (1957) *Sovereignty: An Inquiry into the Political Good*, Chicago IL :University of Chicago Press, p.40-76.

that sovereignty must be channeled so that sovereign authority wills nothing but what is legitimate. To Jouvenel morality has validity independent of the sovereign. He argues that there are wills that are just and others which are unjust. Sovereignty he says carries with it an obligation to command only what is just.

Amongst the most radical opponents of sovereignty is Jacques Maritain. In his book *Man and the State*, he contends that political philosophy must get rid of the concept of sovereignty. He argues that the concept is antiquated and intrinsically wrong because of what he calls false connotations inherent in it.²⁶

From the foregoing, I conclude that the sovereign State has been extensively circumscribed by developments in international human rights law, international trade, and integration of States, internet, and globalization. The nation State is not what it once was.

1.4.1 Sovereign Equality of States and State Obligations in International Law.

From the outset, I must point out that the equality discussed herein is the formal equality or what I will at times refer to juridical equality of States in the UN.

The principle of sovereign equality of States in Art: 2(1) of the UN Charter is reflected in other international instruments. Article: 4 of the *Montevideo Convention on the Rights and Duties of States* provides that:-

States are juridical equal, and enjoy the same rights, and have equal capacity in their exercise, the rights of each one do not depend upon the power which it possesses to

²⁶ Maritain (1951) *Man and the State*, Chicago IL:University of Chicago Press.

The natural school of thought propounds that the “law of nature” is the foundation of all law and international law is part of it. Under the natural school of thought, is the doctrine of fundamental rights. According to the doctrine of fundamental rights, the principles of international law can be deduced from the essential nature of the state. It urges that every state, like man, is endowed with certain fundamental or natural rights i.e. self preservation, independence, equality, and respect. It emphasizes more on the individuality of man than on the state. However proponents of the natural school of thought are not unanimous on the basis of the alleged fundamental rights. In addition, the school is not able to accommodate the historical process in the evolution of the state.²⁸ Because of these shortcomings, the school of thought has declined in significance over the years.

On the other hand, we have the “positivist” school of thought. According to this theory, international law is binding on the states because they have expressly or impliedly consented to be bound by it. The states consent is manifested in treaties and customary rules. Positivists start from the premise that state sovereignty is without limitation. Accordingly, they argue that rules of international law are adapted to the extent to which the states have voluntarily restricted their sovereignty. This approach has merits in that treaties and constitutions of international organisations reflect a consensual relationship freely entered into by member states.²⁹

²⁸ Kapoor (1990) *International Law*, 8th ed. Central Law Agency, p.62.

²⁹ Oppenheim (1955), *International Law*, Vol.1, 8th ed London: Longmans Green.

The Charter of the UN is therefore a multinational treaty and the constitution of the UN. State parties signed the charter in exercise of their sovereignty. The rules of international law set out in the Charter of UN bind member states because they consented to be so bound. *Pacta sunt servanda* is therefore the fundamental norm and absolute postulate of international legal system from which the Charter of UN and international at large law derives their binding force and authority.³⁰

1.5 Conclusion

The Charter of UN is part of international law. In this regard, the Charter is a multilateral treaty between the UN member states. It is also the constitution of the United Nations Organisation established by the said treaty. The provisions thereof reflect the agreement between member states. International rules created there under have an effect of limiting exercise of various prerogatives of member state's sovereignty. Despite the limitations of exercise of their sovereignty by the UN Charter, UN member states retain their character as sovereign states in international law.

Classifying UN as international law imports into the Charter the ordinary norms of international law. First is that powers not expressly provided cannot be freely implied. That even the implied powers must flow naturally from the grant of express powers and the said implied powers are further limited to those that are necessary to the powers expressly granted. In the *Reparations Case*, the ICJ held that the rights and duties of an

³⁰ Verma (1998) *An Introduction to Public International Law* New Delhi: Prentice -Hall of India p.12.

international entity such as the UN must depend on the entity's purposes and functions as specified or implied in the constitutive document.³¹

Accordingly, powers of the UN security council being a creature of international law are circumscribed by the purposes, principles, and the rules created by the Charter. Exercise of Security Council's powers for purpose other than that in Article 1 or in contravention of the principles in Article 2 and the rules created by the Charter would be outside the consensual relationship. In municipal law, exercise of statutory powers by a statutory body for purposes outside the constitutive statute or in contravention of the same would be adjudged *ultra-vires*. The legal status of Security Council's actions that are outside or contrary to the purposes and principles of the Charter will be addressed in chapter 4 of this study. Exercise of power is a function of the decision organs and process. In Chapter 2, the study will examine the UN Security Council as one of the decision making organs of the UN. The Security Council's composition and members voting rights will be contrasted with other international organisations to find how its peculiar composition and voting rights impact on the equality of states before the Security Council itself and the international law regime created by the UN Charter.

³¹ ICJ Rep. (1948-1949) p.266.

CHAPTER 2

DECISION MAKING IN UN SECURITY COUNCIL CONTRASTED WITH OTHER INTERNATIONAL ORGANS AND INSTITUTIONS

2.1 Introduction to Chapter 2

International organizations rely on defined voting procedures in their decision-making process. Proposals are put to organs of the international institutions in form of draft resolutions. Members of the organs vote to adopt or reject. Depending on the institution's constitution, adoption of a resolution may require unanimous affirmative vote, or different levels of majority.

International organizations have increasingly accepted decision-making by majority vote. This applies both to legally binding as well as to non-obligatory resolutions. In the case of non-binding resolutions, the choice of majority voting may not matter very much to a dissenting member state. Voting rights become crucial when an international organization or organ deals with matters that states consider pertinent to their national interests. The UN Security Council deals with international peace and security. Its resolutions are binding on all UN member states and the resolutions often have far reaching effects on the supreme interests of the targeted member state.

Consequently, member states voting rights in the UN Security Council impacts heavily on the member states international law rights. Amongst those rights is the right of every member states to equality before the international law regime created by the UN Charter and enforced by the Security Council in matters of international peace and security.

In this chapter, I will examine equality of member states before the principal decision making organs of various international organizations. The study will focus on UN organs and international institutions that deal directly or indirectly with international peace and security.

Under Articles 10, 11, 12, and 14 of the UN Charter, the GA may deal with matters touching on international peace and security. Article 12 however bars the GA from making recommendations on any dispute or situation while the Security Council is still seized. The GA has dealt with matters of international peace and security under those provisions as well as under "Uniting for Peace" resolution. We will examine the voting rights in the General Assembly and see how the same impacts on equality of states in the General Assembly.

In discharging its responsibility of maintaining international peace and security, The Security Council works closely with other organizations such as the International Atomic Energy Agency hereinafter referred to (IAEA). Nuclear bomb is the most potent weapon currently known to mankind. As a matter of international peace and security, the IAEA seeks to restrict proliferation of nuclear weapons through the Nuclear Non-Proliferation Treaty. I will discuss the voting rights in the Board of Governors of the IAEA to see whether it treats NPT member states equally before the international law regime created by the NPT.

Article 92 of the Charter provides that the ICJ is the principal Judicial Organ of the UN. It plays an indirect but important role in maintenance of international peace and security. Article 33(1) of the Charter cites judicial settlement of disputes as one of the pacific means of settling disputes to which the Security Council may under Article 33(2) call upon parties to apply. In addition, Article 36(3) stipulates that in making recommendations for pacific settlement of disputes, the Security Council shall take into consideration that legal disputes should as general rule be referred to the ICJ. For this reason, I will discuss equality of member states before the ICJ.

The 1998 *Rome Statute of International Criminal Court* establishing the International Criminal Court (ICC) will be discussed. The Statute is crucial to this study because it represents one of the most democratic international decision making process in a jurisdiction that overlaps with that of the UN Security Council in matters touching on international peace and security. Theoretically, it is possible to prosecute members of the armed forces of any country accused of genocide and war crimes. Unlike in the UN Security Council, the US government will not be able to use the veto to shield its citizens from the ICC. There will be no place for a veto in the Court and it is not a wonder that the US attempted to block the treaty. The Treaty of Rome will be referred to and contrasted with the provisions of the Security Council in regard to equality of member states before the international law regime created by the treaty.

International Criminal Tribunals will also be examined because they are established by the UN Security Council in exercise of its powers under Chapter VII of the UN charter.

They are established to try and punish international crimes which threaten or threatened international peace and security. Equality before the law in the Tribunals touches more on the individual than the state. However, the choice of suspects and the crimes is closely related to international politics played at the Security Council.

2.2.1 The UN

Article: 7 of the Charter of UN establish the principal organs of the UN. These are a GA, a Security Council, an Economic and Social Council, a Trusteeship Council, an ICJ, and a Secretariat. This study is primarily concerned with the Security Council. Under Article 27 of the UN Charter, the Security Council's primary responsibility is maintenance of international peace and security.

In discussing democracy in and/or the representative character of the Security Council, one must start by analyzing the structure of the entire UN.

Each of the organs established by Article 7 of the Charter has its own voting rules and procedures. Consequently member states experience of democracy, representation in decision making, and equality before the law is different in each organ. It is therefore important that we discuss member states representation, democracy, and juridical equality in each of organ separately.

2.2.2 The General Assembly

Under Article 20, the GA meets on regular annual sessions. The Secretary General at the request of the Security Council or a majority of the general membership of the UN may however convene a special session.

Under Art. 9 of the charter, the general assembly shall consist of all the members of the UN. Though each member state has one vote in the GA, each member may have not more than five representatives. Decisions of the GA are taken by voting. It is important to study the provisions relating to voting as they reflect democracy and equality between the member states in the GA.

2.2.3 Voting Rights in the General Assembly

The voting procedure of the Assembly is provided for in Article 18. It entails one vote for each member state. Decisions on important questions are taken by a two-thirds majority of the members present and voting, and decisions on other questions by a simple majority of members present and voting.

This arrangement may seem irrational in that it purports to equate major powers like the former Soviet Union, China, USA, and such other major powers with the minute states like Rwanda, Maldives Islands, Comoros, Dominica, and Samoa. In the GA, mini-states have one vote each equal to that of the larger and more powerful states. These voting rights do not reflect individual state's power and influence. Consequently, the larger states are irritated by some activities of these miniature states. The small and micro-states pay tiny fractions of the organizations budget yet, through their voting strength, the tiny

states can create a majority in the GA and adopt expensive programs for which the organization as a whole must pay. Micro states are each entitled to their vote equal to that of a large States like China so long as they fulfill the criteria of statehood and are members of the UN.

Perhaps a system of weighted voting would work in the GA. According to criteria such as the size of the population, gross national product, military power, or a combination of these factors, some states would cast more votes than others. Such systems are to be found in World Bank and International Monetary Fund. In these organizations, the number of votes per member state varies according to its capital contribution to the organization. In the UN however this idea would be sure to generate controversy. Small and poor states would obviously oppose the idea in its entirety for it would mean loss of their formal status of equality. Fortunately for them however, their cooperation is needed in order to alter the UN Charter. The idea is unlikely to succeed as long as these small and poor states remain more than one third of the membership.

Voting can be by acclamation, show of hands, electronic, or if demanded, by roll call. Secret ballot is also used in certain cases, notably elections. Decisions of the GA on important questions are made by two thirds majority of the members present and voting. Under Article 18(2) important questions include; recommendations with respect to maintenance of international peace and security, election of non permanent members of the Security Council, the election of members of the ECOSOC, election of members of the Trusteeship Council, admission of new members to the UN, expulsion of members,

operations of the trusteeship system and budgetary questions. However, the list is not exhaustive. Decisions on other questions are made by a majority of the members present and voting.

The GA is empowered by Article 18(3) to add onto the categories. However, the distinction between the categories or the basis of the distinction is not provided in the Charter. This causes controversy. Good example here is the issue that arose in the sixth session of the General Assembly over the representation of China. By a simple majority, the General Assembly passed a resolution to the effect that the issue fell within the category of important questions. On the other hand, a request for an advisory opinion on the question of South West Africa was by a similar majority voted to be a non-important issue in 1950.¹ Piece-meal categorizations of the issues as they arise has been the trend all along so that the list has remained unaltered but with convenient degree of flexibility.

However the powers of the GA are minimal and of little effect compared to the powers wielded by the Security Council. Resolutions of the GA are mere recommendations and are not binding on the member states or other organs of the UN. Its powers are essentially deliberative. Nevertheless, the GA enjoys legislative functions in various forms. Under Article 13(1) (a), the GA has the mandatory power to initiate studies and make recommendations for purposes of encouraging progressive development of international law and its codification. For this purpose, the GA constituted the International Law Commission in 1947. Besides, the GA has facilitated diplomatic conferences for the purposes of drafting and opening for signature important multilateral treaties. Examples

are the *Geneva Convention on the Law of the Sea* (1958), *1969 Vienna Convention on the Law of Treaties*, *Vienna Convention on Diplomatic and Consular Relations*, and the *1982 Law of the Sea Convention*.

In addition, prescriptive resolutions of the GA over time do develop into binding rules of international law.² Resolutions of the GA, *prima facie* are not binding but they help in evolution of the binding rules of international law, either in form of customary rules, or conventional rules embodied in the treaties.

2.2.4 Powers of the General Assembly

The powers of the GA are set out in articles 10 to 17 both inclusive.

Article 10 and 14 empowers the GA to discuss and make recommendations on any questions or any matter within the scope of the present charter or relating to the powers and functions of any organs provided in the Charter. These powers are subject to Article 12 which prohibits the GA from making recommendations on any dispute in which the Security Council is exercising its functions.

The functions of the Security Council are set out in Article 24 (1) of the Charter which provides that:

In order to ensure prompt and effective action by the UN, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Question then is whether this jurisdiction of the Security Council is exclusive. Can the GA deal with an issue of international peace and security when the council is seized of the same? The answer is categorically in the negative. Article 12 prohibits the GA from making any recommendation with regard to any dispute or situation in which the Council is exercising jurisdiction unless requested by the Security Council. This was the interpretation of the USSR when opposing a Security Council resolution, which enabled the GA to deal with matters of international peace and security in the place of the Security Council. When the resolution now known as "Uniting for Peace." was used to censure the Soviet Union's invasion of Hungary in 1956, the USSR questioned the legality of the same on the grounds that the Charter reserved that jurisdiction for the Council exclusively. Later in 1960, the Security Council became deadlocked in the Congo issue, the General Assembly was summoned in September 1960. All this time, the USSR strongly opposed use of the GA in matters of maintenance of international peace and security. The USSR insisted that the matters should be dealt by the Security Council. This is because the USSR had a veto in the Security Council.

On the reasons cited above, the USSR refused until the 1980s to pay for the costs of peacekeeping in the Middle East between 1956 and 1967 as the same activities emanated from resolutions of the GA. The issue of expenses arising from international peace and security operations authorized by the GA under "Uniting for Peace Resolution" was to become the subject of the *Certain Expenses of the United Nations case*.³² "Uniting for Peace" Resolution ultimately fell into disuse in the same 60's when the GA became

³² ICJ Rep. 1962, p.151-182.

dominated by third world countries the majority of who were sympathetic to the Soviet Union.

The provision in Article 12 that the General Assembly may discuss such a matter upon request by the Council only serves to further the exclusivity of this jurisdiction in favor of the Security Council. Whether to refer an issue of international peace and security to the General Assembly is an important question. The same is amenable to the veto of any permanent member.

Nevertheless, the said provision is in the Charter and therefore all the organs of the UN including the General Assembly are constitutionally bound by Article 12.

Save for the powers of the General Assembly to receive and consider annual and special reports from the Security Council under Art. 15(1), there does not seem to be any other supervision of the Security Council by the General Assembly.

