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Interpretation and Implementation Of The International Law Obligations Set Forth In The U.N. Charter By The Security Council Of The United Nations

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INTERPRETATION AND IMPLEMENTATION OF THE INTERNATIONAL LAW
OBLIGATIONS SET FORTH IN THE U.N. CHARTER BY THE SECURITY COUNCIL
OF THE UNITED NATIONS

by

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Chapter 1

Introduction

The United Nations sprang to life, creating a commendable record, after successfully suppressing the Iraqi aggression during the recent Gulf War and restoring the peace and security. It was then for the first time the world witnessed the true power of the United Nations and realized its efficacy as a world organization in disciplining the states' behavior to conform to the principles of international law.

The entire machinery of enforcement of international law is controlled by the Security Council, pursuant to the enormous powers granted upon it by the Charter of the United Nations, thereby making the success or failure of the United Nations a reflection of the Security Council's performance.

The Charter places primary responsibility for maintaining international peace and security on the Security Council. The duties of the Security Council towards maintaining international peace and security are two fold: first, to facilitate peaceful settlements of international disputes; and second, failing a nonviolent solution, to apply diplomatic, economic, and political sanctions, in order to restore the peace. 1

Both these functions primarily involve interpretation and implementation of international law.

This Article comprehensively analyses the manner in which the Security council, in the process of carrying out its functions, interprets and implements the international legal principles set forth in the U.N. Charter. The nature of its functions

is such that, despite being a political body, it is engaged in dealing with a variety of issues concerning one or more principles of international law, most of which are enumerated in the U.N. Charter, and which is discussed in the second chapter.

After a brief explanation of how the function of pacific settlement of disputes necessitates the Security Council to interpret the international legal principles, the third chapter focuses on the theories of interpretation of basically the U.N. Charter, because, Charter being an embodiment of those principles, interpretation of the former is not possible without the interpretation of the Charter.

The fourth chapter specifically analyses certain significant Charter provisions that involve important legal principles and discusses the mode of its interpretation by the Security Council. Finally, the fifth chapter explains with illustrations how the Council applied the legal norms in a given factual situation, and enforced them.

The date of publication of all writings that have been researched for the purpose of drafting this Article is no later than December, 1994.
Chapter 2

International Law and the Security Council

2.1 Aspects of International Law within the Realm of the Security Council

'Peace' was the only dream and desire of the frustrated international society after the disastrous world wars. Their thirst for peace culminated in the birth of the United Nations, an organization primarily established to maintain international peace and security. The Charter of the United Nations, wherein the principles of law for world peace are incorporated, is given paramount importance, and is considered a multilateral treaty or a fundamental instrument that governs the conduct of the states that agreed to adopt those principles by attesting their signatures. It gives form and stability to the organs, emphasizes general goals, and by its principles and procedures maintains a balance among universal, regional, and national authorities, and between the powers of public agencies and the rights of persons and nations. ¹

The U.N. Charter consists of rules for an organization of states and for the limits of action on the part of their governments. These rules are cast in the form of legal obligations, binding on states and accepted as such by their governments. The U.N. Charter itself is described by jurists as a multilateral convention, a treaty that is binding law. ²

Since the law of international institutions is nothing but a specialized branch of general (customary) international law upon which it rests, it is not surprising that principles of international law are as much enshrined in the U.N. Charter as they are in regional treaties. And when the United Nations was being established, serious attention was given to ensuring that the principles of the Charter became immutable legal norms for all states to be strictly abided by. The Charter states in no uncertain terms that "the organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security." The Charter also affirms basic principles of modern international law and order.

The new international principles of the U.N. Charter prohibits and provides for collective measures to prevent aggressive war by states. Maintaining International peace and security, assuring equal rights and self determination of people, organizing international cooperation in solving economic, social, cultural and humanitarian problems, and engaging in international actions to assure respect for human rights and fundamental freedoms are the fundamental principles emphasized by the Charter. Each would require significant development of international law.

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5 "A major purpose of the United Nations is to assure the observance of human rights, the self-determination of peoples, and the economic, social and cultural progress of all mankind. These purposes (Preamble and Articles 1, 53, 73, 76) are intended as guides to 'international cooperation' through the United Nations and the Specialized Agencies." See QUINCY WRIGHT, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR 49 (1961).
6 GRAY L. DORSEY, BEYOND THE UNITED NATIONS: CHANGING DISCOURSE IN INTERNATIONAL POLITICS AND LAW 52 (1986).
7 Id. at 41
The Charter dedicated the United Nations to be "a center for harmonizing the actions of nations" in pursuit of certain common aims. Of these, the maintenance of international peace and security is the United Nations' primary and continuing task. 8

The Preamble of the Charter of the United Nations "declares as an 'end' of the United Nations 'to save succeeding generations from the scourge of war,' which is identical with what the preamble declares a means for this end: 'to live together in peace with one another as good neighbors,' 'to maintain international peace and security,' and to ensure ... that armed force shall not be used, save in the common interest." 9

With maintenance of international peace and security as the primary objective, various principles of international law are enshrined in the Charter of the United Nations, and each constitute a fundamental norm of international law, primarily because their recognition is strengthened by the significance of the Charter and by their adoption by a vast majority of the states.

These principles include principles of individual and collective self-defense, 10 state jurisdiction, 11 state sovereignty and equality, which together is referred to as sovereign equality, 12 principle of non-intervention, 13 and pacific settlement of disputes. 14

8MOSES MASKOWITZ, THE ROOTS AND REACHES OF UN ACTIONS AND DECISIONS 10 (1980).
9HANS KELSEN, THE LAW OF THE UNITED NATIONS 13 (1st ed. 1950). The formulas 'to maintain (or further) international peace and security' or 'maintenance of international peace and security' appear also in other Articles of the Charter (U.N. Charter arts. 2(6), 11(1, 2), 43(1), 47(1), 48(1), 51, 52(1), 73(c), 84, 99, and 106).
10U.N. Charter art. 51.
11U.N. Charter art. 2(7).
12U.N. Charter art. 2(1).
13U.N. Charter art. 2(7).
14U.N. Charter arts. 1(1), 2(3), and chs. VI and XIV of the Charter.
Maintenance of international peace and security corresponds to the regulation and enforcement of the principles of international law regarding the outlawry of war including other kinds of use of force and breaches of the peace. The League of Nations created a new dimension to the concept of use of force and since then, with the emphasis made by the Kellogg-Briand Peace Pact (1929), the Nuremberg Charter (1945), the United Nations Charter (1945) and several other instruments, outlawry of war gained the force of law.

Article 2(4) of the United Nations Charter declares that, "[a]ll 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. This principle was elaborated as a new principle of international law in the 1970 Declaration on Principles of International Law and analyzed systematically. 15 Although the Declaration is of itself not a binding legal document, it is much clear that resort to war or other breaches of the peace is a vivid violation of international law. The Security Council being entrusted with the responsibility of maintaining international peace and security, is impliedly authorized to interpret and apply, whenever necessary, the principles of law relating to the use of force. 16

The United Nations provides three pillars for the maintenance of peace: Peaceful change, Pacific settlement of disputes, and Collective security. 17 Being the general principles established by Contemporary international law, both Pacific settlement of disputes and Collective security contribute to the maintenance or restoration of peace, and it is not infrequent for the Security Council to involve in these facets of

16 U.N. Charter arts. 23(1) and 24(1), and the specific powers granted to the Security Council for the discharge of its duties under this responsibility are laid down in Chapters VI, VII, VIII, and XII.
17 WERNER LEVI, FUNDAMENTALS OF WORLD ORGANIZATION 86 (1950).
law whilst engaged in matters pertaining to the use of force or other breaches of the peace. 18 Further, the Security Council is required by the Charter to “bring about in peaceful means, and in conformity with the principles of justice and international law, adjustment and settlement of international disputes or situations which might lead to a breach of the peace.” Finally Article 14 states the duty to act in accordance with international law and “the principle that the sovereignty of each state is subject to the supremacy of international law.” 19

Article 24(2) of the United Nations Charter, in describing the functions of the Security Council, declares that the Security Council, in discharging its duties, “shall act in accordance with the Purposes and Principles of the United Nations.” This obligates the Security Council to conform to the principles of equal rights, self-determination of peoples, human rights and economic, social and cultural progress of all mankind. 20 It also has to assure the territorial integrity, political independence and sovereign equality of states and give due regard to the principle of domestic Jurisdiction. 21

Although the Security Council is required to address settlements which are primarily of a political nature, it does not mean that even when it does not seek the aid of the ICJ, it operates in isolation from rules of international law . . . . 22 because, as a quasi-judicial body in discharging its functions of dispute settlement, the Security Council confronts numerous legal questions, collectively concerning various principles of international law, like, the substantial rights and duties of the states, treaty interpretation, etc.

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18 U.N. Charter art. 1(1).
19 General Assembly Resolution 375(IV) of December 6, 1949.
20 U.N. Charter art. 1, paras. 2 and 3, comprising the Purposes of the United Nations.
See WRIGHT, supra note 1, at 47.
22 WESLEY L. GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 569 (1957).
Thus resolution of international disputes and adoption of enforcement measures provide the Security council with ample opportunity to interpret and implement almost every facet of international law. The crucial importance of the Security Council in world society is clear. It follows that the Security Council’s significance has had an impact on its actions.

