APPRAISAL OF THE SECURITY COUNCIL AS MACHINERY FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY UNDER THE UN CHARTER

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UNIVERSITY OF NIGERIA
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DEPARTMENT OF INTERNATIONAL LAW AND JURISPRUDENCE

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A DISSERTATION PRESENTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS (LL.M) DEGREE

BY

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NOVEMBER, 2016

CERTIFICATION

This is to certify that this research work titled "Appraisal of the Security Council as Machinery for the Maintenance of International Peace and Security under the UN Charter**"** was carried out by Osuagwu Adrian, a postgraduate student in the Department of International Law and jurisprudence with Registration Number PG/LLM/08/47415, in fulfilment of the requirement for the award of the degree of Masters of Laws (LL.M).

The content of this dissertation is original and has not been presented in part or in full for the award of any diploma and or degree of this University or any other University Save for the references that are fully acknowledged.

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DEDICATION

To Almighty God, the author and finisher of our faith

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Art.	-	Article
Arts.	-	Articles
AU	-	African Union
CTC	-	Counter Terrorism Committee
CTED	-	Counter Terrorism Committee Executive Director
CWC	-	Chemical Weapons Convention
ECOSOC	-	Economic and Social Council
ed.	-	editor
eds.	-	editors
edn.	-	edition
et al	-	*et alli* (and others)
GA	-	General Assembly
HLP	-	High Level Panel
IAEA	-	International Atomic Energy Agency
ibid	-	*ibidem*ï in the same place as the one last cited
ICRtoP	-	International Conciliation for the Responsibility to Protect
ICJ	-	International Court of Justice
ILC	-	International Law Commission
ICRC	-	International Committee of Red Cross
loc.cit	-	*lococitato*- at the passage previously cited

MINURSO	-	United Nations Mission for the Referendum in Western Sahara
MINUSMA	-	United Nations Multidimensional Integrated Stabilization Mission in Mali
MINUSTAH	-	United Nations Stabilization Mission in Harti
MONUSCO	-	UN Organization Stabilization Mission in Democratic Republic of Congo
MSC	-	Military Staff Committee
NATO	-	North Atlantic Treaty Organization
NPT	-	Non Proliferation Treaty
OAS	-	Organization of American States
OAU	-	Organization of African Unity
ONUSAL	-	UN Observation Mission in EL-Salvador
op. cit.	-	opere citato-in the work previously cited
OPCW	-	Organization for the Prohibition of Chemical Weapons
OTPIC	-	Online Training Program for Intractable Offence
p.	-	page
pp.	-	pages
para	-	Paragraph
PCA	-	Permanent Court of Arbitration
PCIJ	-	Permanent Court of International Justice
Res.	-	Resolution

s.	-	section
ss.	-	sections
SC	-	Security Council
SIPRI	-	Stockholm International Peace Research Institute
UN	-	United Nations
UNAMID	-	African Union United Nations Hybrid Operation in Dafur
UNAVEM	-	United Nation Angola Verification Mission
UNECYP	-	United Nations Peacekeeping Force in Cyprus
UNEF	-	United Nations Emergency Force
UNFIL	-	United Nations Interim Force in Lebanon
UNGA	-	United Nations General Assembly
UNISFA	-	United Nations Interim Force in Abyei
UNITAF	-	United Nations Task Force
UNMIH	-	United Nation Mission in Hart
UNMIK	-	United Nations Interim Administration in Kosovo
UNMIL	-	United Nations Missions in Liberia
UNMISS	-	United Nations Mission in the Republic of South Sudan
UNMOGIP	-	United Nations Military Observer Group in India and Pakistan
UNNOF	-	United Nation Disengagement Observer Force
UNOC	-	United Nations Operations in Congo
UNOCI	-	United Operation in CoteôIvoire

UNOSOM	-	United Nations Mission in Somalia
UNPROFOR	-	United Nation Protection Force in Former Yugoslavia
UNSC	-	United Nations Security Council
UNSCOM	-	United Nations Special Commission
UNTAC	-	UN Transitional Authority in Cambodia
UNTAG	-	UN Transition Assistance Group in Namibia
USA	-	United States of America
USSR	-	Union of Soviet Socialist Republics
vol.	-	volume
WMD	-	Weapons of Mass Destruction

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ABSTRACT

The United Nations which was founded in 1945 after the Second World War reflects humanityôs aspiration for peace; security and progress. Thus, one of the cardinal points of the preamble of the Charter of the United Nations is that members of the organization resolve to pool their resources together to actualize certain objectives. These objectives include *inter alia;* the practice of tolerance; to live in peace with one another as good neighbours; to bring about an international regime for the maintenance of international peace and security and ensuring that armed force shall not be used except in the common interest. To this end one of the purposes of the United Nations as stated under the Charter is the maintenance of international peace and security. The primary question therefore explored in the dissertation is whether the United Nations as an organization, is capable of maintaining an international peace and security regime by means of a collective security system as outlined under the Charter of the United Nations. This work argued that the collective security system as contemplated under the Charter has been vitiated due to disagreement among the members of the Security Council especially the permanent members of that Council. This attitude has given way to the United Nations peacekeeping mission as an improvised mechanism for confronting threats to international peace and security an unrealistic effort. Secondly, this work attempted to highlight the fact that the notion of threat to international peace and security has under gone a considerable dynamics. Thus, conflict in a state if unabated, together with international terrorism and nuclear proliferation may threaten global peace and security. The result of this study revealed that the success of the collective security system depends on the continuing cooperation and unanimity of the permanent members of the Security Council. In other words, the findings showed that, the United Nations as an organization is capable of realizing global peace and security subject to international cooperation especially among the permanent members of the United Nations Security Council. It is therefore safe to conclude that, the veto power held by the permanent members of the Security Council is not the real problem. The real problem is disagreement among those with the power.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

During the twentieth century, the human race experienced two world wars. These wars left humanity with some horrifying experiences. Thus, before the expiration of the Second World War, Winston Churchill the former Prime Minister of Britain and Franklin Delano Roosevelt, the former President of the United States of America, were already in agreement with regard to the formation of an international organization which should be responsible for the maintenance of international peace and security. Sequel to this, leaders of the United States of America, United Kingdom, the Soviet Union and Nationalist China met in Moscow and Teheran with the intention of the formation of the United Nations[1]. However the United Nations was formed after its Charter was drafted at the San Francisco conference which was held in April - June 1944. This Charter took effect on 24th of October 1945 when the United Nations began its operation. The United Nations was therefore formed to ñsave succeeding generations from the scourge of war which twice in our lifetime has brought untold sorrow to mankindò.[2]

In this vein, the Charter of the United Nations (UN) states that one of its purposes is the maintenance of international peace and security. In order to achieve this, the organization was structured to take collective measures so as to prevent and remove threats to the peace and to suppress acts of aggression or other breaches of the peace and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes which might lead to a breach of the peace.[3] From the foregoing, there is no

[1] B. V. Rao, *World History from early Times to AD 2000* 3rd edn. (New) Delhi: Sterling Publishers Prt. Ltd., 2007) p. 341.
[2] See the preamble of the Charter of the United Nations.
[3] See Art. 10 of the Charter

doubt that the founding fathers of the organization designed the world body to be a sort of security system.

However, disagreement among the Security Council (hereinafter, the SC) especially the five permanent members[4]vitiated the UN collective security system which has given way to UN peacekeeping missions. Moreover, there are new threats to international peace and security which were not contemplated by the founding fathers of the UN. Thus, extreme violence within a state resulting to some trans-border effects, gross violation of human rights, international terrorism and nuclear proliferation have been considered by the UN as threats to international peace and security.

1.2 Statement of the Problem

Under the Charter, the SC has the primary responsibility in the maintenance of international peace and security. The SC consists of fifteen members.[5] Out of these fifteen members, five are permanent members who enjoy the veto right. The reason for according them such exclusive right is that, since the weight of maintaining international peace and security rests on their shoulders, they must have the final say on how to carry-out this responsibility. Again, by virtue of the veto right, no member will be forced to pursue a course of action which the five permanent members are not in agreement with.[6] Thus, at the formation of the UN, the possibility of a division among the permanent five in the SC was foreseen.[7] It is this division that has contributed to the malfunction of the collective security system as designed under the Charter.

[4] China, France, Soviet Union (now Russia), the United Kingdom and the United States of America
[5] China, France, Soviet Union (now Russia), the United Kingdom and the United States of America, Angola, Chad, Chile, Jordan, Lithuania, Malaysia, New Zealand, Nigeria, Spain, Venezuela.
[6] J. G. Starke, *Introduction to International Law* 10th edn. (New Delhi: Aditya Books,1994) p. 644
[7] *Ibid*

Apart from the disagreement among the five permanent members of the Security Council, there are other challenges being faced by the UN in the maintenance of the peace and security. Thus, it is necessary to observe that the range of threats to international peace and security being addressed by the UN are wider than those contemplated by the founders of the organization at Dumbarton Oaks, Yalta and San Francisco in 1945.[8]

1.3 Objectives of the Research

The objectives of this study are;

(i) To determine how far has the UN succeeded in maintaining international peace and security.

(1) To ascertain whether the primary responsibility of the SC in the maintenance of international peace and security under the Charter implies exclusivity.

(2) To analyze what role, if any is given to the other organs of the UN in the maintenance of international peace and security.

(3) To determine what options are available to the SC upon a determination that there is a threat to the peace, breach of the peace or an act of aggression.

1.4 Significance of the study

(i) At the formation of UN, threat to international peace and security was mainly limited to inter-state disputes based on the experiences of the international community in the two world wars. Inter- state wars are no longer the basic threat to international peace and security.

[8] E. C. Luck, ñA Council For All Seasons: The Creation of the Security Council and Its Relevance Todayò in V. Lowe *et al* (eds*.),The United Nations Security Council and War* (Oxford: University Press, 2008) p. 61.

(2) To this end, in an era where inter-state wars and acts of aggression have been reduced to the barest minimum, one could then question the relevance of the United Nations with regard to its basic mission of the maintenance of international peace and security.

(3) The significance of this research is therefore, to highlight the notion that threat to international peace and security has undergone a considerable dynamics. Thus, what could constitute a menace to international peace and security is not limited to inter-state disputes.

1.5 Scope of the Study

It is trite that the primary purpose of the UN is the maintenance of international peace and security. The Charter provides some means for the realization of this objective such as pacific settlement of international disputes and collective action in dealing with disputes and situations which pose serious threat to the peace, breaches of the peace, or acts of aggression. The Charter also provides for an informal approach to international peace and security such as the emplacement of political, social and economic conditions conducive to international peace and security. However, it is to the former that this work is concerned. Therefore, this dissertation is primarily concerned with the action of the UN to disputes which are likely to endanger international peace and security. It also deals with the responses of the UN in the face of threat to the peace, breaches of the peace and acts of aggression.

1.6 Methodology

In this research, we adopted a descriptive and a critical approach. The primary sources employed in this research include the Charter of the United Nations, Statutes, International Treaties and

Conventions. The secondary sources relied upon include case law, books, journal articles and legal periodicals.

1.7 Literature Review

The basic text for this work is the Charter of the United Nations. Article 1 outlines the purposes of the United Nations. The primary purpose of the organization is the maintenance of international peace and security. In order to achieve this, the United Nations is to take collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other branches of the peace.

Article 24(1) places the primary responsibility for the maintenance of international peace and security on the Security Council. It also provides that the members of the UN are in agreement that in carrying out this responsibility, the Security Council acts on their behalf. In our humble view, the phrase ñprimary responsibilityò is susceptible to interpretational problems. Thus one could ask if this primary responsibility of the Security Council in the maintenance of international Peace and Security implies exclusivity as regards other organs of UN especially the General Assembly.

In his work, *The Charter of the United Nations:* A*Commentary,* B. Simma outlines the different meanings of the term ñprimary responsibilityò. Firstly it could mean that in principle, the organs charged with the maintenance of international peace and security under the Charter that is, the SC and the GA would act in parallel and concurrently but that in discharging its peacekeeping function in a given circumstance, the SC would be granted priority over the GA as regards the

time of taking the first step.[9] Secondly the term may also be understood in a qualitative sense which means that the most important powers in the area of the maintenance of peace are placed exclusively on the SC.[10] It is our humble opinion that both meanings of the term ñprimary responsibilityò are not correct as such literal interpretation is not consistent with the intendment of the Charter.

Therefore, the correct interpretation of the phrase primary responsibility is that offered by the following writers consulted in the course of the work. Hence for B. Simma ,the term ñprimary responsibilityò means that in the realm of the maintenance of peace and security the SC enjoys priority over the GA not merely in terms of time and procedure, but that the SC has stronger powers than the other organs, namely the GA. This is of course without prejudice to the fact that the GA may also concern itself with such questions as the maintenance of international peace and security under Article 10 of the Charter.[11]He therefore concludes that, the Charter placing the primary responsibility for the maintenance of international peace and security on the SC means that the SC and the GA have a parallel or concurrent competence in this area but that the SC has an exclusive competence with regard to taking effective and binding actions when it comes to enforcement actions.[12]

Like Simma, J. G. Stake opines that although the primary responsibility for the maintenance of international peace and security is located in the SC, the GA is invested in this regard, certain facultative and permissive powers of consideration and recommendation.[13] Corroborating this point, A. Kaczorowska maintains that, although Article 24(1) of the Charter gives the UNSC

[9] B. Simma*et al* (eds.), *Charter of the United Nations: A Commentary 2nd edn.* vol.11 (Oxford: Oxford University Press, 2010) p. 445.
[10]*Ibid.,*p. 446.
[11]*Ibid*.
[12]*Ibid*., p. 447.
[13] J. G. Stake *op. cit*. p. 638.

primary responsibility for the maintenance of international peace and security, it does not exclude the UNGA from exercising a secondary and residual role.[14] In his views, Hossain opines that in the maintenance of global peace and security, the GA plays an important role especially when the SC is handicapped because of the veto of the five permanent members. However, he maintains that this residual power is narrowly interpreted as the GA does not have the power to make binding decisions in this regard.[15]

Similarly, Kelsenôs view is very insightful and consistent with the purpose of the United Nations. For him therefore, the Charter speaks in Article 24(1) of a primary responsibility and not of an exclusive responsibility of the SC. Thus, it does not prevent the GA from assuming a secondary responsibility in the maintenance of international peace and security in order to ensure prompt and effective action by the United Nations within its competence as determined by Articles 10 and 11 of the Charter. Thus a recommendation by the GA to members to a use of force could not be considered as a recommendation inconsistent with the purposes of the United Nations.[16]

According to K. Hossain,[17] A. Kaczorowska[18], D. Zaum,[19] and others, the restricted powers allotted to the General Assembly under the Charter has been-extended in the resolution adopted during the Cold ï War.[20] This resolution which is known as the Uniting for Peace Resolution enables the General Assembly to play a new role in the collective security system. Thus,in a situation whereby the Security Council is deadlocked by a veto of one or more of its members,

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[14] A. Kaczorowska*Public International Law* 4thedn. (London: Routledge, 2010) p. 766.
[15] Hossain, A., ñThe Complementary Role of the United Nations General Assembly in Peace Management,òavailable athttp://www.usak.org.tr/dosvalar/derai/XRFonf2JVQqv3uGJhN2P/lghyDHJyd.pdg(assessed 10 December 2014).
[16] A. Kelsen,*The Law of United Nations* (New Jersey: The Law book Exchange, Ltd, 2009) p. 975
[17] K. Hossain*, loc. cit*
[18]A. Kaczorowska, *op cit.,* p. 766.
[19]D. Zaum,ñThe Security Council, the General Assembly and War: The Uniting for Peace Resolutionò in V. Lowe *et al* (eds.),*The United Nations Security Counciland War* (Oxford: Oxford University Press, 2008) pp. 155 - 162
[20] A state of hostility that existed between the Soviet bloc countries and the Western Powers from 1945 ï 1990.

the General Assembly is empowered to act independently of the Security Council. Hence, that the General Assembly under the Uniting for Peace Resolution can authorize collective measures which include the recommendation of coercive measures for the maintenance of international peace and security.However it is the view of Kelsen which we are in sympathy with that, ñthe interpretation of the use of armed force may lead to serious conflicts between the General Assembly and the Security Council in Security matters.ò[21]

Under the Charter, there are basically two approaches available to the SC in discharging its primary responsibility, namely peaceful settlement of disputes and enforcement measures. As regards the former most literatures[22]available have the major defect of not providing a detailed discussion on the subject matter. Some writers like A. Kaczorowska[23] and others who attempted a seemingly detailed discussion limited their treatment on the subject to the obligation of members of the UN to adopt the procedures outlined in the Charter. The role of the UN in this regard is not given a fair treatment.

The collective enforcement measures outlined under the Charter are dependent in the determination of the Security Council that there is in existence, a threat to the peace breach of the peace or act of aggression. Once this threshold is crossed, the provisions of Articles 40, 41, and 42 of the Charter can be put in place. One obvious flaw in the provisions dealing with the enforcement measures is the lack of a definition as to what constitute threat to the peace, breaches of the peace and acts of aggression. The result of this*lacuna* is that the SC has been

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[21] H. Kelsen, *op. cit.* p. 977

[22] M. Dixon and B. McCorquodale, *Cases and Materials on International Law* 3rdedn. (Great Britain: Blackstone Press Ltd., 2000) pp. 600-637; B. Simma, *et al* (eds.), *Charter of the United Nations: A Commentary* 2ndedn vol. 1 (Oxford: Oxford University Press, 2010) pp. 588-591; J. G.Starke*Introduction to International Law 10thedn.* (New Delhi: Aditya Books*, 1994),*pp.485- 516; D. Harris*Cases and Materials on International Law 7thedn.*(London: Sweet and Maxwell, 2012), p. 1024 etc.

[23]A. Kaczorowska,*op. cit.,* pp. 622 ï 632.

given a wide discretion in the matter. At least a working definition should have been attempted in order to guide the SC in this regard. And we make haste to say that such *lacuna* is prone to political maneuverability.

For many authors such as T. G. Weiss *et al*,[24]J. M. Hamhimaki,[25] B. Simma*et al*,[26] A. Kaczorowska,[27] M. N. Shaw,[28] etc. the collective security system as envisaged by the Charter has not been realizable due to some obvious reasons as we shall see in the course of this work. In place of this, the UN has resorted to an alternative means of maintaining international peace and security which has come to be known as peacekeeping operations. The various authors consulted in the course of this work are in agreement that the concept of peacekeeping is not mentioned in the Charter. However, peacekeeping has become an improvised mechanism of confronting threats to international peace and security.