Under Article 11, the General Assembly has powers to consider the general principles of co-operation in the maintenance of international peace and security. Hand in hand with this power is the power under Article 14 to make recommendations with regard to the peaceful adjustment of any situation, regardless of origin which it deems likely to impair the general welfare or friendly relations between nations. However, as earlier pointed out, these powers are mainly deliberative in nature. The resolutions ultimately passed by the UNGA are not binding.

Finally, under Art.16 and 17(1) of the Charter, the UNGA performs functions under the trusteeship system and has the powers to consider and approve the budget of the organization respectively.

I conclude that the UN Charter constitutionally bars the UNGA from making recommendations on matters of maintenance of international peace and security without the request of the Security Council. The primary responsibility of maintaining international peace and security is constitutionally reserved for the Security Council by Article 27. The Article provides that the members agree that in performing its functions, the Security Council acts on behalf of the entire membership. It is to be borne in mind that maintenance of international peace and security is the foremost purpose of the United Nations in Article 1.

In the subsequent chapters of the study, we will find that a substantial membership of the UN is dissatisfied with the manner in which the Security Council performs its functions of maintaining international peace and security. Some members accuse the council of double standards. In particular, the Islamic states accuse the Security Council of allowing itself to be used as an extension of the US foreign affairs office.³³

The upshot is that the GA often finds itself unable to affect its policies on various matters in the Security Council. Recommendations of the GA though not binding on the Security Council or the parties are often disregarded by the Security Council. A good example

³³ Masood (2000) "Security Council's Credibility Undermined", Pakistan, *Karachi Dawn*.

here is the General Assembly Resolution calling on the US to comply with ICJ judgment that the US pays Nicaragua \$17 billion in reparations.³⁴

Considering that the Security Council acts on behalf of the entire UN membership, and the said membership sits as the GA, the actions of the Security Council should reflect the general consensus at the GA . The ideal legal relationship between the Security Council and the GA will be addressed incisively in chapter 4 of the study.

2.3.1 Security Council

Those words in Article 24 of the UN Charter, "to maintain international peace and security" have vested the Security Council with what many have termed "the only real power" in the UN. Given the binding nature of Security Council resolutions, there is some truth to this somewhat cynical view of UN. Since its first meeting in London in 1946, the Security Council of the UNO has always been respected. Its resolutions are binding on the international community. With the end of bipolar world, the Security Council has become more powerful and effective. This is because the Anglo -American alliance is able to impose its geopolitical weight on the Security Council and thereby influence the Council's decisions and actions in its favor without any worthwhile opposition. The paralysis occasioned by the international power struggles between the super powers is no longer there. The cold war had its own role to play as in my view it was the ultimate check and balance against either superpower bulldozing the Security Council. The weak states in the general UN membership were protected by the

³⁴ UNGA Resolution 42/18 and 43/11 in the case of *Nicaragua and U.S.A.*

superpower rivalry. My view which I will sufficiently support hereafter is that the Security Council discharges its responsibility of maintaining international peace and security with a bias in favor of the Anglo-American alliance.

An illustration here will be the amazing disparity in the enforcement actions of Security Council when the Anglo- American alliance is an interested party and when it is not. Under this topic I will also venture into the lopsided manner in which the Security Council has attempted to deal with international crimes. Examples will be the Nuremberg and Tokyo Trials, the ICTY, ICTR, and the International Criminal Tribunal for Liberia. International Criminal Tribunals are established by resolutions of the Security Council.³⁵ As will be noted, most often than not at least two members of the Security Council will be interested in any issue before the Council at least indirectly. Yet they are constitutionally entitled to sit in the deliberations and vote in the resolutions of the Security Council. The results have been one sided justice. An illustrative case here is the Nuremberg and Tokyo trials of the senior officers in the Axis powers in the 2nd World War. Not a single soldier or government officer of the allied powers was prosecuted for war crimes despite the obvious fact that the allies too had committed grievous war crimes.³⁶ Only the Germans and Japanese were prosecuted. This is a clear case of a victor's justice.

³⁵ International Criminal Tribunals for Rwanda and Yugoslavia are established under UN Security Council Resolutions Nos. 955 of 8 Nov 1994 and 827 of 25/5/93 respectively.

³⁶ The Nuremberg Judgment: International Military Tribunal, Nuremberg (1946) Cmd.6964: AJIL 1947, p.172.

In some cases, the victim has been turned the villain and indicted as such. In the case of The Federal Republic of Yugoslavia, NATO was clearly the aggressor. It had no right under the UN Charter to intervene in a matter, which was essentially within the internal jurisdiction of Yugoslavia. Infact, NATO's action fell squarely within the prohibition of Art. 2(7) of the Charter.³⁷ It is surprising however to note that it is President Milosevic of former Yugoslavia who was indicted by the Prosecutor of the International Criminal Tribunal for Yugoslavia and not NATO leaders or their Generals. For a clear perspective of this irony, I emphasize here the fact that the Tribunal is a creature the Security Council in which three out of the five permanent members are also NATO members.

NATO's war against the Yugoslavia in the name of humanitarian intervention constituted all the facts of international crime of starting a war of aggression no different from that of the Nazi Germans. I will at the appropriate point of my study deal with this issue more substantively. For now, it suffices to note here that UN Security Council Prosecutor did not indict anyone in the NATO camp or even make an attempt to do so. To the shocking contrary President Slobodan Milosevic was indicted for alleged crimes against humanity.

2.3.2 Composition of the Security Council

Constitutional inequalities in the Security Council start right from the composition. Article 23 of the UN Charter governs the composition of the Security Council. There are five permanent members and ten non-permanent members. The permanent ones are the Republic of China, France, the Union of Soviet Socialist Republics (succeeded by Russia

³⁷ Owuor "UN Big Loser in NATO Bombing of Yugoslavia", Daily Nation 13 May, p.6.

since the breakup of USSR), the UK and the USA. The non-permanent ones sit in the Security Council on a rotational basis for a term of two years. Election of the non-permanent members is by GA in accordance with the GA Res.1991 (XVIII).The same provides the formula for electing the non-permanent members. Five members are elected each year for purposes of continuity. A two-thirds majority is required in election of the non-permanent members of the Security Council. Initially, distribution of the seats used to be on the basis of a gentleman agreement. However, under the aforesaid resolution, it is now on the basis of a settled formula. Africa and Asia share five seats, Western Europe two seats, and the Latin America two seats also.

The permanent members are indeed permanent in the Security Council. According to the founding fathers, the basis of the permanent membership is that the five would shoulder the burden of implementing and enforcing the resolutions of the Security Council.³⁸This criteria has been highly criticized because, naming of the big powers and conferring upon them this privileged position makes the Charter static. Britain and France are no longer the relatively big powers they were in 1945. The 2nd largest world economy and contributor to the UN budget is Japan yet Japan is not a permanent member of the Security Council. Other states such as Germany, Australia, Brazil, and India may be stronger than either France or Britain economically and even militarily. This change in geopolitics makes it imperative to reform the Charter so that it can reflect the world today. Japan, Germany, Nigeria, South Africa, India, Italy, Egypt have all been clamoring

³⁸ Repertoire of the Practice of the S.C 1952-1955(St. PSCA/!/ADD.1), p.63 et seq.

for permanent seats in the Security Council.³⁹ However, the international community cannot agree on which states should be included in the permanent membership or the formula for electing additional permanent members. Even more controversial is the issue of veto powers for the additional permanent members. On the other hand, the current permanent members are not willing to relinquish their privileged status even when it is clear that their contribution to the work of UN is not commensurate with their special status. In chapter 4 of the study, I will examine this stalemate and various proposals on reforms tendered by the various members and interest groups.

2.3.3 Veto and Voting Rights in the Security Council

The voting rights in the Security Council represent the most interesting constitutional deviation from the democratic principle of one party one vote. Article 24 provides that when the Council acts, it acts on behalf of the entire UN membership. It is therefore most surprising to find the said Council wielding powers over and above the entire membership in matters of international peace and security. International peace and security it must be remembered is the foremost purpose of the UN. However to say that the UN Security Council is powerful would be missing the point for the real power is wielded not by the Council as such but by the five permanent members. Each of the permanent members wields a veto over any decision of the Council in non-procedural issues. In this regard Article 27 provides that:

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

³⁹ Report of the High Level Panel on Threats, Challenges and Change, *A more Secure World: Our Shared Responsibility*, p.79-83.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

It follows that any of the permanent members can block any non-procedural decision of the Security Council. This is prima facie undemocratic. The seriousness of it all is that the entire Security Council and UN membership can be held at ransom by a negative vote of a single member. There are numerous instances in which the Security Council has been so paralyzed but the most remarkable instance arose during the Korean conflict in 1950 when the North Korea invaded in South Korea. It was obvious that that the decision making process was as good as frozen without the cooperation of USSR who was a veto holder. The USSR was actively supporting the communist forces in Korea and was sure to veto any move by the Council adverse to the invasion.⁴⁰ This case amply demonstrated how the veto by just one member can frustrate the entire UN membership. It is for such reasons that member states are calling for reform of the Charter of UN. The Secretary General in his report titled *In Larger Freedom* notes that member's proposals vary from abolition of the veto to enacting constitutional guidelines to regulate use of veto.⁴¹

The constitutional composition, structure, and powers of the Security Council generate certain legal and political queries. Its composition and the veto often operate to defeat the purposes and principles of the UN. In some cases, opportunistic major powers in the Security Council take advantage of the Council's structure and composition, and powers

⁴⁰ Brecher, "What can the World do if Bush Attacks Iraq?" 5/5/2003

⁴¹ Report of the Secretary General to the 59th session of the UNGA, "In Larger Freedom: Towards Development, Security and Human rights for all", p.41-45.

to illegitimately override international law rights of other member states. I will highlight some of the said legal and political problems.

2.4 Legal and Political Problems Caused By the Current Composition and Voting Rights of the Security Council

2.4.1 Rigidity in amending the Charter

Under Article 108 amendments to the Charter require adoption and ratification by two thirds majority of the GA including all the five permanent members. Any reforms to the Security Council whether by addition of new permanent members, redistribution of the permanent seats, or revision of the concept of permanency, or stripping of permanency and or veto powers will in one way or the other dilute the powers of all or at least one of the current permanent members. Yet, each of the five permanent members must consent to any amendments to the Charter. This creates a stalemate. Rigidity in amendments is worsened by the fact that the Charter does not provide for a party withdrawing from the UN. Other constitutions of international organisations contain withdrawal clauses with varying conditions attached to the right to withdraw. In any event, states are deemed free to withdraw from treaties unless they have expressly or impliedly surrendered the right to withdraw. In the case of the UN Charter which contains no withdrawal clause, ascertaining the conditions or obligations in event of a member withdrawing becomes a problem.

The right to withdraw is practical. In January 1965, Indonesia purported to withdraw from the UN and also the UN specialised agencies. However Indonesia subsequently resumed “full cooperation” with the UN in September 1966 with the Secretary General

termining the purported withdrawal a ‘cessation of cooperation’ as opposed to a withdrawal.⁴²

2.4.2 Veto Powers Exempts Permanent Members From Any Action of Security Council

Another feature of the Charter that generates political complaints is the veto power granted to each of the five permanent members under Article 27 effectively insulates the permanent members from any action by the Security Council. How can the Council to perform its primary responsibility of maintenance of international peace and security when the aggressor is one of its permanent members.

The Council upon whom the maintenance of international peace and security rests is entirely impotent when one of the major powers is involved. The predicament demonstrated itself in the Kosovo crisis. Article 6 of the Charter establishing The International Military Tribunal in Nuremberg established crimes against Peace as:

Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.⁴³

Article 2(4) of the UN Charter prohibits threats of force or use of force by one state against territorial integrity or political independence of any other state. The General Assembly in *Resolution 2131, Declaration on the Inadmissibility of Intervention* reinforced the view that a forceful military intervention in any country is aggression and a crime without justification.

⁴² *Withdrawal from the UN* (1965)14 ICLQ p.637.

⁴³ The Nuremberg judgment, The International Military Tribunal Nuremberg (1946) Cmd.6964 41 AJIL 1947, p.172.

The military action by NATO was without sanction of the Security Council and was clearly a crime of aggression on which the Security Council ideally ought to have acted. However, USA, France, and Britain all permanent members of the Security Council were amongst the aggressors in Kosovo. Any issue brought to the Security Council against the aggressors had no chance. The same would be vetoed by the same aggressor.

Putting a "NATO" label on aggressive policy and conduct does not give that conduct any sanctity. The North Atlantic Treaty pledged its signatories to refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations, and it explicitly recognized "the primary responsibility of the Security Council for the maintenance of international peace and security." Obviously, in bypassing UN approval for the invasion, NATO violated Article 2(4) of the Charter and committed crimes against peace defined in the Nuremberg trials.

If the threat to international peace and security was as grave as NATO would have us believe or as to warrant intervention, then the Security Council would have been the best forum to deal with the situation. As it turned out the Security Council was simply bypassed and the entire world watched helplessly as a regional organization led by the three out of the five permanent members violated the territorial integrity of Yugoslavia. Both Yugoslavia and Russia attempted to bring the matter to the Security Council but without any success as Britain, USA, and France opposed. Ultimately, the Security Council was not involved until their NATO bombs had crushed Yugoslavia and of

course, not until the interests of the aggressor permanent members had been secured. If the war for Kosovo proved anything to the UN members, it is that the permanent members are not bound by the provisions of the Charter. Viewed another way, the UN members are completely helpless when the aggressor is a permanent member of the Security Council.

2.4.3 International Criminal Tribunals Represents Victors' Justice

The manner of establishment and the persons tried by International Criminal Tribunals demonstrates that the said tribunals normally represent the victor's justice. Consequently, they do not command international respect by jurists and politicians.

In the case of World War II, two International Military Tribunals were established to try the war crimes. The Nuremberg Tribunal was established by a joint Declaration on 1st November 1943 between the USSR, UK, and the USA. Unsurprisingly, the Nuremberg Tribunal consisted representatives of the three powers in addition to France. The Tokyo Tribunal was established on 19th January 1946 by Potsdam Declaration of 20th July 1945. This time, it was by an agreement between the USSR, the UK, the USA, and China. The Nuremberg Tribunal tried 22 leaders of the Third Reich while the Tokyo Tribunal tried 22 Japanese. The Nuremberg Trials convicted 19 out of the 22 while the Tokyo Tribunal convicted 26 out of the 28 defendants.

There is no doubt that the defendants were responsible for appalling atrocities, but, as the Indian judge on the tribunal noted in his dissenting opinion:

The victorious allies had themselves committed grave crimes, and the US atomic bombings of Hiroshima and Nagasaki were the most horrific war crimes of the Pacific War but only the atrocities committed by the Japanese were punished. In short, the war crimes trials represented 'victors' justice.⁴⁴

Since then, the UN Security Council has set up three International Criminal Tribunals. One dealing with Yugoslavia wars (set up in 1993), one with Rwanda (set up in 1994), and the last one dealing with Liberia. The resolutions setting up the tribunals escaped veto by the interested members of the Security Council because the establishing statutes are framed in such a way as not to encroach on any national of the involved permanent members. The enabling resolution for the ICTR, for example, is worded such that French citizen who shipped arms to the organizers of the genocide in Rwanda and the French government could not be prosecuted.⁴⁵

Over the past six years, the ICTY has indicted some 84 individuals for war crimes. But because the Tribunal is dependent on others to provide it with evidence, not all those who have committed serious atrocities have been indicted. In particular, the Croatian military leaders responsible for Operation Storm, in which two hundred thousand Serbs in the Krajina region of Croatia were ethnically cleansed and/or driven out and killed have not been indicted, in large part because the USA, which aided the operation, has refused to provide the necessary evidence or arrest suspects.