2.2 Significance of the Security Council in the International arena

The United Nations is a political body charged with the political tasks of an important character. The General Assembly and the Security Council are both principal organs of the United Nations. Nevertheless, the Security Council alone has the primary responsibility for the maintenance of international peace and security. 23

The Security Council is an organ of fifteen members. The People’s Republic of China, France, Russia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are its five permanent members. It derives enormous powers from the Charter to exercise its rights and discretion while performing its functions described as ‘purposes’ in Article 1, which are the maintenance or restoration of peace in the international community. Dominated by the great powers which together control most of the world’s military power, it is said to have great theoretical legal power, which is to be exercised with a high degree of discretion. 24

At the time of the adoption of the U.N. Charter, there was an underlying assumption that the party states accepted and would abide by the international law that had been developed in the international community of nation states over the pre-
vious 300 years, and that they would participate in developing that law as necessary in order to achieve the purposes of the United Nations.  

The United Nations is based on the principle of sovereign equality of states, but the scope of sovereignty has been so modified by obligations undertaken by the members in ratifying the Charter that the principles of that instrument can be called a "new international law."  

Security Council has the exclusive authority to control any violation of those principles insofar as such violation amounts to any threat to the peace or breach of the peace. Members and non-members are bound by the decisions taken by the Security Council in order to maintain international peace and security.

Above all, it can be argued that perhaps the most important provisions of the Charter, is one that provides the Security Council with the general powers to take any action it deems necessary in order to maintain or restore international peace and security.

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25 DORSEY, supra note 6, at 41.
26 WRIGHT, supra note 1, at 7.
27 U.N. Charter art. 25.
Chapter 3

Theories of interpretation

3.1 Pacific settlement of disputes

Inherent in any international dispute or a situation that is likely to erupt as a dispute is the risk of danger to the world in the form of threat to the peace or breach of the peace. To avoid confronting terrible consequences, it is extremely important and necessary to settle such disputes or situation by peaceful means. With the existence of numerous clashes of power and politics between states today, pacific settlement of disputes is inevitable to maintain world peace, and there is no question that its significance in modern International law has tremendously increased.

The principle of peaceful settlement of disputes, constituting an effective means to prevent breach of the peace is attached substantial importance and is strongly favored by the Charter of the United Nations, as it has been included in its purposes and its procedure described in chapters VI and XIV.

It is the purpose of the United Nations “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” 1 This purpose of the United Nations constitutes a function of the organization, to be carried out by the General Assembly, the Security Council, and the International Court of Justice. 2 To this function of the Organization corresponds an obligation of the members presented as a “principle” in Article 2, paragraph 3:

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1 U.N. Charter art. 1(1).
"All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered." 3

As far as the organization is concerned, the application of "peaceful means" standard is confined to the settlement of only those international disputes or situations which may endanger international peace and security. 4 Further, the term "peaceful means" has no definite meaning. Article 33 enumerates some of them, but the list is not exhaustive; the General Assembly and the Security Council have power to add to it, either by the combination of existing methods of settlement or by creating precedents for new procedures. 5

The Security Council is entrusted with the responsibility of maintaining of international peace and security. It thus plays a major role in ensuring that peaceful methods of dispute settlement have been adopted by the states to prevent breach of the peace. 6 "The Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute." 7 Also, if the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to recommend appropriate procedures or methods of adjustment or to recommend such terms of settlement as it may consider appropriate. 8

Up to this date, a large number of international disputes or situations have been either brought to the attention of the Security Council or voluntarily undertaken by the Security Council for resolution. But the performance of a judicial function of dispute settlement by a political body like the Security Council has made crucial the

3 Id.
4 U.N. Charter art. 1(1).
6 The Security Council's powers and functions in this regard are enumerated in Chapter VI of the Charter.
7 U.N. Charter art. 38.
8 U.N. Charter art. 37(1).
demarcation of international disputes between legal and political. The Charter itself recognizes the category of legal disputes in international disputes and has framed a distinct procedure for the settlement of such disputes. 9

3.2 **Legal and Political disputes**

In a society where states as political entities, amidst the political pressures and the legal constraints, strive to enhance their power even at the stake of violation of law, the blending of law and politics is a common feature of international conflicts. Thus, as described by Lauterpacht, while “it is not difficult to establish the proposition that all disputes between states are of a political nature, in as much as they involve more or less important interests of states, it is equally easy to show that all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, as the rule of law is recognized, they are capable of an answer by the application of legal rules.” 10

International law and international politics are inextricably intertwined, 11 and as explained by D.W. Greig, “Law cannot exist in isolation from the needs of the community it governs. In the international community, the very existence and future development of its legal framework is dependent upon reconciling the various political forces and pressures within the community.” 12

Despite the argument of various experts that law and politics are interrelated to each other, the realists viewed that all international disputes are likely to be political disputes. 13 But according to the position taken by Hans Kelsen, “Any conflict between states as well as between private persons is economic or political in

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9U.N.Charter arts. 92, 96 and 36, para. 3.
12GREIG, *supra* note 10, at 477-78.
character; but that does not exclude the possibility of treating the dispute as a legal dispute. A conflict is economic or political with respect to the interests which are involved; it is legal (or non-legal) with respect to the normative order controlling these interests . . .”\textsuperscript{14}

Nevertheless, the recognition based on the majority opinion is that political disputes and legal disputes are interrelated to a varying degree and that law and diplomacy in international relations are mutually complementary, but not that the former exclusively serves as an instrument of the latter.\textsuperscript{15}

One more intricate issue is the determination of an international dispute, which necessitates the understanding of the meaning and rationale of “legal disputes” on international plane. Speaking before the first meeting of the Institute of International Law in 1873, Professor Goldschmidt defined legal disputes between nations as “disputes which ought to be decided by the application of principles of law,” which included questions of territorial claims and the interpretation of treaties, but which excluded questions of nationality, equality, or supremacy as being determined by considerations of power and therefore political.\textsuperscript{16}

Article 36(2) of the Statute of the International Court of Justice reads:

> The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

> a. the interpretation of treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constituted a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

\textsuperscript{14}Id. at 1.
\textsuperscript{15}Opinion of Lauterpacht, Lincoln P. Bloomfield and Myres McDougal cited in KAHNG, supra note 13, at 3.
\textsuperscript{16}Id. at 8.
As far as the general definition of legal disputes is concerned, any dispute which falls in one or more of these four classes of disputes is by definition "legal."

"But the term "legal" is not confined to these connotations. As pointed out by Lauterpacht, "legal" encompasses the following:

Does it refer to disputes which are capable of a solution by the application of an existing rule of international law? Or to disputes of minor importance as distinguished from political disputes involving grave issues? Or to disputes to which the plaintiff state puts forward its demand in the form of a legal proposition? Or does it refer to disputes in which the application of legal rules is likely to yield results compatible with justice and the progress of international relations? The term "legal" has been applied in the last thirty years in each of these meanings." 17

It has to be noted that a dispute is clearly not legal though it may be "about" international law, if it is not centered upon the legal "position" (which is not contested by the parties) but upon whether or not that position should be altered or disregarded. 18 "Although interpretation of a treaty is prima facie a function within the competence of an international tribunal, the terms of the particular treaty may raise matters regarding political rather than legal judgments". 19

The International Court of Justice, in handling the issue of its power to adjudicate an international dispute, applied a similar principle and pronounced that if a question is referred to the Court which cannot be resolved by applying legal criteria, then unless it has been asked to give a decision ex aequo et bono, the Court must declare its incompetence. 20

At the same time, there is a fundamental difference between answering a question which is essentially political, and answering a legal question in the light of political factors. 21 It was pointed out by the International Court of Justice in

17 "British Reservations to the Optional Clause," 10 Economica 162 (1930).
18 GREIG, supra note 10, at 476.
19 Id.
21 GREIG, supra note 10, at 477.
its early advisory opinions concerning the interpretation of the Charter that whatever the background or political implications of a case be, if it raises a question of international law, the Court can give a decision. 

It therefore follows that irrespective of the interplay of law and politics, the underlying issue involved in an international dispute is either a question of law or fact, requiring resolution by application of legal principles or by political means as the case may be.

Exemplifying this principle, The Permanent Court of International Justice, in the Mavrommatis case provided that, "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." The disputes handled by the Security Council are no exception to this and are centered upon either a legal or political question.

3.3 U.N. Charter Interpretation

According to Article 36(3) of the U.N. Charter, the Security Council, in recommending appropriate procedures or methods of peaceful settlement of international disputes brought to its attention, "should also take into consideration that legal disputes should as a general rule be referred by the parties to International Court of Justice." Throughout the history of the Security Council only rarely have these formal procedures of handling legal questions been followed. This evidences that the Security Council has dealt on its own both political as well as legal questions.

It has been argued that the United Nations is a "living" institution and that the Charter is more like a constitution than an ordinary treaty. The Charter

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24KAHING, supra note 13, at 5.
25CHARTER AND LIVING LAW 160.
which sets forth the objectives, purposes, principles of the Organization, and the
powers and functions of the organs, has made obligatory for the Security Council to
"bring about by peaceful means, and in conformity with the principles of justice and
international law, adjustment or settlement of international disputes or situations
which might lead to a breach of the peace." 26 Further, the Preamble of the Charter
says: "We the peoples of the United Nations determined ... to establish conditions
under which justice and respect for the obligations arising from treaties and other
sources of international law can be maintained."