Further, this dissertation identifies some challenges to international peace and security. Hence, for T.G. Weiss,[29] M. J. Peterson,[30]R. Thakur,[31] J. M. Hanhimaki[32]etc, violations of human rights, international terrorism and proliferation of nuclear weapons are some of the challenges to the peace. In this connection, J. Crawford,[33] N. D. White,[34] B. Simma*et al*,[35] E. Andankian,[36] and

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[24]T. G. Weiss *et al*, *The Un*ited *Nations and Charging World Politics*5[th]edn. (U.S.A: Westview Press, 2007) p. 33.
[25]J. M. Hamhimaki*The United Nations: A Short Introduction* (Oxford: Oxford University Press, 2008) p. 71
[26]B. Simma*et al,op. cit.,* pp. 660 ï 661.S
[27]A. Kaczorowska,*op. cit.,* pp. 765 ï 770.
[28]M. N. Shaw, *op. cit.,* p. 1120.
[29]T.G. Weiss *op. cit.,* p. 29.
[30]M. J. Peterson ñUsing the General Assemblyò in J. Boulden and P.G. Weiss (eds.),*Terrorism and the UN* (Indianapolis: Indiana University Press, 2004) p. 177
[31]R. Thakur *The United Nations, Peace and Security* (Cambridge: Cambridge University Press, 2008) pp. 181-202.
[32] J. M. Hanhimki, *op. cit.,*p. 65.
[33]J. Crawford *Brownlie's Principles of Public International Law 8[th]edn.*(Oxford: Oxford University Press, 2012) p. 760.
[34]N. D. White *op. cit.,* p. 42.
[35]B. Simma*et al, op. cit., pp. 722 – 726.*

others are of the opinion that the notion of threat to the peace has undergone a considerable evolution as it is no longer limited to the absence of the use of armed force.

CHAPTER TWO

HISTORY AND STRUCTURE OF THE UNITED NATIONS

2.1 Origin of the United Nations

The conception of an international organization for the maintenance of international peace and security found its practical expression in the formation of the League of Nations.[37] Thus at the end of World War 11,[38] the League of Nations was established as a result of the Treaty of Versailles.[39]

However, it is trite that the League failed in its primary purpose because of the following reasons which include;

(i) the non-membership of the United States of America made the League to be congenially and fatally weak. Hence, it was unable to survive the holocaust of World War 11;[40]

(ii) the inability of the League to apply sufficient pressure in order to prevent clear-cut instances of aggression;[41]

(iii) the organization was ill-structured to deal with the precarious world peace due to the fact that, it lacked the necessary instrument for global pacification. In other words, it did not

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[36] E. Andankian E., ñThe Security Council and Article 39 of the UN Charterò, available athttp://www.lebarmy.govilh/article.qspl?n=eenscid=32249(assessed 10 December 2015)

[37] L.M. Goodrich *et al*; *Charter of the United Nations Commentary and Documents,* 3rd edn. (USA: Columbia University Press, 1969) p.1.

[38] World War 1, started in 1914 and ended in 1918.

[39] On June 28, 1919, Germany and the Allied Nations (including Britain, France, Italy and Russia) signed the Treaty of Versailles, formally ending the war. See The Library of Congress,ñWorld War 1 Ended With the Treaty of Versailles June 28, 1919ò available at www.americaslibrary.gov/jb/jazz/jb__jazz_ww1_1.html (assessed 11 December 2014).

[40] L.M. Goodrich *et al*., *op. cit*., p.12.

[41] J.M. Hanhimaki, The *United Nations, A Very Short Introduction* (Oxford: Oxford University Press, 2008) p.12.

possess the necessary force for the maintenance of international peace. More so, an organ such as the Security Council of the current United Nations was absent;[42]

(iv) the inability of the League of Nations to prevent World War 11, finally occasioned its collapse.

Thus, as soon as the collapse of the League became evident, the genesis of the UnitedNations began.[43] Hence, the

> ñThe need for collective action by powerful states against threats to stability of the international order was to become the primary concern in the various efforts to reframe the organizational structure of the World Community.[44]

The direct lines of origin of the United Nations may be traced to the ideas and plans of the war time allies of establishing an international organization to keep the peace as soon as the war ended. Thus in their Declaration of Principles known as the Atlantic Charter,[45] President Roosevelt of the United States of America and Prime Minister Churchill of Great Britain expressed a common aspiration of establishing a peace which will afford all nations the means of living in safety within the confines of their territory and at the same time afford all men the opportunity of living their lives in freedom from want and fear.[46] In other words, the term ôUnited Nationsô was first coined by F.D. Roosevelt to describe the allied countries. Its first

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[42] C.U. Mac Ogonor, *The UN, NATO and Post Cold War Management of Global Peace* (Port Harcourt: Rositan, 2000) p.87.

[43] B. Simma*et al,* (eds), *The Charter of the United Nations: A Commentary,* 2nd edn. *Vol. 1* (Oxford: Oxford University Press, 2010) p.1.

[44] O.Schacter, *The Charter's Origins in Today's Perspective*, ASIL Proc. 89 (1995), p. 46 in *ibid.*

[45] The Atlantic Charter was issued in August 1941 as a pivotal policy statement which defined the Allied goals for the post world war. It was drafted by the United States and Britain, and later agreed to by all the Allies. The Charter stated the ideal goals of the war which include; no territorial aggrandizement, freedom from fear and want abandonment of the use force, disarmament of aggressor nations etc. See UN, ñThe Atlantic Charterò available at http://www.un.org/en/aboutun/history/atlantic_charter.shtml (assessed 12 December 2014).

[46] L.M. Goodrich *et.al.,op.cit.,* p.2.

official use as a term was on January 1, 1942, when twenty-six governments signed the Atlantic Charter pledging to carry-on the war effort.

The next stage in the formation of the United Nations was the Moscow Declaration.[47] This was a declaration issued by the government of China, the Soviet Union, the United Kingdom and the United States, whereby they recognized the importance of establishing a central international organization to keep the peace.[48] By the Moscow Declaration these governments declared that:

> theyrecognize the necessity of establishing at the earliest practicable date a general international organization based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such states large and small, for the maintenance of international peace and security.[49]

Thus the Moscow Declaration was a firm commitment from these governments to form an international organization whose primary duty shall be the maintenance of international peace and security.

The most important stage in the formation of the UN and the adoption of the Charter of the UN (herein after, the Charter) was the double conference of Dumbarton Oaks.[50] In that conference, the leaders of the four major powers[51] prepared the actual plan which included *inter alia*, the

[47] The Moscow Declaration was made on October 30, 1943.
[48] See J.G. Stake, *op.cit*.,p.631. See also B. Simma*et al*; (ed), *op. cit*., p.7. See also L.M. Goodrich *et al., op.cit*, pp. 12-13.
[49] US Department of States Bulletin, Nov. 16, 1943, at 307 in B. Simma*et al* (eds), *op. cit*., p.7.
[50]The reason for the two separate conferences was because of the fact that the Soviet Union had a strong reservation with regard to the Chian Kai ï Shek government and did not accept it as a partner to the conference; The Soviet position was based on the fact that since it was in a non-belligerent position with Japan,it will not cooperate with China that was at war with Japan. Thus in the late summer of 1944, the Anglo Saxon powers first met with Soviet delegation (August 21- September 28) and later with the Chinese delegation (September 29 ï 0ctober 7). Dumbarton Oaks is a private estate in Washington D.C. Here the basic blue print of the new organization was drawn- up. See B. Simma*et al* (ed), *op.cit*., p 8. See also J.M. Hanhimaki, *op. cit*., p.14.
[51] China, Soviet Union, United Kingdom and United States of America.

objectives, structure and manner of the functioning of the would-be UN.[52] In other words, it was at this conference that the draft proposals of the organizations were worked out.

Though the Dumbarton Oaks proposals made clear the type of organization the major powers wanted to establish, they did not cover such crucial issues as voting procedures in the Security Council, the role of the proposed International Court of Justice, etc. Thus the Crimea (Yalta) Conference[53] came up with decisions regarding;

a) formula regulating Security Council voting procedure,[54] and

b) basic principles governing the establishment of a trusteeship system.[55]

It is worthy to note that, before the UN finally came into existence, two additional conferences were held, namely; the Mexico City Conference of the Inter-American System and the Conference of a Committee of Jurists.[56]

The final stage in the formation of the UN and the making of the Charter was the United Nations Conference on International Organization held at San Francisco.[57] In that conference, all the sponsoring states and invited states were represented and together they drafted the UN Charter which contains 111 articles. It also contains the Statute of the International Court of Justice.

The Charter was signed on June 26, 1945 and entered into force on October 24, 1945, when instruments of ratification had been deposited by the five permanent members of the Security

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[52] B.V. Rao, *World History From Early Times to AD 2000,* 3rd edn. (New Delhi: Sterling Publisher, Private Limited 2007) p.341.
[53] This Conference took place between February 3- 11, 1945.
[54] L.M. Goodrich *et al, op.cit*., p. 4.
[55] I*bid.* See also I.L. Claude. JR., *Swords into Plowshares,* 4th edn.(New York: Random House, 1984) p.59.
[56] The Mexico City Conference of the Inter-American System (American Republics) took place between February 2-March 8, 1945. In that conference, the United States gained support for the Dumbarton Oaks proposal and formulated a hemispheric position on the question of the regional security. The Conference of a Committee of Jurists met in Washington in April 1945 and prepared the draft statute of an international Court of Justice.
[57] From April 25 - June 26, 1944.

Council[58] and majority of other signatories as provided in the Charter.[59] The Charter is the Constitution of the organization. In other words:

> The Charter is the constituting instrument of the Organization,setting out the rights and obligations of member states and establishing the United Nations organs and procedures. An international treaty, the Charter codifies the major principles of international relations ï from the sovereign equality of states to prohibition of the use offorce in international relations in any manner inconsistent with the purposes of the United Nations.[60]

Thus, the Charter is the foundational and constituent treaty of the organization. The Charter contains a preamble and a series of articles grouped into chapters. Hence, there are nineteen chapters and one hundred and eleven articles contained in the Charter

The Charter has undergone some amendments. Thus, the General Assembly adopted the amendments to Articles 23, 27 and 61 of the Charter.[61] There was also another amendment of Article 61.[62] Article 109 was also amended and adopted by the General Assembly.[63]

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[58] China, France, Soviet Union, United Kingdom and the United States of America
[59] Art. 110 (3). Of the Charter.
[60] United Nations, *The United Nations Today* (New York:Department of Public Information,2008) p.3
[61] On December 17, 1963 and the came into force on August 31, 1965.
[62] This amendment was adopted by the General Assembly on December 20, 1971 and came into force on September 24, 1973.
[63] On December 20, 1965 and came into force on June 21, 1968. The Article 109 which relates to the first paragraph of that Article provides that a General Conference of all members for the purpose of reviewing the Charter may be held at a date and place to be fixed by two-thirds vote of the members of the General Assembly and by a vote of any nine members (formerly seven) of the Security Council. The Amendment to Article 23 enlarges the membership of the Security Council from eleven to fifteen. The Amendment to Article 27 states that decisions of the Security Council on procedural matters shall be by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of the five permanent members of the Security Council. The amendment to Article 61, enlarged the membership of the Economic Social Council from eighteen to twenty seven. A further amendment to that article increased the membership of the Council from twenty seven to fifty four. See UN, ñUN Charter ï United Nationsò available at http://www.un.org/en/documents/charter (assessed 12 December 2014).

2.2 Principal Organs of the United Nations

The Charter makes provision for six principal organs of the United Nations namely; the General Assembly, the Security Council, the International Court of Justice, the Secretariat, the Economic and Social Council and the Trusteeship Council.[64] Of these, the first four are substantially and directly involved in the maintenance of international peace and security. Each of these four principal organs is discussed below

2.2.1 The General Assembly

The General Assembly (here-in-after, the GA) is the plenary organ of the UN in which all members participate on an equal basis. Thus, it is the only principal organ in which all member states are represented.[65] The GA is the main deliberative and policy making organ of the UN, providing a platform for multilateral discussion on variety of international issues covered by the Charter.[66]

2.2.2 Composition

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[64]Article 7 (1) of the Charter
[65] Article 9 (1), *Ibid*.
[66]UN, ñGeneral Assembly of the United Nationsò available at http://www.un.org/en/ga (assessed 15 December 2014)

The GA consists of all members of the UN, that is all the original members,[67] and other members admitted under Article 4 of the Charter.[68] An applicant for membership must fulfill the following criteria:

(i) It must be a State;

(ii) peace loving;

(iii) it must accept the obligations contained in the Charter;

(iv) it must be able to carry out those obligations;

(v) finally, it must be willing to do so.[69]

It is pertinent to observe that aside the membership of the UN who alone make up the composition of the GA, the so called observers have been admitted to the GA.[70] Non-member observer states are accorded recognition as Sovereign States and are free to apply to become full members.[71] Entities and international organizations are admitted to become observers at the UN. Further, observers have the following rights at the United Nations General Assembly (here-in after, the UNGA)

i. the right to speak at the UNGA meetings,

ii. the right to participate in procedural votes,

iii. the right to sponsor and sign resolutions, but not to vote on resolutions and other substantive issues.[72]

2.2.3 The General Assembly and International Peace and Security

[67] Article 3 of the Charter.
[68] At the time of writing, there are 193 members of the UN.
[69] Article 4 of the Charter.
[70] B.Simma*et al* (eds), *op.cit*., p.248.
[71] Such as The Holy See and the State of Palestine.
[72] UN,ñUnited Nations General Assembly Observersò available at http://www.un.org/en/ga/about/observers.shtml (assessed 15 December 2014).

At the San Francisco Conference, there was a hot debate and conflict of interests between the smaller states and the big powers. The Great Powers wanted a concentration of power in the Security Council while the smaller states wanted to strengthen the position of the GA. Thus, Chapter VI of the Charter containing provisions relating to the peaceful settlement of disputes represents a compromise between the provisions granting generous powers to the GA and the provisions which try to limit the powers and competence of the GA. In this regard, the former are spelt out in Articles 10 and 14, while the latter are provided for in Article 11 and 12 of the Charter.[73]

This implies that the competence of the GA in the management of global peace and security is spelt out in Articles 10, 11 and 14. However the main provision regulating the role of the GA provides as follows:

> The General Assembly may discuss any questionrelating to the maintenance of international peace and security brought before it by any member of the United Nations, or by the Security Council, or by a state which is not a member of the United Nations in accordance with Article 35 paragraph 2 and except as provided in Article 12, may make recommendations with regard to any such question to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.[74]

The importance of this Article cannot be over emphasized. By authoritatively empowering the GA to discuss and make recommendations on matters affecting international peace and security, Article 11 provides the foundation for the Assembly to have the competence to deal with threats to the peace, breaches of the peace and acts of aggression whenever the Security Council is

[73] K. Hossain, ñThe Complementary Role of the United Nations General Assembly in Peace Managementò available at http://www.usak.org.tr/dosvalar/derai/XRFmF2JVQqv3uGJb2PI9IghYDHJyd.pdf (assessed 18 January 2015). See also B. Simma*et.al* (eds.), *op.cit.,* p.263.
[74] Article 11(2) of the Charter.

handicapped to perform its primary responsibility in the maintenance of international peace and security.[75]

Hence, although under the Charter,[76] the Security Council has the primary responsibility for the maintenance of international peace and security, the GA is vested in this connection with some permissive and facultative powers of consideration and recommendation.[77]

In the *Certain Expenses of the United Nations case,*[78] the GA asked for an advisory opinion of the ICJ when some members of the UN refused to pay their contributions of two peacekeeping operations created under the direction of the assembly namely; the United Nations Emergency Force (UNEF 1) and the United Nations Operation in Congo (UNOC). These members argue that these two forces were created illegally thus unconstitutional.

The Court advised that the role given to the SC under the Charter is primary and not exclusive thus, the GA has a secondary or subsidiary role in this regard. The Court also advised that the exclusive prerogative of the SC under the Charter to take enforcement action does not prevent the GA from making recommendations under Articles 10 and 14. In the Courtôs view, the UNEF action was not an enforcement action but instead measures recommended under Article 14 of the Charter.

It should be noted that the legality of the Congo force was not in dispute since it was initiated by the SC. Hence, the Uniting for Peace Resolution was not in issue. The main argument as

[75] L.M. Goodrich *et.al, op.cit*., p. 115.
[76] Article 24(1) of the Charter.
[77] J.G. Starke, *op. cit*., 638.
[78] (1962) I.C.J. Rep 151.

regards the Congo operation was that the Secretary General of the UN exceeded and abused the powers conferred on him. This allegation was jettisoned by the Court.[79]

Therefore under the Charter, the GA may consider the general principles of co-operation in the maintenance of peace and security including the principles as to disarmament and the regulation of armament and may make recommendations on the subject to member states or to the SC.[80] It may discuss any question relating to international peace and security,[81] call the attention of the SC to situations which are likely to endanger international peace and security,[82] and recommend measures for the peaceful adjustment of any situation.[83] There is general limitation on these powers of recommendation thus, while the SC is exercising its primary function under the Charter that is, actively dealing with a situation or dispute, the GA is prevented from making recommendations.[84] The restriction imposed by this Article is limited in nature hence, it is only applicable to the Assemblyøs recommendation not its deliberative powers. Secondly it is not applicable to all matters being considered by the SC but only to disputes and situations, and finally, it does not apply to limit the Assemblyøs right to make recommendations with regard to the general principles of cooperation in the maintenance of international peace and security.[85]

Further, in the maintenance of global peace and security, the GA plays an important role especially when the SC is handicapped because of the veto of the five permanent members. This residual power given to the GA is narrowly interpreted, and the GA does not have the power to make binding decisions on states in this regard. However, in spite of the restricted power

[79] A. Kaczorowska, *Public International Law,* 4thedn. (London: Routledge, 2010) p.768.
[80] Article 11(1) of the Charter.
[81] Article 11(2*), Ibid.*
[82] Article 11 (3*) Ibid.*
[83] Article 14, *Ibid.*
[84] Article 12(1), *Ibid.*
[85] L.M. Goodrich et *al; op.cit*., p.13.

allotted to the GA under the Charter, there has been an extension of the power as exemplified in the resolution adopted during the cold war period called the Uniting for Peace Resolution.[86] This is discussed below.

2.2.4 The Uniting for Peace Resolution

The point has been made that the responsibility conferred on the SC with regard to the maintenance of international peace and security is primary and not exclusive. However, the Charter makes it clear that the GA is also concerned with international peace and security.[87] The only limitation imposed on the GA is the restriction outlined in Article 12(1) which provides that while the SC is dealing with the same matter, the GA should not recommend measures, unless the council makes such a request.

Howbeit, the Korean Crisis[88] in 1950 provided a catalyst for the GA to play a new role in the collective security system and to act independently of SC in a situation where the council is deadlocked by a veto of one or more of its permanent members.[89]

It must be noted that it was only due to the fortuitous absence of the Soviet representative who boycotted the United Nations Security Council in June/July, 1950, that made possible the creation of the unified command in Korea by the SC. Once the Soviets returned, the council was deadlocked. In response to this situation and to make sure that the UN would not be rendered impotent in a future case similar to that of Korea, the United States and its allies looked for

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[86] K. Hossain, *loc. cit.*
[87] See Articles 10, 11 and 14 of the Charter. See also *The Certain Expenses of the United Nations' Case,supra,* p. 163.
[88] The Korean Crisis which lasted from 1950-1953 began as a civil war between North Korea and South Korea. The conflict soon became international when the United States joined to support South Korea and The Peopleôs Republic of China entered to help North Korea .See U.S. Department of State, ñThe Korean War 1950-1953ò available at https://history.state.gov/milestones 1945-1952/Korean -war-2 (assessed 13 May 13, 2015)
[89] A. Kaczorowska, *op. cit.*, p. 765

alternative ways to change the institutional balance of power between the GA and the SC at a time when the Council was paralyzed because of regular Soviet vetoes.[90]

This resulted to the passing of Resolution 377(v) titled, ôUniting for Peaceô. The most important passage of this Resolution provides as follows:

> If the Security Council because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in cases where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of abreach of the peace or act of aggression, the use of armed force, when necessary, to maintain or resolve international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty four hours of the request thereof. Such emergency special session may be called if requested by the Security Council on the vote of seven members, or by a majority of the United Nations.[91]

Before the GA can proceed under the Resolution, four essential preconditions must be satisfied:

a) The SC must have failed to exercise its primary responsibility with regard to the maintenanceof international peace and security;
b) the failure must flow from the lack of unanimity of its permanent member;
c) there must appear to be threat to the peace, breach of the peace or act of aggression;
d) the first essential two preconditions presuppose a fourth precondition which is to the effect that, the SC must have considered the matter before the GA may take up any action whatsoever.