Democratizing the UN Security Council should aim at making international criminal justice system a truly impartial system. The victors justice represented in the International

⁴⁴ The Nuremberg Judgment, *supra*.

⁴⁵ UNSC Resolution 550 (1984).

Criminal Tribunals set up by the Security Council in its current composition, and decision making process does not command much respect in the international community.

2.4.4 Charter Makes Permanent Members of Security Council Judges of Their Own Causes

Article 27(3) of the Charter provides that members of the Security Council shall abstain from voting in decisions under chapter VI of the Charter. Decisions on the existence of a breach of peace, act of aggression, or a threat to peace are not covered since the same are made under Chapter VII, of the Charter. Therefore, under Article 27(3), an interested member may vote in a matter in which he is a party in determining a threat to international peace and security, a breach of peace or aggression. This is against the principle of *nemo iudex sua causa* because in most cases, actions of the Security Council entail a political determination of the party's international law rights. The maxim is a general principle of law recognized by the civilized nations.⁴⁶

In the Lockerbie Aerial Incident matter, USA and UK sat in the Security Council to determine whether Libya had breached the 1971 *Montreal Convention on Suppression of Unlawful Acts against the Safety of Civil Aviation*. They voted to compel Libya to *surrender its suspected citizens to themselves for trial*.⁴⁷

In the case of *Effects of Awards of Compensation made by the United Nations Administrative Tribunal* case, the International Court of Justice held that in view of

⁴⁶ International Law as applied by International Courts and Tribunals, Vol. III Schwirzenberger, p.85.

⁴⁷ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention. Libya and Scotland* ICJ Rep. 1992.

the GA's "composition and function", the GA was unsuited to act itself as judicial organ in disputes between itself and members of staff of the organisation.⁴⁸ The court observed that one party to the dispute was the UNO itself.

And in the *Mosul* case, the PCIJ observed that from a practical stand point, to require that the representatives of the parties should accept the Council's decision would be tantamount to giving them a right of veto, enabling them to prevent any decision from being reached.⁴⁹

The reasoning in the Mosul Case and in the Effects of the Awards remains valid and applies with equal force to the operations of the Security Council. Though the right of the permanent members to sit as judges in their own causes in Chapter VII of the Charter is constitutional, it is an anomaly which is targeted by those calling for reforms of the UN Charter. In Chapter 4 of the study, I will highlight some of the proposals made by member states on issue of *nemo iudex in sua causa*.

2.4.5 Selective maintenance of international peace and security

Under Article 39, the Charter reserves for Security Council the exclusive powers of determining a threat to peace, breach of the same, or an act of aggression. The remedial action is also to be determined by the Security Council. Enforcement may take non-military actions under Article 41 or military action by air, sea, and land forces under Article 42.

⁴⁸ (1954) ICJ Rep. 1954, p.47.

⁴⁹ (1925) Series B, No. 12 IWCR 722.

No action is ever taken against the interests of major powers i.e. the USA, or former USSR. Their unilateral invasions of the sovereign states of Grenada and Afghanistan, Kosovo, Iraq, respectively were acts aggression and breaches of international order. However, being holders of the veto and permanent members of the council, no such action could be taken. This is to be contrasted with Iraq's invasion of Kuwait in 1990 when the Security Council swiftly gathered an international force that kicked Iraq out of Kuwait. If Iraq were in the position of a permanent member, it would certainly have vetoed that decision of the council. This demonstrates Security Council's selectivity when it comes to actions under Chapter VII of the UN Charter.

It is not a wonder then that some issues have been before UN organs for 40 years and yet no action has been taken. The Palestine-Israel dispute commonly referred to as the Palestinian question and the Middle East issues in general are good examples.

It cannot be denied that the Middle East is a crucial issue which continues to threaten international peace and security. Moreover, in an organization where the international law created by the Charter is meant to be applied uniformly, why should some issues threaten international peace for over 40 years without Security Council acting yet Iraq Invasion of Kuwait is resolved by force in less than six months? A good explanation here is that all the resolutions of the General Assembly with regard to Palestinian land are against the Israel's expansionist policies in the region. Israel being a key ally of the USA in the region is protected by the US veto in the Security Council. In the incident of

Israeli's expropriation of Palestinian land which was clearly in breach of subsisting Councils resolutions, and the 1949 *Fourth Geneva Convention on the Protection of Civilians in Times of War*, the US vetoed the draft resolution calling upon Israel the occupying power to rescind its orders for expropriation of 53 hectares of land in East Jerusalem.

Getting the Security Council to act against illegitimate interests of the veto holders and their cronies would involve a fundamental change in the constitution of the United Nations.

2.4.6 Conclusion on equality before the law at the UN Security Council

Article 24(1), of the Charter provides that,

To ensure prompt and effective action by the United Nations, members confer on the Security Council primary responsibility of maintenance of international peace and security and agree that in carrying out its functions under the Charter, the Security Council would be acting on their behalf.

In Article 24(2), the members stipulated that in discharging its duties under the Charter, the Security Council shall act in accordance with the purposes and principle of the Charter.

For effectiveness, the Security Council was constituted as an organ of limited membership. The five permanent members earned their permanent membership by virtue of their victory in the 2nd World War. Further, their military and economic might was then indispensable in maintaining international peace and security. Under Article 23(1) of the Charter, the ten non-permanent members are elected by the GA,

...due regard being especially paid in the first instance to the contribution of the members of the United Nations to the maintenance of international peace and security and to other purposes of the organization, and also to equitable geographical distribution.

Whereas the formula for electing the five permanent members of the Security Council was logical and perhaps the only workable in 1945, geopolitical changes 60 years later have made the said formula irrelevant.

Under the said Article 23(1), member's contribution to maintenance of international peace and security continues to be the main criteria for membership in the Security Council. Consequently, permanent members whose contribution has considerably declined have no legitimate basis for continuing to enjoy permanent membership and veto in the Security Council. In the same vein, there is no legitimate ground for denying permanent membership and or veto to the UN members whose contribution to maintenance of international peace and security surpasses that of some of the current permanent members.

As it is however, the permanent members are named in the Charter. They therefore enjoy a constitutional right to the permanent membership and the veto. This anomaly in itself calls for reforms of the constitutive document so as to bring the structure of the Security Council in line with today's reality. In addition, introduce a non-static formula for electing all future members of the Security Council.

The current composition and decision making structure of the Security Council makes it difficult for the Security Council to adhere to the purposes and principles of the United Nations as stipulated in Article 24 (2) of the Charter in discharging its functions. Selfish

interests of the powerful member states have diverted functions of the Security Council to serve their selfish interests.

Member's states whose international law rights have been prejudiced by the Security Council's composition and structure have been at the forefront in calling for reforms to the Charter. In particular, they want the Security Council to be made more representative of the UN membership at large. In their view, democratization of the Security Council would ensure that member states enjoy equality before international law and the Security Council. In Chapter 3 of the study, I will deal with specific cases of alleged contravention of Article 24(2) of the Charter by Security Council acting for purposes extraneous to the Charter or contrary to the principles thereof.

2.5.1 The ICJ

In the preceding part of chapter 1 I have examined the level of the democracy, representative character, and equality before the law in the UN Security Council. Hereinafter, I will contrast the representative character, democracy, and equality before the law in the ICJ with the same parameters in Security Council. I have chosen the ICJ because it is the principal judicial organ of the UN. Its activities have a direct bearing on member states rights in international law. I will therefore highlight the provisions that safeguard member state's equality before the court and International law. The ICJ is established under Chapter XIV of the UN Charter. Article 92 provides the ICJ shall be the principal judicial organ of the UN and shall function in accordance with the Statute of ICJ annexed to the Charter of UN.

2.5.2 Composition of the Court

Under Article 2 of the Statute of ICJ, the court is comprised of an independent body of fifteen judges. Under Article 4 of the Statute of ICJ, the judges are appointed by the GA jointly with the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration.

Under Article 2 of the Statute, the only requirement to their appointment are that they be independent, be persons of high moral character, possess qualifications required in the respective member states for appointment to judicial offices or are jurisconsults of recognized competence in international law.

Comparing the requirement of independence of the judges with that of the members of the Security Council, one finds that under Article 28(3) of the UN Charter, actors in the Security Council are governments through their representatives. It is therefore clear that while the ICJ acts independently in determining member states international law rights, findings of threats to and breaches of international peace and security are made by the states who are members of the Security Council. There cannot be equality before the law in cases where interested parties sit in judgment over their own causes. The US-Iraq matters before the Security Council demonstrate the point.

Quite apart from this requirement there are many other safeguards which are meant to bolster independence of the court. Under Article 3(1), no two judges may be nationals of the same state.

As if to ensure that the Security Council has no control over the judges, Article 8 of the statute makes it clear that the Security Council and the GA shall act independently of each other when making their respective appointments. In a further clarification, Article 10(3) specifies that the vote for the appointment of a judge shall be taken without distinction as to the permanent and non- permanent status of members.

Since the Statute ensures that the Court is an independent body of judges, it is clear that the member states intended that no state would have any influence over the court in determination of the disputes before it. This goes along way in securing equality of the litigants before the court. This is juridical equality described in the *Declaration On Principles Of International Law Concerning Friendly Relations And Co- Operation Among States In Accordance With The Charter Of The United Nations*.

The said Declaration provides that,

All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements;

- (a) States are juridical equal;
- (b) Each state enjoys the rights inherent in full sovereignty
- (c) Each state has the duty to respect the personality of the other states.
- (d) The territorial integrity and political independence of the state is inviolable
- (e) Each state has the right to freely choose and develop its political, social, economic and cultural systems.

- (f) Each state has the right to comply fully and in good faith with its international obligations and to live in peace with the other states.....

As in the municipal systems, the judges are given a nine-year working contract, which is akin to the security of tenure granted to judges. This is meant to ensure that the judges are in a position to decide without fear or favor. Article 18 of the Statute provides that no member of the court can be dismissed unless in the unanimous opinion of the court he has ceased to fulfill the required conditions. Impartiality is further secured by Article 17 which requires that no judge shall act as an agent, counsel or, advocate in any case for which he has previously taken part as an agent, counsel or advocate for one of the parties or as a member of a national or international court or of commission of inquiry or in any other capacity.

Article 31(2) of the Statute provides that if the Bench of the court includes a judge of nationality of one of the parties, the other party may choose a judge to sit upon the bench. And in Art 31(3), if the bench has no judge from any of the party states, each of the parties may proceed to choose their own judge.

The statute leaves absolutely no room for institutionalized inequalities between the parties in the discharge of its duties. Even when the court is dealing with non- members, Article 35(2) of the statute expressly prohibits the Security Council from imposing conditions that place either party in a position of inequality before the court. This is to be compared with the Security Council where, members vote in matters in which they are directly interested except in decisions under chapter VI. The decisions of the ICJ are binding on the parties to the dispute only and again only in respect of the particular

dispute. In conclusion, equality before the law and the court is constitutionally guaranteed and practiced except as noted herein below.

2.5.3 Drawbacks to equality of Parties before the ICJ

The main drawback to equality of the parties before the ICJ is that under Article 94(2) of the UN Charter, it relies on the Security Council to enforce its judgments in event of non-compliance by a party.

This now brings us back to the same Security Council, which as we have already concluded performs its functions selectively undertakes enforcement action in a selective manner. Surprisingly, Article 94(2) of the UN Charter makes enforcement of ICJ judgments discretionary at the option of the Security Council. The words are,

...the other party may have recourse to the Security Council which if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

Despite Article 59 of the Statute stipulating that decisions of the ICJ are binding to the parties in that particular dispute, question remains as to the binding character of the judgment if one of the parties is a permanent member of the Security Council. Such a member can subsequently veto enforcement measures proposed by the Security Council. In the *Case of Military and Paramilitary Activities in and against Nicaragua* the Court awarded Nicaragua US\$17 billion against USA as reparations for the illegal military and paramilitary activities of the US against the territorial integrity of Nicaragua.⁵⁰ The USA ignored the judgments. The US also ignored General Assembly resolution 42/18 calling

⁵⁰ *Case of the Military and Paramilitary Activities in and against Nicaragua.*

on the US to comply with the ICJ judgment. Of course the US would have blocked any attempt by Nicaragua to enforce the judgment at the Security Council. The US went to ahead to fund opposition parties in Nicaragua to the tune of US\$9million leading to the defeat of the Sandinista government. Relying on the Security Council to enforce its judgment places parties before the ICJ in a position of inequality.

The Statute of ICJ otherwise exemplifies sovereign equality of states. However, the discretion of the Security Council in enforcing the judgments returns the parties who have litigated on equal footing to positions of potential inequality before international law. This draw back on the ICJ brings us back to the issue of equitable representation of the UN member states in the Security Council.

2.6 Equality of Member States before the IAEA

The IAEA resembles the Security Council in several aspects. The Nuclear Non-Proliferation Treaty (NPT) is administered by the IAEA. The IAEA has a working agreement with the UN and deals with matters of nuclear proliferation which is of direct interest to the UN Security Council's primary responsibility of maintaining international peace and security. For these reasons I will examine equality of member states before the international law regime created by the NPT.

The treaty on Non –Proliferation of Nuclear Weapons also referred to as NPT was opened for signature on 1st July 1968. It entered into force on 5th March 1970. As at year 2000, a total of 187 states had signed the NPT.

The key provisions of the NPT are:

Under Article I, nuclear weapon states undertake not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices and not to assist encourage or induce any non-nuclear-weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices.

Under Article II, each non-nuclear-weapon state pledges not to receive, manufacture, or otherwise acquire nuclear weapons or other nuclear explosive devices and not to seek or receive assistance in their manufacture.

Article III obliges each non-nuclear-weapon state to accept comprehensive international safeguards measures through agreements negotiated with the IAEA. The intent of these safeguards is to deter and detect diversion of nuclear materials for nuclear weapons.

Under Article IV, parties may engage in peaceful nuclear programs in a manner consistent with Articles I and II and are expected to assist the nuclear programs of other parties, with special attention to the needs of developing countries.

Article VI obligates all parties to pursue good-faith negotiations on effective measures relating to ending the nuclear arms race at an early date to nuclear disarmament, and to achieving a treaty on general and complete disarmament under strict and effective international control.

There are striking similarities and connections express and implied between the NPT and the chapter VI of the UN Charter on the Security Council.

First, article VIII (2) of NPT provides that the NPT cannot be amended without approval of all the nuclear weapons states. This provision is strikingly similar to article 108 of the Charter of UN which provides that the UN Charter cannot be amended without the concurring votes of the five permanent members of the Security Council. The permanent members of the UN Security Council are also the nuclear weapons states under the NPT.

Secondly, while Article IX (3) of the NPT, provides that for purposes of the treaty, nuclear weapons state is one which has manufactured and exploded a nuclear weapon or other nuclear explosive devise prior to 1st January 1967, the permanent members of the Security Council under Article 27 of the Charter of UN happen to be the only ones qualifying as nuclear weapons states.

Thirdly, it is evident from the key provisions hereinabove that while article 24 of the charter of UN protects and preserves the privileged positions of the five permanent members of the Security Council by naming them as the permanent members, the NPT preserves the nuclear weapons exclusivity of the same states as the only nuclear weapons states of the world by prohibiting others form acquiring nuclear weapons vide Article II.

Finally, “the nine members most advanced in the technology of atomic energy” are assured of permanent membership in the twenty five member Board of Governors of the IAEA. Their membership in the board is for all practical purposes permanent in that outgoing board is bound by the provisions to designate the most advanced states for membership in the incoming board. All members of the Security Council are amongst the most advanced nations in nuclear technology. In any event the five permanent members of the Security Council that is USA, Russia, Britain, China and France are the only acknowledged nuclear powers. The rest 25 members are elected at the General Conference. Each governor represents one member state.