The Security Council is therefore under a constraint to give primary consideration
to the principles of international law when confronted with a legal question. However,
the U.N. Charter and the general international law include principles of justice as well
as rules of order, 27 and the rules concerning recognition, aggression, disarmament,
and military necessity are therefore the primary concern of the international order. 28
These principles are also known as principles of new international law. Characterized
in the Charter are also the basic principles of law or the customary international
law. 29

Thus in majority of the cases where interpretation of international law is required,
the interpretation of the Charter would suffice, because the Charter itself is an
embodiment of the principles of international law, and as pointed out by Quincy
Wright, law emerges from the interpretation and application of those principles
contained in the Charter. 30

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26 This obligation, described in U.N. Charter art. 1, para. 1, is imposed upon all the
organs of the organization.
27 QUINCY WRIGHT, ROLE OF INTERNATIONAL LAW IN THE ELIMINATION
28 See supra p. 5.
29 See supra p.5 and text accompanying notes 10-14.
30 QUINCY WRIGHT, INTERNATIONAL LAW AND THE UNITED NATIONS 19
(1960).
There is a division of opinion amongst the scholars of international law as to the nature of the United Nations Charter. It has been viewed either as a multilateral treaty or as a constitution. Whether it is called a constitution, a constituent instrument or a special treaty, it has been argued that the following features of the Charter have set it apart not only from bilateral treaties, but from other multilateral treaties as well: In the first place, it is a constituent instrument defining the structure of the Organization and setting forth the powers and functions of its organs and the rights and duties of its members. Second, it was intended to endure not just for the present, or for the foreseeable future, but for “succeeding generations.” Third it is superior to all other treaties as a “higher law” (Art 103 and 2(6)). And fourth, the states that participated in its drafting are far out numbered by new members. 31

It has been remarked by Samuel Shih and Tsaiyen, that “The problem of constitutional interpretation is two-fold: (1) Who has the authority to interpret? and (2) How to interpret? 32

Though interpretation has been the principal method by which the Charter has been adapted to new conditions, answers to these basic questions are not specifically provided for in the Charter itself. 33

Answer to the first question, “who has the authority to interpret?” is kept open by the San Francisco Conference, leaving each organ of the United Nations to interpret itself the relevant parts of the Charter with the hope that their interpretation will receive general support and make the United Nations a living institution. 34 It is commonly perceived that the Charter leaves the door wide open for any organ, or even the members individually to interpret it. Since the Charter is not a model

34 SHIH & TSAICHEN, supra note 32.
of precise drafting, the profuse ambiguities and even inconsistencies make possible wide divergencies of interpretation and development. 35

Concerning the precept of interpretation, it has been pointed out that the special features of the Charter preeminently warrant the application of the points relating both to treaty interpretation and to constitutional construction: evolutionary development, subsequent practice, structural interpretation and effectiveness. 36 Professor Oscar Schachter, as early as 1951, applied the theory of evolutionary development, and stated: "it [the Charter] is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future. Any doubt as to the flexibility and adaptability of the Charter must surely have been resolved by recent developments." 37 Interpretation of the principles of domestic jurisdiction, self-defense, etc., are glorious examples illustrating that the U.N. Charter has proved itself sufficiently flexible to adapt to new situations.

Art 31(1) of the Vienna Convention on treaties states the approach to interpretation, "in the light of its object and purpose." 38 Such an interpretation is perfectly applicable to the Charter because the broad and sweeping language of the Preamble and of Article 1 on the purposes of the United Nations manifests nothing but the object and purpose. In the words of Quincy Wright, "Even if some of the operational clauses appear precise in their terms, the symbolic preamble and the broad assertions of purposes and principles provide ample opportunity for supplementing, complementing or modifying their apparent meaning." 39

The structural interpretation remains in the background waiting to play its role in the proper time and circumstances, although the International Court, in inter-

35 WRIGHT, supra note 30, at 33.
36 Sloan, supra note 31, at 117.
39 WRIGHT, supra note 30, at 33.
interpreting the Charter, has referred to “the structure of the Charter” and “the relations established by it between the General Assembly and the Security Council.” 40

The “principle of effectiveness” would give priority to achieving the major purposes of the Organization and subordinating restrictive provisions of the Charter. 41

‘Liberal or effective interpretation’, which gives weight to the purposes of the organization, and which permits any organ to act when necessary and proper to carry out the purposes of the charter unless explicitly forbidden or unless the proposed action is clearly contrary to the general intentions of the instrument. 42

In support of the theory of ‘liberal interpretation’, the International Court of Justice, in the Certain Expenses case, expressed the view that, [W]hen the organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not “ultra vires” the Organization. 43

Another category known as ‘restrictive interpretation’ has also been recognized, which assumes that states have not parted with their sovereignty or limited its exercise unless they have agreed to do so expressly and explicitly. Those who espouse the principle of ‘restrictive interpretation’ are more inclined to view the Charter as a treaty to be interpreted with the recognized principles of treaty interpretation. 44

Interpretation through practice, which is a procedure allowing flexibility and organic growth (Article 31(3)(b) of Vienna Convention) is particularly appropriate for documents like the Charter, whether we call it a constitution, a constituent

40 See Sloan, supra note 31.
42 WRIGHT, supra note 30, at 38. See GOODRICH, supra note 33, at 36.
43 Certain Expenses Case, 1962 I.C.J. 157. Also, in its opinion on the capacity of the United Nations to bring a claim for damages suffered by an official of the Organization, it stated that, “[T]he organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.” See GOODRICH, supra note 33, at 37.
44 GOODRICH, Supra note 33, at 36.
instrument or a special treaty sui generis.  

For example, Article 22 of the U.N. Charter authorizing the General Assembly to establish such subsidiary organs as it deems necessary for the performance of its functions. Instead of interpreting it narrowly to refer only to committees and commissions set up to assist the Assembly through studies and advice, it has been broadly interpreted to permit the establishment of a great variety of operational agencies including peace keeping forces, aid missions, an environmental agency and other organs needed to meet particular exigencies. 

An often cited example is, Article 27(3) requires the affirmative vote interpreted expansively of nine members including “the concurring votes of the permanent members” for decisions on all matters other than procedure. Practice quickly established that abstentions would not be considered vetoes. Peace Keeping operations, developed by the General Assembly and subsequently followed by the Security Council is another example. Peace keeping falls somewhere between peaceful settlement in Chapter VI and Enforcement Action in Chapter VII, but finds no precise authorization in the Charter. These firmly established practices are variously considered either a broad interpretation or informal amendment through practice.

Although the common values which the Charter sets forth are stated in very general terms and their generality permits much latitude in their interpretation, the organs of the United Nations, generally speaking, do not have the authority to interpret and apply these principles in any conclusive manner. 

Since the responsibility for interpretation is vested in organs and members alike, the process is more likely to be political than judicial. The task faced by most

\[45\] Sloan, supra note 31, at 120.

\[46\] Id.

\[47\] Id. at 120-121.

\[48\] Id. at 121.

\[49\] Id.

\[50\] GOODRICH, supra note 33, at 29.
U.N. bodies is practical and instrumental—that is, to prepare a plan of action or to recommend state behavior to achieve a goal. 51 A political body, in majority of the cases, takes the action deemed expedient in the circumstances, thereby indicating that it regards its action as in accord with the Charter, 52 and, interpretation is implicit in the measures adopted, which are centered largely on the relation between means and ends in the specific contexts. 53

There are important exceptions, however, where interpretation of a more explicit adjudicative character related mainly to the U.N. Charter provisions and to some major treaties is involved. 54 The vagueness and ambiguity of the Charter provisions lead to multiple contradicting perceptions thereby making the process of interpretation complex and debatable. This is especially true regarding the obligations of states under the Charter and general international law in regard to the use of force, intervention, self-determination, human rights, and the principles of sovereignty, independence, threats to the peace, and equality. 55

It is constructive, with respect to the issues of this thesis to analyze how few of the important provisions of international law enumerated in the Charter which were severely contested were interpreted by the Security Council during the years of its practice.

51 Schachter, supra note 41, at 6.
52 WRIGHT, supra note 30, at 37.
53 Schachter, supra note 41, at 6.
54 Id.
55 Id. at 7.
Chapter 4

The Security Council’s approach to the interpretation of Charter law

4.1 Article 2(4) of the Charter

Article 2(4) states that:

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

Article 2(4) is one of the few provisions of the Charter that stands significant and distinct from the others, and that has a greater impact on the political and legal aspects of the behavior of states. It implicitly reiterates the objective of the United Nations—‘maintenance of peace and security,’ by imposing a negative obligation on the member states, which is to refrain from threat or use of force. It focuses on an important concept of international law—the threat or use of force, and accordingly sets forth the duties of the members.

A proper interpretation of Article 2(4) would necessitate a careful reading of Article 39. Article 2(4) and Article 39 go hand in hand, and therefore, ought to be read simultaneously. Thus in the joint opinion of Anthony D’Amato and Detlev F. Vagts, “To ‘apply’ Article 2(4) in isolation from Chapter VII would be to ignore the other side of the coin. That is not to say that Article 2(4) would be meaningless
in the absence of Security Council enforcement action; rather, it must be carefully interpreted. ¹

This is certainly true because, Article 2(4) does not only prohibit the threat or use of force to achieve political objectives, but also prohibits the use of force in any other manner inconsistent with the purposes of the United Nations. The determination as to whether any threat or use of force is inconsistent with the purposes of the United Nations (which is primarily to maintain international peace and security by prevention and removal of the threats to the peace, breaches of the peace and acts of aggression), is made by the Security Council, as empowered by Article 39 of the Charter.