Further, the Resolution only allows the GA to recommend collective measures to members. Therefore, under the Resolution, the GA lacks the competence to authorize the use of force

[90] D. Zaum, ñThe Security Council, the General Assembly and War: The Uniting for Peace Resolutionò, in V. Lowe *et. al* (eds.), *op.cit*., p.155.
[91] G.A. Res. 377(v) (1950).

against a member state. The power to do so lies in the SC.[92] Hence in the exercise of its secondary responsibility, the GA may embark on effective collective measures, including the recommendation of coercive measures so as to bring about international peace. The duty of referral on the part of the GA[93] arises only when in the judgment of the GA, enforcement measures are in issue. However, it has been opined that:

> there is an exception to the GAôs duty of referral under Art 11(2) ed. 2, according to the Uniting for Peace Resolution, in cases when the SC is unable to function. In such cases, the GA can recommend military measures even when, in its opinion, binding enforcement measures should be taken by SC according to chapter VII of the UN Charter.[94]

In other words, the division of functions between the SC and GA is not watertight. Therefore the United Nations has the discretion if necessary, to work through the GA exercising its omnibus powers[95] to discuss questions or matters within the scope of the Charter and these include matters which relate to the maintenance of international peace and security.

Since the Korean Crisis, the procedure of the Uniting for Peace Resolution has been used eleven times, seven times by the SC in resolution transferring a matter to the GA[96] and four times by the GA.[97]

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[92].D. Zaum, ñThe Security Council, the General Assembly, and War:The Uniting for Peace ResolutionôôinV.Lowe*et al*, *op.cit.,*p. 158.
[93]B.Simma*et al* (eds.), *op.cit*.,p. 266.
[94]*Ibid.*
[95] U.O. Umozurike, *Introduction to International Law* 3rdedn. (Ibadan: Spectrum Books Ltd; 2007) p.204.
[96] In the following crises, the Security Council requested the GA to take on an issue because of a deadlock in the council: the Conflict in Suez Canal, the Hungarian crises, the conflict in Jordan and Lebanon, the Congo crisis, the conflict between Indian and Pakistan over East Pakistan (Bangladesh), and the annexation of Golan Height by Israel.
[97] In 1967, the G.A. called for an emergency special session at the request of Soviet Union over the six day war in the Middle East. In 1980 an emergency special session was called at the request of Senegal to address the issue of occupied territories and Palestinian right to a state and right to return. In 1987, an emergency special session on Namibia was called at the request of Zimbabwe. The last one was called in 1997 on the request of Qatar in the question of East Jerusalem. See the *Legal Consequences of the Construction of a Wall on the Occupied PalestinianTerritory (Advisory Opinion) (2004) ICJ Rep. 136.*

Supporters of Resolution 377(v) put forth the argument that although Article 24(1) of the Charter gives the Security Council primary responsibility for the maintenance of international peace and security, it does not prevent the General Assembly from assuming a residual responsibility based on the wide scope of Article 10 of the Charter.

Those opposing the Resolution maintain that, it is indicative of illegality as it amends the Charter of the United Nations in breach of its Articles 108 and 109. They also opine that, it is only the SC that is competent under the Charter to take coercive action. For the opponents of the Resolution, it is inconsistent with Article 12(1) of the Charter, thus whenever the SC is paralyzed, it is still exercising its functions in that, the relevant issues are still on its agenda and thus the GA should not be allowed to act.[98] It is our humble view that the above submission is incorrect and one wonders how the SC could be exercising its function of maintaining international peace and security when it is deadlocked. In such a situation of paralysis, the United Nations can work through the GA invoking the Uniting for Peace Resolution, in order to achieve one of the purposes of the United Nations which is the maintenance of international peace and security.

2.3 The Security Council

The Security Council is one of the principal organs listed in the Charter.[99] It is generally referred to as the executive organ of limited membership, charged with the primary responsibility for maintaining international peace and security. Its efficiency was predicated on the unity of

[98] A. Koczorowska, *op. cit*., p.766.
[99] See Article 7(1) of the Charter.

purpose of its members and the unanimity which the device of veto in the procedure of voting was designed to achieve.[100]

2.3.1 Composition

The Council has fifteen members. Five out of this fifteen are permanent members.[101]

These five permanent members enjoy some privileges and pre-eminence not only by virtue of their permanency but also by reason of special voting rights called the power of veto.[102] The reason for according them these exceptional status lies in the inescapable fact of power differentials. Thus the basic assumption was that since the weight of maintaining international peace and security rests on their shoulders, they must have the final say on how to go about such responsibility.[103]

The other ten are non-permanent members are elected by the United Nations GA for a two year term. Of the ten non-permanent members, Africa has three seats; Asia has two seats; Eastern European countries have one seat; Latin American and Caribbean countries have two seats and Western Europe has two seats. Every year, five of these ten non-permanent members vacate the SC and are replaced.

The Charter[104] outlines the essential requirements for the election of non-permanent members. They are as follows:

(i) due regard must be paid to the contribution of the candidates to the maintenance of international peace and security and to the other purposes of the United Nations;

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[100] B.O. Okere, Unpublished Lecture Notes on The United Nations, p.7.
[101] The United States, The Russian Federation, (formerly the Soviet Union), the United Kingdom, France and China. See Article 23(1) of the Charter.
[102] B.O. Okere; *loc. cit*., p.7. A detailed discussion on the power of the veto will be discussed shortly.
[103] B.O. Okere, *loc. cit*., p.7.
[104] Article 23(1) of the Charter.

(ii) theelection must pay attention to the equitable geographical distribution of seats.

However, the Charter did not sufficiently spell out how the contribution to global peace and security could be determined. In this regard, certain criteria have been suggested.[105] They include the following;

(a) the military strength of a member state to be elected;

(b) the economic strength of a member state;

(c) attention may also be paid to criteria which could be met by smaller states such as their contribution to solving international disputes through mediation, negotiation, etc, or even their peaceful conduct as parties in international conflicts.

In spite of the foregoing;

> there seems to be no special practice in this area perhaps because the criterion which appears primary, namely a contribution to international peace... has been completely neglected in favour of the criterion of an equitable geographical distribution.[106]

According to Article 23(3), each member of the SC will have one representative. This contrasts with the position of the GA where each member is allowed to have five representatives.[107]

2.3.2 Functions and Powers of the Security Council

The functions and power of the SC as outlined under the Charter are:

(i) to maintain international peace and security in accordance with the principles and purposes of the United Nations;

(ii) to formulate plans for the establishment of a system to regulate armaments;

(iii) to call upon parties to a dispute to settle it by peaceful means;

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[105] B. Simma*et al.(eds.), op. cit.,* p. 440.
[106] I*bid.*
[107] Article 9(2) of the Charter.

(iv) to investigate any dispute or situation which might lead to international friction;

(v) to recommend methods of adjusting such disputes or term of settlement;

(vi) to determine the existence of a threat to the peace or acts of aggression and to recommend what action should be taken;

(vii) to call on members to apply economic sanctions and other measures not involving the use of force to prevent or stop an aggression or any situation that endangers international peace and security;

(viii) to resort to or authorize the use of force to maintain or restore international peace and security;

(ix) to encourage the peaceful settlement of local disputes through regional arrangements for enforcement action under its authority;

(x) to request the International Court of Justice to give an advisory opinion on any legal issue.[108] A detailed discussion on these powers is attempted in chapters two and three.

2.3.3 Voting Procedure in the Security Council and the Veto Power

Each member of the SC has one vote. Decisions on procedural matters are taken by the affirmative votes of at least nine of the fifteen members. Decisions on substantive matters require an affirmative vote of nine members including the concurring votes of the permanent members. This is the rule of great power unanimity, the famous veto arrangement which each permanent member of the SC has taken advantage of when the occasion arose.[109]

[108]United Nations, *op. cit*., p. 9.
[109] I. Brownlie, *The Powers and Functions of the United Nations SecurityCouncil,* (Lagos: N.I.A.L.S, 1979) p.3. See Arts 27(1-3) of the Charter.

Article 27[110] does not define procedural matters. Thus the article takes for granted the distinction between procedural matters and other questions.[111] However certain matters listed in articles 28, 29, 30, 31, and 32 though not exhaustive,[112] are regarded as procedural matters which require simple majority. Such matters include:

i) the decision of the SC to hold meetings at places other than the seat of the organization (Art. 28)

ii) the establishment of subsidiary organs by the SC (Art. 29)

iii) the invitation of a member(not a member of the SC) or non-member of the United Nations to participate in the deliberations of the SC (Art. 31-32)

Instances of non-procedural or important matters which are subject to the qualified majority include the following;

(i) decisions according to chapters six and seven of the Charter;

(ii) admission of new members (Art. 4);

(iii) the suspension of members (Art. 5);

(iv) the expulsion of members (Art. 6);

(v) the execution of judgments rendered by the ICJ pursuant to Art 94(2);

(vi) the request of or an Advisory Opinion of the ICJ pursuant to Art. 96 (1);[113]

(vii) recommendation for the appointment of the Secretary General.

It is in this area of substantive matters that the óvetoôoperates.

There is no express mention of the veto in the Charter. The Charter indirectly or by necessary implication refers to it in Article 27(3). In any organization where the veto is constitutionally

[110] Of the Charter.
[111] B. Simma*et al,(eds.), op. cit*., p.483.
[112] *Ibid*
[113] Not every request for an Advisory Opinion is subject to a qualified majority. If the question itself concerns procedural matters a simple majority might suffice. See B. Simma*et al* (eds.), *op.cit*., p. 484.

provided for, the justification of the theory stands on three interconnected propositions[114] namely;

(i) that peace, be it international or local, is dependent on the agreement of those who have the power to effect it either by contributing more of their resources or by being actively involved in the process of making peace;

(ii) that those who have the capacity and resources and actively contribute more to the effective running of the organization should have a controlling voice on what, where, how, and when their resources are going to be spent and finally,

(iii) that those who have power and resources to wage modern war will not consent in creating an organization with power to force any of their relatively equal power elites (permanent members of the Security Council).[115]

Thus the jurisprudence of the right of veto is that, since the permanent members of the SC as great powers naturally bear the brunt of the responsibility of maintaining stable peace and security, non should be coerced by a vote of the SC to pursue a course of action which it is in disagreement with [116] Hence the possibility of a division among the permanent members on particular issues of collective security was foreseen.[117]

The veto has been described ñas the rise of a negative vote by a permanent member to prevent the adoption of a proposal which has received the required number of affirmative votes.ò[118]

In other words a negative vote by any of the permanent member is sufficient to prevent the SC from arriving at any decision on any substantive matter.[119] The provision of Article 27 (3) which

[114] C.U. Mac Ogonor, *op. cit*., p.91.
[115] J. Reston, ñVotes and Vetoesò, Foreign Affairs, 25 (Oct. 1946) pp. 13-22 in C.U. Mac Ogonor, *op.cit.,* pp.91-92.
[116] J.G Starke, *op.cit.,*p.644.
[117] *Ibid.*
[118] L. M. Goodrich *et al*., *op. cit.,* p. 227.

accords veto power to the permanent members of the UN is not absolute. This privileged position is therefore moderated by abstentions and absences.

2.3.4 Limitations to the Veto Right: Abstentions and Absences

The veto right accorded to the permanent members has some limitations. Under the Charter, the second arm of Article 27 paragraph 3 makes abstention from voting mandatory in case a member, whether permanent or elected is a party to the dispute. Thus as regards decisions concerning peaceful settlement of disputes, whether under Chapter VI or under articles 52(3), any permanent or elected member if a party to a dispute under determination, must abstain from voting.

It must be noted that neither the Charter nor the Provisional Rules of Procedure of the SC provided for the legal effect of mandatory abstention. However, it is generally accepted that such abstention does not render the decisions of the SC invalid since it is clearly an exception to the rule of unanimity[120]and accords with one of the cardinal principles of national justice- *nemojudex in causasua*.

With regard to voluntary abstention, the practice of the Security Council reveals that such abstention does not constitute a bar to the legality or validity of a resolution of the SC.[121] This practice has been given approval by the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa).*[122] In its advisory opinion,

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[119] At the time of writing the total number of vetoes cast by the permanent member is 268. Soviet Union (Russia has used the Veto 127 times, United States of American 82 times, Britain 32 times France 18 times and China 9 times. See J.A. Kechichian, ñUN Security Council Shackled by Vetoesò available at http://gulfnews.com/opinion/thinkers/un-security-council- shackled-by-vetoes 1.1053521 (assessed 15 January 2015). Recently the United States of America in February 18, 2011, vetoed a draft resolution condemning Israeli settlement in West Bank. In July 19, 2012, Russia and China vetoed threatening Chapter 7 sanctions against Syria.
[120] L.M. Goodrich, *op. cit*., p.229.
[121] See J.G Stake*, op.cit.,* p.44; H.Kelsen, *The Law of the United Nations* (New Jersey:The Lawbook Exchange Ltd; 2009) p.241; F.A. Agwu, *World peace Through World Law* (Ibadan: University Press Plc, 2007) pp. 33-34.
[122] (1971) ICJ Rep. 16.

the court ruled that the Security Council Resolution of 1970 which declared illegal the continued presence of South African in South West Africa (Namibia) was valid despite the abstention of two permanent members from the voting process. Therefore it has become an accepted practice of the SC and in particular the permanent members not to regard a voluntary abstention as a veto and also as an established part of the law of the Charter.[123]

With respect to absences, the SC has adopted a number of resolutions in the absence of a permanent member. Thus in 1994, the representative of the Soviet Union was absent from three discussions on the complaint of Iran in the SC. The council did not consider such absence as a veto. Again in 1950, the Soviet representative was absent for a period of seven months. This was in protest against the seating of the representative of Nationalist China in the SC.

It must be observed that, the decisions taken by the SC in the absence of the Soviet Union during the first period were not clearly of a substantive character so as to translate to firm precedents and even if present, the Soviet Union would have been obligated as a party to the dispute to abstain.[124] However, important decisions taken by the SC in the second period as regards the complaint of aggression against the Republic of Korea were evidently substantive in nature since they were taken under the provisions of Chapter VII. These decisions were considered by majority of the members of the United Nations as valid hence, an absence by a permanent member was viewed as an abstention which does not constitute a veto.[125] In spite of this, it must be borne in mind that:

> The continuing agreement and cooperation of the great powers is as important today to the survival of the United Nations as it was during the cold war. It was to guarantee this cooperation that the veto was inserted in Articles 27 paragraph 3 of the Charter. This cooperation would

[123] *See* Statement and References *in Repertoire* of the Security Council, pp.173-75 in L.M Goodrich, *op.cit*.,p.231.
[124] *Ibid.*
[125] I*bid.*

> certainly not be served in a context where a Resolution is upheld to be legal in the absence or abstention of a permanent member who declared that it did not recognize the legality of the Resolution.[126]

The acceptance of a contrary view will lead to the absurdity that it is possible for one permanent member in the absence of other permanent members to pass a valid resolution on matters of substance.[127]

The Soviet representative has always viewed such decisions of the SC without its participation as a violation of Article 27, which requires the unanimity of the permanent members.[128] On the other hand, the abuse of absence for political reason or purpose is a violation of Article 28 of the Charter. Thus, it may be argued that a permanent member by way of absence has actually given up its voting privileges and this might translate to a failure of fulfilling its responsibility of attendance at the SC meetings.[129] The Charter provides that:

> The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the organization[130]

This means that members of the Council have the obligation not to obstruct the proceedings of the Council through absences as this could paralyze its functions.[131]

However, it must be noted that the Korean case played a crucial role to end all the controversies surrounding the interpretation that the absence of a permanent member is not equivalent to the veto[132]

2.4 The Secretariat of the United Nations

[126] F.A Agwu, *op.cit.,* p.36.
[127] *Ibid.*
[128] C.Y. Park, *Korea and the United Nations* (The Netherlands: Kluwer Law International, 2000) p.109.
[129] *Ibid.*, p.108.
[130] Article 28 of the Charter.
[131] C.Y. Pak, *op.cit*., p.109.
[132] *Ibid.*

The Secretariat of the United Nations is one of the principal organs of the UN, an intergovernmental organization vested with the responsibility of aiding states to collectively maintain international peace and security.[133]

The Secretariat is composed of international staff working in duty stations world- wide. At the head of the secretariat is the Secretary- General (here- in- after called the SG). He is appointed by the GA on the recommendation of the SC for a five-year renewable term. The duties carried out by the Secretariat are as numerous as the problems dealt with by the organization.[134] In this work, we shall concern ourselves with such duties as they relate to the maintenance of international peace and security. These include administrating peacekeeping operations and mediating international disputes.

The position of the Secretariat as one of the principal organs of the United Nations is to a large extent determined by the office of the SG since he is assigned certain functions by the Charter which goes beyond the administrative nature of traditional secretariats.[135] Notwithstanding that, the SG is a component of the Secretariat, his office encompasses more than that organ and since he is the chief administrative officer of the organization, it therefore follows that he is not just the administrative head of the Secretariat.[136]

Apart from the administrative duties of the SG, he performs other functions which are political in nature. As the chief administrative officer of the organization, he acts in that capacity in all the meetings of the GA, SC, ECOSOC and Trusteeship Council. Thus, the GA, and the three councils may entrust the SG with administrative and other functions which might be political in

[133] See Art.7(1) of the Charter.
[134] United Nations, *op.cit*.,p.14.
[135] B. Simma*et al* (eds),*op.cit.*, p.1193.
[136] *Ibid.*

nature.[137] Under Article 99, the SG is given a wide range of discretion to bring to the notice of the SC any matter which in his opinion, may threaten international peace and security. The provisions of Article 99 are therefore, the legal foundation for the political competence of the SG which ensures from his own initiative and not as a delegation of duties.[138]Mention must be made that the Charter does not expressly permit the SG to perform an analogous function in respect to the GA.[139]The reason for this restriction is to safeguard the primary responsibility of the SC as the maintainer of international peace and security. Moreover, it is the view of a legal writer which we agree with that, the Annual Report of SGS in line with Article 98 constitutes ñan adequate basis for the co-operation between the SG and GA.ôô[140]

An obvious implication of the power conferred on the SG under Article 99 is that, for the SG to determine that the matter which he contemplates to bring to the attention of the SC threatens international peace and security, he must first of all investigate the matter.[141] Thus, Article 99 implicitly confers on the SG certain powers of fact-finding. This enables the SG to acquire sufficient knowledge of the relevant facts of any dispute or conflict which will help the SC in the exercise of its role in the maintenance of international peace and security.[142] In 2009, on receiving a letter from the government of Pakistan, requesting him to establish an international commission with regard to the death of the former Prime Minister of Pakistan, Mohtarma Benazir Bhutto, theSG acceded to the request and expressed his intention to establish a three ï member commission of inquiry.[143] Again in October, 2009 the SG through a letter, informed the

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[137] H. Kelsen, op. cit., p. 302.
[138] B. Simma, *et al* (eds.),*op.cit.,* p. 1217.
[139] H. Kelsen, *op. cit*., p. 303.
[140]S. M. Schwebel, óóUnited Nations Secretary Generalôô, EPILIV, 1164 ï 8 in B.Simma*et al* (eds.),*op. cit*. p. 1218.
[141] H. Kelsen, *op. cit*., pp. 303 ï 304.
[142] B. Simma,*et al* (eds.), *op. cit*., p. 1196.
[143]UN, ñ*Repertoire* of the Practice of the Security Council 16th Supplement 2008 ï 2009ò available at http://www.un.org/en/sc/repertoire/2008-2009/partvi/08-09_part V1.pdf (assessed 15 March 2015).