In conclusion, the IAEA is an international organization that has far reaching constitutional powers to arrange transfers, investigate, audit and report all dealings in nuclear materials. The powers are meant to prevent nuclear weapons proliferation and ensure safe civilian use of the same. However, these powers are misused by the nuclear club to perpetuate their nuclear capability and monopoly. Whereas the stated objective of the NPT under Article VI is to ultimately eliminate nuclear weapons, one finds a situation where the safeguard measures in article III of NPT are applied strictly against the non-nuclear states while the nuclear weapons states make no genuine effort towards eliminating their nuclear stockpiles under article VI of the NPT. To the contrary, the USA has declined to sign the Comprehensive Test Ban Treaty and withdrawn from the (retain). This too is a case of inequitable application of the international law regime created by the NPT.

2.7.1 The ICC

The 1998 *Rome Statute of ICC* is important to this study because it represents a movement of the UN member states from the current UN system of punishing international crimes. There will certainly be a competition for legitimacy between the ICC and the International Criminal Tribunals established by the UN Security Council. In my view, the ICC commands greater legitimacy as it is established by the ICC member states under a treaty that respects equality of all states before the international law.

As stated hereinabove, the International Criminal Tribunals established by the UN Security Council dispense victor's justice. Under the said regime, there is no possibility of any suspect allied to any of the permanent members of the UN Security Council being prosecuted. Veto powers would apply against such a move. Starting with the dropping of atomic bombs on civilian targets in Hiroshima and Nagasaki during the 2nd world war to starting wars of aggression in Yugoslavia and Iraq, permanent members of the Security Council have committed war crimes and crimes against humanity with impunity.⁵¹ Not a single member of the armed forces of the permanent members of the Security Council has ever been prosecuted under any International Military or Criminal Tribunal. Unhappy with the victor's justice, international community finally devised a mechanism of trying and punishing international crimes without regard to nationality of the culprits. This led to the *1998 Rome Statute of the International Criminal Court*.

⁵¹ *The ICC in the Security Council*, Article by Global Policy Forum. Available at global_policy@global_policy.org

I will deal with each organ separately.

2.7.2 The Assembly of States

This is a main organ under the statute. As in its name, it is an assembly of the states who are parties to the Statute. In this assembly there is what one may call an absolute juridical equality of the member states. Under Article 112(1), each member state shall be represented by one representative who may be accompanied by alternates and advisers. Each state party has one vote and decisions are taken by voting. Despite this requirement of the rule by majority, Art. 112(7) require that every effort shall be made to reach decisions by consensus in the Assembly. It is only when decisions cannot be reached by consensus on matters of procedure that a decision is approved by a simple majority of the members present and voting. Decisions on substantive issues are decided by a two-thirds majority. Under this article, the right to vote may be lost if a member state remains in arrears of an amount equivalent to its two years dues. However, if the default is occasioned by circumstances beyond the control of the defaulter, the Assembly may nevertheless allow such a party to vote. The provisions show a case of the member states bending over backwards to uphold the equality states. This is the sort of equality before the law that those campaigning for reforms in the Security Council would want.

Financing of the ICC is the other element that demonstrates that there can be equality before the law even when budgetary contributions by members are not equal. Under Article 115 the ICC is to be financed by,

- a. Assessed contributions of the member states.

- b. Funds provided by the UN, subject to the approval of the GA. This is particularly so when the expenses are incurred in a matter referred to the court by the Security Council. The statute governs all matters of finance.

Members' contributions are assessed in accordance with an agreed scale of assessment, based on the scale adopted by the UN for its regular budget and adjusted in accordance with the principles on which the scale is based. Applying these assessments to the ICC, it will mean that the major powers will be meeting more than half of the ICC budget. Unlike in the UN Security Council however, these major contributors will not be in any privileged position. They will not be having a veto and their negative vote will not stay action by the ICC. The other main organ of the treaty is the Court which I will discuss herein below.

2.7.3 The Court

The court is composed of the

- a. The presidency,
- b. An Appeals Division , a trial division and a pre- trial division;
- c. The prosecutor
- d. The registry.

Judges man the entire presidency and all the divisions. In total there are eighteen judges.

The judges in the ICC will arbitrate over indictments against persons who were once senior in their states and who may still be very influential within the countries and

beyond. There will be a lot of pressure on the judges from the affected governments to decide the matters in a manner favorable to their interest. To ensure that all the states remain equals before the court and that the states comparative political strength does not sway the judges, the statute has provided the following in Article 40,

- a. That the judges shall be independent in the performance of their functions. That a judge shall not participate in any case in which his or her impartiality might reasonably be doubted. He can be disqualified only in the manner set out in the statute itself and that any question as to the disqualification of judge shall be determined by an absolute majority of the judges themselves.

No room is left for the powerful countries to influence the outcome of matters before the court. Unlike in the Security Council where the representatives' of country are agents of the respective state, the judges have absolutely nothing to do with their governments. In fact, the requirement that the judges act independently requires that they be independent even from their own governments. With those guarantees, one is entitled to conclude that the states before the court are indeed equal before the Rome Statute of ICC. Anything to the contrary would be purely personal on the part of the judges. If the court was sitting today, I believe that Libya would have been more willing to surrender the two suspects in the Lockerbie Aerial Incident to the court, as impartiality would be guaranteed.

2.7.4 The Office of the Prosecutor

Article 42 establishes the office of the prosecutor as an independent organ separate from the court. As would be expected, the office is responsible for investigations and prosecutions. In the discharge of his duties, the prosecutor just like the judges is prohibited from taking instructions from any external source. The external source includes powerful governments, which may ordinarily want to dictate to the Prosecutor. To ensure that the office is truly independent, the Statute requires that the Prosecutor and the Deputy Prosecutor be from different nationalities.

The prosecutor is appointed by a secret ballot by an absolute majority of the Assembly of States. As with the judges, Article 42 (5) prohibits the Prosecutor and the deputy prosecutor from engaging in any business, which may compromise his position in the Court. The requirement of impartiality is so great on the part of the prosecutor that even the accused persons are given a right to move the court to disqualify the prosecutor on any of the grounds set out in the Statute. Indeed, before taking up their offices, both the prosecutor and the Judges are required by Article 45 to make a solemn undertaking in open court that they will exercise their functions impartially and conscientiously. During their engagement to the court, the salaries of these officers cannot be altered adversely and they enjoy the same privileges and immunities as are accorded to heads of diplomatic missions during and after their service to the court. Even the accused is guaranteed the right to a fair trial conducted impartially. The prosecutor too has the security of tenure like the judges. Both the judges and the prosecutor can only be removed from their

offices by the Assembly of states and by a secret ballot. All these checks, guarantees and immunities are meant to ensure that there is true impartiality and equality of the sovereign states whose citizens and actions may be subjected to the jurisdiction of the court.

2.7.5 State Cooperation with the ICC

All the member states are expected to cooperate with the court fully in the discharge of its functions. Pursuant thereto, the court has the powers under Article 87 to call upon any member state to cooperate. If a state fails to cooperate with the court the court will make a finding to that effect and refer the matter to the Assembly of States and if the Security Council had referred the matter to the court, report the default to the Security Council.

When it comes to non-members, the Statute recognizes their essential sovereignty in all matters including cooperating with the court. Accordingly, Article 87(5) provides that the court can only request cooperation from a non- member state on an ad hoc arrangement. Non members unlike in the UN charter are not bound by the terms of treaty.

2.7.6 Enforcement of judgments

ICC's judgments will not be as toothless as the UNGA Resolutions. Their enforcement will also not be discretionally at the option of the Security Council and ICJ judgments. Once a sentence is passed the convict is jailed in anyone of the member countries. Under Article 105, all the states are to share the responsibility for enforcing sentences of imprisonment and the sentence shall be binding on all the state parties. None of the

parties should modify it. With respect to fines and forfeitures, the Statute enjoins the state parties to assist the court and take measures to recover the value of the proceeds, property or assets as ordered by the court to be forfeited.

2.7.7 Amendments to the Statute

Because the state parties recognize that all states are juridical equal any amendment to which they have not consented, the statute provides that amendments shall be by consensus failing which, by a two thirds majority. However, amendments that go into the jurisdiction of the court i.e., to articles 5, 6, and 7 of the statute shall only come into force as against the parties consenting to the amendments only. For the avoidance of doubts, the statute provides that the court will not have jurisdiction under the amendment against a non- consenting state. This requirement of unanimity in amendment and exemption in default is to be contrasted with Article 108 of the UN charter which requires not only a two-thirds majority but most importantly, requires unanimity of the permanent members. Whereas the sovereign equality is specifically safeguarded in the former it is expressly disregarded in the latter. Under Article 121(6), state parties reserve the right to withdraw from the treaty if amendments they oppose are adopted by seven eighths of the membership.

2.7.8 Withdrawal from the treaty

As if all those safeguards on the equality of member states before the Statute are not enough, the statute grants the member states the right to withdraw from the treaty in Article 127. The only condition is that a state give one year written notice and discharge

its outstanding obligations as at the time of withdrawing. In contrast, the UN charter does not provide for the withdrawal of members. Members are left to rely on the customary international law on the rights of a state to withdraw from a treaty.

2.7.9 Jurisdiction

A prosecution may be triggered in three ways:

- a. By the Security Council acting under Chapter VII of the UN Charter,
- b. By a State Party to the statute and
- c. By the Prosecutor acting on her own initiative. (Article 13)

When the Security Council refers a "situation," to the court, the Court will be able to exercise its jurisdiction without regard to whether interested countries, such as the country of a suspect's nationality, have accepted the Court's jurisdiction. The authority for the Court's jurisdiction in such circumstances, like the authority of the ad hoc tribunals created by the Security Council, stems from the Security Council's authority to maintain international peace and security. Thus, the Court's reach is greatest under Security Council mandate. As with any Security Council action, referrals to the Court will require the support of all five permanent members, as well as an overall majority of the Security Council. This form of triggering the Court's jurisdiction represents an institutionalization of the precedent of the ad hoc tribunals.

Apart from the Security Council referrals, the court under Article 12(2), can only exercise its jurisdiction if either,

- a. The state on whose territory the conduct in question occurred or,
- b. If the state of nationality of the accused has accepted the Court's jurisdiction or
- c. States accept the Court's jurisdiction by ratifying the treaty or filing an ad hoc declaration.

What is most relevant to this study is the UN member states rejection of the inequality before the law evident in the International Criminal Tribunals. Further, their move to establish a parallel international criminal justice system which assures equality before the legal regime created there under.

1.8 Conclusion on Equality before the Law in Various International Organizations

Compared to Rome Statute of the ICC, Statute of ICJ, NPT, and even Chapter IV of the UN Charter on the General Assembly, the Chapter V of UN Charter on the security council fails to make provisions to ensure that UN member states are accorded equality before the international law regime created by the UN Charter and overseen to a large extent by the Security Council.

This occurred because the UN founding fathers created the Security Council as a powerful organ in charge of maintaining international peace and security. The organ is the UN Security Council. For effectiveness, it was constituted as an organ of limited membership wielding immense powers in matters of international peace and security.

However, the immense powers delegated to the Security Council by the rest of UN membership, was to be exercised on behalf of the entire membership i.e., a collective security system. Foreseeing that the said powers could be abused by the donee, they expressly stipulated in Article 24(2) that the said powers shall be used for the purposes set out in article I and in accordance with the principles as set out in Article 2.

However, the founding fathers failed to make sufficient safeguards against abuse of the powers conferred on the Security Council. They failed to provide checks and balances on the Security Council's use and or abuse of the said powers. By coincidence, the geopolitics changed in a manner that enabled some major powers in the Security Council to hijack the Security Council for their foreign policy. Consequently, the Security Council often acts on behalf of the said major powers as opposed to the entire UN membership. In so doing, the Security Council uses the Charter powers for purposes extraneous to the charter and in contravention of the principles of the Charter.

The ultimate consequence is inequality of UN member states before the international law regime created by the Charter of UN. Some member states' international law rights are prejudiced and at times illegitimately overridden by the very Security Council meant to protect them. Members are illegitimately placed in a position of inequality before the international law regimes and organs they created as sovereign equals.

To remedy this anomaly, member states have been calling for reforms to the Charter of UN. In my view, member states equality before the Security Council and the UN system may be achieved by providing equitable representation of the entire UN membership in the Security Council. Put another way, democratize the UN Security Council to reflect the often competing interests of various groups and member states of the entire UN.

Alternatively, equality before the Security Council and international law created by the Charter of UN may be achieved by placing checks and balances on the Security Council's powers. I will delve into the details of the said proposals and recommendations in Chapter 4. In the next chapter, I will examine the particular cases where the Security Council is accused of acting outside the purposes of UN, contravening the principles thereof, or otherwise putting a member state in a position of inequality before the international law regime of the UN Charter.

CHAPTER: 3

CASE STUDIES DEMONSTRATIVE OF INEQUALITY OF STATES BEFORE U.N SECURITY COUNCIL

3.1 Introduction to Chapter 3

In the previous chapter I examined and contrasted the provisions safeguarding member states equality before various international law regimes created under different treaties and organizations. The UN Security Council under the Charter of UN is amongst those examined and is the focus of this study. In chapter 2 hereof, I found that the Charter of UN does not have adequate checks and balances against potential abuse of the immense powers entrusted to the Security Council by the rest of UN membership. That consequently some powers led by the USA have been able to take advantage of the static provisions and the geopolitical changes to appropriate the Security Council to their selfish agendas. Consequently, international law rights of some member states have been violated.

In this chapter, I will deal with specific cases of alleged violation of the international law rights of member states by the UN Security Council. I will demonstrate the prejudice occasioned to the victim UN member states. I have picked cases in which the major powers in the Security Council have vested interests in the action or inaction by the Security Council.

3.2.1 Aerial incident over Lockerbie

This case demonstrates how the Security Council can overstep its mandate and trump on international law rights of a UN member state at the illegitimate instigation of major powers in the Security Council.

3.2.2 Background

On 21 December 1988, Pan Am aircraft flight 103 crashed at Lockerbie, Scotland. In November 1991, the Lord Advocate of Scotland charged two Libyan nationals alleging that they had caused a bomb to be placed aboard Pan Am aircraft flight 103 on 21 December 1988. *The flight bound to New York from London exploded midair over Lockerbie Scotland, crashing and killing all onboard.*

The charges constituted an offence within the meaning of Article 1 of the *1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* which, in the relevant part, provides:

"Any person commits an offence if he unlawfully and intentionally:

- (a) Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft or,
- (b) Destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or Article 1
- (c) Places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight."

The said charge was communicated to Libya. At the time the charge was communicated to Libya, or shortly thereafter, the accused were present in the territory of Libya and remained there since. Thereafter, Libya took such measures as were necessary to establish its jurisdiction over the offences alleged therein. Libya also took measures to ensure the presence of the accused in Libya in order to enable criminal proceedings to be instituted and initiated a preliminary inquiry into the facts.

Libyan investigators sought information from the authorities in the UK, and expressed their willingness to travel to the UK or elsewhere to review the evidence or cooperate with the investigations in those countries. The Libyan Government also sent communications to the Attorney General of Scotland requesting his co-operation in the Libyan judicial investigations. Libya received no response to any of these initiatives, and the UK refused to co-operate in any respect with the Libyan investigations. Libya went ahead to invite the UK to agree to arbitration in accordance with Article 14 (1) of the Montreal Convention.

The UK failed to respond formally. Nonetheless, the UK Ambassador to the UN stated that the Government of Libya must surrender for trial all those charged with the crime and that Libya's request for arbitration was not relevant.