Careful scrutiny reveals that it does not outlaw all transboundary uses of military force, but only those directed against a nation’s territorial integrity or political independence. A “humanitarian intervention” that does not annex any portion of the target state arguably is allowed by Article 2(4) if the Security Council’s enforcement capability is prevented by the veto. Thus, since 1945 there have been several successful unilateral humanitarian interventions arguably creating new customary law, such as India in Bangladesh (1971), Tanzania in Uganda (1979), France in Central Africa (1979), and the United States in Grenada (1983) and Panama (1989).

According to the text and the drafters’ intent, Article 2(4) does not cover internal use of force, such as civil strife, revolutions, etc., and in a corresponding construction, the terms “breach of the peace,” “act of aggression,” and “threat to the peace,” as used in Article 39 of the U.N. Charter, have been interpreted to relate to the international use or threat of use of military force. ² In all but two cases, the Council

has adhered to a narrow reading of both Article 2(4) and Article 39. The following instances, however, in the post-Cold War era, manifests that the Council, in furtherance of the object and purposes of the United Nations, laid a strong foundation for the emerging principles of international law by not merely reinterpreting the principles of the two Articles, but also by taking effective enforcement measures.

The Council’s determination that the consequences of the repression of the Kurds in Iraq by the Iraqi government during the wake of the recent Gulf War, “threaten international peace and security” substantively corresponds to Article 39, which empowers the Security Council to determine whether there exists “a threat to or breach of the peace or an act of aggression.” It is evident from the text of the resolution that the Council found that an internal situation—the forcible repression of minorities in Iraq—constituted a threat to international peace and security because of its “consequences,” that is, its potential escalation into an international conflict.

Less than half a year later, the Security Council confronted the growing violence in the Federal Republic of Yugoslavia, where the constituent republics of Slovenia and Croatia set out to secede from the Federation. Although there was no immediate danger of neighboring states becoming involved in the military conflict, the Security Council did not hesitate in classifying the situation as a “threat to international peace and security.”

Also, when reports of massive air raids on the Shiite minority in southern Iraq were received in early fall 1992, although by inference rather than express decision taken, the violence within Iraq was the starting point for an interventionist activity within the framework of a Security Council decision.

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3 Id. at 708.
4 Id. at 708-709.
6 Delbruck, supra note 2, at 709.
7 Id. at 710.
Subsequently, in the cases of Somalia and Haiti, the Security Council characterized the internal conflict as a threat to international peace and took Chapter VII enforcement measures. These instances indicate that the Council is prepared to construe Article 39 more broadly than it was originally envisaged and applied. The enforcement of the prohibition of the use of force, that is, of Article 2(4), seems also to extend now to internal as well as international use of force, where this internal use of force at least potentially, or with some reasonable probability, constitutes a threat to international peace and security and/or results in massive human rights violations.

The Charter recognizes three major exceptions to the use of armed force within the meaning of Article 2(4): 

9 The first is provided by Article 51, which preserves for states "the inherent right of individual or collective self-defense," thereby permitting the states to exercise this right "until the security Council has taken the measures necessary to maintain international peace and security." The second exception to Article 2(4) arises once the Security Council takes the "necessary measures." Hence, once the Security Council takes the "necessary measures" which transform an action of self-defense into an enforcement action, member states have a duty to assist in the enforcement action and to refrain from assisting the aggressor (Art 2(5)). The mechanism for facilitating this transformation is contained in the enforcement provisions of Chapter VII. But this mechanism is dependent on the special agreements being concluded between the member states and the United Nations. Until this happens, a transitional security arrangement under Article 106 operates. This agreement provides the third major exception to Article 2(4): a joint action by the five permanent members of the Security Council on behalf of the United Nations.

8 See infra notes 32 and 36.

A few more exceptions could be identified by a careful scrutiny of Article 2(4). As has been interpreted by one school of thought, it is a conditional qualified ban on the use of force, because, the closing words of Article 2(4), prohibiting the use of force in any aspect contrary to the purposes of the United Nations Charter, when read in conjunction with the human rights provisions throughout the Charter (Arts 1(3), 13(1)(b), 55(c), 62(2) 68(2)), lend further credence to this proposition—they are regarded as supporting a contextual reading of the proscription of the use of force, balancing the latter against the protection of human rights. 10

Thus, force used for purposes consistent with the spirit of the United Nations, such as intervention to uphold human rights, is arguably allowed by Article 2(4), and since 1945 there have been several successful unilateral humanitarian interventions arguably creating new customary law, such as India in Bangladesh (1971), Tanzania in Uganda (1979), France in Central Africa (1979), and the United States in Grenada (1983) and Panama (1989). 11

4.2 Article 2(7) of the Charter

Non-intervention is a fundamental principle of International law based upon the Sovereignty, equality, and the political independence of states. 12 This obligation extends to both states and international organizations. The founders of the United Nations incorporated the doctrine of non-intervention in Art 2(7) of the U.N. Charter which reads:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such

11 See supra p. 12 and note 11.
matters to settlement under the present Charter; but this principle shall not prejudge the application of enforcement measures under Chapter VII."

This provision has also been extensively criticized as vague and ambiguous, and therefore susceptible to multiple interpretations.

A “broad” interpretation of the provision has led to contentions that, 13 (1) it was incorporated in the Charter in Article 2 as one of the Principles; Consequently, it is a rule rather than an exception in the operation of the United Nations. (2) the exclusion of the reference to “international law” at San Francisco Conference implied the competence of a nation to determine whether a matter was within the domestic jurisdiction of that State. (3) the term “intervene” is a broad term the meaning of which includes all measures of intervention, dictatorial or otherwise. (4) the use of the term “essentially” in place of “solely” increased the reserved domain, for some matters which are not solely within the domestic jurisdiction “such as the questions of nationality would still be essentially within the domestic jurisdiction”; and (5) the insertion of words “enforcement measures” further prevented the Organization from intervening in domestic matters even under Chapter VII of the Charter, if proposed action were in the nature of provisional measures under Article 40 of the Charter.

However, a “narrow” interpretation of the paragraph has provided that, 14 (1) “discussion” of a question does not constitute an intervention; the same is true of recommendations of general character and even those specifically addressed to individual states if they are not calculated to exercise direct pressure; (2) the principle of domestic jurisdiction should be balanced by other equally important principles of the Charter; (3) there is no substantial legal, much less practical, difference between


14 Id. at 29.
the terms "essentially" and "solely"; (4) the absence of a provision for the determination of whether a matter is essentially within the domestic jurisdiction of a state does not warrant autointerpretation by that state; and (5) the question may be answered by an impartial finding of the competent non-judicial organs of the United Nations.

Because of these many ambiguities, caution must be exercised by the Security Council in interpreting Article 2(7), so that a reasonable balance may be ensured between the interest of the Security Council in the maintenance of international peace and security and the interest of sovereign nations in the exclusive control over matters falling within their domestic jurisdiction. 15

Article 2(7), which proclaims the principle of non-intervention, provides in itself an exception to it: “but this principle shall not prejudice the application of enforcement measures under Chapter VII”. In order for the U.N. to adopt enforcement measures under Chapter VII of the Charter, the Security Council must find that the controversy: (1) does not lie “essentially within the domestic jurisdiction” of the state, and (2) constitutes a threat to international peace and security, 16 and the power to determine the existence of any threat to the peace, breach of the peace, or act of aggression vests with the Security Council. 17

While the phrase “essentially within the domestic jurisdiction” is undefined by the Charter, when new developments in a state become a matter of international concern, they loses their status as a matter within the domestic jurisdiction of the state.

15 Id. at 31.
17U.N. Charter art. 39, ch. VII.
Thus, Article 2(7) is inapplicable not only when the Security Council takes measures pursuant to Chapter VII of the Charter, but also when a matter is not essentially within the domestic jurisdiction of the state.

As early as 1946, Dr. Evatt, Chairman of the Sub-Committee established by the Security Council “to make further studies in order to determine whether the situation in Spain has led to international friction and does endanger international peace and security, and if it so finds, then to determine what practical measures the United Nations may take,” explained this point in terms of the relation between Article 2(7) and Chapter VII of the Charter as follows:

“...it should be pointed out quite clearly that Article 2, Paragraph 7, of the Charter does not say that the United Nations shall not intervene in any matter which does not fall within Chapter VI. What it does say is that the United Nations shall not intervene in a matter essentially within the domestic jurisdiction of state. When considering this point we can forget about Chapter VII. We should concern ourselves only with the terms of Article 2, Paragraph 7, and ask ourselves whether or not this question is essentially within the domestic jurisdiction of Spain. That is a question of fact. It depends upon the circumstances of the particular case. What are the facts? The facts are that there is a situation the continuance of which, in the finding of the Sub-Committee, is likely to endanger the maintenance of international peace and security.” 18

The Security Council has frequently recognized that domestic disputes often carry international implications, 19 and in many cases ripen into a potential threat of international peace and security. 20

What constitutes a “threat to the peace” is undefined by the Charter. 21 Instead, the Security Council is vested with broad discretionary power in determining a threat to the peace. 22 Nevertheless, lack of precision and clarity of the term “threat to

18 KAHNG, supra note 13, at 34.
20 Appropriate examples are the recent cases of Iraq, Yugoslavia, Somalia, and Haiti.
21 Gordon, supra note 12, at 563
22 U.N. Charter art. 39, ch. VII.
the peace" has created many problems of interpretation. However, in determining a threat to the peace, the Security Council has acted with due regard to factual findings, interpretations of Charter provision, and the weighing of political considerations; the concept employed are not solely legal in nature.23 Its recent actions in Iraq, Somalia, and Bosnia-Herzegovina, have introduced a new concept of a selective, collective approach to global security, and a redefinition of the concept of sovereignty and have also launched collective security missions.24 Each case is discussed in detail in order to gain a good grasp of the reasoning behind the Security Council's actions.