President of the SC of his decision to establish an international commission of inquiry to investigate the numerous killings, injuries and alleged gross human rights violation which took place in the Republic of Guinea on 28 September 2009.[144]

At the time of writing, Article 99 has only been formally and directly applied twice. The first application was by Dag Hammarskjold during the Congo crisis in 1960 and the second application was by Kurt Waldheim as a result of the occupation of the American Embassy in Tehran in 1979.[145]

In the second case, the SG exercised his political powers under Article 99 and drew the attention of the SC to a matter which might pose a threat to global peace and security. This situation occurred in 1979 due to Iranian occupation of the embassy of the United States in Tehran and the taking of Americans in the embassy as hostages. Immediately after the occupation and hostage taking, the USsent a communication to the President of the SC stating that, the occupation, hostage taking and the support which these acts received from some members of the Iranian Government are offences against international peace and security. The United States therefore requested the SC to take all appropriate measures to secure the release of the diplomatic staff and the restoration of the diplomatic immunity of the embassy staff and building in Tehran.[146]

Iran on the other hand, sent a communication detailing her own heads of grievance and finally requested that the SC should meet to consider these matters. In response to Iranôs communication, Kurt Waldhein (SG) sent a communication to the President of the SC, giving an account of the situation in which the United States and Iran found themselves. In his opinion,the

[144] *Ibid.*
[145] B. Simma *et al* (eds.), *op. cit.,* p . 1220
[146] See UN ï JB (1979) p. 307 in B. Simma*et al* (eds.), p. 1222.

crisis posed a grave threat to international peace and security, making it imperative for the SC to convoke an emergency meeting so as to reach a peaceful solution to the crisis.

Further, in addition to the overt application of the powers accruing from Article 99, each of the Secretary ï General in exercising his political functions has implicitly relied upon his authority under Article 99. Kofi Annan for example, acting independently of the SC, initiated negotiations consequent upon Iraqôs refusal to grant access to UNSCOM[147] Inspection Team. This made it possible for Annan to personally meet Sad am Hussein and was able to broker an agreement acceptable both to Iraq and the SC, while at the same time showing faith with the resolution.[148]

The current SG, Ban KI Moon at the time of writing has not invoked Article 99 either expressly or by implication. However, he has called the attention of the SC to some deteriorating situations and has made known his preparedness to establish commissions of inquiry to investigate such issues.[149] With regard to the Syrian crisis, the SG recalling the seriousness of the situation, enjoined the UNSC to address it with a sense of urgency and take collective action with a sense of unity.

2.5 The International Court of Justice

The first Permanent World Court ever established by the international community was the Permanent Court of International Justice (hereafter the P.C.I.J).This World Court was accessible to all states and exercised jurisdiction over all international legal disputes. The P.C.I.J was dissolved by a Resolution of the United Nations General Assembly on April 18, 1946. The dissolution necessitated the inauguration of the International Court of Justice (hereafter, the ICJ.

[147] The United Nations Special Commission which was set up by SC Resolution 687 in April 3, 1991 for the purpose of the disarmament of Iraq.
[148] A. Brehie,ñGood Offices of the Secretary ï General as Preventive Measuresò in B. Simma*et al* (eds.), *op. cit.,* p. 1230.
[149]UN, ñ*Repertoire* of the Practice of the Security ï Council 16th Supplement 2008 ï 2009,ò*loc. cit.*

The Statute creating the ICJ[150] is annexed to and forms an integral part of the Charter of the UN. Thus,the Charter makes references to the ICJ.[151]For instance, the Charter establishes the ICJ as one of the six principal organs of the UN.[152] Hence, it is the judicial organ of the United Nations. The Charter of the United Nations also makes all members of the UN automatic parties to the Statute of the ICJ. However non-members can become parties to the Statute by a special procedure.[153] Again each member of the UN has the obligation to comply with the decisions of the ICJ.

The ICJ is located at The Hague in the Netherlands. Only states may be parties in contentions cases brought before the court; thereby submitting their disputes to it. Private persons, entities or international organizations do not have access to the Court. Therefore, its main functions are the settling of legal disputes submitted to it by states and the provision of advisory opinion on legal questions submitted to it by duly authorized international organs, agencies, the UNGA and the UNSC.[154]

The ICJ is composed of fifteen judges. They are elected to a nine year term by the GA and the SC of the UN voting independently, from a list of persons nominated by the national groups in the Permanent Court of Arbitration.[155] The choice of the judges is based on their qualification, and in their election,care is taken to make sure that the principal legal systems of the world are represented in the Court. Thus, no two judges may be from the same country. To ensure

[150] See Article 1 of the ICJ Statute.
[151] See Chapter XIV (Articles 92 ï 96 of the Charter).
[152] Articles 7(1) and 92 of the Charter.
[153] Article 93(2) of the Charter.
[154] Articles 34 of the ICJ Statute, and 96 of the Charter.
[155] The elections process is set out in Articles 4 ï 19 of the ICJ Statute.

continuity the elections are staggered and they occur once in three years with regard to five judges each time.[156]

The law applied by the Court is outlined in the Charter.[157] In the determination of cases, the Court shall apply international conventions, international customs, and general principles of law recognized by civilized societies or nations. It may also refer to academic writings, that is, the teachings of most highly qualified publicists of the various nations.

Further, the Court may also decide cases *exaequoet bono;* that is according to the principles of equity. This is dependent on the consent of the parties involved in the dispute. It is submitted that at the time of writing no such authorization has been conferred on the ICJ. A detailed discussion on the role of the ICJ in the maintenance of international peace and security is attempted in Chapter three.

[156] M. N. Shaw, *op. cit.*, p. 961.
[157] Article 38(1) of the Charter.

CHAPTER THREE

THE UNITED NATIONS AND PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

3.1 Obligations of Parties under the Charter

It is apposite to hold the view that the fundamental purpose of international law is the maintenance of international peace, and to this end, the settling of international disputes between states. For Starke;

> é the rules and procedures in this connection are partly a matter of custom or practice and partly due to a number of important law-making conventions such as the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes and the United Nations Charteré 1945.[158]

The Hague Conventions are a group of international treaties that emerged from Hague Conventions in 1899 and 1907. The principal concern of these two conventions was the pacific settlement of international disputes as opposed to the traditional resort to war in settling differences between states.[159]

An international dispute is subject to varied definitions. It could be a disagreement that arises between states concerning their relations with one another and with other states. However the definition offered by the Permanent Court of Justice constitutes an authoritative indication.[160] For the Court, international dispute is a disagreement over a point of law or fact, a conflict of legal interests or views between two states.[161]

One of the purposes of the United Nations (hereafter, the UN) is:

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[158] J .G. Starke, *Introduction to International Law* 10th edn.(New Delhi: Aditya Books, 1994) p.485

[159] See Council on Foreign Relations, ñHague Conventions of 1899 & 1907ò available at http://www.cfr.org/international-law/hague-convenentions-1899-1907/p9597 (assessed 3 June, 2015).

[160] M. N. Shaw, *International Law*, 5th edn. (Cambridge: University Press, 2005) p. 916.

[161] *Mavromatis Palestine Concessions Case (Jurisdiction)* (1924) PCIJ Reports, Series A No 2, p.11.

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful meansé adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[162]

To achieve a peaceful settlement of international disputes, the provision of Article 2 of the Charter of the United Nations (hereafter, the Charter) outlines two obligations for the members. The first obligation requires all members to settle their international disputes by peaceful means so as not to endanger international peace and security and justice.[163] Secondly, members are obliged to 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 contrary to the purpose of the UN.[164]

The obligations set out in Article 2(3) and (4) of the Charter are given a vital force in the Charter. Thus the Charter provides as follows:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.[165]

The relationship between Articles 2(3) and 33(1) is worth commenting on. Article 33(1) constitutes an elaborate detail of Article 2(3).[166]In the later, there is an obligation incumbent on parties to settle their disputes by peaceful means, while the former outlines various methods for the pacific settlement of disputes. Again, while parties to a dispute are obligated under Article 2 (3) to settle their differences by pacific procedures, the institutional responsibility of the UN is

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[162] Article 1(1) of the Charter.
[163] Article 2(3) of the Charter.
[164] Article 2(4) of the Charter.
[165] Article 33(1), *ibid.*
[166]B. Simma *et al (*eds.), *Charter of the United Nations: A Commentary* ,2nd edn. Vol.1 (Oxford: University Press, 2010) p. 584.

activated only if international peace and security are threatened.[167] In other words, the phrase ófirst of allô in Article 33(1) implies that, it is incumbent on the parties themselves to ignite the remedial methods. If their efforts prove abortive then, the procedures of Chapter V1 ï or of Chapter V11 ï become applicable.

The Charter respects the freedom of the parties to resort to any procedure of their choice in order to arrive at a peaceful settlement of their dangerous differences. Hence:

> There would appear, therefore, to be no inherent hierarchy with respect to the methods specified and no specific method required in any given situation. States have a free choice as to the mechanisms adopted for settling their disputes.[168]

The principle for the peaceful resolution of disputes has been reaffirmed in various General Assembly Resolutions such as Resolutions 2625 (xxv) of 24 October 1970, 2734 (xxv) of 16 December 1970 and 40/9 of 8 November 1985 etc.[169]

The specific methods for the peaceful resolution of international disputes as enumerated in Article 33(1) of the Charter are discussed hereunder

3.2 SpecificMethods of Pacific Settlement of International Disputes under the Charter

3.2.1 Negotiation

The word ónegotiationô means a ñdiscussion to bring about some result.ò[170] It is derived from the verb to ónegotiateô, which means, to try to reach a compromise or agreement with others through the process of discussion.[171] In international law, negotiation is a

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[167] *Ibid*.
[168] M. N. Shaw, *op. cit*., p. 918.
[169] UN, ñHandbook on the Peaceful Settlement of Disputes between Statesò available at http://www.un.org/law/books/Handbook on PSD. Pdf (assessed 3 June 2015).
[170] D. O. Bolander*et al* (eds.), *The New Websters Dictionary, International Edition* (New York: Lexicon Publications, Inc., 2000) p. 669.
[171] C. Soanes*et al* (eds.), *Concise Oxford English Dictionary,* 11th edn., revised (Oxford: University Press, 2008) p. 958.

> diplomatic procedure in which representative of states, in direct personal contact or through correspondence, engage in discussing matters of mutual concern and attempt to resolve disputes that have arisen in their relations with one another.[172]

In negotiation therefore, parties to a dispute maintain direct or indirect contacts between themselves and discuss litigious issues.[173] Negotiation is the most commonly used technique of pacific settlement of international dispute.

The duty to negotiate before resorting to force has become a well-established rule of customary international law and currently is enshrined in many treaties.[174] Again various resolutions of the United Nations General Assembly have laid emphasis on the necessity of negotiation.[175] The value of negotiation as a means of settling international disputes has been acknowledged by the ICJ in the *North Sea Continental Shelf Cases.*[176] The case arose out of a series of disputes that came to the ICJ in Jan 1969. They involved agreement among Denmark, Germany and the Netherlands regarding the delimitation of areas ï rich in oil and gas ï of the continental Shelf in the North Sea.

Germanyôs North Sea Coast is concave while the Netherlands and Denmarkôs Coasts are convex. If the delimitation had been determined by the equidistance rule that is, drawing a line each point which is equally distant from each shore, Germany would get a smaller portion of the resource rich shelf relative to the other two states. Germany, thus argued that the length of the coast lines be used to determine the delimitation. However in subsequent negotiations, the states granted to Germany most of the additional shelf it sought.

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[172] R. L. Bledsoe *et al*., *The Dictionary of International Law* (Oxford; ABC ï Clio Inc, 1987) p.302.
[173] B. Simma*et al* (eds.), *op. cit.,* p. 588.
[174] See for example Manila Declaration on the Pacific Settlement of Disputes, Art. 33 (1) of the Charter.
[175] See for example Res. 37/10 approving the Manila Declaration; Res. 49/9 of November 1985.
[176] (1969) I.C.J.Rep. p. 3

Negotiation is more than a possible means of settling international dispute. It is also a method used in the prevention of disputes and in this sense it is considered as consultation. When a state perceives that a proposed cause of action may cause injury to another state, consultation with the ópossible victim stateô may provide an opportunity for preventing the dispute by creating an avenue for adjustment and accommodation.[177] Highlighting the value of consultation Merrills has the following to say:

> Quite minor modification to its plans, of no importance to the state taking the decision, may be all that is required to avoid trouble, yet may only be recognized if the other side is given the chance to point them out.[178]

In other words, the usefulness of consultation is that it provides an opportunity of making available useful information at the suitable time prior to any action. It also provides an opportunity of making the necessary adjustment at the decision making stage, rather than later, when exactly the same action may be viewed as a surrender to foreign pressure or a sacrifice of domestic interest.[179]

Negotiation, be it bilateral or multilateral could take various forms. It could be carried out through diplomatic channels or by competent authorities of the parties, that is, by the representatives of the particular ministries in-charge of the issue under consideration. At times, negotiation is institutionalized by the creation of mixed on joint commissions in order to deal with recurrent problems which require continued supervision.[180]

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[177] J. G. Merrils, *International Disputes Settlement* 5th edn. (Cambridge: Cambridge University Press, 2011) p. 3.
[178] *Ibid.*
[179] *Ibid.*
[180] Following the judgment of the ICJ which awarded the Bakassi territory to Cameroon and the rejection of the judgment by Nigeria, a Mixed Commission was created. This is seen as a new model for peaceful resolution of conflicts between states. See Dawodu.Com, ñCameroon and Nigeria Mixed Commissionò available at www.segun.bizland.com/2.htm(assessed 3 June2015). Another example of a Mixed Commission is the International Joint Commission which is an independent bi-national organization established by the US and Canada under the Boundary Waters Treaty of 1909. The purpose of the Commission is to help prevent and resolve disputes about the use and quality of boundary waters and to advise the two countries about water resources. See ñInternational Joint

As a means of settling international disputes, negotiation enjoys some degree of flexibility and effectiveness. As to the former it can be applied to all kinds of disputes be it political, legal or technical. Further, unlike the other methods mentioned in Article 33(1) of the Charter, negotiation involves only the state parties to the dispute. This enables them to monitor all the phases of the process from its initiation to its conclusion and conduct it in the manner that suits them.[181]

Therefore, it allows the parties to assume control over the dispute. With regard to effectiveness, though it is not always successful, it does solve the majority of disputes. One of the draw backs of this method of peaceful settlement of disputes is that it is predicated on the willingness of the parties to the dispute. Hence negotiation cannot go on if the parties refuse to have any dealings with each other. Such a situation might lead to the severance of diplomatic relations.[182]

3.2.2 Inquiry

In the peaceful settlement of international disputes, inquiry and fact-finding are more or less used interchangeably. Inquiry may be defined as an elucidation ñof facts surrounding an international dispute by an impartial investigative body for the purpose of a successful adjustment of the dispute.ò[183]

Most often, international disputes are centered on disputed questions of fact. In such a situation, an impartial inquiry becomes handy in reducing the tension and the area of disagreement between the disputants.[184] The purpose of inquiry is to produce an impartial finding of disputed

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Commission: Canada and the United States of Americaò available at http://www..transboundarywaters.orst.edu/research/case_studies/documents/ijc.html.(assessed 3 June, 2015).

[181] UN Handbook on the Peaceful Settlement of Disputes between States, ñNegotiationò, *loc. cit.*

[182] J.G. Merrills, *op. cit*., p. 25.

[183] R. L. Bledsoe et al*., op. cit*., p. 293.

[184] P. Malanczuk, *Akehurts Modern Introduction to International Law,* 7th rev.edn. (London: Rouledge, 2001) p. 277.

facts and thus prepare the direction for a negotiated settlement. However the parties must not accept the findings of the inquiry even though they often accept the outcome of the inquiry.[185]

Prior to the United Nations Charter which outlined inquiry asone of the methods of the settlement of international disputes, the function of inquiry as a clarification or investigation of disputed facts was elaborately dealt with in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. The former provides as follows:

> In disputes of an international natureé and arising from a difference of opinion on points of fact the contracting powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.[186]

The Commissions of inquiry created under the Hague Conventions turned out to be useful in so many ways. A historic example of the use of the Hague Conventions was in the dispute *Anglo-Russian dispute (the Dogger BankIncident).*[187] This incident occurred on the night of 21/22 October 1904, when the Russian Baltic Fleet e*nroute* for the Russo ï Japanese war attacked and sank some British trawlers in the mistaken belief that they were Japanese vessels launching an attack. In that incident three British fishermen died and a number were wounded. The incident almost led to war but it was diplomatically settled. The report of the Commission of Inquiry settled the differences between the United Kingdom and Russia and reported that no Japanese vessels was seen anywhere in the North Sea and that the attack by the Russia Baltic Fleet was totally unjustified. The report was accepted by both parties and Russia paid 66,000 pounds to Britain.

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[185] *Ibid.*
[186] Article 9.
[187] Official European Forum, ñDogger Bank Incident-Russian Imperial Fleet Attack a Fishing Boatò available at http://forum.worldofwarships.eu/index.php?/topic/693-dogger-bank-incident-russian-imperial-fleet-attack-a-fishing-boat/ (assessed 3 June, 2015).

Another example of inquiry[188] include; the Red Crusader Inquiry which was conducted as a result of a dispute between Denmark and the United Kingdom. In the Red Crusader Inquiry, the Red Crusader, a Scottish trawler was arrested in May 1961 by the Danish frigate NellsEbbesen, for having illegally fished, within the boundaries of the fisheries around the Faeroe Islands, a Danish semi-autonomous province. A small Danish crew was put aboard the Red Crusader to guide it to a Port in the Faeroe Island, but the vessel nevertheless continued towards Aberdeen in Scotland, despite efforts on the part of the Danish fisheries protection vessel to prevent this. Among other things, the Danish frigate fired warning shots across the Red Crusader.As these warning shots were ignored, the Red crusader was fired upon directly with solid shots which damaged the vessel.

In a bid to resolve the legal and political crisis caused by the incident, the governments of Great Britain and Denmark appointed a neutral Commission at The Hague to investigate the details of the incident. The report of the Commission made available in March 1962 found no definite proof that the Red Crusader had been engaged in poaching, although it had been apprehended clearly within the borders of the fishing limit, with its trawl out. The Commission also found that the Danish vessel exceeded the limits for the reasonable use of force as allowed by the principles of international law.