It was apparent that the dispute could not be settled by negotiation. Through various diplomatic overtures before the UN Security Council and elsewhere, Libya made it clear

that it was willing to settle the dispute by means of a neutral, international arbitration. The UK had persistently rejected this approach and insisted, in violation of the Montreal Convention, that only its courts, or those of the US, were competent to hear the matter. The failure of the UK to respond positively to Libya's requests evidenced its lack of interest in arriving at a negotiated settlement. Accordingly, it was not possible to settle the dispute by negotiation, a conclusion reinforced by the fact that Libya and the UK had already severed their diplomatic relations.

By the same token, and in view of the total lack of any positive response by the UK to Libya's proposal to arbitrate, the Parties were unable to agree on the organization of an arbitration to hear the matter. In the light of the ongoing violations by the UK of the Montreal Convention and the UK's refusal to enter into arbitration, the ICJ had jurisdiction to hear Libya's claims.

There was no extradition treaty in force between Libya and the UK. Consequently, Libya could not legitimately extradite the accused persons to Scotland or US. So, Libya submitted the case to its competent authorities for prosecution of the suspects, which authorities were to decide in the same manner as in the case of any ordinary offence of a serious nature under Libyan law.

In light of the facts described above, it is clear that a dispute existed between Libya and the UK which dispute had to be resolved either by negotiation, arbitration or by the ICJ. Whereas Libya repeatedly indicated that it was ready and willing to fulfill its obligations

under the Convention, the UK made it clear that was not interested in proceeding within the framework established by the Convention. Rather, it was intent on compelling the surrender of the accused persons in violation of the provisions of the Convention. Moreover by refusing to furnish the details of its investigation to the competent authorities in Libya or to co-operate with them, the UK was failing to afford the proper measure of assistance to Libya as required by Article 11(1) of the Montreal Convention.

It was also apparent that Libya had undertaken all the necessary measures relating to the incident as provided for in the Montreal Convention. Thus, despite the efforts of Libya to resolve the matter within the framework of international law, including the Montreal Convention, the UK rejected this approach and continued to adopt a posture pressuring Libya into surrendering the accused to it.

Having reached this dead end, Libya proceeded to the International Court of Justice with a view to getting the Court to direct that the matter be resolved in accordance with the provisions of the Montreal Convention.

Article 36(1) of the Statute of the ICJ provides that the Court's jurisdiction "comprises... all matters specially provided for... in treaties and conventions in force". As Members of the UN, Libya and the UK are parties to the Statute, which forms an integral part of the UN Charter.

Libya and the UK were also parties to the Montreal Convention, which was in force with respect to both Parties at all times material to this case. Article 14 (1) of the Montreal Convention provides,

Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Under the UN charter, the matter was logically to be referred to the ICJ being the principal judicial organ of the Organization under Article 92 of the UN charter. Consequently, a legal dispute existed between two member states in which the ICJ had undisputed jurisdiction.

In my view, Libya was correct and had fulfilled all its international obligations under the international law for the following reasons:

- (a) The Montreal Convention was the only appropriate convention in force between the Parties dealing with the offences listed in Article 1 referred to above. Consequently, the UK was bound to adhere to the provisions of the Montreal Convention relating to the incident.
- (b) Pursuant to Article 5 (2) of the Montreal Convention, Libya was entitled to take such measures as may be necessary to establish its jurisdiction over the offences in question. This is because the alleged offender was present in its territory and was not eligible for extradition pursuant to Article 8 of the Convention. By its actions and threats against Libya, the UK, in violation of Article 5 (2) of the

Convention, was attempting to preclude Libya from establishing its legitimate jurisdiction over the matter.

- (c) Pursuant to Article 5 (3) of the Convention, Libya was entitled to exercise criminal jurisdiction over the matter in accordance with its national law. By its actions and threats, the UK was again attempting to preclude Libya from exercising that right in violation of the Convention.
- (d) Under Article 7 of the Convention, Libya was obliged to submit the case to its competent authorities for the purpose of prosecution a step that Libya had already taken. By its efforts to force Libya to surrender the accused, the UK was attempting to prevent Libya from fulfilling its obligations in this respect in violation of the Convention.
- (e) Under Article 8 (2) of the Convention, extradition is made subject to the laws of the State from which extradition is requested. Under Article 493 (A) of the Libyan Code of Criminal Procedures, Libyan law prohibits the extradition of its nationals. It follows therefore, that there was no basis in either Libyan law or under the Montreal Convention for the extradition of the accused from the territory of Libya, and the UK's efforts to the contrary constituted a violation of this provision of the Montreal Convention.

(f) Under Article 11(1) of the Convention, the UK was under an obligation to afford Libya, as a Contracting State, with the greatest measure of assistance in connection with criminal proceedings brought by Libya in respect of the offences listed in Article 1. By failing to provide such assistance, the UK was breaching its obligations under the Montreal Convention.

(g) The UK was bound by its legal obligations under the Montreal Convention, which obligations required it to act in accordance with the Convention, and only in accordance with the Convention, with respect to the matter involving flight PA 103 and the accused.

So, whereas Libya had fully complied with its own obligations under the Convention, the United Kingdom had breached, and was continuing to breach, those obligations.

Under the Statute of ICJ, the remedies which the Court ought to have granted are the following:-

- (a) Find that Libya had fully complied with all of its obligations under the Montreal Convention;
- (b) Find that the UK had breached, and was continuing to breach, its legal obligations to Libya under Articles 5 (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention;
and

- (c) Find that the UK was under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats of force against Libya.

Whichever way one was to interpret the facts and the applicable international law, the ICJ was set to rule in favor of Libya. That was not a possibility that the two big powers could take. Both UK and the USA are permanent members of the Security Council. It was therefore more profitable for the two states to take the matter to the Security Council. Here, the two states would sit and judge their own cause. For this reason I will now discuss the action taken by the Security Council.

3.2.3 Action of the Security Council

The events that followed demonstrate how the permanent members in total disregard of the applicable international law can confound the UN structure. They demonstrate that the powerful states can wrestle the powers out of the chief judicial organ of the UN and appoint themselves the prosecutors, judges and executors of their own cause. The Security Council did not give the Court a chance to determine the respective rights of the parties. Instead, it passed two resolutions that effectively decided the dispute without any consideration of the applicable international law. It passed binding resolutions compelling Libya to hand over its two suspected nationals to the UK or USA for trial even before the ICJ could deliver its ruling on the legitimacy of that very demand. If the parties had gone by their respective rights and duties under the Montreal Convention, Libya was perfectly entitled to have the matter adjudicated upon by an arbitrator

appointed by the two parties. That would have been a decision on merits based on the evidence, the facts and the applicable international law.

However, since the odds were against UK and USA on the merits of the matter, the two powers decided to use their leverage as permanent members in the Security Council. Here, they would be the judges of their very cause against the unrepresented Libya. Accordingly, the Security Council took up the matter alleging that Libya's failure to surrender the two suspects to either UK or USA for trial amounted to a threat to international peace and security.

To legitimize the two member's demand for extradition of the two suspects, the Security Council on 21st January 1992 adopted a resolution, urging the Libyan government to provide full account and effective response to the requests of the two countries in connection with the destruction of Pan Am aircraft flight 103 over Lockerbie, Scotland.⁵³ The resolution also requested the Secretary General to seek cooperation of the Libyan government to provide full and effective response to the requests. On 31st March 1992, the UN Security Council was at it again. This time, it adopted a resolution imposing sanctions, if Libya did not comply and hand over the two suspects to UK or USA for trial by the 15th April 1992.⁵⁴ Obviously, no impartiality could be expected from the courts of these two states, which had already made up their minds that the loss of the aircraft was an act of terrorism, by the two alleged Libyan Nationals. In any event, the conclusions that it was the Libyans as well as the investigations that led to the same

⁵³ Security Council Res. 731/1992.

⁵⁴ Security Council Res. 748/1992.

were conducted if at all by the biased Anglo - American investigators who despite numerous requests would not let the accused discover the evidence against them. Against all the tenets of a fair trial recognized in the civilized and even the so called uncivilized nations, the UN Security Council ordered Libya to hand over its two national to their enemy accusers. In such a case justice would not be seen to be done much less be actually done.

The gravity of the matter for Libya was that the UN Security Council purported to act under chapter VII of the UN Charter. Under this chapter, all decisions of the Council are binding on all the member states under Art. 25 of the Charter. Further, in accordance with Article 103 of the charter, the orders imposed on Libya by the Security Council override all other obligations of the parties. It is therefore correct to conclude that the sub judicial and decisive intervening resolutions of the Security Council had rendered the Libyan suit in the ICJ without object. Irrespective of whether the obligations are contested by the parties in another forum the ICJ concluded that Libya was to comply first. These sanctions remained in force until 1999 when Libya ultimately gave-in and surrendered the two suspects to a Scottish judge for trial in an independent state Netherlands.

Clearly, this was an unfair state of things in that Libya a sovereign country was in a situation of serious inequality before the two main organs of the UN. The inequality was occasioned by the fact that its accusers were hiding behind the cloak of the Security Council to pursue their selfish interests. The situation left Libya with recourse only to the ICJ whose redress is not binding on the Security Council. The irony of it all is that even if

Libya had succeeded in obtaining a favorable decree against both USA and UK at the ICJ, it would not have been in a position to implement the same because Article 94 (2) of the UN charter provides that noncompliance with the ICJ judgments shall be reported to the Security Council. Libya would in effect have had to report the eventual non-compliance to the UK, USA dominated Security Council. His Excellency Omar Mustafa Muntasser the representative of the Libyan Arab Jamahiriya narrated the tribulations of his country at the UN 50th anniversary in these terms,

Failure of the UN is not due to any defect in the charter. It is due to the absence of political will in the case of the major world powers that want the organization either to become impotent and incapable of performing its tasks by withholding funds, or to surrender to the pressures of those powers and to execute their designs. Regrettably, those few states have succeeded in executing and achieving their objectives. The General Assembly which should be the highest authority in the UN system has had its role marginalized in such a way that it has become a sort of a "wailing wall" where the small and poor countries shed their tears, exchange their woes while nobody listens and nobody cares. Most powers have been concentrated in the Security Council, which has turned into a sort of exclusive club whose activities are governed by selfish interests and where double standards are the order of the day. This has enabled a few members to impose their policies, get their designs adopted and use the council as a tool to impose sanctions on countries, especially small ones in an attempt to subjugate them. Worse still, the Security Council, which is the body entrusted with maintaining international peace and security, has become an instrument of aggression. This situation is untenable and impossible to co-exist with. Lastly, the US has used the Security Council to impose unjust sanctions against Libya, under the pretext of a legal dispute already dealt with in the *Montreal Convention for the suppression of unlawful acts against the safety of civil aviation*.⁵⁵

Unlike the Libyan representative who placed the buck on power politics, I submit that this dead-end is occasioned by failure by the Charter to provide checks and balances on the powers of the Security Council. Alternatively, by lack of equitable representation of Libyan interests in the Security Council. The situation arose because the UN charter allows concurrent jurisdiction of the council and the Court. If there had been an express provision barring the council from dealing with matters which are before the Court, Libya

⁵⁵ The UN at 50: Statements by world leaders: New York 22-24 October p.232-234.

would have had its day in Court. It is contradictory for both the Security Council and the court to exercise concurrent jurisdiction particularly on an issue, which is more legal than political. However, there is no provision barring the Security Council from dealing with matters that are before the ICJ.

This overlapping of the roles of the Security Council and the court appears to have been deliberate on the part of the drafters of the charter. This may be inferred from the express provisions contained in the Charter controlling the relationship between the same Security Council and the GA. Whereas Article 12 of the Charter expressly forbids the General Assembly from making any recommendation with regard to dispute or situation while the Security Council is exercising its functions in respect of that dispute, no such restriction is placed on the functioning of the Security Council when the court is exercising its functions by any provision of the charter or the Statute of the ICJ.

This is quite surprising as it is for the ICJ as the principal judicial organ of the UN to resolve any legal questions that may be in issue between the parties to a dispute. Indeed, quite in line with the spirit of the UN Charter resolutions of such legal disputes by the court is the best way to promote peaceful settlement of international disputes as against any mandatory orders of the Security Council. In fact in making recommendations for peaceful resolution of disputes under chapter VI of the charter, the Security Council is supposed to take into consideration that legal disputes should as a general rule be referred by the parties to the ICJ in accordance with the provisions of the Statute of the Court.⁷

In the case of *United States Diplomatic and Consular Staff in Tehran*, the ICJ went short of accusing the drafters of the charter of deliberately creating a collision between the Security Council and the ICJ in their exercise of their respective functions.⁵⁶ In their judgment, they said,

It does not seem to have occurred to any member of the council that there could be anything irregular in the simultaneous exercise of their respective functions by the court and the Security Council. Nor is there any cause for surprise.

In my view, the simultaneous exercise of jurisdiction by the two bodies immensely prejudices peaceful resolution of international disputes in the ICJ. When the five permanent members are involved directly or indirectly, it is possible for them to overtake the main judicial organ of the UN by dubbing the dispute situation a threat to international peace and security and dealing with it themselves as the UN Security Council. Libya's Aerial incident case is a symbol and a seal of the inequality that the member states encounter before the UN Security Council. It is inequality and double standards when seen against the Council's blind eye to the *Case Concerning The Aerial Incident Of July 3rd 1988* when a US warship equipped with the state of the art radar systems destroyed an innocent Iranian civilian aircraft killing all the 290 passengers and crew onboard

This was against the 1944 Convention on International Civil Aviation and the same 1971 Montreal Convention. Is it conceivable that superpower warship would fail to distinguish a huge 270 seater civilian aircraft from a small military jet? Well that was the American explanation. The Security Council did not even go as far as debating the issue or

⁵⁶ Wade , "US Disappointed with world wide Response to WMD Resolution ", Arms Control Today, December 2004

condemn this admitted American act of terrorism. If destruction of American plane over Scotland was an act of terrorism amounting to a threat to international peace and security, a similar act by Americans cannot be any different. Further more, whereas Libyans were only suspects, the Americans owned up what could only be an intentional act. Equality before international law would require that the Security Council order the USA hand over their respective suspects to the Islamic Republic of Iran for trial. Anything short of that is inequality before international law regime created by the Charter of the United Nations Organization.

3.3. Nuclear Weapons Non-proliferation

The action of the Security Council in matters of nuclear weapons proliferation presents another good example of the double standards employed by the Security Council in discharging its obligations under the UN Charter.

Nuclear weapons proliferation is principally governed by the *1968 Treaty on The Non-Proliferation Of Nuclear Weapons*. The key provisions of the said treaty are;

Under Article 1, the nuclear weapons states undertake not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosives devise , and not to assist encourage or induce any non-nuclear weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devises.

Under Article II, each non nuclear weapon states pledges not to receive, manufacture, or otherwise acquire nuclear weapons or other nuclear explosive devises and not to seek, or receive assistance in their manufacture.

Under article III, each non-nuclear state is obliged to accept comprehensive international safeguards through agreements negotiated with IAEA. The effect of these safeguards is to deter and detect the diversion of nuclear material for nuclear weapons purposes.

Under article VI, all parties are obliged to pursue good faith negotiations on effective measures relating to ending the nuclear arms race at early date, to nuclear disarmament, and to achieve a treaty on general and complete disarmament under strict and effective international control. Only India, Pakistan and Israel have not ratified the treaty at the date hereof.

These provisions represent the main obligations of the NPT member states. However the UN Security Council has, vide its resolution 1540 of 28th April 2004 added onto the NPT obligations without the consent of the member states.