After the end of Gulf War, Iraqi Kurds began a rebellion against the Baghdad government, wanting the anti-Iraq coalition to liberate them, along with Kuwait, from Saddam Hussein's Government.25 The fierce military onslaught by government forces prompted large numbers of Kurds to attempt to flee Iraq for Turkey and Iran.26 Despite the massive human rights violation, the Security Council remained inactive for some time because of the prohibition by Article 2(7) of the Charter of direct intervention in the domestic affairs of the member states, and apparently, the human rights abuses were not enough to make this an international issue warranting intervention.27 Rather it was the massive movement of people to neighboring countries that took the matter out of Iraq's internal affairs and made the Security Council action by passing of Resolution 688, wherein the Security Council found for the first time, that massive displacement of refugees constituted a threat to international

23 Gordon, supra note 12, at 563-564.
26 Gordon, supra note 12, at 546-547.
peace and security. The ultimate passage of Resolution 688 which involved the Security Council in a civil conflict without the consent of the state involved, in the absence of Chapter VII measures, is a new and important development.

The fighting that broke out in Yugoslavia between the province of Croatia, which had declared its independence, and the Yugoslav federal government also raised the question of U.N. intervention in civil war. Although there was no cross-border activity in this case, the Security Council disregarded the domestic jurisdiction principle and declared that the communist problem is so associated with neighboring states that the threat to the peace is international, and justified the intervention and application of Chapter VII of the U.N. Charter.

The U.N. took a substantial step forward in late 1992 when the Security Council authorized humanitarian intervention in Somalia, and the Security Council, for the first time, equated massive human tragedy with a threat to international peace. The horrific situation in Somalia, characterized by anarchy and massive human rights abuses in that the population was denied access to food, medicine, and other relief supplies, undoubtedly made the situation of international concern. Although the human rights violations did not pose a viable threat to international peace under traditional views, the suffering was severe and massive. In this factual situation, the U.N. Charter neither precluded nor mandated humanitarian intervention.

29 Gordon, supra note 12, at 549.
30 O’Connell, supra note 25, at 909.
31 Boutin, supra note 19, at 155.
32 Gordon, supra note 12, at 551.
33 Boutin, supra note 19, at 163.
34 Id.
The Security Council balanced the desperate need for humanitarian intervention with political concerns. 35

Haiti is another instance where the Security Council took a startling step by intervening in the internal conflict of Haiti, in the rationale of “threat” to the peace, despite the fact that the Haitian regime was no threat to its neighbors, no military or any other kind of intervention was contemplated, and that the human rights abuses were not as serious as those in Somalia. 36

While its intervention in Iraq and Yugoslavia are justified by the provisions of the Charter, its efforts to deal with the problems in Somalia and Haiti raise profound questions regarding the parameters of the term, “threat to the peace,” making later actions by the Security Council more problematic. 37

These instances clearly depict that, even an essentially domestic conflict, such as civil strife, may threaten the stability of the international community and constitute a threat to the peace. 38

4.3 Article 39

The crux of the enforcement mechanism in the U.N. system exists in Article 39 of the Charter, because it makes the very existence or non-existence of any threat to the peace, breach of the peace or act of aggression dependent upon the determination made by the Security Council in this regard. It provides that:

“The Security Council Shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

35 Id.
36 Gordon, supra note 12, at 573.
37 Id. at 546.
38 Gallant, supra note 10, at 906.
The terms ‘threat to the peace,’ ‘breach of the peace,’ and ‘act of aggression’ have not been defined by the Charter. This gives the Security Council a wide discretionary power in determining what constitutes a ‘threat to the peace,’ a ‘breach of the peace,’ or an ‘act of aggression.’ Even though from the point of view of the context of Article 39, a ‘breach of the peace’ exists whenever hostilities occur between armed forces controlled by governments, de facto or de jure, at opposite sides of an internationally recognized frontier, and a ‘threat to the peace occurs when, because of a declaration of war, of intervention, or of other hostile intent by the government of a state against another state, the Security Council, acting with due regard to factual findings, interpretations of Charter provision, and the weighing of political considerations, has gone far beyond this to accommodate various acts within the undefined terms including those that have not been envisioned by the Charter. For example, in the cases concerning Iraq, Yugoslavia, Somalia and Haiti, the magnitude of civil strife within the state was considered an immediate danger of a breach of international peace.

During the period of Gulf War, Iraq deliberately pumped oil into the Gulf and ignited oil well fires. Iraq’s deliberate pumping of oil into the Gulf certainly amounts to a release of a harmful substance from a land-based source, and also constitutes pollution from an installation operating in the marine environment.

Although the Security Council did not specifically declare that the environmental damage constituted a “breach of the peace,” from a practical perspective, however, the Security Council had already characterized Iraq’s invasion as a “breach of the peace” and hence there was no need to further characterize individual acts in such


\[40\] See supra pp. 31-33.

terms. 42 The Security Council by its Resolution 687 imposed liability for an unlawful use of force, acknowledging expressly that the unlawful use of force included environmental damage. 43

The finding that the deliberate sabotage by Iraq constituted 'use of force,' is one other instance that exemplifies the Security Council's adoption of elaborate interpretation.

4.4 Article 51 of the Charter

The inadequate statutory drafting of Article 51 has predictably led to substantial disagreement, 44 as to the meanings of the words and phrases in the Article.

Article 51 not only revolves around the principle of the legitimate use of force through self defense, but also couples the rights of states with the function of the Security Council. In view of the language of this Article, clarity of interpretation of especially this Article is crucial. Otherwise, whoever interprets Article 51 will interpret to their advantage, and chaos will result. "Because the Charter is the essential paradigm for determining the legality of actions taken by international actors, its lack of precision and multiple interpretations cannot be tolerated." 45

The text of Article 51 provides:

“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

42 Id.

43 Paragraph 16 of the S.C. Res. 687, U.N. SCOR. 46th Sess., U.N. Doc. S/Res/687 (1991), expressly “re-affirms that Iraq . . . is liable under INTERNATIONAL LAW for any direct loss, damage, including environmental damage and depletion of natural resources . . . as a result of Iraq’s unlawful invasion and occupation of Kuwait.”


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."

The Charter recognizes Article 51 as an exception to Article 2(4), whereby, the states are authorized to exercise their inherent right of individual or collective self defense. But such a right is not unlimited. It was the intent of the drafters of the Charter that the self-defensive action be permitted only “before the machinery of the Organization [could] be brought into action,” and this intent to permit a very limited right of self-defense is evident in (1) the overall purpose of the Charter, (2) the purpose of Article 51, and (3) the evolution of the text of the article at the San Francisco Conference. 46

The text of Article 51 dictates that the right of self-defense is limited and cannot be exercised after the Security Council takes the “measures necessary to maintain international peace and security.” The phrase “until the Security Council has taken measures necessary to maintain international peace and security” is very vague and is open to numerous interpretations. 47

Since the Charter does not explicitly define “measures necessary,” it is not clear at what point Article 51 limits a nation’s right of self-defense. If “measures necessary” is interpreted expansively to include even the call for a Security Council meeting to discuss a conflict, then a nation’s right of self-defense would be cut off quickly. 48 At the other extreme, if “measures necessary” is read to mean only Security Council actions which actually end a conflict, then a nation would have a virtually unlimited right to take independent action at any time during a conflict. 49

47Plochau, supra note 45, at 339-340.
48Elliot, supra note 46, at 68.
49Id.
Thus, based on the interpretation that self-defense action is allowed until the Security Council takes action, if Article 51 was applied to the situation of Iraq's armed attack against Kuwait during 1990, then, when the Council already has taken such measures—namely economic sanctions against Iraq and the dispatch of naval forces to regional waters to enforce against Iraq, Kuwait's right to resist no longer existed, because the Security Council passed several resolutions on this crisis, and an action was therefore taken. 50

Another plausible interpretation is that self-defensive action is permitted until the Security Council takes action that definitely restores and maintains international peace and security. Since the economic sanctions showed no signs of forcing Iraq out of Kuwait, continued self-defensive action by Kuwait and its allies is permitted despite the Security Council's adoption of economic sanctions. 51

Article 39 indicates that "measures necessary" means whatever measures the Security Council selects, and also empowers the Security Council to "decide what measures shall betaken in accordance with Articles 41 and 42, to maintain or restore international peace. Further, Article 39 is the first Article in Chapter VII of the Charter, which includes Article 41 (allowing economic sanctions, embargo, and severance of diplomatic relations), Article 42 (allowing collective police action) and Article 51. 52

According to the Charter, therefore, it is within the province of the Security Council to determine what types of measures are necessary to restore international peace and security. These measures may be listed in Articles 41 and 42, such as economic sanctions, embargo, severance of diplomatic relations, or collective police action. Thus, if the Security Council passes a resolution calling for an embargo, the

\footnotesize{\textsuperscript{50}Plofchan, supra note 45, at 341.  
\textsuperscript{51}Id. at 342-343.  
\textsuperscript{52}Elliott, supra note 46, at 68.}
Council has expressed its determination of the measure necessary for the restoration of international peace. 53

As far as Article 51 is concerned, various scholars have given their opinion and following are a few of them. First, as Professor Abram Chayes of Harvard Law School suggests, a nation could exercise the right of self-defense when the Security Council is debating a situation "with no likelihood of a serious substantive outcome." As an example, he states that when the Security Council was immobilized by reciprocal vetoes during the Cold War, "a state acting in individual or collective self-defense could not be expected to forego continuing action simply because the Council was debating the situation" with no prospect for passage of a resolution. 54 Similarly, Professor Thomas Franck and Faiza Patel of New York University School of Law argue that the right of self-defense, suspended by a collective police action, might revive if the Council became blocked from taking necessary measures. 55

Second, Professor Chayes proposes that a nation's right of self-defense might not be limited when the Security Council's action is "plainly in commensurate with the seriousness of the situation." 56 Rarely has a nation acted independently based on the Security Council's failure to take the measures necessary. 57

The correct meaning of the two phrases, "inherent right" and "if an armed attack occurs," is also open to debate. 58 Professor Kelsen writes that: [T]he Charter restricts the right of that the right applies only against "an armed attack" . . . . It is of important to note that Article 51 does not use the term "aggression" but the much narrower concept of "armed attack," which means that a merely "imminent"

53 Id.
56 Elliott, supra note 46, at 69.
57 Id.
58 Warriner, supra note 44, at 52.
attack or any act of aggression which [does] not [have] the character of an attack involving the use of armed force does not justify resort to force as an exercise of the right established by Article 51.\textsuperscript{59} Scholars have construed this language as a limitation or restriction on the traditional right of self-defense.