Recently as a result of the so-called óflotilla incidentô of 31 May 2010 involving the Israeli military operation in international waters against the convoy sailing to Gaza, the Security Council took note of the statement of the Secretary-General on the need to have a full investigation into the matter. Thus, in August 2, 2010, the Secretary ï General informed Council

[188] See Everything2,ñThe Red Crusader Affairò available at http://everything2.com/title/the+red+crusader+affair (assessed 9 June 2015). See also the ñLetelier and Moffitt case between Chile and the United States.

members that, he had decided to establish a panel of inquiry on the Flotilla incident. The panel was tasked with making findings about the facts, circumstances and context of the incident.[189]

In sum, it is safe to hold the view that, strictly speaking inquiry is not settlement.[190] It is a provisional and political device linked to the idea that, resorting to an inquiry provides a cooling off period and reduces the risk of destabilizing the world order or breaches of the peace; while the report on the facts *de facto* might lead to the settlement of the dispute.[191]

3.2.3 Mediation

Mediation has been defined as a

> technique of third party peaceful settlement of an international dispute whereby that party, acting with the agreement of the disputing states, actively participates in the negotiating process by offering substantive suggestions concerning terms of settlement and, in general, trying to reconcile the opposite claims and appeasing any feelings of resentment between the parties.[192]

In Mediation therefore, an impartial and neutral third party with the consent of parties intervenes into the dispute. He has no authority to decide on the issue in dispute. His sole is to assist the disputing states to freely arrive at a mutually accepted settlement. However, there is no prior commitment to accept the proposals of the mediator.

Where parties to a dispute fail to arrive at a settlement through negotiation, one or more of the parties may invite a third party neutral. The third party neutral may on his own initiative step in

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[189] See UN, ñ*Repertoire* of the Practice of the Security Council, 17th supplement 2010-2011ò available at http://www.un.org/en/sc/repertoire/2010-2011/Part%20Vi/2010-2011_Part%20Vi.pdf (assessed 9th June 2015)

[190] L. M. Goodrich, *Charter of the United Nations* ,3rd and rev. edn. (New York: Columbia University Press, 1969) p. 261.

[191] I. Brownlie, ñThe Peaceful Settlement of International Disputeò available at http://chineseejil.oxfordjournals.org/content/8/2/267.full (assessed 9 June 2015).

[192] R. L. Bledsoe *et al., op. cit*., pp. 301 ï 312.

to act with both parties in order to arrive at a peaceful resolution of the disputes.[193] In other words, mediation

> is a procedure which may be set in motion either upon the initiative of a third party whose offer to mediate is accepted by the parties to the dispute, or initiated by the parties to the dispute themselves agreeing to mediation[194].

It therefore means that, it is predicated on the consent of the parties to the dispute in question and the mediator or mediators are chosen or accepted based on the mutual consent of the parties. As a method of peaceful settlement of international disputes, mediation can be used to facilitate dialogue between disputants.

Its aim is to reduce hostilities and tensions thereby arriving, through a political process controlled by the parties, a peaceful resolution of an international dispute.[195]

Mediation is often confused with good offices. This confusion arises due to the fact that both are procedures of settlement in which usually, a friendly third party/ state helps in bringing about an amicable solution of the dispute.[196]

However a distinction exists. In good offices, the third party neutral encourages the party to come to the negotiating table so as to resolve their dispute. But in mediation, the mediator assumes an active role of suggesting proposals to the parties for possible settlement. Such proposals may be accepted or rejected by the parties. This is because, in mediation, the parties retain control over the process.[197]

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[193] B. Jacob, *Resolving international Conflicts: Theory and Practice ofMediation* (Boulder Colorado, USA: Lynne Riener Publications, 1996), in S. Yahaya, ñIs Mediation a Viable Option for Resolving International Disputes?ôô available at http://www.dundee.ac.cuc/cepinlp/gateway/files.plpp=cepmlp_car13_14_254520024pdf.(assessed 10 June 2015)

[194] UN Handbook on the Peaceful Settlement of Disputes between States, ñMediationò, *loc. cit.*

[195] *Ibid.*

[196] J. G. Starke, *op. cit.*, p. 512.

[197] S. Yahaya, *loc. cit.*

Elaborating on the difference between mediation and good offices Verma declares;

> In a traditional sense, good offices stop where mediation begins. In good offices, the third party brings the disputing parties together and induces them to negotiate or provides the occasion for negotiations between them to proceed without itself participating in the negotiations. In mediating on the other hand, the mediatory party has a more active role. It participates in the negotiations, directs them and can suggest a solution though the suggestions are not binding upon the parties. However, in actual practice, both tend to merge with each other and many a time, it is difficult to distinguish between the two.[198]

The strongest point in the difference between the two techniques is the fact that, in mediation, the third party is actually involved in the process. He participates in the negotiations and directs the parties in such a way that an amicable solution may be reached.[199] This active involvement is lacking in good offices.

Mediation may take different forms. It could be carried out by states, international organizations or by individuals. Non-governmental organizations may act as mediators. The International Committee of Red Cross (here-after, the ICRC) may act as mediators. The ICRC for example, avoids being involved in political disputes but it often intervenes where armed conflict in the treatment of prisoners of war raise humanitarian concerns.[200]

One obvious limitation of mediation is that, its success is dependent on the willingness and co-operation of the parties in a dispute. Therefore, the mediator can do his or her best and only rely that the parties co-operate with him. It can thus be said that mediation is only successful as the parties desire it to be.[201]

Examples of successful mediation include the following:

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[198] S. K. Verma, *An Introduction to Public International Law (*New Delhi: PHI Learning Pvt; Ltd., 2004) p.333.
[199] J. G. Starke, *op. cit*., p. 513.
[200] See D. P. Forsythe, óHumanitarian Mediation by the ICRC in Towal and Zartman, *International Mediation,* p. 233 in J.G. Merills, *op. cit*., p. 29
[201] S. Yahaya, *loc. cit.*

The mediation conducted by Pope Led XII as a result of the German -Spanish dispute over the Caroline Islands[202] in the Pacific in 1885.

(i) The mediation of the Soviet Union which brought about a ceasefire between India and Pakistan over Kashmir in 1965.

(ii) The mediation of the United States in the 1978 peace talks between Egypt and Israel.

(iii) The mediation of the United States in the person of Mr. Alexander Haig, in the dispute between Britain and Argentina over the Falkland Islands in 1982.

(iv) The mediation of Pope John Paul II in the dispute between Chile and Argentina over the Beagle Channel.[203] Award in 1984. In this dispute, the Pope offered the services of Cardinal *AnthonioSamone* as mediator. The reason for such intervention is not difficult to distill. According to Merrills,

> é the concern naturally aroused by the prospect of war between two Catholic States was here reinforced by both the promptings of the United States and a tradition of Papal involvement in South American affairs stretching back over five centuries.[204]

(v) The mediation carried out by the Secretary-General of the United Nations in 1988 as regards the termination of the war between Iran and Iraq.

(vi) In 1995, the mediation of the United States in the conflict in the former Yugoslavia led to the conclusion of the Dayton Peace Agreement.

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[202] The Caroline Islands were under the Spanish control in 1886. After the Spanish-American War, the islands were sold to Germany in 1889. They were occupied by the Japanese, who in 1920 received a League of Nations mandate over them. In 1935, Japan annexed the islands. During World War 11, America occupied the islands and were placed under U.S. administration by the United Nations in 1947. The islands are now divided between two separate political entities: the Federated States of Micronesia, which became independent in 1986, and Palau, which became independent in 1994. See The Columbia Encyclopedia, ñCaroline Islandsò available at www.enclyclopedia.com/Caroline_islands.aspx (assessed 10 June 2015).

[203] The Beagle conflict was a border dispute between Chile and Argentina over possession of Picton, Lennox and Neuva Islands and the scope of the maritime jurisdiction associated with those islands that brought the countries to the brink of war in 1978. See Evi, ñBeagle Conflictò available at https://www.evi.com/the_beagle_conflict (assessed 10 June 2015).

[204] J. G. Merrills, *op. cit*. p. 29.

(vii) Presently, there is an on-going American mediation in the ever recurrent Arab ï Israeli conflict over Palestinian settlement or territorial question.[205]

(viii) Recently, Egypt mediated in the conflict between Israel and Hamas who presently controls the Gaza strip. The mediation resulted in the ceasefire agreement which took place on November 21, 2012.[206]

3.2.4 Conciliation

Conciliation is defined as: ñA settlement of disputes in an agreeable manneré A process in which a neutral person meets with the parties to the disputeé and explores ways how the dispute might be resolved.öö[207] As a means of international dispute settlement conciliation involves the medium of a third party whose role is to ascertain the facts in the dispute and recommends possible solutions to the disputants.[208]

For Collier et al,[209] it is an intervention in the settlement of an international dispute by a person or body (commission), who has no political authority of its own but enjoys the confidence of the disputants. His task is to investigate every aspects of the dispute and propose a solution which is not binding on the parties. As such conciliation vacillates between inquiry and mediation. Thus conciliation,

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[205] C. U. M. Ogonor, *The UN, NATO and the Post Cold War Management of Global Peace*, (Port Harcourt; Rostian, 2000) p. 118.

[206] Israel launched its military offensive in Gaza on Nov. 14 2012 to put to a stop to months of renewed rockekfire from Gaza. In a first Salvo, it assassinated the Hamas military chief, then bombarded more than 1,500 targets in eight days of air strike and artillery attacks. Palestinian militants led by Hamas showered Israel with more than 1,500 rockets, including long-range weapons that reached as far as Jerusalem and Tel Aviv. The conflict has taken 161 Palestinians, including 71 civilians, and forced hundreds of thousands of people on both sides of the border to remain huddled. In the disputes five Israelis lost their lives. This has been described as the worst blood- shed since an Israeli invasion of Gaza four years ago that left hundreds dead. See The World Post, ñIsrael- Hamas Ceasefire: Egypt Announces Peace Deal to Take Effect at 9pmò available at http://www.huffingtonpost.com/2012/11/21israel_hames_ceasefire_n_2171197.html (assessed 10 June 2015)

[207] B. A. Garner (ed.), *Black's Law Dictionary,* 7thedn.(St. Paul, Minn: West Group, 1999) p. 284.

[208] N. L. Wallace-Bruce, *The Settlement of International Disputes* (The Netherlands: MartinusNijhoff Publishers, 1998) p. 43s

[209] J. P. Cot, *International Conciliation*, (London, 1972), p. 9 in J. G. Collier *et al*, *The Settlement of InternationalDisputes in International Law*: *Institutions and Procedures* (Oxford: Oxford University Press, 2000) p. 29.

> is sometimes described as a combination of inquiry and mediation. The conciliator who is appointed by agreement between the parties investigates the facts of the dispute and suggests the terms of settlement.[210]

In other words, conciliation is a peaceful settlement procedure which combines the elements of inquiry and mediation.

However, conciliation is different from mediation in the following ways: firstly, conciliation is more formal and less flexible than mediation. The proposals of the mediator might be rejected by the disputants, if this happens, he can go on formulating new proposals. But in conciliation, the conciliator usually issues a single report with conclusions and a proposal.[211]

Secondly, unlike mediation which is generally carried out by governments who are the third party, conciliation is the task of an impartial commission.[212]

Various international instruments[213] recommend conciliation as one of the peaceful means for the settlement of international disputes which may be carried out by an individual. The function may also be performed by a commission. Its usefulness also arises when the principal issues in the dispute are legal but the parties are willing to seek an equitable solution.[214]

Examples of disputes dealt with by conciliation commissions include;

(i) the*Chaco case* (1929);

the Franco-Siamese Border case (1947);

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[210] P. Malanczuk, *op. cit*., p.277.
[211]*Ibid.* See also R. L. Bledsde*et al., op. cit*., p. 285.
[212]*Ibid*.
[213] See the Hague Conventions of 1899 and 1907, the 1928 Geneva General Act for the Pacific Settlement of International Disputes, which was revised in 1949, the Charter of the United Nations, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, the 1948 American Treaty of Pacific Settlement (the Bogota Pact), the 1957 European Convention for Peaceful Settlement of Disputes, the 1964 Protocol to the OAU (now AU), Charter on the Commission of Mediation, Conciliation and Arbitration (as amended in 1970), the 1981 treaty establishing the organization of Eastern Caribbean States.
[214] J. G. Collier *et al., op. cit*., p. 29.

the*Belgian-Danish dispute* concerning Danish ships evacuated from Antwerp (1952);

(ii) the *Franco-Italy* dispute and the dispute between France and Switzerland (1955).

(iii) *the Norwegian – Icelandic dispute* which gave rise to the Jan Mayen Award.[215]

The *Gran Chaco controversy*[216] was a dispute between Bolivia and Paraguay. In 1928 an armed conflict occurred between the two countries over the possession of Chaco Territory. The League of Nations recommended to both parties that they should resolve the dispute by peaceful means. The two countries submitted the dispute to the Pan-American Conference for arbitration. The Pan-American Conference did not succeed in resolving the matter. However, the League took the initiative in appointing a commission of investigation, it also imposed arms embargo on both sides of the conflict. The arms embargo imposed on Bolivia was lifted when Bolivia accepted the report of the Assembly, to which the case was referred. On the part of Paraguay, the embargo continued. Consequently Paraguay left the League. Therefore the League did not succeed in the Gran Chaco dispute between Bolivia and Paraguay.

The most recent example of successful state to state conciliation is the *JanMayen Award*, given by a Conciliation Commission with regard to a dispute between Iceland and Norway (Norwegian Icelandic dispute)[217] in the continental shelf area between Iceland and Jan Mayen. The Island of Jan Mayen (Norway is situated) at about 290 nautical miles north east of Iceland. Iceland had in 1979 established a 200 mile exclusive economic zone around its country. Between Iceland and Jan Mayen lies the Jan Mayen Ridge, the Northern portion of which may contain hydrocarbon

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[215]*Ibid*., p. 30.

[216]OnWar.Com, ñThe Chaco Dispute 1927 ï 1929öö available at http://www.onwar.com/aced/chrono/c/1900s/yr25/fchaco1927.htm (assessed 10 June 2015).

[217] S. P. Jogota, *Maritime Boundary*, (The Netherlands: MartinusNijhoff, 1985), pp. 165 ï 166. See also Reports of International Arbitral Award ,ñConciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen; Report and Recommendations to the Governments of Iceland and Norway, Decision of June 1981öö available at http://untreaty.un.org/cor/riaa/cases/vol_xxvii/1-34pdf

resources. Iceland claimed that it was entitled to a continental shelf area extending beyond its 200 mile economic zone line. Disagreement between the 2 countries on the question resulted to a referral of the issue to a conciliation commission which was created under the Agreement of 28 May 1980. In May 1981, the Commission submitted its recommendations.

Though the Commission based on its findings concluded that Iceland could not claim any area of Jan Mayen Ridge beyond the 200-mile line on the basis of the natural prolongation of its landmass, it however, took cognizance of Icelandôs strong economic interests in these sea areas and the fact that Iceland was entirely dependent on imports of hydrocarbon products. The commission finally recommended that although no new boundary line may be established between the two countries, a specified area for joint development should be established. The joint development area accommodated the interests of the two countries however, with some preferential treatment on the part of Iceland. The recommendations of the Commission were accepted by the two countries which resulted in an agreement between Iceland and Norway.[218]

It must be noted that, on December 11, 1995, the General Assembly adopted, without a vote, Resolution 50/50 (United Nations Model Rules for the Conciliation of Disputes between States).[219] The Rules provide *inter alia*, for the initiation of conciliation proceedings, the number and appointment of conciliators, detailed provisions as regards the conduct of the conciliation proceedings such as the confidentiality of the Commissionôs work and documents, the preservation of the legal position of the parties etc.[220]

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[218] The Agreement entered into force on June 2, 1982.
[219] See UN, ñUnited Nations Model Rules for the Conciliation of Disputes between States: General Assembly Resolution 50/50ò available at http://untreaty.un.org/cod/arl/pd/ha/unmrcdbs/unmrcdbs_ph_e.pdf.(assessed 11 June 2015).
[220] *Ibid.*

3.2.5 Arbitration

According to the International Law Commission, ñinternational arbitration is a procedure for the settlement of disputes between states by a binding award on the basis of law and as the resultofs an undertaking voluntarily accepted.[221] In other words, arbitration is the nomenclature given to the determination of disputes between states through a legal decision of an arbitrator or arbitrators and an umpire or an arbitral tribunal. Once the parties agree to submit their disputes to arbitration, it therefore means that they have accepted to be bound by the award of the arbitral tribunals. In this respect, one of the main attributes of arbitration is that, it results in binding decisions upon the parties to the dispute and this is a quality which arbitration shares will judicial settlement.[222]

The characteristic of making binding decision qualifies arbitration as a compulsory means of settling disputes.[223] The compulsory nature of arbitration does not mean that states must submit their disputes to arbitration, unless there is a treaty obligation to do so. But it does mean that, once they submit to arbitration, they are bound by the arbitral award.

Prior to the League of Nations and the United Nations, arbitration was used by states as a pacific means of settlement of disputes. This goes to show that arbitration is an ancient institution. It was used throughout the Hellenic world for over five hundred years. In the middle ages, arbitration

[221] See ILC, ñReports of the International Law Commission to the General Assembly, 1 June ï 14 August 1953ò, available at http://untreaty.un.org/ilc/publications/yearbooks/ybicro/umes(e)/ILC_1953_V2_e.pdg (assessed 11 June 2015)
[222] UN Handbook on the Peaceful Settlement of Disputes between States, ñArbitrationò, *loc.cit.*
[223] *Ibid*.

found favour with the Italian city States, the Swiss Confederation and the Hanseatic League. However its use declined with the evolution of independent sovereign states.[224]

Arbitration[225] in its modern form could be traced to the Jay Treaty of 1794 between Great Britain and United States of America, which provided for the establishment of three arbitral commissions to settle disputes and claims arising out of the American Revolution. Further development of arbitration was prompted by series of arbitral agreements which created ad hoc arbitral tribunals to deal with specific cases or to determine a great number of claims. Notable among these arbitral tribunals was the *Alabama Claims Arbitration*[226] which was established under the Treaty of Washington of 1871. By the conclusion of this treaty, the United States of America and Great Britain agreed to settle claims which arose from the failure of Great Britain to maintain its neutrality in the time of American civil war. The controversy began when the confederates that is, the Southern States contracted the British boatyards for the construction of warships in favour of the former during the US civil war. Though disguised as merchant vessels, they were indeed commerce raiders. Two of these ships, Florida and Alabama, occasioned great damage on the Union ships. The Alabama for instance, destroyed some sixty-four ships of the Union before it was sunk in June 1864 by a U.S. warship. The US accused Great Britain of infringing customary rules on neutrality by aiding the confederates.

The arbitral tribunal found against Great Britain and ordered Britain to pay the US $15.5 million as compensation for the *Alabama Claims*. *The AlabamaClaim*s and its peaceful resolution, seven years after the end of the war set an important precedent for the settlement of serious international disputes through arbitration.

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[224] A. Kaczorowska, *Public International Law,* 4thedn. (London: Routledge, 2010) p. 626.
[225] Encyclopedia Britannica, ñArbitrationò available at www.britannica.com/topic/arbitration#ref1107647 (assessed 11 June 2015).
[226] (1872) Moore, I IntArb 495.