UN Security Council Resolution 1540 of 2004, submitted by the US requires all UN member states to undertake a series of measures to prevent proliferation of biological, chemical, and nuclear weapons, their delivery systems and related materials particularly to prevent their transfer to terrorists and other non-state actors. It specifically prohibits countries from providing any kind of support to non-state actors for the development of

weapons of mass destruction (WMD) and mandates that states adopt laws to prevent the diversion and transfers of WMD and related materials. All states were required by October 28th 2004 to report their efforts to review domestic laws and regulations, and to demonstrate that action was being undertaken to comply with the resolution. By that deadline, only 54 of the 191 countries had submitted the said reports.⁵⁷

The bonafides of the resolution and its sponsors is questionable in the context of the Charter of UN and the NPT as here below,

First, with regard to adherence to the NPT, the US continued breaching the NPT by providing nuclear weapons to be deployed by, and to be stored in other NATO non-nuclear states in Europe. In addition, pilots and other staff of the non-nuclear NATO states under the NPT practice handling and delivering the US nuclear bombs, and non-US war planes have been adapted to deliver US nuclear bombs. This must involve some transfer of some technical nuclear weapons information. NATO states and the US argue that internally, the US controlled the weapons in storage and that no transfer of the weapons or control over them was intended until a decision were made to go to war. As at 2005, the US still provided about 180 tactical B61 nuclear bombs for use by Germany, Belgium, Italy, the Netherlands, and Turkey under NATO agreements. This is a direct breach of article I and II of the NPT.⁵⁸

⁵⁷ Nuclear Non-Proliferation Treaty-Wikipedia.The free Encyclopedia
http://en.wikipedia.org/wiki/Nuclear_Non-Prolifertion_treaty.

⁵⁸ Proliferation Security Initiative: Frequently asked questions, US Department of State, Bureau of Non-Proliferation 27 October
<http://www.state.gov/t/np/rls/fs/32725.htm> .

The Security Council turns a blind eye to the said breach and instead passes resolution 1540 tightening the prohibition against the non-nuclear states under the NPT as the nuclear weapons states who happen to be permanent members of the Security Council breach the same treaty with impunity.

Secondly, the Security Council while reigning hard on the non nuclear weapon states under the NPT conveniently forgets the second pillar of NPT which is nuclear disarmament by the nuclear weapons states. Article VI as stated hereinabove requires that NWS pursue negotiations to reduce and liquidate their nuclear stockpiles. However, after *more than 30 years of NPT coming to force, disarmament has remained only a promise.*

To date, the USA has not only failed to ratify the *Comprehensive Test Ban Treaty* but it has abandoned the *Verifiable Fissile Material Cut –Off Treaty*.⁵⁹ In addition, the US on 13th December 2001 announced that its withdrawal from the Anti Ballistic Missiles Treaty, ABM Treaty. The withdrawal was to enable the US pursue its National Missile Defense (NMD) Program, the successor to Reagan’s Star Wars Program. Then on 25th January 2002, Pentagon conducted a sea based NMD test in gross violation of Article 5(1) of the ABM Treaty without waiting for the requisite 6 months to expire.⁶⁰

This disregard of the disarmament aspect of the NPT creates intimidation of non-nuclear states by the nuclear states to an extent the former can legitimately argue that they have been induced to withdraw from the NPT under article X. The said article X provides that

⁵⁹Francis , “The Rogue Elephant: The Bush administration has become ‘a threat to the peace’ within the meaning of the UN Charter Article 39” , 7/02.

⁶⁰ William , “Weapons of Mass Destruction and International Order”, Adelphi Paper 370, International Institute for Strategic Studies, November 2004, p.74.

in exercising its national sovereignty each member state shall have the right to withdraw from the treaty if it decides that extra ordinary events related to the subject matter of NPT have jeopardized the supreme interests of its country. In that event, the withdrawing state is to give 3 months notice to the Security Council and all the other parties stating the extraordinary events. It is my submission that North Korea and the countries neighboring Pakistan, India, and Israel can legitimately withdraw from the treaty in view of their neighbors' nuclear capability. On the other hand, countries like Iraq, Yugoslavia, Iran, Afghanistan, Sudan, Syria, and others who have been victims of military attacks or are threatened by military attacks US or other nuclear states can also withdraw under the said article X of NPT. An attack by a nuclear weapon state must surely be an extra-ordinary event that threatens a country's supreme interest within the meaning of Article X of NPT. Before imposing additional obligations on the non-nuclear states, the Security Council should look inside its own five permanent members and enforce the NPT international law regime equally between the member states.

Thirdly, by dictating to UN member states to legislate on nuclear and other Weapons of mass destruction, the Security Council is blatantly violating Article 2 (7) of the UN Charter which provides that nothing in the charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state. Legislation is undoubtedly a domestic jurisdiction of the member states.

Again, resolution 1540 refers to all states. The all inclusive wording has the effect of bringing the three non-NPT member states of India, Pakistan and Israel into a non-

nuclear proliferation regime akin to the NPT they rejected in exercise of their sovereignty. Even members who may subsequently withdraw from the NPT will still be subject to resolution 1540.

Initiation of this resolution by the US should be seen against bypassing of the same Security Council by the US when attacking Iraq and Yugoslavia without UN Security Council sanction yet the resolution is binding on the entire UN membership under Chapter VII of the UN Charter.

By resolution 1540, the US –UK hegemony in the UN Security Council has effectively legislated for the whole world on the nuclear non-proliferation regime with binding Security Council Resolutions while they remain above the international law regime created by the UN Charter and the NPT. If any state cannot be trusted with the nuclear weapons, it is not Iraq, North Korea or Iran. Rather, it is the USA for it is the only country with a record of using nuclear weapons at all. It is akin to the villain legislating and policing the otherwise international law abiding UN member states. This situation calls for reforms to the Charter.

3.4 Military and Paramilitary Activities in and Against Nicaragua by U.S.A

This case demonstrates how the powers of Security Council can be abused by veto wielding permanent members to create inequalities with respect to otherwise binding decisions of the I.C.J.

In the 1980s Nicaragua was ruled the communist government of Sandinista party. The capitalist administration in U.S.A supported Contra rebels in Nicaragua with the intention of overthrowing the communist Sandinista government.

U.S support of Contra rebels included a paramilitary force. U.S pretended that the force was to stop the flow of military supplies from Nicaragua to El-Salvador though there was no evidence of such flow of military supplies. The paramilitary U.S force mounted raids in Nicaragua attacking schools, raping, kidnapping, torturing, committing massacres and mining Nicaraguan harbours. By the late 1980's the U.S supported paramilitary force had around 50,000 men.⁶¹

In 1984, U.S President Ronald Reagan publicly claimed to end aid to Contras rebels in accordance with a Congressional ban. However, his administration continued to support contra's leading to the Iran-contra scandal.⁶²

In 1986 Nicaragua filed a case in the ICJ asking for relief to end U.S efforts to destabilise Nicaragua government. The case is now known as *Military and Paramilitary Activities and Against Nicaragua*.⁶³

In the proceedings, Nicaragua produced evidence and satisfied the Court that U.S was involved in organizing mob violence, kidnappings, blowing-up public buildings, political

⁶¹ The Guardian, 26/7/2000, Media Monitors 24/9/2001:Rosset and Vendemeer 1986: Keen 1992.

⁶² The guardian, 26/7/2000, Keen 1992: Rosset and Vendemeer, 1986.

⁶³*The case of Nicaragua and USA* (1986) ICJ Rep. p.14.

assassinations, mining harbours, waterways and fields in what the U.S had labeled “psychological operations in Guerilla Warfare”.⁶⁴

On 27/06/1986, the ICJ entered judgment in favour of Nicaragua and found the U.S guilty of violating territorial integrity and political independence of Nicaragua. ICJ awarded Nicaragua US\$17 billion in reparations.

This case demonstrates inequality of member state before the Security Council in several aspects as here below:-.

First before Nicaragua filed the claim in ICJ, it had tried unsuccessfully to bring the matter to the Security Council. This was due to opposition at the Security Council by U.S who was the aggressor in Nicaragua.

Secondly, U.S ignored and refused to comply with the judgment of the I.C.J despite Article 59 of the statute of I.C.J which stipulates that I.C.J decisions are binding on the parties.

With the I.C.J judgment ignored by U.S, Nicaragua’s recourse under the U.N Charter was to refer the matter to the Security Council under Article 94(2). In this event, Security Council if it deemed necessary, would have made recommendations or decided on measures to be taken to give effect to the judgment.

⁶⁴ Smith , “Nicaragua vs. USA”, *Library of Congress: History of Nicaragua*.

However, even with the judgment of I.C.J Nicaragua found itself helpless because any move to refer the judgment to the Security Council was sure to be vetoed by the U.S.

Nicaragua finally brought the matter to the UN General Assembly seeking General Assembly's support in enforcing the I.C.J judgment against U.S.A. The General Assembly passed resolution 42/18 calling on U.S to comply with the I.C.J judgment and pay Nicaragua the US\$ 17 billion in reparations.

The U.S ignored the General Assembly too. In this situation, Nicaragua was left helpless against the U.S under the international law regime created by the U.N Charter.

This case demonstrates how veto wielding permanent members of the Security Council can abuse their privileged position to create inequalities before the Security Council and international law. The situation may have been different if there was a rule barring a party from voting in its own cause at the Security Council or if Nicaragua had some representation at the Security Council. Nicaragua's case calls for a review of the relationship between the General Assembly and the Security Council as well as between the Security Council and the I.C.J.

3.5 Peace keeping (the case of Rwanda)

When it comes to the peace keeping missions of the UN it becomes apparent the UN is more interested in welfare of some member states than others. The activities of the UN in Rwanda immediately before and during the 1994 genocide demonstrate the bias in the

UN. The Security Council involvement in the affairs of this member state presents an interesting contrast to the impulsiveness of the international rush into the domestic collapse of Yugoslavia and the succession wars that followed. African conflicts no matter how bloody are simply ignored. The 1994 Rwanda genocide in which more than 600,000 persons of Tutsi ethnic background were killed is a case in point. Rather than strengthen its small UN Mission in Rwanda UNAMIR, the UN Security Council pulled out as the genocide raged in the country.

In most cases, nothing is done beyond passing resolutions condemning the belligerents or the party that is not in good books with western powers. The Security Council has a history of abandoning Africa at its hour of need. A small mission may be sent but when the Africans really need the full force of the Security Council, the council will either sit back and watch the fire or simply pull out. We cannot be short of examples in this case as in the case of Rwanda genocide in 1994, Somalia's slide into anarchy in 1992, Liberia's bloodshed during the civil war led by the warlords Samuel Doe, Prince Johnson and Charles Taylor are all excellent examples. My interest in this trend of the Security Council is in the fact that though these may appear like domestic conflicts, the loss of human life and suffering has been no less than in those situations in which the Security Council has intervened allegedly to avoid a human catastrophe. The Yugoslavia wars provide a good comparison. The trend discloses apathy to African conflicts. It is as if the phrase "We the peoples of UN determined to save succeeding generations from the scourge of war" does not include Africans. If the UN is to uphold the sovereign equality

of its member states, it must begin by recognizing equality of the peoples of those nations.

In Rwanda, fighting first broke out between the predominantly Hutu Rwandese armed forces and the Tutsi dominated (RPF) Rwandese Patriotic Front across the Ugandan border in 1990. The OAU negotiated a cease-fire between the government of Rwanda and RPF under which the UN Security Council was invited to place an observer mission along the Uganda, Rwanda boarder. This became UNOMUR. Its mandate was to discourage transit of military equipment to the RPF, which was allegedly operating from the Ugandan side. Thereafter OAU and Tanzania negotiated a comprehensive peace treaty between Rwanda and RPF. The Security Council was again invited to assist with the peace keeping force to guarantee public security especially for the delivery of humanitarian aid and to help in discovering weapon catches. This became UNAMIR. Its mandate was to contribute to the establishment of a climate conducive to the secure installation and subsequent operation of a transition government.

On the 6th April 1994 the Presidents of both Rwanda and Burundi were killed when their plane was shot down by a missile. Kigali exploded into holocaust of slaughter. The Tutsi Prime Minister was murdered by the presidential guard along with ten Belgian soldiers. What followed from here is what would demonstrate the double standards. Rather than move in to stop the massacre, the UN Security Council pulled out virtually the whole of its peacekeeping mission UNAMIR. In any event, having failed to contain the fighting its mandate of creating a atmosphere conducive for the intended transitional government had

become almost irrelevant. The collapse of the peace keeping operation can only be blamed on the United Nations. Even though no one could have anticipated the shooting down of the presidential jet, the blood bath that followed had always been a possibility as the old enmity between the Tutsi's and the Hutus was well known. It was not the first genocide in Rwanda or the neighboring Burundi. The UN was too small and too poorly equipped to control the nation-wide blood bath. The United Nations adopted such detached attitude that it did not even bother to expand UNAMIR's mandate to enable it do the little good it could have done in the circumstances.

Upon comparing this lack of concern on the part of the UN in Rwanda and its involvement in the Yugoslavian wars it becomes clear that there is an undeniable element of neglecting African wars. The ongoing Congo war is a salient example. Congo is a sovereign state undemocratic as it may be. Uganda and Rwanda can only be aggressors.

How can they plead self defense when occupying Kisangani which is more than 500 kilometers inside the territory of a sovereign country? An aggressor is an aggressor whether violating the territorial integrity of a sovereign country in the remote parts of Africa or the rich oil fields of northern Kuwait. The Security Council should by now have imposed trade sanctions on the two countries or at least condemned them.

The apathy of the Security Council towards the conflicts in Africa leads one to conclude that the council does not care anyway. Incidentally the conflict in Congo is directly related to the Rwandan genocide. In these conflicts, there is the consequential refugee problem of unequaled magnitude. It is the same Hutu refugees who went across the

border to Zaire fleeing the RPF that were forced to flee deeper into Congo. At some point in the Great Lakes war, the same refugees were forced to flee into Congo Brazzaville. War followed them there and they had to flee into the Central African Republic. It should not be forgotten that these refugees were initially based in the Zaire - Rwanda borders town of Goma Rwanda (RPF) raided and demolished the said refugee camp under the pretext of stamping out the Hutu militias and the former soldiers so as to stop the cross border raids. The same refugees were massacred in Zaire by the alliance of President Kabila, Rwanda and Uganda as they advanced towards Kinshasa against then President Mobutu. The Security Council is well aware of the massacre as it even made a half heated attempt to investigate the same. It is my submission that the Security Council has neglected to save the main purpose of Africans from the scourge of war. That was the sole idea behind the establishment of the UN as proclaimed in its charter. If equality of states were to be seen in this light, it would appear that the African states were not meant to benefit from the organization. The apathy of the Council towards the Liberian civil war in the early 1990's confirms its don't care attitude towards Africa. In the Liberian civil war it is ECOWAS that ultimately created peace through ECOMOG. In Somalia, the warlords reign supreme. In Yugoslavia, except in the case of Kosovo the Security Council imposed and kept the peace. Is this a show of equality across the entire membership on whose behalf the Security Council allegedly acts?