Based upon the examination of the founding documents pertaining to Article 51, and from the examination of the founding documents relevant to Chapter VIII of the U.N. Charter on regional arrangements, it has been argued that the right of self-defense should exist at all times unless the Security Council were to specifically prohibit its exercise.\textsuperscript{60}

It could therefore be concluded that the right of self-defense is fundamental and can only be limited if state action is in direct contravention of the purposes and principles of the Charter, or if the Security Council takes explicit action to limit this right.\textsuperscript{61}

4.5 Article 106 of the Charter

Article 106 states that, prior to the conclusion of the special agreements, in order for the Security Council to exercise its responsibilities under Article 42: “The parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.” The four states referred to in the Article are the permanent members of the Security Council.

\textsuperscript{60}Plofchan, \textit{supra} note 45, at 372.
\textsuperscript{61}Id. at 373.
The wording is unclear about whether the duty to consult "with a view to such joint action" includes a duty to actually take action, and also as to whether the subject of the consultation even has to include the measures decided upon by the Security Council. 62

According to Professor Hans Kelsen, Article 106 is susceptible to two interpretations: either (i) the Five Powers can take joint action only after the Security Council has made a determination under Article 39; or (ii) the Five Powers are completely independent of the Security Council and may take joint action when they see as necessary to maintain international peace and security. 63 He sees the first view, that joint action can only be taken after the Security Council makes a determination under Article 39 as more compelling. 64

In the Gulf War situation, the Security Council, by determining there was a breach of international peace and security, obligated itself to decide what measures not involving the use of force needed to be taken under Article 41, and impliedly authorized the Five Powers to consult with each other (and if the occasion required with other member states) with a view to taking joint action. 65 Simultaneously, acting under Article 42, the Security Council sought a voluntary resolution of the crisis by calling upon Iraq to comply with a provisional measure: the withdrawal of its forces from Kuwait. 66

Further, the exact nature of the relationship between Article 106 and Chapter VII is unclear. 67 Article 106 authorizes "joint action" by the Five powers, yet this

62Gilman, supra note 9, at 1139.
65Gilman, supra note 9, at 1146.
67Gilman, supra note 9, at 1143.
term is undefined. It is clear that “action” refers to military action, but what is less clear is what qualifies such action as “joint.” 68

Since Article 106 does not expressly require unanimity of purpose, a more flexible interpretation of Article 106 permits action without strict unanimity of purpose among permanent Members, thereby making it a viable solution to Security Council paralysis. 69

Until now, however, the Security Council members have never voted to adopt resolutions while acknowledging that any threat determination authorizes independent joint-enforcement action by Permanent Members. 70

4.6 QUESTION AS TO THE FUNCTIONAL COMPETENCE (ARTICLE 24(1) OF THE CHARTER)

Question as to functional competence, meaning ‘implied competence’ mostly concerns the interpretation of Art. 24. All the questions of competence involved, for obvious reasons, the problem of the interpretation of the Charter. 71

On the point of ‘the capacity of an international organization to expand and the limits set to its freedom are both determined by its functions,’ the ICJ declared:

“[T]he rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. 72 Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties .” 73

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68 Id.
70 Id.
71 KAHNG, supra note 13, at 93.
73 Id. at 182.
As of December 1946, there arose a question whether the Security Council was empowered under the Charter to assume responsibilities for the integrity and independence of the Free Territory of Trieste. At the 91st meeting of the Council on 10 January 1947, a second meeting on the case, the Council heard a statement of the Secretary-General in which he presented the following interpretation of Article 24 of the Charter:

The words “primary responsibility for the maintenance of international peace and security,” coupled with the phrase, “acts on their behalf,” constitute a grant of power sufficiently wide to enable the Security Council to approve the documents in question and to assume the responsibilities arising therefrom.

Furthermore, the records of the fourteenth meeting of the Committee III/I at San Francisco, demonstrate that the Security Council was not restricted to the specific powers set forth in Chapters VI, VII, VIII and XII. In the discussion, all the delegations which spoke, including both proponents and opponents of this amendment, recognized in this discussion that the responsibility that the responsibility to maintain peace and security carried with it a power to discharge this responsibility. This power, it was noted, was not unlimited, but subject to the purposes and principles of the United Nations.

In handling of questions relating to competence, the Council has necessarily concerned itself with the interpretation of those provisions of the Charter which related to the functions of the Council under specific situations and disputes.

Most significant development appears to have been made in the field of the implied power of the Security Council: Not only the power to determine the nature of a dispute when “legally” there no longer existed a dispute and the power to undertake territorial administration together with accompanying responsibilities, but also the power to establish a non-enforcement force, determine its functions irrespective of the intention of the host state, and authorize it to use force for the purpose of, among

74 KAHNG, supra note 13, at 75.
76 KAHNG, supra note 13, at 94.
others, preventing a civil war, may all be regarded to have been established. 77 The cumulative effect of this development may be such that the scope of the implied power of the Council may still expand in yet unknown direction.

4.7 Overview

There are no specific categories of legal disputes where it may be reasonably anticipated that the Security Council would follow a certain pattern of handling them and giving its legal opinion. 78 Whether the legal question be on the revision of treaty, the construction of customary law, or a principle of international law, or the legality of nationalization, the Council may follow a course of action it considers appropriate in the context of each case. 79

Although its practice demonstrates that it is undoubtedly politics which played the greater role in the Security Council and that it is a function of politics, and not of law, to promote the functional interplay and even integration of the law and politics, a change towards the better side in its reaction to an international crisis since the collapse of the east-west power politics cannot be overlooked.

It has followed exclusively the first of the numerous methods of the Charter interpretation anticipated by the San Francisco Conference, 80 and its interpretation of Articles 2(7) and 51 illustrates the same.

77 Id. at 108-109.
78 Id. at 226.
79 Id.
80 Id.
Chapter 5

Implementation of International Legal Principles

5.1 The Security Council as an Enforcement Authority

An individual state being its own law enforcement agent, International legal order has lacked a general central law enforcement authority to enforce international norms and obligations in day-to-day international transactions. ¹ Modern international law, as it has evolved particularly after World War II, has centralized international use of force to the extent that military enforcement measures may be applied only under the authority of the U.N. Security Council or in cases of individual or collective self-defense within the bounds of Article 51. ²

A substantial array of tools with which the Security Council could pursue its primary mission of maintaining international peace and security ³ are contained in Chapters VI, and VII of the Charter, which grants the Security Council immense powers to perform the enforcement function. The various methods as contained in Chapter VI include diplomatic action, such as facilitating consultation and negotiation among member nations, ⁴ instituting investigations with binding force, and such other measures of conflict prevention, and making recommendations by means of resolutions with a view to a pacific settlement of disputes.

⁻¹Josef Delbruck, A more effective international law or a new "world law"?—Some aspects of the Development of international law in a changing international system, 68 Ind. L.J. 705, 720 (1993).
⁻²Id. at 721.
⁻⁴Id.
The Security Council has been involved in numerous disputes as a quasi judicial body, and has dealt with all kinds of questions, both legal and political. The resolutions passed by the Security Council for settlement of the disputes reflect the Security Council’s perspective of international law and constitutes the measures taken by the Security Council to implement the International law. The Security Council also serves as a forum for informal consultations among its members thereby facilitating relaxed negotiations and effective conflict resolution.  

Chapter VII of the U.N. Charter, which sets forth the Security Council’s powers for responding to the threats to the peace, breaches of the peace, and acts of aggression, is intended by the framers of the Charter to be “the teeth of the United Nations.” Significant among these include the Security Council’s authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” The enforcement measures include, imposition of economic and military sanctions, severance of diplomatic relations, the use of collective armed force, and non aggressive military action, such as dispatching and maintaining peacekeeping missions.