Arbitration was furthered by the Hague Peace Conferences. These conferences adopted the Hague Conventions on the Peaceful settlement of disputes, one in 1899, the other, in 1907. The later revised the former. For these conventions, the objective of international arbitration is the settlement of disputes between states by judges freely chosen by them and such settlement is based on the respect of the law.[227] Arbitration therefore, represents a qualitative leap over the other measures as it necessitates the settlement of the dispute in accordance with existing international legal standards.ò[228]

The most practical achievement of the 1899 Hague Conventions was the establishment of the Permanent Court of Arbitration (hereafter, the PCA) in 1900.[229] The PCA has made significant contributions to the peaceful settlement of disputes and to the development of international law. Thus between 1902 and 1932, the PCA arbitrated not less than twenty cases. However, from that year until 1972, only five cases were dealt with. The reason for the decline of the importance of the PCA was the establishment of the Permanent Court of International Justice (PCIJ) in 1922 and its successor, the International Court of Justice (ICJ) in 1945.

Among the several awards rendered by the PCA include; the *North Atlantic Fisheries Arbitration*[230] between the United States and Great Britain, the *Savarkar Case*[231] between Great

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[227] Articles 15 and 37 respectively of the Hague Conventions of 1899 and 1907.

[228] R. Mani, ñPeaceful Settlement of Disputes and Conflict Prevention,ò in T. G. Weiss *et al* (eds.), *The OxfordHandbook on the United Nations*, (Oxford: Oxford University Press, 2007), p. 316.

[229] ñThe designation is a misnomer because there is no permanent court in the sense of an established tribunal to which resort can be had upon application. The Role of the PCA is to facilitate the task of the parties to a dispute who have decided to go to arbitration and to provide facilities for the conduct of the arbitration. The PCA has a list of jurists designated by each state party to the Convention. Up to four of these potential arbitrators may be put on the list by each state. Disputing states can select from them when the need arises. This seemingly rather insignificant arrangement does in fact go some way towards overcoming one of the major difficulties in resolving disputes, which is getting the parties to agree on composition of an arbitral tribunal at a time when their relations may be less than good.ò See B. A Gardiner, *op. cit*., 475.

[230] (1910) 11 RIAA 167.

[231] (1911) 1 Scott 276.

Britain and France and the *Island of Palmas Arbitration*.[232] This case arose out of a dispute between the Netherlands and the United States. As a result of the Spanish ï American War of 1898, Spain ceded the Philippines to the United States by the Treaty of Paris 1898. In 1906 an American official of the US visited the Island which the US behaved to be part of the territory ceded to it. He found to his greatest charging a Dutch Flag flying theme. The two countries referred sovereignty over the Island to arbitration. The United States relied on the Treaty of Paris 1898 which was a treaty of cession in her favour while the Netherlands relied on the historical connection between it and the neighbouring states of which the Island was a part, since about 1700, and on acts of sovereignty by the Netherlands since that date. The Arbitrator Max Huber upheld the Netherlandsô title to the Island.

Presently, there are pending state to state arbitrations at the PCA which include*; the Maritime and Territorial Dispute between Croatia and Slovenia,*[233] *the Duzgit Integrity Arbitration (Malta v Sao Tome and Principe),*[234] *the Arctic Sunrise Arbitration (Netherlands v Russia)*.[235]Thus, the competence of the PCA extends to all arbitration cases submitted to it by the agreement of the parties involved. The disputes determined by arbitration may be between a state and non-state actors or claims of nationals of either of the two states against the other state. But our concern here is the dispute that concerns states.

From the definition and explanations of arbitration undertaken above, the main features of arbitration become evident. Firstly, the arbitrators are freely chosen by the parties involved in the dispute, secondly, the parties decide on the form of an arbitral tribunal. Thirdly, the parties decide on the choice of law applicable to the dispute and finally, the award is intended to be a

[232] (1928) 2 RIAA 829.
[233] PCA Case No. 2012-04
[234] PCA Case No. 2014-07
[235] PCA Case No. 2014-02

final settlement of the dispute except where there is a manifest error of law or fact, irregularity in the appointment of arbitrators, or an essential procedural error such as the arbitrator exceeding his or her power or failing to give reasons for the award. As regards, the third element, the law applicable to international arbitration is international law, but parties are free to spell out in their compromise the law applicable to their dispute. Therefore, they may come to the decision that the principles of equity or justice should apply to their dispute. They may even instruct the arbitrators to seek an equitable solution to their dispute especially when the dispute is of a political rather than legal nature.[236]

3.2.6 Judicial Settlement

Article 33(1) of the Charter lists judicial settlement as one of the methods for the peaceful settlement of disputes, the continuance of which are likely to endanger the maintenance of international peace and security.

The principal judicial organ of the UN is the International Court of Justice (hereafter the ICJ). The establishment, the composition and the law applied by the court has been dealt with in Chapter Two.[237] The jurisdiction of the Court is two-fold namely contentions jurisdiction and advisory jurisdiction. However, the jurisdiction of the Court is predicated on the fundamental principle of international law that no state can be coerced to submit its disputes with other states to any kind of pacific settlement. Thus, the jurisdiction of the court is based on the consent of the states involved in the dispute. The principle of consent is however less significant in the context of the advisory jurisdiction of the court.[238]

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[236] A. Kaczorowska, *op. cit*., p. 632.
[237] See Chapter 2.5
[238] R. L. Bledsoe *et al, op. cit*., p. 286.

3.2.6.1 Contentious Jurisdiction

This has been defined as the ñpower of the International Court of Justice é to render, in accordance with international law, a legally binding decision in disputes of a legal nature which are submitted to it on the basis of consent by states confronting each other in adversary proceedings before the court.[239] The necessary consent required to establish the jurisdiction of the court may be furnished in the following ways;

(a) Conventional jurisdiction, that is, a special agreement between the parties to submit the dispute to the ICJ known, as *compromis*.[240] By signing a ó*compromis*,ô parties to the dispute give their consent to the jurisdiction of the Court. Thus, by virtue of this special agreement, jurisdiction is conferred on the court and the court is seized with the case by the fact of notification to the court of the agreement. Another generic type of special agreement is the unilateral application of one of the parties to the Court.[241] In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility*),[242] the king of Sandi Arabia, with the agreement of the Amirs of Qatar and Bahrain, established a tripartite committee charged with the task of preparing a document for the submission of the dispute to the ICJ. The dispute is centered on the territorial sovereignty and maritime delimitation between Qatar and Bahrain. There was a disagreement on the drafting of the terms of reference. While Bahrain was ready to submit all the disputed matters to the Court for adjudication, Qatar wanted to

[239] I. Brownlie, *loc. cit*.
[240] See Article 36(1) of the ICJ Statute which provides that the jurisdiction of the Court consists of all cases submitted to it by the parties and this is usually done by many of notification to the Registrar of a special agreement called *compromis*. This is an agreement between the parties to the dispute to resort to judicial settlement.
[241] See Art. 35(2) and (3) of the Rules of the Court.
[242] (1994) I.C.J Rep. p. 112, 25.

submit only a few selected issues. However, the parties did agree on five areas of territory which were the subject of dispute.

However, no completed submission was agreed. The Committee held a meeting in December 1990 and extended the period of the good offices of Saudi Arabia and came to the conclusion that if these efforts did not yield a favourable result by the end of May 1991, then the issue would be brought before the ICJ for settlement. Minutes of this meeting were signed by the foreign ministers of Qatar and Bahrain.

At the stipulated date, no settlement was reached. Qatar unilaterally applied to the Court for the settlement of a selected number of issues. There was an objection by Bahrain as regards the jurisdiction of the Court since there was no mutually agreed bilateral submission from both parties. The ICJ held that the minutes of the meeting of December 1990 amounted to an agreement over which the Court could found jurisdiction since they enumerated the commitments to which the parties have consented thus creating rights and obligations in international law for the parties.

(b) byvirtue of a jurisdictional clause or compromisory clause which provides that if a dispute arises as regards the interpretation or application of treaties, one of the parties may refer the dispute to the ICJ and the other party is bound to submit to the jurisdiction of the Court.

There are numerous treaties internationally and regionally[243] which provide for the compulsory settlement of disputes by the court, arising from the interpretation and application of such treaties

[243] General Act for the Pacific Settlement of International Disputes of 26 September 1928 and 28 April 1949; The Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes adopted by the 1958 United Nations Conference on the Law of the Sea (Article 1); The Optional Protocol to the Vienna Convention on

unless there is an agreement by the parties to resort to arbitration or other methods of peaceful settlement. For instance, in the *Case Concerning the Application of the Convention on thePrevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v* Yugoslavia) (Preliminary Objections),[244] the ICJ assumed jurisdiction based on Article ix of the Genocide Convention, 1948

(c) The doctrine of Forum *prorogatum*: Prorogated jurisdiction is

> a principle relied upon in some cases by the International Court of Justice é whereby the Court exercises jurisdiction over a case when consent to submit to its jurisdiction is given after the initiation of proceedings in an implied or informal way or by a succession of acts.[245]

By this doctrine, a defendant state accepts the jurisdiction of the Court even after the initiation of proceedings against it. This is done either by an express statement or by implication.[246]

(d) Compulsory jurisdiction: This is based on the optional clause as contained in Article 36(2) and (3) of the ICJ Statute. Article 36(2) provides that, parties to the present Statute, may at any time declare that they recognize as compulsory *ipso facto* and without any 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 a treaty,

(b) any question of international law,

(c) the existence of any fact which, if established, would constitute a breach of an international obligation,

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Diplomatic Relations Concerning the Compulsory Settlement of Disputes of 18 April 1961 (Articles 1 and 2); European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (Article 1) American treaty on Pacific Settlement (Pact of Bogota) of 30 April 1948 (Article XXXI).

[244] (1996) I.C.J. Rep. p.1. See also A. Kaczorowska, *op. cit.,* p.648.

[245] R.L. Bledsoe, *op. cit*., pp 289 ï 290.

[246] *Ibid.,* p. 287.

(d) the nature of the reparation to be made for the breach of an international obligation.

These declarations may be made:

(i) unconditionally; or

(ii) on condition of reciprocity on the part of several or certain states; or

(iii) for a certain time only.[247] The so called optional clause is regarded as a compromise between the advocates and the opponents of compulsory jurisdiction.[248] However there is no obligation incumbent on states to make such a declaration, and for this reason, jurisdiction cannot in the real sense, be regarded as compulsory.[249]

The contentious jurisdiction is open to members of the UN, non-member states of the UN who wish to become parties to the Statute of the Court on conditions determined in each case by the General Assembly upon the SCôs recommendation and states who are not parties to the Statute.[250]

The judgments of the ICJ are binding and final. However, the Court lacks an effective mechanism to enforce its decisions. A state who fails to obey the judgment of the Court may be referred to the SC for enforcement action. There is no guarantee for such necessary action when the decision of the ICJ adversely affects the national interests of one of the SCôs permanent members.[251] Nonetheless, the Court has been able to settle inter-state disputes.[252]

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[247] R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* in P. Malanczuk*op. cit*., 284
[248] A. Kaczorowska, *op. cit*. p. 651
[249] *Ibid*.
[250] See UNSC Resolution 9 of 1946, for the conditions of access to the court as regards such states.
[251] In 1986 the ICJ found that the United States had violated international law by placing mines in Nicaraguan harbors, but the United States refused to pay the fine imposed by the ICJ and subsequently withdrew its acceptance of the courtôs compulsory jurisdictionö. See P. Robinson, *Dictionary of International Security (*Cambridge: Polity Press, 2008) p.105.
[252] See the following cases: *Application of the Convention on the Prevention and Punishment of the Crime ofGenocide (Bosnia and Herzegovina v. Serbia)* (2007) ICJ Rep. p 43; *Land and Maritime Boundary Between*

3.2.6.2 Advisory Opinions

Advisory Opinions according to legal writers;

> are judicial statements on legal questions submitted to the Court by organs of the UN and other international legal bodies. The legal questions may be unrelated to a legal question in dispute between states (abstract questions) or the request may relate to a legal question actually pending between two or more statesé [253]

In other words, advisory opinions can only be requested on legal questions which are either abstract or concrete.

The Charter lays down the mechanism on how the advisory jurisdiction of the Court could be triggered. Hence, Article 96 provides that the GA and the SC as well as the other organs and specialized agencies of the UN that have the authority of the GA are competent to request advisory opinions from the ICJ.[254] While the GA and the SC can seek for an advisory opinion as regards any legal question, the others so authorized can only seek the advisory opinion of the Court on legal issues arising within the scope of their activities. Thus, while the GA and SC have direct authorization to request an advisory opinion,[255] the other organs and specialized agencies have indirect authorization. However, the Charter empowers solely the GA to give such authority to the other organs and specialized agencies to make such requests. The reason for this restriction is justified on the basis that the GA is the plenary organ of the UN thus, occupying a special position.[256]

Cameroon and Nigeria *(Cameroon v Nigeria: Equitorial Guinea Intervening*) (2002) I.C.J. Rep. p. 303; *FrontierDispute (Burkina Faso v Niger)* (2013) I.C.J. Rep. p. 44; *Territorial and Maritime Dispute (Nicaraqua v Colombia*) (2012) I.C.J. Rep. p. 624.

[253] B. Simma*et al* (eds.), *op. cit.,* p. 1181.

[254] See also Art. 65(1) of the Statute of the ICJ. It is safe to assume that the Art 96 was substantially incorporated into Art 65 (1) of the ICJ Statute. See also M. Sameh, The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations, (The Netherlands: Kluwer Law International 2003) p. 49.

[255] Art 96(1) and (2) of the Statute of ICJ

[256] M. Sameh, *op. cit*., p. 53

The reasons for the provision of advisory jurisdiction of the ICJ under the Charter include the following; firstly, the advisory function helps the GA and SC in the discharge of their duties of conciliation over disputes submitted to them. Secondly, it gives them an authoritative legal advice on points of law[257] and thirdly, it might also help in eliminating further controversy over the legal aspects of a dispute or by having a calming effect on parties.[258]

Further, the advisory jurisdiction of the Court is limited only to legal questions. Hence, the Court is not bound to give an advisory opinion on a purely academic question. However, question which finally assist the concerned international organization in carrying out its functions are not to be considered purely academic.[259] Again, in its advisory jurisdiction, the Court should not decide upon the merits of a dispute between the parties.[260]

An advisory opinion suffers a substantial defect. It lacks the binding force of a judgment in a contentious case unless when provided for in some international instruments.[261] Notwithstanding this obvious limitation, it is usually accepted and acted upon by the requesting entity or state concerned. Thus, an advisory opinion is of a strong persuasive value, it is consultative and advisory in character and enjoys a moral authority.

At the time of writing, up to twenty- six advisory opinions have been requested from the ICJ.[262] It is therefore safe to assume that the advisory jurisdiction as contemplated by the Charter and in

[257] S. K. Verma, *op. cit*., p. 353
[258] M. Sameh, *op. cit*., p. 47.
[259] S.K. Verma, *op. cit*., p. 353.
[260] *Ibid.*
[261] Examples of such international instrument include; the Convention on the Privileges and Immunities of the United Nations 1946; the Convention on Privileges and Immunities of Specialized Agencies 1947.
[262] Some of the advisory opinion given by the ICJ include; *Western Sahara Case (Advisory Opinion*) (1975) ICJ Rep 12;L*egality of the Threat or the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (1996) ICJ Rep 226;*Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion by the World HealthOrganization)* (1996) ICJ Rep 90; *Accordance with International Law of the Unilateral Declaration ofIndependence in Respect of Kosovo (Advisory Opinion)* (2010) ICJ Rep 403.

the statute of the Court compensate for the lack of capacity of the United Nations and the specialized agencies to be parties in cases before the ICJ.[263]

3.2.7 Resort to Regional Agencies or Arrangements

The Charter provides for the referral of a dispute to regional agencies or arrangement. A part of Article 33(1) and Chapter VIII of the Charter are devoted to regional arrangements or agencies and the role they play in dispute settlement. Precisely, the Charter provides as follows:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.[264]

The article goes beyond giving legitimacy to such arrangements or creating such agencies; it enjoins members to make sincere efforts to arrive at peaceful settlement of local disputes by these means before they can refer them to the SC.[265]

According to the United Nations, the term regional arrangements:

> denotes arrangements (regional multilateral treaties) under which states of a region undertake to regulate their relations with respect to the question of the settlement of disputes without creating there under a permanent institutions or a regional international organization with international legal personality. The term ñregional agenciesò, by contrast, refers to regional international created by regional multilateral treaties under a permanent institution with international legal personality to perform broader function in the field of the maintenance of peace and security including the settlement of disputes.[266]

Hence, in envisaging an important role for regional organizations within dispute settlement, it is the intendment of Charter that local disputes are first of all addressed by regional institutions or mechanism. If the regional body succeeds in the resolution of the dispute this would render any

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[263] B. Simma*et al* (eds.), *op. cit*., p. 1182.
[264] Art. 52(1).
[265] Article 52(2) of the Charter. See also L. M. Goodrich *et al., op. cit.,* p. 355.
[266] UN Handbook on Peaceful Settlement of Disputes between States,ñResort to Regional Agencies and Arrangements,ò *loc. cit.*

action by the United Nations unnecessary. On the contrary, the dispute shall be referred to the SC for an appropriate action.[267] For example, the violence that erupted after the national elections in Kenya in December 2007, was settled through the mediation efforts headed by a former UN Secretary ï General, Kofi Annan who headed the African Union Panel of Eminent Personalities including Mozambiqueôs GraaMachel and Tanzaniaôs Benjamin Mkapa. Following Annanôs meeting with both partiesô negotiation teams, individual discussions with Kibaki and Odinga as well as dialogue between all three actors, mediation efforts led to the signing of power sharing agreement on 28 February 2008. The agreement established MwaiKibaki as President and RailaOdinga as Prime Minister, as well as the creation of three Commissions ï the Commissions of inquiry on Post-Election Violence, the Truth, Justice and Reconciliation Commission and the Independent Review Commission on the General Elections.[268]

The UN manual on peaceful settlement describes the resolution mechanism and procedures of some of these regional institutions such as the Organization of African Unity now the African Union (hereafter, the OAU and AU respectively), the Arab League, the Organization of American States and the Council of Europe. These regional organizations provide for the peaceful settlement of disputes and the procedures adopted by them are almost the same with the methods outlined in Article 33(1) of the Charter.

In the past, the OAU for example provides for the peaceful, settlement of disputes by negotiation, mediation, conciliation and Arbitration[269]and in Article 19, member States gave their commitment to settle their disputes by peaceful means; and to this end established a Commission of Mediation, Conciliation and Arbitration.

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[267] R. Mani, ñPeaceful Settlement of Disputes and Conflict Prevention in T. G. Weiss *et al*., p. 307

[268] See ICRtoP, ñThe Crisis in Kenyaò available at http://www.responsibilitytoprotect.org/index.phd/crises/crisis-inKenya (assessed 11 June 2015)

[269] Art. 3(4) of the Charter of the OAU

It is pertinent to observe that the jurisdiction of the Commission was not compulsory and was not utilized as African States preferred informal third party involvement through the medium of the OAU.[270]

The African Union[271] also provides for the peaceful resolution of disputes[272] and its procedure is similar to that of the OAU.

However, the Charter places upon States, three obvious limitations as regards the utilization of regional arrangements and agencies. The first limitation is that, issues dealt with must be appropriate for regional action. Secondly, the arrangement or agencies and their activities must not be inconsistent with the purposes and principles of the United Nations[273] and finally the SC must always be informed of action undertaken or those to be embarked upon in the future under regional arrangements or by regional agencies in order to maintain international peace and security[274]. The purpose of this limitation is to provide the SC the necessary information it needs so as to be able to discharge its primary duty under Article 24(1) of the Charter, and while at the same time exercising the degree of control over the activities of regional organizations in the maintenance of global peace and security as envisaged by Articles 52 and 53 in particular,[275]of the Charter.