3.6 “Humanitarian Military Intervention” by NATO in Kosovo, Yugoslavia

As a concept, the so called “humanitarian intervention” lacks definitional clarity. On one hand, the classical definitions ascribe the right and duty of humanitarian intervention

to states only. On the other hand, the liberal definitions encompass intervention by entities other than states so long as it is on humanitarian grounds.⁶⁵ In attempts to define humanitarian intervention, this study adopts the functional definition expounded by Dr. Kindiki and the descriptive definition by Oppenheim. In his book *Humanitarian intervention and state sovereignty: The Changing Paradigms of International Law*. He states:

.....the aim of humanitarian intervention is to forestall, limit or halt large scale violations of human rights in the target state, where the government of the target state is perpetrating the violations or is unable or unwilling to allow international action to end them.⁶⁶

Oppenheim on the other hand defines humanitarian intervention as:

The dictatorial interference by state in the affairs of another state for the purpose of maintaining or altering the actual conditions of things.⁶⁷

However, this study is concerned with the reaction of the Security Council to various incidents of humanitarian intervention. Under the UN Charter, the only basis for Security Council authorizing humanitarian intervention is by the Security Council first making a finding under Chapter VII that a certain situation constitutes a breach of or a threat to international peace and security. This is so whether the intervention is by the UN itself, another state, or a group of states. Intervention in the affairs of another state without authorization of the UN Security Council particularly military intervention is illegal. In addition to threats of and or actual use of force, it violates the territorial integrity and political independence of the target state and is specifically prohibited by Articles 2(4) and 2(7) of the Charter.

⁶⁵ Kindiki *supra* p.4.

⁶⁶ Ibid. p.5.

⁶⁷ Ibid p.3.

Incidents of humanitarian intervention can be easily classified as illegal legal depending on whether they have been sanctioned by the Security Council. One would expect the action and or the reaction of the Security Council to various incidents of authorized and or unauthorized intervention to be equally clear. However, the Security Council has not been consistent in its action and or reaction to incidents of unauthorized and hence illegal interventions.

This study examines the double standards of the Security Council in reacting to unauthorized and hence illegal interventions by its own veto wielding permanent members.

What may be seen as impotence on the part of the Security Council when its veto wielding members are the aggressors transforms into inequality before the international law regime created by the Charter of UN. In examining this case, it should be remembered that among the NATO members who attacked Yugoslavia were three of the five permanent members of the UN Security Council namely USA, UK, and France.

Under article 2(4) of the Charter, member states are expressly and comprehensively prohibited from threatening or using force against the political and territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. Kosovo province is a province of the former Federal Republic of Yugoslavia now Serbia. When NATO intervened by military force during the civil war in Yugoslavia, it cited widespread human rights abuse of the Albanian population in

Kosovo province.⁶⁸ Yugoslavia and opponents of the war on the other hand argued that humanitarian military intervention is itself an illegality unless sanctioned by the UN Security Council. Granted that the military intervention, was not sanctioned by the Security Council, I will briefly examine the legal status of the intervention before examining its import on the equality of states before the UN Security Council and the international collective security system that the Security Council is entrusted with enforcing.

On the question of enforcement of respect for human rights by military means, the fundamental rule from which any inquiry must proceed is Article 2(4) of the UN Charter, according to which,

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

It is clear, that the prohibition in Article 2(4) was, and is, intended to be of a comprehensive nature. It is not designed to allow room for any exceptions from the ban, but rather to make the prohibition watertight. In contemporary international law, as codified in the 1969 Vienna Convention on the Law of Treaties (Article 53 and 64), the prohibition enunciated in Article 2(4) of the Charter is part of *jus cogens*, i.e., it is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character. Further, the Charter prohibition of the threat or use of armed force is binding on states both

⁶⁸ Cassese A, "Ex inuria ius oritur: Are we moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community".

individually and as members of international organizations, such as NATO, as well as on those organizations themselves.

The law of the UN Charter provides two exceptions from the prohibition expressed in Article 2(4), the mechanism of the so-called “enemy-state-clauses” (Article 53 and 107) should be left aside as it is now unanimously considered obsolete). The first exception, embodied in Article 51 of the Charter, is available to states which find themselves victims of aggression,

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

As the Charter reference to collective self-defense, Article 51 constitutes the legal foundation of the Washington Treaty by which NATO was established, Article 5 of the NATO Treaty bases itself expressly on Charter Article 51.

According to the UN Charter, individual or collective self-defense through the use of armed force is only permissible in the case of an “armed attack”. Like Article 2(4), Article 51 has become the subject of certain gross misinterpretations, most of them put forward during the Cold War when the Security Council regularly found itself in a state of paralysis. Against such attempts to turn a clearly defined exception to the comprehensive Charter ban on the threat or use of force into a convenient basis for all sorts of military activities, it should be emphasized once again that Article 51

unequivocally limits whatever further-reaching right of self-defense might have existed in pre-Charter customary international law to the case of an “armed attack”. In particular, any offensive self-help by threats or use of armed force without a basis in Chapter VII has been outlawed by the *jus cogens* of the Charter.

With regard to the second exception to the Charter ban on armed force, Chapter VII constitutes the very heart of the global system of collective security. According to its provisions, Security Council, after having determined that a threat to peace, breach of the peace, or act of aggression has occurred, may, if necessary, take military enforcement action involving the armed forces of the member States. In actual UN practice, it is now common for such enforcement action to be carried out on the basis of a mandate to, or more frequently an authorization of, states which are willing to participate, either individually or in *ad hoc* coalitions or acting through regional or other international organizations, among them prominently NATO. While the implementation of Chapter VII through a “franchising system” of this kind creates numerous problems of its own, it is universally accepted that a Security Council authorization granted under Chapter VII establishes a sufficient basis for the legality of the use of armed force employed in conformity with the respective Security Council Resolutions. Conversely, any threat or use of force that is neither justified as self-defense against an armed attack nor authorized by the Security Council must be regarded as a violation of the UN Charter.

Chapter VIII of the Charter (Regional arrangements) completes the legal regime thus devised. Hence, according to Article 53 para. 1,

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.

The UN Secretary-General's 1992 *Agenda for Peace* emphasized the desirability, indeed necessity, of this mechanism of support. The charter provision states thus,

But no enforcement action shall be taken under regional arrangement or by regional agencies without the authorization of the Security Council.

Under Article 103 of the Charter, it is provided that,

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Prominent among the Charter obligations enjoying priority are, of course, the prohibition on the threat or use of force embodied in Article 2(4), in the context of the provisions of the Charter to which reference is made above (Articles 51 and 53, Chapter VII). Since Article 2(4) reflects a norm of *jus cogens*, any agreements, decisions and obligations conflicting with it are invalid. Hence, Article 103 renders the UN Charter itself, as well as the obligations arising from it, for instance, binding Security Council decisions, a "higher law" *vis-à-vis* all other treaty commitments of the UN Member States, among them those stemming from NATO's membership.⁶⁹

The question of the legality versus the illegality of so-called "humanitarian intervention" must be answered in light of the foregoing. Thus, if the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a "humanitarian intervention" by military means is permissible. In the

⁶⁹ Boutros-Ghali B, *An Agenda For Peace* (1992) SC Doc. S/24111, 17/6/1992.

absence of such authorization, military coercion employed to have the target state return to a respect for human rights constitutes a breach of Article 2(4) of the Charter. Further, as long as humanitarian crisis do not transcend borders, and lead to armed attacks against other states, recourse to Article 51 is not available. For instance, a mass exodus of refugees does not qualify as an armed attack. In the absence of any justification unequivocally provided by the Charter the use of force could not be the appropriate method to monitor or ensure respect for human rights. The International Court of Justice stated this in its 1986 decision in the case of *Nicaragua and U.S.A.*⁷⁰. The United Kingdom foreign Office summed up the problems of unilateral, that is, unauthorized, humanitarian intervention as follows,

The overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem to specifically incorporate such a right; secondly, State practice in the past two centuries, and especially since 1945, at the best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation ... In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its terms of respect for international law.⁷¹

Having found that the military intervention was illegal, what were the legal options for Yugoslavia? Under Article 51 Yugoslavia reserved its inherent right to self defense against the armed attack by NATO until the Security Council has taken measures to preserve international peace and security. Further, the Article required the Yugoslavia to immediately report to the Security Council all the measures it had taken in its self defense. Article 51 provides the measures taken by Yugoslavia in its self defense would not affect the authority and responsibility of the Security Council to any time take such

⁷⁰ *Nicaragua vs. USA* (1986) ICJ Rep. p.14.

⁷¹ UK Foreign Office Policy Document No. 148, Reprinted in *57BYbIL* (1986) 614.

actions it deemed necessary to maintain international peace and security. The other option was to lodge a claim before the ICJ. Assuming Yugoslavia got a favorable judgment at the ICJ perhaps declaring the war illegal and ordering reparation, Yugoslavia would as required by article 94(2) of the Charter have had to refer the judgment to the Security Council in event of non-compliance by the aggressor members of the Security Council. Three of them hold the veto. In addition, there is no legal provision in the Charter to prevent US, Britain, and France formulating a resolution and sitting in the Security Council to impose an arms embargo or such other measures as would favor their war of aggression against Yugoslavia. Yugoslavia's fate may have been different if the Security Council was not dominated or monopolized by some powers.

The fact that none of the leaders of the aggressor state will ever face an International Criminal Tribunal for starting a war of aggression against Yugoslavia in view of the aggressors veto calls for a review of the Charter so that the provisions of the Charter can apply more equitably amongst member states. The legal lessons from the Yugoslavia war will form a basis of some of the recommendations on reforming the charter in chapter 4 of the study.

3.7 Conclusion

The case studies demonstrate various shortcomings on the part of the Security Council's overseeing of the international collective security system created by the UN Charter. It has often fallen short of the purposes, principles, and the rules created by the Charter of UN.

Prominent amongst the shortcomings is the double standards. The Nuclear non proliferation international law regime under the NPT and Security Council resolution 1540 of 2004 has been enforced in such a manner that perpetuates nuclear capability disparity between the nuclear weapons states and the non nuclear weapons states. Security Council resolution 1540 tightens the regime tightens the nose against non-nuclear states while leaving a free hand to the nuclear states to retain their nuclear stockpiles , continue nuclear testing, and withdraw from other nuclear non-proliferation treaties.

The case of disarming Iraq by UNSCOM and UNOMOVIC discloses a case of the Security Council using its powers under resolution 687 to assist the Anglo-American alliance spy on Iraq in preparation for the ultimate war for regime change in Iraq. In addition, maintaining punitive trade sanctions on Iraq with the hidden agenda of weakening the country in preparation for the war of aggression by the Anglo-American alliance. It is a case of the Security Council acting *ultra vires* its charter powers. The Security Council was simply acting in bad faith.

The case of Aerial Incident over Lockerbie demonstrates an instance of the Security Council usurping the powers of the ICJ to make a judicial finding that Libya was in breach of its obligations under the Montreal Convention on the suppression of unlawful activities against the safety of civilian Aviation. Enforcement action was taken by the Security Council upon its own *ultra vires* decision. Libya suffered Security Council

imposed trade and air sanctions for more than 10 years. The Security Council maintained sanctions on Libya even after Libya complied and handed over its nationals for trial by UK.

The case of Rwanda and NATO intervention in Kosovo proves two things. First, that the Security Council will not take action when the interests of the major powers are adversely involved. Rather than act on time to stem the genocide, the Security Council withdrew its already limited presence in Rwanda and watched the genocide NATO's intervention in Kosovo on the other hand shows that the Security Council is impotent when major powers are the aggressors bypassing the same Security Council and violating the territorial and political independence of another state with impunity. The Security Council did not even condemn the invasion.

In totality, each of the case studies shows a different aspect of the Security Council treating member states unequally before it and the international law regime created by the various treaties that the Security Council has sought to enforce in the discharge of its functions under the Charter of UN. Member states are unhappy with the status quo. They have been calling for reforms to the UN Charter.

CHAPTER 4

REFORMING THE SECURITY COUNCIL

4.1 Introduction to Chapter 4

The UN Charter is the constitution of the UN. At the same time, it is a multilateral treaty between the UN member states. As a treaty and a constitution of an international organization, it forms part and parcel of international law recognized by Article 38 of the Statute of ICJ. International law represents the consensual relationships between sovereign states. If the Charter of UN no longer reflects the said relationships or operates to defeat its purpose, it calls for reforms by way of amendments or otherwise. The Charter provides for amendments in article 108. Since signing the Charter, at San Francisco in 1945, it has been amended severally by to address shortcomings in its provisions, reflect the prevailing geopolitical realities and meet aspirations of the UN membership⁷². Chapter 3 of this study addressed case of the Security Council acting short of the purposes, principles and the rules of international law created by the charter. It is my submission that further reforms by way of amendments can remove the shortcomings highlighted by the study.

On the face of the shortcomings some of which have been pointed out in Chapter:3 hereof, scholars, member states , the UN secretary General , Non Allied Movement and regional organizations have made proposals on reforms to the Charter of UN. I will deal with some of the proposals made and add my own based on observations made in this study.

⁷² Introductory Note in the Charter of the United Nations and the Statute of the ICJ.

4.2 Security Council Be Expanded To Make It More Representative or Democratic

The Security Council should be expanded to make it more representative of the international community as a whole as well as reflective of the geopolitical realities of today.

The UN Secretary General in his report titled *In Larger Freedom: Towards Development, Security And Human Rights For All*, contended that the Millennium Declaration in which the all states resolved “to intensify their efforts to achieve a comprehensive reform of the security council in all its aspects” reflected the view long held by majority in the GA, that a change in the council’s composition was needed.⁷³ He contended that the reforms were needed to make it more broadly representative of the international community as a whole, as well as the geopolitical realities of today. The UN Secretary General argued that a truly representative security council would be more legitimate in the eyes of the world. He argued that decisions of the Security Council should command world wide respect since the entire UN membership has agreed to be bound by its decisions. To the Secretary General, the hard part in making the council more broadly representative is in making the council not only more representative but also more able and willing to take action when action is needed. Towards the twin goals, the Secretary General adopted the position set out in the *Report of the High -Level Panel on Threats, Challenges, and, Change* concerning the reforms in the Security Council.

⁷³ General Assembly Resolution 55/22 para. 30.

In the said report, the High-Level Panel had proposed that Article 23 of the Charter should be honored by increasing involvement in decision making of those who contribute most to the UN financially, militarily, and , diplomatically, specifically in terms of the United Nations assessed budgets , participation in mandated peace operations, contribution to the voluntary activities of the UN in areas of security can development , and diplomatic activities in support of United Nations objectives and mandates⁷⁴. Thereby, the Secretary General proposed two models of a reformed Security Council. I reproduce the said models herein below:-

Model 'A' provides for six new permanent seats with no veto being created, and three new two -year term non-permanent seats, divided among the major regional areas as follows: Africa is to get two of the proposed new permanent seats and two of the proposed two –year non-renewable seats. Asia and Pacific would get two of the proposed new permanent seats, and three of the two year non-renewable seats. Europe would get one of the proposed new permanent seats and two of the proposed two-year non-renewable seats. Americas would get one of the proposed new permanent seats and four of the proposed two-year non-renewable seats.

Model 'B' provides for no new permanent seats but creates a new category of eight four- year renewable- term seats and one new two-year non-permanent (and non-renewable) seat, divided among the regional areas as follows: Of the proposed four- year renewable seats, Africa would get two, Asia and Pacific two, Europe two, and Americas

⁷⁴ “A More Secure World: Our shared Responsibility”, United Nations (2004) Report of the High level Panel on Threats, Challenges and Change, p.79-91.

two. Of the proposed two-year non-renewable seats, Africa would have four, Asia and Pacific three, Europe one and Americas three.

The guiding considerations in the two proposals were that:-

- a. The reforms should bring into decision-making countries more representative of the broader membership , especially from the developing world,
- b. They should not impair the effectiveness of the security council,
- c. They should increase the democratic and accountable nature of the Security Council.

Whilst the proposed reforms would go along way in democratizing the Security Council and making it more representative of the entire membership, expansion of membership alone would not sufficiently address the underlying problem of the Security Council acting *ultra vires* the purposes and the principles of the UN. An expanded Security Council would still be liable to abuse. In my view, the expansion of the Security Council would have to be accompanied by legal checks and balances in exercise of the Charter powers.