5.2 SANCTIONS

Sanctions assume a punitive nature by representing the “penalty attached to transgression and breach of international law” in the form of “punitive actions initiated by a number of international actors, particularly a world organization such as the

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5 Id. at 252-253.
7 U.N. Charter art. 39, ch. VII.
8 U.N. Charter art. 41, ch. VII.
9 U.N. Charter art. 42, ch. VII.
League of Nations or the United Nations, against one or more states for violating a universally approved Charter, as inducements to follow, or refrain from following, that particular course of conduct and conform with international law." 10

One of the most significant objectives of the use of sanctions is to send a clear signal to the target state (the state against which the penalties are being imposed) that its behavior is unacceptable to the international community, constituting a service of notice that further illegal action or continuation of the present illegal action may lead to more serious measures. 11

There are various forms of sanctions, for example, there are moral and diplomatic sanctions, which attempt to effectively isolate the target state in terms of public opinion or official diplomatic recognition, economic sanctions, that seek to achieve political goals through the isolation of the target state’s economy by using techniques such as boycotts, embargoes, blockades, asset freezes, financial transaction restrictions, and other economic tactics, maritime sanctions, etc. 12

In framing the Charter of the United Nations, special attention was again given to the use of economic sanctions as part of a more sophisticated system of collective security, and the Security Council has resorted to sanctions as one of its enforcement action surder Chapter VII of the Charter during the following occasions: First, in 1966, comprehensive economic sanctions were imposed on Rhodesia after a unilateral declaration of independence from Britain by the government of Ian Smith. The second instance involved an arms embargo against South Africa, imposed in 1977 and which continues to the present day. The most recent instances of sanctions authorized by the Security Council pertains to Iraq, Yugoslavia, Somalia, and Haiti.

10Joyner, supra note 6, at 2-3.
11Id. at 3.
12Id. at 4.
The umpt number of resolutions passed by the Security Council with respect to sanctions collectively represent the exercise of Security Council authority to restore international peace and stability.

The cases discussed below involve one or more principles of international law, and their detailed discussion depicts the manner in which the Security Council has implemented those principles.

5.3 Some instances of Security Council’s performance

5.3.1 Congo

Shortly after the former Belgian Congo became independent on June 30, 1960, the province of Katanga, under Moise Tshombe, with military and other support of Belgium seceded from the new Republic and declared itself independent. 13

While the Security Council did not adopt the view that the Belgian troop’s presence constituted aggression, it agreed with the argument that the troops violated Congolese sovereignty and made the dispute between the Congolese government and Katanga an international one. 14

Security Council Resolution 143 (1960) called upon Belgium to withdraw its troops from the territory of the Republic of the Congo (now Zaire). 15 Security Council Resolution 145 (1960), while recognizing that the Congo had been admitted to U.N. membership “as a unit” 16 called on all governments to refrain from any action which might undermine the territorial integrity and the political independence of the republic of the Congo. Security Council Resolution 169 (1961)
strongly deplored "secessionist activities and armed action now being carried on by the provincial administration of Katanga" and completely rejected "the claim that Katanga is a 'sovereign and independent nation'." It requested all member states "to refrain from any action which may directly or indirectly impede the policies and purposes of the United Nations in the Congo and is contrary to its decisions and the general purposes of the Charter."

The case of Katanga highlighted several principles of U.N. policy: Colonial borders are to be maintained sacred and secession from an existing state is taboo; in civil disturbances within the borders if a Member State foreign aid to non-governmental forces will not be tolerated; and most importantly, recognition as a state should be denied in cases where "independence" is grounded upon secession of the territory in question.

5.3.2 Rhodesia

On November 11, 1965, the minority white government of Southern Rhodesia under the premiership of Ian Smith declared the country independent. The unilateral declaration of independence was promptly condemned by the U.N., and caused the Security Council to recommend sanctions against the regime that professed to constitute the government of the territory.

The Sanctions resolution called upon states, inter alia, not to recognize or to uphold diplomatic or other relations with the "illegal authority" in Southern Rhodesia, and furthermore, not to assist or encourage the "illegal regime" and the

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18J. D. Van Der Vyver, Statehood in international law, 5 Emory Int'l L. Rev. 9, 36-37 (1991).
racist settler minority in Southern Rhodesia." Security Council Resolution 221 (1966) proclaimed positively that the situation in Rhodesia constituted a threat to the peace, 22 and was followed by Security Council Resolution 232, (1966) which for the first time in the history of the U.N. imposed mandatory sanctions under Chapter VII of the U.N. Charter against a political community. 23

Pursuant to Article 39, the Security Council could characterize any extreme violation of human rights principles as a "threat to peace," and therefore intervene in domestic situation which would potentially erupt into international conflicts. 24 The Security Council, by enacting Sanctions against the Ian Smith regime in Southern Rhodesia, justified this intervention by characterizing these policies as "disturbance[s] of international peace" and "threat[s] to international peace and security. 25

The problem in Southern Rhodesia brought two particular issues onto the agenda on non-recognition: The emphasis on racism in the composition and practices of the "illegal regime," and the question of self-determination of peoples. 26 The right of the people of Southern Rhodesia “to determine their own future” was mentioned in paragraph 7 of Security Council Resolution 217 (1965) and reiterated in paragraph 4 of Security Council Resolution 232 (1966). The Rhodesian problem came to a happy ending with Security Council Resolution 460 (1977), in which the Security Council applauded the Lancaster House Agreement which culminated in the independence of Zimbabwe in 1980, and terminated the mandatory sanctions. 27

26 Vyver, supra note 18, at 38.
5.3.3 The South African Homeland States

Pursuant to the policy of apartheid, the South African government demarcated a total ten regions in the country as “homelands” (initially they were called “Bantustans”) for ethnically defined sections of the Black (African) population. The U.N. refused to recognize the “independence” of all those territories that applied to the South African government of “independence” and were granted that status. In Resolution 417 (1977), the Security Council called on South Africa to “[a]bolish the policy of bantustanization, abolish the policy of apartheid and ensure majority rule based on justice and equality.”

The President of the Security Council, at the 2168th meeting of the Council on September 21, 1979, made the following statement:

The Security Council calls upon all Governments to deny any form of recognition to the so-called “independent” bantustans, to refrain from any dealing with them and to reject travel documents issued by them, and urges all Member Governments to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called “independent” bantustans.

Non-recognition of the homeland states was prompted by considerations founded on the right to self-determination and the international censure of racial discrimination and apartheid, and here too, there might soon emerge a happy ending.

5.3.4 The Turkish Republic of Northern Cyprus

Cyprus became an independent state in 1960, and from the outset, suffered under the rivalry of the deeply divided Greek and the Turkish factions of its population.

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28 Vyver, supra note 18, at 39.
32 Vyver, supra note 18, at 41.
Following an abortive coup in 1974, executed by the Cyprian National Guard and backed by Greece, Turkey invaded the island by sea and air with United States supplied weapons and equipment. 33

The Security Council declared attempts to create the Turkish Republic of Northern Cyprus to be invalid, deplored the "purported secession" of that region, and called upon states to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus, while at the same time also urging them not to recognize any Cyprian state other than the Republic of Cyprus. 34

5.3.5 EAST JERUSALEM, THE WEST BANK, AND THE GOLAN HEIGHTS

Since its establishment on May 15, 1948, the state of Israel has been in constant conflict with its Arab neighbors. Following the Six-Day War of 1967, Israel took possession of East Jerusalem and the territory west of the Jordan River, known as the West Bank, which it had captured from Jordan and laid claim to the Golan Heights, which was part of Syria. 35

The Israeli government's claim to annex the Golan Heights and East Jerusalem through municipal law was a violation of the fundamental rule of international law. "One of the most basic elements in the law of self-defense is that it only authorizes a defender to preserve its existing values and not to acquire those of an enemy, and the consistent history provides convincing evidence of the expansion of Israeli perceived interests or values as opposed to their conservation." 36

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34 *Id.*, supra note 18, at 43.
35 *Id.*, at 45.
The U.N. founded its annulment of Israel’s claim to the occupied territories on the basic premise of contemporary international law, particularly, the use of force, which is inadmissible.

5.3.6 Kuwait

On August 2, 1990, Iraqi military forces invaded Kuwait, unseated the Emir and took control of the country; on August 8, Iraq formally annexed Kuwait; on August 10, Iraq instructed the foreign governments to close their embassies and consulates in Kuwait by August 24; and on August 28, the 19th Iraqi governorate. The Security Council responded promptly and with unprecedented vigor to Iraq’s unlawful acts of aggression. 37

The Security Council condemned Iraq for its invasion of Kuwait and demanded its immediate and unconditional withdrawal, 38 imposed mandatory sanctions under Chapter VII of the U.N. Charter against Iraq, affecting all trade with Iraq and Kuwait, 39 declared the annexation of Kuwait “null and void”, demanded that Iraq rescind its declaration of the “merger” of the two countries, and called on all states and institutions not to recognize the annexation and to refrain from any action that might be interpreted as recognition of Iraq’s claim to Kuwait, 40 followed by such other resolutions, and finally passed the Resolution 678, 41 recalling Iraq’s refusal to comply with any of the above resolutions and allowing Iraq one final opportunity, “as a pause of good will,” to do so, paved the way for armed intervention under article 42 of the U.N. Charter.

41 Id.
War erupted in the Persian Gulf on January 16, 1991, when allied forces from twenty-eight countries began the offensive authorized by Security Council Resolution 678 (1990) to liberate Kuwait. 42 Non-recognition of the Iraqi claim to Kuwait is clearly founded on the salient rule of international law against aggression.

On two occasions during the debate over Iraq and Kuwait, the Security Council ordered the Collective use of force in the name of international law and as authorized by Chapter VII. 43

The Charter moved beyond the Kellogg-Briand Pact, as the signatories renounced not only their right to go to war, absent circumstances of individual or collective self-defense, but their right to resort to the threat or use of force as well. These proscriptions on aggression were to been forced through a systematic procedure authorizing collective force against an aggressor nation. 44

5.3.7 Offensive Administration of a Foreign Territory

South West Africa, which was colonized by Germany in 1884, was awarded by the latter, through the Peace Treaty of Versailles, to South Africa to be administered by her as “an integral portion of the Union of South Africa” in accordance with the rules applicable to C Mandate territories. 45 South Africa’s administration of South West Africa attracted the attention of the U.N., and this issue eventually culminated in the termination by the General Assembly in 1966 and Security Council in 1969.