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[270] For instance, in the boundary dispute between Algeria and Morocco the OAU created an ad-hoc commission whose mandate was to achieve a settlement. Again in the Western Sahara dispute, the OAU established a committee which failed to reach a settlement in the conflict. See M. N. Shaw, *op. cit*., pp.930-931

[271] The African Union is an intergovernmental organization established in 2002. It is the successor of the OAU (Organization of African Unity). Its aim is to promote unity and solidarity of African States, to spur economic development, and to promote international cooperation. See Enclopaedia Britannica, ñAfrican Union (AU)ò available at http://www.britannica.com/EB checked/topic/8408/African-Union-AU (assessed 11 June 2015)

[272] Art. 4(e) of the Constitutive Act.

[273] Art. 52(1) of the Charter.

[274] Art. 54, *ibid.*

[275] L. M. Goodrich *et al., op. cit.,* p. 368.

3.3 The Role of the Security Council and other Organs of United Nations

One of the most important functions of the UN is the settlement of international disputes. The Charter provides that one of the purposes of the United Nations is

> 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.[276]

As a result of this, the Charter outlined a system for the peaceful settlement or adjustment of international disputes or situations under which the wide competence of the UN in this regard is established.[277] The Charter also spells out the corresponding obligations of members of the UN[278]. Thus parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security are obliged to settle such dispute by using any of the means or methods outlined in Article 33(1) of the Charter.

If the remedial methods employed by parties to international disputes prove unsuccessful,[279] the UN is authorized under the Charter to give some substantive recommendations. In this regard the Charter gives the SC four independent authorities[280] namely;

(i) to urge the disputants to end their dispute by one of the traditional means of settlement (Article 33(2);[281]

(ii) to investigate disputes in order to determine if they are likely to endanger the peace (Article 34);

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[276] Art. 1 (1) of Charter.
[277] W. Abdulrahim, ñPeaceful Settlement of Disputesò available at https://sites.google.com/site/walidabdulrahim/home/.my_studies_in_english/14_peaceful_settlement_of-disptues (assessed 11June 2015).
[278] See Chapter VI of the Charter.
[279] Art. 37(1) of the Charter.
[280] S.R. Ratner, ñImage and Reality in the UNôS Peaceful Settlement of Disputesò available at http://www.ejil.org/pdfs/6/1/1305.pdg (assessed 11 June 2015).
[281] ó óNote that under article 38, the Security Council may make recommendations to the parties with regard to the peaceful settlement of disputes generally if all the parties to the dispute so request.õõ See M. N. Shaw, *op. cit*., p. 1103.

(iii) to recommend appropriate procedures or methods of adjustment for such disputes (Article 36(1)

(iv) to recommend terms of settlement for such disputes (Article 37(2). *This* goes to show that Chapter VI of the Charter constitutes the advisory functions of the SC in assisting in the peaceful settlement of disputes.[282]

It is a well-known fact that in addition to open debates, behind-the scene discussions and lobbying, the SC has applied all the diplomatic techniques available in various international conflicts.[283] Further the SC has been alive to the powers imposed on it under Chapter VI of the Charter. For instance, on April 1982, the SC called upon the governments of Argentina and United Kingdom to settle their differences over the Falkland Island by seeking a diplomatic solution and to fully respect the purposes and principles of the Charter.[284] Again the SC on 26 May 1982 requested the Secretary-General[285] to renew the mission of good offices. The Council also mandated the parties to the dispute to cooperate fully with the SG, so as to bring the hostilities to a peaceful end. Further, following the attack Of March 26, 2010 by the Democratic Republic of Korea which led to the sinking of the Cheonan - a naval ship ï belonging to the Republic of Korea, the SC called for appropriate and peaceful measures to be taken against those responsible for the incident, aimed at the peaceful settlement of the issue, in line with the Charter and all other relevant provisions of international law.[286]

The SC has continuously reaffirmed its commitment to the pacific resolution of disputes in accordance with the provisions of the Charter. Thus in a high-level meeting on mediation and

[282] S. R. Ratner, *loc. cit.*
[283] M. N. Shaw, *op. cit.,* p. 1104.
[284] See SC/RES/502 (1982)
[285] See SC/RES/505 (1982)
[286] See UN, ñRepertoire of th Practice of Security Council 17th Supplement 2010-2011ò, *loc. cit*

settlement of disputes,[287] the Secretary-General stressed the importance of mediation as a means of pacific settlement of disputes and encouraged states to continue to use this procedure in the settlement of disputes and at the same time, highlighting the important role of the United Nations in this regard.[288]

In its effort at pacific settlement of disputes, the SC has recommended various methods of settlement, such as bilateral or multilateral negotiations,[289] the conduct of elections or the establishment of a representative government.[290] Thus:

> In countries such as Burundi, Central African Republic, Chad, Cote dô Ivoire, Guinea- Bissau, Liberia, Nepal and Sudan, several peace agreements laid out plans and time tables for elections. In that context, the Security Council called on the Government and parties to provide the necessary conditions, including material support and security for the conduct of free and fair elections. The Council also requested the missions through the Secretary-General, consistent with their mandate and within their capacities to support the electoral process.[291]

In so many occasions, the SC has made recommendations as regards good offices, mediation and conciliation efforts to be undertaken by the Secretary-General[292] or governments of neighbouring countries or regional leaders.[293]

As regards investigation of disputes and fact-finding the SC has performed or requested the SG to undertake various investigative and/or fact-finding activities which fall within the scope of Article 34 or relates to its provisions. For example, the SC has in a number of instances, dispatched missions comprising council members to conflict areas such Afghanistan, Cote

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[287] Held on 23rd September 2008.
[288] UN, ñ *Repertoire* of the Practice of the Security Council 16th Supplement 2009ò available at http://www.org/en/sc/repertoire/2008-2009/PartVI/08-09_PartVI.pdg#page=33(assessed 11 June 2015)
[289] See the case of Burundi. See also UN ñRepertoire of the Practice of the Security Council 16th Supplement 2008 ï 2009ò, *loc.cit.*
[290] As in Chad, the Central African Republic and the sub region. See S/RES/1861 (2009). See also UN, ñRepertoire of the Practice of the Security Council 16th Supplement 2008-2009, *loc. cit*
[291] *Ibid.*
[292] As in the case of Democratic Republic of Congo.
[293] As in the case of Chad, the Central African Republic and the sub- region. See SC/RES/1861(2009).

dôivoire, Democratic Republic of Congo, Haiti, Liberia, Rwanda, Sudan etc. It should be noted that the term of reference of these missions were not exclusively investigative but they helped the SC to form an impression of the respective situations on the ground.[294]

It must be observed that the SC is by no means, the only actor in the pacific settlement of disputes. While the primary and secondary responsibility lies with the parties to the conflict and the SC respectively, the GA may under Articles 10, 11, 12 bring issues to the attention of the SC. The SG is under Article 99 empowered to act so as to bring about the peaceful settlement of disputes. This mandate could be exercised personally, through staff in the secretariat or by ad hoc appointments (special envoys and special representatives).[295] In this regard, the Secretary-General plays an important role in the peaceful settlement of disputes by using his good offices and dispatching his representatives to facilitate durable and comprehensive settlements. For instance, in Africa, as regards Cote dôivoire, the SC requested the Secretary-General including through his Special Representative, to facilitate political dialogue among all the stakeholders so as to bring peace in the country and make them respect the outcome of the presidential elections of 31st October, 2010.[296] Again the ICJ is also involved in the peaceful resolution of disputes by providing judicial remedy.[297] Thus while making recommendations under Chapter VI of the Charter the SC must take into consideration the general principle that legal disputes should be referred by the parties to the International Court of Justice.[298]

The role of the United Nations in the peaceful settlement of disputes faces some challenges. In the first instance, though Article 2(3) of the Charter creates an unambiguous and binding

[294]UN, ñ*Repertoire* of the practice of the Security Council 16th Supplement 2008 ï 2009ò, *loc. cit*.
[295] R. Mani, ñPeaceful Settlement of Disputes and Conflict Preventionò in T.G. Weiss *et al; op. cit.,* p. 309.
[296] See UN, ñRepertoire of the Practice of Security Council 17th Supplement 2010-2011ò, *loc. cit*.
[297]R. Mani, ñPeaceful Settlement of Disputes and Conflict Preventionò in T. G. Weiss *et al op.cit.,* p. 308
[298] Article 36 (3) of the Charter.

obligation on states to peacefully resolve their disputes, the framing of that provision does not impose any obligation on states to find a particular solution. Thus states to a dispute may out of bad faith thwart efforts to arrive at peace.[299] Secondly, the final judgment or advisory opinions of the International Court of Justice are sometimes overlooked.[300] Thirdly, although the SG plays a significant role in dispute settlement, its success is predicated on the natural ability or propensity of the incumbent and is ñhostage to the vagaries of world politics.ò[301]

Finally, the power of the SC under Chapter VI of the Charter is limited to the issuance of recommendations which have no binding character. However, once there is a determination by the SC that there is a threat to the peace or breach of the peace or act of aggression, it may make decisions which have biding character upon member states of the UN under Chapter VII. To this, we shall turn to.

[299] R. Mani, ñPeaceful Settlement of Dispute and Conflict Prevention in T. G. Weiss *et al, op. cit.,* p. 316.
[300] For example, the ICJ's 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in theOccupied PalestinianTerritory* was partly rejected by an Israeli High Court of Justice Rulingò.See *ibid.*
[301] *Ibid.*

CHAPTER FOUR

THE UNITED NATIONS AND ENFORCEMENT ACTIONS

4.1 The Concept of Collective Security

The attempt of the League of Nations to preserve the peace proved unsuccessful. One of the reasons for the failure of the League of Nations was its inability to act collectively in international crisis due to its unanimity rule, coupled with the fact that members had the right to withdraw from participating in the Leagues activities.[302]

Therefore, the League provided vital experiences for the drafters of the Charter of the United Nations (hereafter the Charter), on how to create a collective security system with effective enforcement.

Although the expression ócollective securityô does not appear in the Charter, it is often used to refer to the ósystem for the maintenance of international peace and security under the Charter[303] and the corresponding provisions of regional organizations.[304]

Again, in spite of verbal semantics, as regardscollective security, there is no doubt that the UN was designed by its founders to be a system of collective security.[305]

States face two kinds of threats in general. The first is an external threat which comes from a potential aggressor who is not part of the group. The second is an internal threat from a member

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[302]E. Y. Kuthay, ñMaintenance of International Peace and Security: A Historical Assessment of Evolution of the Unitedò available at www.online.edergi.com/makaleDosyalari/51/pdf2004_1_12.pdf (assessed 13 June 2015).

[303] See the UN High-Level Panel Report on Threats, Challenges and Change, p.22. This report places heavy emphasis on the proposition that the UN must aim at a collective Security System.

[304] See Art 3 of the Inter-American Treaty of Reciprocal Assistance 1947 which provides that ñan armed attack by any state against an American state shall be considered as an attack against all the American states.ôô

[305] J. Robinson, ñMetamorphosis of the U.N in B. O. Okere, Unpublished Lecture Notes on Peace-keeping and Collective Security under the United Nations: The provisions of the Charter, p. 4.

of the group who has betrayed its friends and resorts to force against them.[306] While the first kind of threat may give rise to collective self-defense, collective security is concerned with the second kind of threat.

Thus, collective security has been referred to as:

> A system, regional or global, in which each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats and breaches of the peace.[307]

It is therefore one of coalition strategy in which a group of states agree not to attack each other and to defend each other against an attack from one of its members, if such an attack occurs.Collective Security rests on the notion of one for all and all for one. The reason why states come together for collective security is because they share the same threat perceptions which make them to believe that they will be better-off if they act together.[308]

From the above description of collective security, it is distinct from systems of collective defense or alliance security, in which groups of states form an alliance with each other, mainly against possible threats from outside. In the words of Morgenthau, collective security

> is the most far-reaching attempt on record to overcome the deficiencies of a completely decentralized system of law enforcement. While traditional international law leaves the enforcement of its rules to the injured nation, collective security envisages the enforcement of the rules of international law by all the members of the community of nations whether or not they have suffered injury in the particular case. The prospective law-breaker then must always expect to face a common front of all nationsé .[309]

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[306] H. Ulusory, ñPossible Transformation of Collective Security Arrangements in the Post - September 11 Eraò available at http://www.turkishpolicy./images/stories/2003-of-postelectionTR/TPQ2003-1-ulusory.pdf (assessed 13 June 2015).

[307]E. de Wet, ñCollective Securityò available at http://www.mpepil.com/sample_article3rd=epil/entries/law_97801992_31690_e2708recno=8 (assessed 13 June 2015)

[308]OTPIC, ñCollective Securityò available at http://www.colarado.edu/conflict/peace/treatment/collsec.htm (assessed 13June 2015).

[309] H.J. Mongenthau, *Politics Among Nations (*New York: Alfred A. Knopf Inc., 1973) p. 293

The point that is being canvassed here is that, in a working system of collective security,the issue of security is not seen as the concern of an individual state, it is treated as the concern of all states. In such a system all states will collectively take care of the security of each state as though their own security were at stake.[310]

As a centralized system of international rules embodied in the Charter, which regulates the collective resort to force under the authority of the UN in order to maintain or restore international peace and security, collective security is designed to prevent or suppress threats to the peace, breaches of the peace and acts of aggression by any state against any other state. This is achieved by presenting to the would be aggressors the credible threats and potential victims of such threats the reliable promise of effective collective actions which could take the form of diplomatic boycott, economic pressure or military sanctions, in order to enforce the peace.[311] Thus, while providing succor to a potential victim of unauthorized use of force, collective security sends a potent signal to the potential law breaker that the resources and means of the international community will be mobilized in case of any abuse of national power.[312] In other words, the system of collective security as contemplated under the Charter discourages any situation that threatens international peace and security by punishing the law breaker, and ensuring that states are given the assurance in the United Nationsô collective security system which proposes that any unlawful use of force and aggression by one nation against the other will be met by a combined strength of all the states.[313]

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[310] *Ibid*., p. 405
[311] I. L. Claude, *Swords into Plowshares,* 4th edn. (New York: Random House, 1984) p. 247.
[312] *Ibid.,* p. 252.
[313] J. Oô Brien, *International Law* (London: Cavendish Publishing Ltd., (2001) in F. A. Agwu, *World Peace ThroughWorld Law,* (Ibadan: University Press PLC., 2007), p. 14.

Before the Security Council (here-in-after the SC) can embark on any action in order to enforce collectivesecurity, it must first of all cross the threshold that ignites thepossibility of collective action under chapter VII ofCharter, by determining the existence of a threat to the peace, breach of the peace, or acts of aggression in accordance with Article 39 of the charter.[314]

4.2 The Power of the Security Council to Make a Determination of a Situation

Under the Charter, there are two different approaches to the problem of maintaining international peace and security. The first approach is the pacific settlement or adjustment of disputes and situations by the procedures outlined under the Charter. The second approach is the taking of collective measure in order to maintain or restore international peace and security.

Once the nature of a dispute or situation which has been referred to the SC either by a state, or the Secretary General,[315] points to the inadequacy of peaceful procedures and indicates the cogency of some enforcement action on the part of the UN, the first act of the Council is to make a determination[316] that there exists, a threat to the peace, breach of the peace,or an act of aggression.

The Charter[317] deals with the crucial action in the face of various kinds of threats to global peace and security. In contrast to the ambiguous language of the Covenant of the League of Nations, the Charter provides for a single organ namely; the SC who has the power to interpret the implications of conflicts and crises, and to make a determination for the whole international

[314] E. de Wet, *loc. cit.*
[315] Article 35 and 99 of the Charter
[316] B. O. Okere, *loc. cit.*, p. 13
[317] Chapter vii (Article 39 - 51)

community whether a threat to the peace, breach of the peace and acts of aggression have occurred.[318] For this reason the Charter provides as follows:

> 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.[319]

The responsibilities of the SC under this article are twofold. The first is the determination of the existence of a threat to the peace, breach of the peace, or act of aggression. The second is to make recommendations and decide on measures to maintain or restore global peace and security. In other words, Article 39 paves theway for the SCôs flexibility in choosing to take or not to take actions in order to maintain or preserve international peace and security. It therefore provides the SC with discretionary powers to determine whether or not in concrete situations there exists any threat to the peace, breach of the peace, or act of aggression, and accordingly make recommendations, or decide what measures shall be put in place in conformity with Articles 41 & 42 of the Charter.[320]

The importance of Article 39 of the Charter flows from the fact that, the determination of the existence of a threat to the peace, breach of the peace, or act of aggression is a condition precedent for the exercise by the SC of the power of an exceptional character under Article 41 and 42 of the Charter. However, in the determination whether there exists a threat to the peace, breach of the peace or an act of aggression, the SC enjoys a considerable discretion. This remarkable discretion is evidenced by

> the wording, which stresses the importance of the SCôs determination, and it is confirmed by the context of the provision. Articles 40 and 42 in

[318] V. Lowe *et al*. (eds.), *The United Nations Security Council and War* (Oxford: Oxford University Press, 2008) p. 7.
[319] Article 39 of the Charter
[320] E. Andakian, ñThe Security Council and Article 39 of the UN Charterò available at www.lebarmy.gov.lb/en/news/?32249#.Vfn_o4GkqrU (assessed 14 June 2015)

> particular refer to the broad discretion of the SC in the choice of measures, and it would seem inconsistentif the resulting flexibility and strength of the organ were undermined by a strict interpretation of the conditions for action.[321]

The point that is being canvassed here is that, if the SC under Article 39 is given broad discretion as regards the measures to be taken, it is therefore meaningless to subject those conditions that would give rise to those measures to a strict interpretation. Thus, the Charter sets no restrictions on the discretion of the SC to make a determination under Article 39. The drafting history of the Charter points to this conclusion. Thus:

> Proposals during the drafting of the Charter to include detailed definitions of threats to international peace and security, in order to constrain the Council, were defeated. It is not tied to any particular legal notion such as aggression, in making its determination.[322]

In this vein, the SC may make a determination that events internal to a particular state threaten global peace and security. It can also make such determination in relation to general threats, as it has done since 2001 in resolutions on terrorism and nuclear non-proliferation.[323]

Under the Charter, the responsibility to determine the existence of a threat to the peace, breach of the peace or act of aggression is that of the SC, who also has the competence to decide what measures of collective nature are to be taken by members of the United Nations in order to maintain or restore international peace and security. However, the GA is not precluded from sharing in this function. The justification for this assumed role by the GA rests on the reasoning that the ñdefinition in the Charterò[324] of the responsibility of the SC is primary and not exclusive.