4.3 General Assembly Should Be Strengthened To Act under Chapter VII of the UN Charter

In the United Nations *Millennium Declaration*, the General Assembly reaffirmed its central position as the chief deliberative, policy –making, and representative organ of the United Nations. It resolved to take steps to enable it play its role effectively and to

intensify its efforts to achieve a comprehensive reform of the Security Council in all its aspects.⁷⁵

The international community as constituted in the General Assembly is the donor of the powers exercised by the Security Council. Under Article 27(1), the entire membership agree that in exercising its functions, the Security Council acts be acting on their behalf. The relationship between the Security Council and the General Assembly is akin to the agent –principal relationship in the ordinary law of agency. The General Assembly is the principal and the Security Council is the agent. As the chief policy making organ, the General Assembly should be able to execute its policies if the organ entrusted with the powers fail for any reason. Accordingly, this study proposes that the UN General Assembly should be empowered by specific provisions in the Charter to act where the Security Council is paralyzed by individual member interests using the veto and or where the Security Council is found to be acting outside the purposes or contrary to principles of the charter. At the minimum, this would entail an amendment to Article 12 of the Charter to delete the provision barring the General Assembly from making recommendations in matters being dealt with by the Security Council.

This proposal is not new. "Uniting for Peace" Resolutions of 1950 was in the same spirit. Under the same, General Assembly resolution would act if the Security Council is paralyzed by vested interest of the veto wielding permanent members. The General Assembly noted that failure by the Security Council to discharge its responsibilities on behalf of all member states does not relieve member states of their obligations or the

⁷⁵ UN Millennium Declaration GA/Resolution/55/27: Article VIII. Item No. 30.

united nations of its responsibility under the Charter to maintain international peace and security. Consequently, the General Assembly passed a resolution to the effect that,

If the security council , because of lack of unanimity of the permanent members fails to exercise its primary responsibility for 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 the peace or an act of aggression the use of armed force where necessary to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within 24 hours of the request therefore. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations.⁷⁶

If “Uniting for Peace” or a provision in the same spirit was expressly provided for in the Charter, chances are that Iraq, Libya or Yugoslavia would have invoked it to at least obtain a condemnation by the General Assembly of the war of aggression by Anglo-American alliance. On this note, the 22- member Arab Group at the United Nations and the 57- member Organization of Islamic Conference (OIC) had as at 11th April 2003 drafted a resolution to convoke an emergency meeting of the General Assembly. The draft resolution was to demand an immediate end to the US invasion of Iraq issue⁷⁷. Their intention was to demonstrate the overwhelming international opposition to US unilateral warfare. I therefore propose that “Uniting for Peace” be entrenched into the UN Charter by an express provision.

⁷⁶ North Atlantic Treaty (1949), 34 UNTS 243.

⁷⁷ Mike B “UN Uniting for Peace Resolution could Demand End to US War On Iraq”, Executive Intelligence Review, 11/4/2003.

4.4 Relationship of the Security Council and the Security Council Member States Should Be Defined

Security Council members represent the country itself and the representatives act and vote under the direct instructions of his or her state. In these circumstances, is not too far fetched to conclude that all the decisions of the member states represent decisions of the respective individual countries. The representatives bear their loyalty to the interests of their states and not to the principles of the charter. The fallacy of this system is always exposed when the Security Council is dealing with a matter in which one of the permanent member's states is interested directly or indirectly. At the 56th General Assembly Plenary 36th Meeting, Iraq's representative to the GA captured the prejudice caused to Iraq by the overlap between the Security Council and its members in the following terms,

The relationship between the Security Council and Iraq is in reality nothing more than a relationship between Iraq and two permanent members of the Security Council. As such , it violates the an important principle of the United Nations Charter , which stipulates that the Council acted on behalf of its member states, rather than according to the wishes of certain actors who dominated Council decisions in accordance with their own interest. Such selectivity was not only evident in its relationship with Iraq, but in the scandalous position of the Council towards crimes committed against the Palestinian people for the past 50 years.⁷⁸

In my view , the problem is that technical decisions pertinent to threat to international peace and security, breach of peace and security, and acts of aggression ,are made by politicians under Chapter VII. Such technical decisions should be made by technocrats.

In this regard, Article 47 of the Charter already provides for a Military Staff Committee. .

Its role is to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and

⁷⁸ More Delegates Urge Restriction of Security Council Veto: Press Release, GA/9945, 56th General Assembly Plenary, 36th Meeting.

security, the employment and command of forces, placed at its disposal, the regulation of armaments and possible disarmament.

If the Security Council had taken advice of professional soldiers before invading Iraq allegedly to destroy the alleged weapons of mass destruction, the advice would perhaps have been that the war would be unnecessary unless the alleged weapons were actually traceable.⁷⁹ I therefore propose that determinations of threats to peace, breach of peace and aggression be made by an independent technical body as apposed to politicians.

4.5 Members of Security Council Should Not Judge Their Own Causes

Another alternative is to amend Article 27(3) of the Charter to bar members of the Security Council from voting in matters in which they have an interest when the Security Council is acting under Chapter VII of the charter. Article 27 (3) already bars members of the Security Council from voting in matters in which they have an interest when the council is acting under Chapter VI of the charter. However, it is not enough for the charter to bar members from voting in matters under chapter VI of the UN charter. Decisions under chapter VII relating to the enforcement action is what really injures member states international law rights. It is here that Security Council members interested in the subject matter should be barred from voting. This again is not a new proposition.

In the case of *Effects of Compensation Made by the United Nations Administrative Tribunal*, the ICJ held that the General Assembly's "Composition and function" made it

⁷⁹ The situation in Iraq was analogous to the North Korea Nuclear Program as analysed by Philip C. Saunders in his article "Military Options for dealing with North Korea's Nuclear Program for Center for Non-Proliferation Studies", cns@miis.edu.

unsuited to act itself as judicial organ in disputes between members of staff and the organization.⁸⁰ And in the *Mosul Case*, the P.C.I.J stated that,

From a practical standpoint, to require that the representatives the UK, Turkey, and Iraq accept the Council's decision would be tantamount to giving them a right of veto, enabling them to prevent any decision being made.⁸¹

The ICJ noted that one of the parties to the dispute was the organization itself. It is against the well-settled maxim of *nemo judex in sua causa* for a member state to sit in the Security Council and determine a matter which has the affects the legal rights of another state in a matter in which it has an interest. Justice in such cases cannot be done for as found in the earlier on in the study, member's states want outcomes that are favorable to themselves. For instance, they would want territorial disputes with their neighbors be decided in their favor. If Ethiopia was a permanent member of the Security Council it would sponsor resolutions ordering Eritrea out of the Badme region and sponsor any enforcement action against Eritrea. No impartiality can be expected from an interested party.

4.6 U.N Should Obtain Financial Independence from the Major Powers in the UN Budget

One of the arguments that the reformers are refusing to buy is a trade off between their sovereign equality and smaller budgetary contributions. It has been argued that the permanent five are entitled to the veto and privileged position because the ultimate burden of maintaining international peace and security falls upon them. It is true that they have the resources military and economic to carry out the UN undertakings.

⁸⁰ ICJ Report 1954, p.47.

⁸¹ PCIJ (1925) Series B, No.12 (WCR 722).

However, if we were to borrow some wisdom from the municipal systems, one would discover that the greatest tax payer does not have a veto over the government. Members must be in a position to vote their governments in and out based on their ability to fulfill the purposes of the charter or the aspirations of the members. In this respect, the UN charter should be amended to allow the members to vote out members who are misusing the Security Council or frustrating its endeavors to apply the international law regime in the UN Charter in a balanced way. It is a great fallacy to propose anything akin to a world government led by permanent non-elected leaders who earned their positions by sheer might in a historical incident.

In this respect, I would propose that the budgetary assessments be contributed as taxes and not as voluntary contributions which can be held ransom. The funds can then be utilized as UN funds and not as pledges from the individual countries. If the main donors insist on financially arm-twisting the UN into making it their puppet by withholding their contributions, then it is for the majority of the sovereign states to make it clear that there is no trade off between their equality before the law with their richer fellows and smaller UN contributions. As we observed in chapter 3 hereof, wisdom and leadership is not a reserve of the richer nations nor is irresponsibility a reserve of the poor nations. In matters of international peace and security, it may well be observed that the two world wars were started by the major powers. With financial independence, the UN would be truly independent of the selfish machinations of the dominant powers.

4.7 Use of Veto Should Be Restricted

In the report titled the *Responsibility to Protect*, the International Commission On Intervention And State Sovereignty, considered use of veto by permanent members in the security council in matters of humanitarian intervention. The Commission noted that many of the member states regarded use of the veto and threats of its use as capricious and the principal obstacle to effective international action in cases where quick and decisive action is needed to avert significant humanitarian crisis.⁸². The Commission termed it unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern. The commission was particularly concerned by the possibility that needed action could be held hostage to unrelated concerns of one or more of the permanent members. That situation had occurred too frequently in the past .The commission noted that the same states who insist on the right to retain permanent membership and the resulting veto power, are themselves in a difficult position when they claim to be entitled to act outside the UN framework as a result of the Security Council being paralyzed by veto cast by another permanent member. That those states insisting on keeping the existing rules of the game unchanged have a correspondingly less compelling claim to reject any specific outcome when the game is played by the those very rules.

Upon these observations and concerns, the Commission proposed that there be an agreed “code of conduct” for use of veto with respect to actions needed to avert a significant humanitarian crisis. The commission proposed that the veto should not be used to

⁸² Under the title ‘legitimacy of the veto’.

obstruct what would be otherwise a majority decision of the Security Council unless vital national interests of the veto power state are involved.

The Commissions proposals on enactment of a code of conduct to govern use of veto should be extended to all functions of the Security Council. That way, the veto power would serve its true purpose of avoiding a direct confrontation between a major power and the Security Council. The code of conduct on use of the veto should be incorporated into the reformed Charter of UN.

4.8 ICJ Should Have Compulsory Supervisory Jurisdiction over the Security Council's Exercise of Charter Powers

The UN Charter delegates enumerated powers to the Security Council. Thereby, the Charter implicitly limits the powers of the Security Council. In the case of *Questions of Interpretation and Application of the 1971 Montreal Convention arising From the Aerial Incident at Lockerbie*, Libya asked the ICJ to find that there was reason to believe that the Security Council might exceed the Charter delegated powers by imposing sanctions against Libya.⁸³

The question raised by the said application is whether the ICJ has power to determine that a political organ like the Security Council has acted *ultra-vires*. Libya's request for interim relief invited the I.C.J to decide that Security Council resolutions might be *ultra vires* and that sanctions would impose irreparable injuries. In particular, Libya argued that, by its resolutions, the Security Council infringed, or threatens to infringe, the

⁸³ General list No.89.

enjoyment and exercise of the rights conferred on Libya by the Montreal Convention, its economic, commercial, and diplomatic rights. In refusing to give interim measures, the ICJ noted that under Article 103 of the UN Charter Libya's obligation to comply with every resolution of the Security Council overrode any rights that and or procedures for dispute settlement under the Montreal Convention.

Another way of looking at the issue is whether a decision of the Security Council may override the legal rights of a state and if so, whether there are any limitations on the power of the Security Council to characterize a situation as one justifying making of a decision entailing such consequences. Are there any legal limits to Security Council's powers of appreciation? If there are limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?

Judge Weeramantry in his dissenting opinion asked whether the Security Council discharges its variegated functions free of all limitations, or there is a circumscribing boundary of norms and principles within which its responsibilities are to be discharged.

This study answers Judge Weeramantry's question in the affirmative. According to this study, the legality of actions by any UN organ must be judged by reference to the Charter as the "constitution" of delegated powers. With respect to the UN Security Council, article 24 (2) of the UN Charter stipulates that in discharging its duties, the Security Council shall act in accordance with the purposes and principles of the UN. Both the purposes and the principles of the UN are enumerated in Articles 1 and 2 of the Charter

respectively. Any act by the Security Council outside the said purposes and principles is *ultra vires*. The issue then is who the competent body to set those limits is.

Article 92 of the Charter provides that the ICJ shall be the principal judicial organ of the United Nations. This central position of the ICJ in the UN system makes the ICJ the best candidate for the role of supervising legality of Security Council actions compared to any other international judicial organ.

However, Article 34(1) of the statute of ICJ blocks this approach in that only states may be parties in cases before the court. The Security Council is not a state and may therefore not be a party before the ICJ. In this regard, this study finds yet another cause for reforming the UN charter to grant ICJ compulsory supervisory jurisdiction over legitimacy of actions of Security Council.

4.9.1 Use of Force Should Be Regulated

Use of force against a state involves large scale loss of lives and property. In most cases where the Security Council has authorized use of force against a state, use of force has always resulted in breakdown of law and order, and change of regime. Use of force is the most traumatic interference with a state. Unfortunately, use of force by the Security Council is not regulated. The wording of Article 42 of the Charter implies that first; force should be used only if the measures not involving use of force taken under article 41 are not adequate or have proved to be inadequate. Secondly, when force is still necessary to maintain or restore international peace and security. However that test if it is a test at all is too simplistic and open to abuse. For instance, the test does not address itself to the

seriousness of the threat. It also does not address itself to the consequences of use of force.

The *High-level Panel on Threats, Challenges, and Change* in the report to the UN titled *A More Secure World: Our Shared Responsibility* recommended some guidelines to regulate the use of force by the Security Council.⁸⁴ In making the proposals, the Panel noted that effectiveness of the global security system as with any other legal order depends ultimately not on the legality of the decision to use force but on the common perception of the legitimacy of the decision itself. Legitimacy of the decision, the Panel noted, is to be measured in terms of its solid evidentiary grounds and right reasons morally and legally.

The guide lines proposed are:-

- a. With regard to the seriousness of the threat, whether the threatened harm to a state or human security is of a kind, and sufficiently clear and serious, to justify prima facie use of force.
- b. Whether the primary purpose of the use of force is to halt the threat in question or there are hidden agendas.
- c. Whether use of force is the last resort. If there are alternatives, they should be explored first before resorting to force.
- d. Whether the proposed use of force is proportional to the threat in terms of scale and intensity,
- e. Whether consequence of the proposed use of force will be worse than the threat i.e., which is the better evil.

⁸⁴ Paragraph 204 p.66.

The UN Secretary General in his report *titled In Larger Freedom* recommended that the UN Security Council pass a resolution adopting the said guidelines as principles on the use of force by the Security Council. He recommended that the resolution should express intention on part of Security Council to be guided by the said principles when deciding whether or not to use force.⁸⁵

4.9.2 Conclusion

This study has made a case for democratizing the UN Security Council and or making it more representative of the entire UN membership. Hand in hand with democratization, the study also made a case for entrenching the rule of the international law so that member states can enjoy equality before the Security Council under the international law regime created by the Charter of UN.

The need for democratic reforms in the Security Council is amply demonstrated by the fact that no member country would internally permit itself to be ruled in the way which United Nations, by its own constitution is set up i.e., self appointed group of the most and once powerful states that cannot be replaced. Ironically, those powerful states with impunity granted by their undemocratic veto powers in the undemocratic UN system violate territorial integrity and political independence of other states in the name of internally democratizing those other states. According to this study, the basic way to look at the UN system is that the most powerful organs should be controlled from bottom –up and not from top down.

⁸⁵ Supra note p.33.

On the other hand, the UN collective security system should work for the benefit of all state members. This study has shown that often, it has been abused to the detriment of some member states. The proposals made in this study and elsewhere by others would help in streamlining the system especially in use of force. The object is ensure that powers donated to the Security Council by the entire UN membership is exercised in good faith for the U.N purposes and in accordance with the principles set out in Articles 1 and 2 of the Charter respectively.

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