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42 Vyver, supra note 18, at 54.
44 Sabec, supra note 41.
45 Christian J. Garris, Bosnia and the limitations of international law, 34 Santa Clara L. Rev. 1039, 1069-1070 (1994).
of the Mandate, and following a further lengthy dispute, finally the independence of Namibia in March 1990. 46

South Africa’s administration of Namibia implicated the right of the Namibian people to choose how they would be governed—their right of self-determination, which norm remains in constant tension with other rights and principles—the principles of “sovereign equality, non-intervention, the non-use of force, and the maintenance of territorial integrity and political independence.” 47

The Security Council, in Security Council Resolution 264 (1969), expressed the opinion that the continued presence of South Africa in Namibia was “illegal and contrary to the principles of the Charter and the previous decisions of the United Nations and is detrimental to the interests of the population of the Territory and those of the international community,” and called on South Africa to withdraw its administration from the territory.

It passed several Resolutions in this regard and finally passed Resolution 283 before submitting the issue to the ICJ for advisory opinion, requesting all states “to refrain from any relations—diplomatic, consular or otherwise—with South Africa implying recognition of the authority of the Government of South Africa over the Territory of Namibia,” and called on all states that maintained diplomatic or consular relations with South Africa to issue a formal declaration stating that they do not recognize any authority of South Africa with regard to Namibia and consider South Africa’s continued presence in the territory to be illegal. 48

46 Id.
5.3.8 THE IRAQ-IRAN WAR AND THE WAR AGAINST IRAQI AGGRESSION

The 1980-88 Iraq-Iran War and the 1990-91 War Against Iraqi Aggression, taken together, have provided the context for the most frequent application since 1945 of the rules of international law relating to the rights at sea of neutrals during the former war, and the application of maritime sanction to non-belligerents and others during the latter. 49

During the eight-year course of hostilities between Iraq and Iran, the two belligerents attacked more than 400 commercial vessels, almost all of which were neutral-state-flag merchant men. 50

No existing norm or international agreement gives a belligerent the right to open fire on a merchant vessel flying a neutral flag merely because it is engaged in non-neutral commerce, and attacks upon neutral merchant vessels simply because they ventured into specified area of the high seas is invalid under International Law. 51

The U.N. Security Council Resolution 661 (1990), adopted on August 6th under Chapter VII of the U.N. Charter, decided that all states shall prevent:

3. (a) the import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution; . . . . 
(c) the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait . . . . 

50 Peace, supra note 49.
51 Id.
Further resolutions of the Security Council clarified the situation with regard to enforcing economic sanctions at sea. Paragraph 1 of Resolution 665 (1990) of August was explicit in recording that the Security Council:

Calls upon those member states cooperating with the Government of Kuwait which are deploying maritime forces to the area to sue such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward shipping in order to inspect and verify their cargoes and destinations and to insure strict implementation of the provisions related to such shipping laid down in Resolution 661 (1990).

The Charter, in the abstract, limits the sovereignty of the membership of the United Nations in at least two ways: first self-defense; and second, the Charter gives the Security Council the power to commit forces collectively, in the name of all members (Art 25) thereby denying member states their customary right to remain neutral. Use of force by individual states is not permitted under Chapter VII of the U.N. Charter. Force could be used only under a U.N. force.

5.4 **Preemptory rules of General International Law**

Article 53 of the Vienna Convention defines a preemptory norm of general international law as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." On the international plane some of the provisions of the United Nations Charter have been held to be jus Cogens, or fundamental norms against which other treaty or source of international law can derogate.  

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Therefore it could be argued that, pursuant to the Charter provisions, several norms of international law invoked by the U.N. and the I.C.J. in the above instances, to wit:

(a) the prohibition of aggression and of the acquisition of territory by means of force (the Turkish Republic of Northern Cyprus, East Jerusalem and other territories occupied by Israel, the Iraqi invasion and annexation of Kuwait, and South Africa's continued presence in Namibia);

(b) denial of the right to self-determination (Katanga, Rhodesia, the South African homeland states, the Turkish Republic of Northern Cyprus, East Jerusalem and other territories occupied by Israel, and South Africa's administration of South West Africa/Namibia); and

(c) the prohibition of racial discrimination and apartheid (Rhodesia, the South African homeland states, and South Africa's administration of South West Africa/Namibia). \(^5^4\)

The above-mentioned norms are all preemptory rules of general international law (jus cogens). \(^5^5\)

5.5 MAJOR PROCEDURAL IMPEDIMENTS TO A PROPER IMPLEMENTATION

Two major procedural impediments have historically limited the effectiveness of the Security Council in responding to particular international conflicts: the veto power of the five permanent members of the security Council, and the Council's failure to take initiative in addressing international disputes. \(^5^6\)

5.5.1 THE VETO

The veto privilege guaranteed that no major action could be undertaken without the consent of all five permanent members. The veto power remains one of the most significant obstacles to the effective workings of the Security Council. \(^5^7\) As a

\(^{54}\) Vyver, supra note 18, at 65.

\(^{55}\) Id. See also J. DUGGARD, RECOGNITION AND THE UNITED NATIONS (1987).

\(^{56}\) Shenk, supra note 3, at 256.

\(^{57}\) Gallant, supra p. 28 and note 10, at 899.
result of their special privilege, the five permanent members, with their disproportional power and singular interests, have precluded the Security Council from acting according to the purposes of the United Nations. 58 In other words, the veto power limited Security Council action in virtually all areas of international conflict. 59

However, increasing respect for international conflict resolution, and decreased East-West polarization in the post-Cold War era have reduced partisan inclinations and the number of conflicts that permanent members of the Security Council perceive to affect their vital interests, and facilitated consensus. 60

5.5.2 LACK OF INITIATIVE

The second principal barrier to Security Council’s effectiveness is that “in too many international disputes, . . . . the Council has taken no initiative, but has waited . . . . for somebody to submit the matter to it.” 61 Under many circumstances the Security Council did not take an action on its own initiative. The problem was either referred to by the Secretary General or any other member. The Security Council’s failure to take prompt and effective measure has been another major obstacle that forestalled any action.

58 Id.
59 Shenk, supra note 3, at 256.
60 Id. at 258.
61 Id.
Chapter 6

Conclusion

Maintenance of peace and security is the primary concern of today’s world, and the absolute responsibility of ensuring world peace is placed on the Security Council. In order to accomplish this goal, it is very crucial that the Security Council appropriately interpret the applicable Charter principles of international law and effectively enforce them.

The Charter that grants enormous powers to the Security Council to carry out this task, also sets forth the rules, methods and procedures, which are binding upon the Security Council in its actions. Such limitations on its power has a great impact on its functioning as a principal organ of the world organization.

Some of the Charter provisions, especially those that relate to the competence and procedure of the Security Council itself, are quite vague and are open to various interpretations. This also has had negative effects on the Security Council’s fulfillment of its tasks. The Security Council’s preference for its own interpretation clearly shows that it wishes to give an authoritative interpretation to the provisions of the Charter in view of its primary responsibilities for the maintenance of international peace and security. ¹

Further, the Security Council does not strictly abide by procedure laid down by the Charter for handling disputes. For instance, the Charter requires the Security Council to refer legal disputes to the I.C.J., ² but throughout the history of the

²U.N. Charter art. 36(3).
Security Council, only rarely have these formal procedures of handling legal questions been followed.

The Security Council’s function as a quasi-judicial body in interpreting and applying international legal norms has been greatly criticized with respect to its resolution of disputes involving the substantial rights and duties of the states and interpretation of treaties. The Security Council ought to submit such disputes to the International Court of Justice, a body more appropriate to perform such functions.

Since the Security Council is a political body, the interplay of law and politics is another factor that hampers the Council’s successful interpretation and implementation of the international legal principles. A review of the Security Council’s performance clearly show that it is politics which played a greater role in the Council. Its impact is such that, even today, if any major power is directly involved in a dispute or a situation, the Security Council becomes handicapped and could not take any effective measures. However, in spite the fact that the task of interpretation of the Charter and other norms of international law especially for a political body like the Security Council is undoubtedly a complicated one, it is believed that the Council’s interpretation is greatly in conformity with the Charter and other principles of international law. 3

Furthermore, as discussed earlier, some of the Charter provisions that set forth the legal principles are not clear and precise. This not only makes it difficult for the Security Council to interpret them in accordance with the purpose and object of the United Nations, but also gives the Security Council an opportunity to exercise its discretion and misuse its powers.

Until the end of the Cold War, the performance of the Security Council regarding enforcement of international law was very static and mostly unsuccessful, primarily

because of the political clashes between the major powers and the excessive use of veto. Since then it has been acting with more vigor, dynamism and efficiency.

Most of the recent, and some of the past enforcement measures undertaken by the Security Council have proved to be a great achievement. In such instances, the Security Council, by its interpretation and implementation techniques, establishes a strong foundation of the relevant principle[s] of international law, which there upon gain more emphasis and strength.

Considering the above-mentioned factors together with other causes like, lack of funds, lack of cooperation among the permanent members, etc., the Security Council is justified in failing to prove to be very successful. Yet, the world must not lose hope, because its strengths and powers can never be undermined.