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[321] B. Simma*et al* (eds.), *op. cit.,* p. 719.
[322] V. Lowe *et al* (eds.), *op. cit*., p. 35
[323] ñA prominent example of involvement in the internal affairs of a state is the Councilôs deliberation with respect to Haiti in SC Res. 841 of 16 June 1993. This was followed by a resolution authorizing the use of force in Haiti ï SC Res. 940 of 31 July 1994. The fact that there had been large number of refugees fleeing Haiti contributed to the situation being viewed as a threat to international peace and security.ò See V. Lowe *et al* (eds.), *op. cit*., p. 35. See also SC Res. 1373 of September 2001 and 1566 of 8 October 2004 on threats to international peace and security caused by terrorism; and SC Res. 1540 of 28 April 2004 on nuclear non-proliferation
[324] L. M. Goodrich *et al*.,*The United Nations and the Maintenance of International Peace and Security* (USA: George Banta Publishing Company, 1955) p. 345

Therefore in the event that the SC is unable to function as a result of the veto of one or more of the permanent members, the GA can assume a residual responsibility in the face of any threat to the peace, breach of the peace, or act of aggression and recommend collective measures which it considers necessary in order to maintain or restore the peace.[325]

At this juncture, it is pertinent to investigate into the meaning of the terms used in Article 39. In doing this, it must be observed that none of these terms was defined in the Charter. In fact, at San Francisco, no definition of these terms was accepted. In the words of Okere:

> this lacuna leaves the Council free to arrive at its conclusions on the basis of whatever factual and other considerations it regards proper to take into account. In fact, this lack of precision was intentional since at San Francisco it was felt that detailed definition would fetter the discretion of the Council and frustrate the needed flexibility and maneuverability.[326]

Therefore, the lack of a precise definition of the terms used in Article 39 leaves considerable room for subjective political judgments.[327]

4.2.1 Aggression

The attempt to define aggression has a long history. The process of adopting a definition of aggression began in 1923 under the auspices of the League of Nations. During the formation of the United Nations, the Soviet Union was one of the front-liners of defining the term. However the United States took the position that a definition was not practicable and since it could not be

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[325] ñThe fact of its being unlikely that the circumstances that permitted the Council to act following the Korean attack of June 25, 1950, would be repeated, led the United States to propose in the Assembly that, if the Council failed to discharge its primary responsibility in any situation of the kind mentioned in Article 39, the Assembly should consider the matter immediately with a view to making appropriate recommendations é the United States delegate argued that Articles 10, 11, and 14 gave the Assembly the right to recommend in all matters except where the Council was acting under Article 12, and although a recommendation by the Assembly would not have the force of a decision of the Council, the Korean incident demonstrated that a voluntary response might be more favourable than the response to an order: See U. N. General Assembly Fifth Session, First Committee, Official Records, 34th meeting (Oct. 9, 1950), p. 64 in L. M. Goodrich *et al., op. cit.,* p. 349. See also GA Res. 377 (v) (1950) titled the Uniting for Peace Resolution.

[326] B. O. Okere, *loc. cit.* p. 13

[327] L. M. Goodrich *et al.,Charter of the United Nations* (New York: Columbia University Press, 1969) p.293.

all-inclusive, it might create a loophole for a would-be aggressor to use the definition to its own advantage.[328] In this regard, a former president of the United States, Harry S. Truman in his report to congress noted that any attempt at such definition would be ña trap for the innocent and an invitation to the guilty.ò[329]

The decision taken at San Francisco not to insert a definition of aggression in the Charter did not end the discussion on the definition of aggression. The issue has been debated in so many *fora* such as the International Law Commission, the GA and other United Nationsô bodies. Therefore, in December 1967, there was a resolution[330] adopted by the GA which established a special Committee on the Question of Defining Aggression. The body which consisted of thirty-five member States submitted its report to the General Assembly after seven years. The report contained draft proposals which formed the basis of the final definition of Aggression.

The United Nations General Assembly Resolution 3314 (xxix)[331] defines aggression as;

> the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nationsé .[332]

This definition traces its foundation in Article 2(4) of the Charter which enjoins members to refrain from the threat or use of force against the territorial integrity or political independence of any state.

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[328] See J .Stone, *Aggression and World Order* (Los Angeles: California Press, 1958), Ch. 2 in *Ibid.,* p. 298.
[329] B. A. Boczek, *International Law: A Dictionary* (U.S.A: Scarecrow Press, Inc., 2005) p. 23.
[330] Resolution 2330(xxii)
[331] This Resolution was adopted by the United Nations General Assembly on December 14, 1974 as a non-binding recommendation to the United Nations Security Council on the definition it should use for the crime of aggression.
[332] Article 1 of Resolution 3314 (xxix). It should recalled that in 2010, the Review conference of the Assembly of State parties to the ICC held in Kampala, Ugandan agreed on the definition of aggression. Thus, the crime of aggression means ñthe planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a state of an act of aggression which by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nationsò. The amendment in defining acts of aggression follows an earlier definition of the General Assembly in Resolution 3314 of 1974. See M. Wierda, available at www.carl-sl.org/home/reports/433-reflections-on-the-icc-review-conference-in-Kampala (assessed 5 January 2016)

Recently the internationally Ukrainian territory of Crimea was annexed by the Russian Federation in March 2014. It seems that the act of Russia evidently shows that it has committed a number of acts of aggression as enumerated in Article 3 of the Definition of Aggression. Firstly, Russia invaded and annexed the Crimean Peninsula. Secondly Russia acted in excess of an invitation provided by ex-president Yanukovych, albeit of dubious legality. Thirdly, if Russia actually provided arms to the Crimean Pro-Russia groups it is possible that Russia will be interpreted to have sent armed bands which in turn have contributed to the annexation of Crimean.[333]

In spite of all these acts committed by Russia in Crimea, it is arguable whether the role played by Russia in the Crimean crisis constitutes aggression. This is because the definition of aggression as provided by Article 1 of Resolution 3314 (xxix) requires armed force. Thus armed force is a fundamental ingredient of aggression and the Russian annexation of Crimea was accompanied without shots being fired.[334] In other words, ñwhile unlawful force for the purpose of Article 2(4) has certainly been used, whether the force that has been utilized is armed force for the purpose of aggression is a subject for debate given that no shots were fired.ò[335]

Aggression is the serious and dangerous form of illegal use of force.[336] In clarifying what this most dangerous form of illegal force is, the GA adopted two approaches. The first approach as seen in Article 1 of the resolution provided a general purpose description without examples. In

[333] E. Murray, ñRussiaôs Annexation of Crimea and International Law Governing the Use of Forceò available at www.academia.edu/10068890/Russia_s_ANNEXATION_OF_CRIMEA_AND_INTERNATIONAL_LAW_GOVERNING_THE_USE_OF_FORCE (assessed 30 June 2015)

[334] *Ibid.*

[335] *Ibid.*however it is safe to conclude that the annexation of Crimea by Russia is an act of aggression following the decision of Nuremberg Tribunal in 1946 which held that the German annexation of Czechoslovakia and Austria amounted to aggression. See United Nations, ñHistorical Review of Developments Relating to Aggressionò available at www.un.org/law/book/Historical Review-agrssion.pdf (assessed 5 January 2016)

[336] See the preamble to Resolution 3314 (xxix)

this regard it is pertinent to observe that, pursuant to Article 2 of the definition of aggression, any first use of force in violation of the Charter is *prima facie* evidence of an act of aggression.

Article 2 of the Resolution was formulated in order to reconcile two basically inconsistent positions namely; the Soviet Union view and the Western Statesô position. The Soviet Union position was that, the first state to use armed force would automatically be identified as the aggressor. On the other hand the Western States put further the argument that before an act could be labeled aggression, it must be demonstrated that the deed was done in order to achieve a prohibited objective. Thus, the *animus aggressionis*[337] was to be considered a vital ingredient of the offence.[338] What later appeared in the definition was a compromise. Thus, the first use of armed force would be *prima facie* evidence of unlawful conduct since other relevant factors could also be taken into consideration. However, the article also provided for an additional requirement. Hence, the first use of armed force must be in violation of the Charter, suggesting that there might be a situation where the first use of armed force could be legitimate. It is humbly submitted that this additional criterion is opened to abuses. It could encourage a first striker to hide under the guise that it was a preemptive defensive action.[339]

The second approach is the enumeration of acts which amount to aggression. The resolution provides that any of the following acts amounts to aggression, unless the SC determines otherwise;[340]

(a) invasion or armed attack of the territory of another state or military occupation resulting from it, or any annexation by the use of force;[341]

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[337] M.C. Bassiouni*et al*, ñCrime Against Peace and Aggression from its Origin to the ICCò in M. C. Bassioun (ed.), *International Criminal Law: Sources, Subjects and Contents*, 3rdedn.Vol .1 *(*The Netherlands: MartinusNijhoff Publishers 2008) p. 223
[338] *Ibid.*
[339] *Ibid*; p. 224
[340] Article 3 of Resolution 3314 (xxix)

(b) bombardment of foreign territory;[342]

(c) blockade of ports or coast;[343]

(d) the use of one stateôs armed forces, which are within another territory with the agreement of the second state, in ways that are contrary to that agreement or prolong the presence of those forces after the agreement has terminated;

(e) An attack by the armed forces of a State on the land, sea, or air forces, or on marine and air fleets of another state;[344]

(f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state.

(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above or its substantial involvement therein.

In listing these seven categories of unlawful conducts,[345] it is the intendment of the GA to omit various acts which had been considered as signposts of aggression.[346] Instances of such acts include:

(i) failure to observe the principle of proportionality;

(ii) failure to submit a dispute to pacific settlement procedures;

(iii) failure to abide by the decisions of the SC or the GA etc.[347]

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[341] It is surprising that the invasion and illegal occupation of Kuwait by Iraq was not regarded as an act of aggression but a breach of the peace. See SC/RES/660(1990)

[342] As in the case of the bombardment and destruction of cities and villages in Lebanon by Israel. See GA/RES/36/226 (1981)

[343] The blockade of the Israel Port of Eilat in May 1967 by its Arab neigbours (Jordan and Egypt).

[344] The Air raid perpetrated by Isreal against Tunisia. See SC/RES/573 (1985).

[345] See Article 3(a)-(g) of the Resolution 3314 (xxix)

[346] M. C. Bassiouni*et al*., ñCrime Against Peace and Aggression from its origin to the ICCò in M. C. Bassiouni (ed.), *op. cit*., p. 225

However, an effort was made to minimize the impact of such omissions by the general authorization which followed in Article 4 of the Resolution which provides that the enumerated acts are by no means exhaustive. Therefore, by the provision of Article 4, the SC has the competence to determine which acts would be condemned as aggression. In other words, resolution 3314 (1974) did not have any effect on the discretionary power which the SC enjoys in accordance with the provisions of the Charter, since it does not limit the Councilôs authority to make a determination on the existence of an act of aggression. It is rather a guideline for the exercise of such authority.[348]The definition is therefore not binding on the SC. Though the Charter empowers the GA to make recommendations to the SC, the GA may not dictate to the Council.

The Resolution accompanying the definition makes it clear that, it is intended to provide guidance to the SC in its determination of the existence of acts of aggression under Article 39 of the Charter, and it states that the SC may arrive at the conclusion that in specific situations, a listed act does not constitute aggression if for example, the acts in question or their consequences are not of sufficient gravity.[349] Further, by restricting the definition of aggression to the use of armed force, other force or coercion such as political and economic sanctions were tactfully excluded from the definition.

The SC has rarely made a determination on aggression. In situations when it had done so, it has not referred to Resolution 3314. Rather in making any pronouncement as regards aggression, the

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[347] *Ibid*.
[348] M.A. Shukri, ñIndividual Responsibility for the Crime of Aggressionò in R. Bellelli (ed.), *The International CriminalJustice: Law and Practice from the Rome Statute to its Review* (USA: Ashgate Publishing Company, 2012) p. 520.
[349] Article 12 of Resolution 3314 (xxiix)

SC often refers to violations of international peace and security.[350] A writer beautifully captured it thus:

> é over a period of more than 60 years ï while the UN Security Council has determined in a host of instances, especially since the end of cold war the existence of a threat to the peace and in a handful of instances a breach of the peace-the UN Security Council has never made a formal finding that aggression in the sense of Art. 39 UN Charter had occurred. In the past, the phrase ócact of aggressionô appeared descriptively in several texts of the UN Security Council Resolutions é but, typically in UNSC Resolution 602. (1987) of November 1987é it was stated that the pursuance of these acts of aggression against Angola constitutes a serious threat to international peace and security. In any event, there is little use of similar terminology in more recent decisions.[351]

The reality is that, the SC for whose benefit the GAôs definition of aggression was drafted has ignored it altogether. Part of the reason is that the Council does not feel the need to be told what legal criteria it should follow in determining the existence of acts of aggression.[352]

Another reason for the reluctance of the SC to refer to the definition of aggression has been attributed to the Councilôs political nature rather than any flaw in the formulation of the General Assembly.[353] For YoramDinstein:

> The UN Security Council is a political, not judicial body. For a resolution to be adopted by the UN Security Council especially a Chapter V11 UN Charter resolution, it is necessary to surmount political hurdles in forging the required majority chiefly, but not exclusively, by eliminating the prospect of a veto by a permanent member. The UN Security Council may have to hammer out a compromise, or decline to take action, regardless of legal dimensions of

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[350] Following the invasion of the Republic of Korea by the forces of North Korea, the Security Council adopted Resolution 84 (1950). As a result of the complaint of Tunisia against Israel due to acts of aggression committed by Israel against the territorial and sovereignty of Tunisia, the Security Council adopted Resolution 6(1988). Resolution 660 (1990) was adopted by the Security Council following the Iraqi invasion of Kuwait. Again, Resolution 667 (1990) was adopted by the Security Council where it concluded that the activities of Iraq in Kuwait constituted a flagrant violation of international obligation. In all these Resolutions, aggressive acts of states concerned were either referred to as a threat to or breach of international peace and security. The Security Council declined to make a formal finding that aggression in the sense of Article 39 of the Charter had occurred in each case.

[351] Y. Dinstein, ñAggressionò available at http://www.mpepil.com/sample-article?id=entries/law (assessed 14 June 2015).

[352] *Ibid.*

[353] M. E. OôConnell, *loc. cit.*

> the issue. The availability of a definition of aggression is not the leading consideration in behind the scene political negotiations.[354]

Though the SC has never relied on the 1974 Resolution to determine that a given situation amounts to aggression, it has nevertheless in several matters involving its powers under Chapter V11 of the Charter relied on some of the contents of the Resolution. However such implicit reliance does not in itself contribute to transforming the Resolution into customary international law.[355]

The GA has often made use of the term aggression as contained in its definition. But since it is prevented from undertaking enforcement actions under the Charter, these resolutions are recommendatory in nature. Thus, they have no binding force. More so, the definition of aggression offered by the General Assembly is a mere guidance of which the SC may disregard as it deems fit.

Finally, the merits of the Resolution 3314 cannot be measured in terms of the number of occasions that an act of aggression has been mentioned either in an aborted draft resolution or in an adopted resolution. The permanent members as members of the GA agreed to the adoption of the Resolution and its definition on aggression.They are always aware of it and it is likely to influence the work of the Council.[356]

4.2.2 Breach of the Peace

Various types of acts could be considered as constituting breaches of the peace. Some of these acts include;

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[354] Y. Dinstein, *loc. cit.,*

[355] M.C. Bassiouni ñCrime against Peace and Aggression from its Origin to the ICC in M.C. Bassiouni (ed.), *op.cit*., p. 227.

[356] B. Broms, ñThe Definition of Aggressionò, 154 *Recueil des cours de L' Academia de droit international de la Haye* (1977) 299 at 373-384 in M.E. OôConnell, *loc. cit.*

(a) hostilities between armed units of two states;

(b) any resort to armed force;

(c) the application of force by or against an effective independent *de facto* regime which is not recognized as a state;

(d) internal armed hostilities could be regarded as breaches of the peace if they pose threats to the peace regardless of any ensuing risk of an international war.[357]

An attempted definition was given by the Australian delegate to the SC during the Indonesian hostilities. According to him a breach of peace means

> a breach of international peace and applies to cases where hostilities are occurring, but where it is not alleged that one particular party is the aggressor or has committed an act of aggression.[358]

In hiselucidation the Soviet Union representation on the SC concluded that, ñif military operations by one country against another cannot be called a breach of international peace then I am at a loss to know what could be called a breach of the peace.[359] It should be observed that the attempted definition of the Australian delegate was not accepted.

However, the term breach of the peace would mean a serious outbreak of armed hostilities but which is not so grave as to translate to aggression. Therefore, from the practice of the SC, it seems to be generally accepted that a determination of a breach of the peace is not as serious as a finding of aggression as far as the position of the parties are concerned, but more serious than arriving at the determination that there is a threat to the peace in terms of consequences for further action by the SC.[360]

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[357] B. Simma*et al* (eds.) *op. cit*., p. 721.
[358] N. D. White, *Keeping the Peace:The United Nations and the Maintenance of International Peace* (United Kingdom: Manchester University Press, 1997) p. 48
[359] See the Soviet Union on the Indonesian question. SCOR/2dyr./173Mtg./Ang./,1947/p.1692 in L. M Goodrich, *op. cit.,* p. 297.
[360] *Ibid;* p. 298

Findings as regards the actual breaches of the peace have occurred four times. They are as follows;

(i) the invasion of South Korea by North Korea;[361]

(ii) the Argentinean Invasion of the Falklands/Malvinas Islands;[362]

(iii) the war between Iran and Iraq;[363]

(iv) the Iraqi invasion and occupation of Kuwait.[364]

It has been argued that as far as significant military operations of one country against another are concerned, only the later three instances constituted actual breaches of the peace. The Korean War was no more than the use of force by a *de facto* government which was not recognized as a state at that time.[365]

This reasoning is however,

> only convincing if one accepts recognition as an additional criteria for state creation, which is not in accordance with the prevailing view in international law. At the time of South Koreaôs invasion by North Korea, both territories fulfilled the criteria for statehood. In both areas there already existed a de facto government which exercised effective control, whilst the 38th North latitude effectively formed the border between the two regimes.[366]

It is therefore safe to conclude that in the Korean conflict, there was a significant use of force by one state against another.[367]

The paucity as to the number of occasions the SC has made findings on breaches of the peace has been attributed to the political nature of the organ. An investigation into the practice of the

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[361] SC/RES/82 (1950)
[362] SC/RES/582 (1982)
[363] SC/RES/598 (1987)
[364] SC/RES/660(1990)
[365] See J.L. Kunz, ñLegality of the Security Council Resolutions of June 25 and 27, 1950, 45 *American Journal ofInternational Law* 139 (1951) in E. de Wet, *Chapter 7 Powers of the United Nations Security Council* (USA: Hart Publishing, 2004) p. 145
[366] *Ibid*.
[367] *Ibid.*

council reveals that, even where it is obvious that the use of armed forcehas gone beyond local skirmishes,the SC has been slow to make a formal determination that a breach of the peace has occurred.[368] Disagreement among the members especially those possessing the veto power, as regards the respective responsibilities of the parties involved has been a major reason for the inaction of the SC.[369] Consequently, where the conditions needed for breach of the peace or act of aggression do not appear to be present, threat to peace, a broad category provided for in Article 39 constitutes a safety net for SCôs action.

4.2.3 Threat to the Peace

In exercising its function of maintaining international peace and security, the SC is empowered by the Charter[370] to determine the existence of any threat to the peace.Threats are a wider category than that of aggression and breaches of the peace. These two concepts namely; breaches of the peace and aggression are more susceptible to legal definition while the concept of threat to the peace gives the Council the latitude to determine whether in a given situation there is a threat to the peace.[371] Thus the notion of threat to the peace is not tied to any particular legal meaning. It is a flexible concept covering anything from intra-state situation to inter-state conflicts.[372] In the words of a learned author:

> The notion of a threat to the peace is mercurial; it raises the possibility of multiple perspectives as to what constitutes a threat, a position which led the International Criminal Tribunal for the former Yugoslavia é in

[368] The conflicts between Ethiopia and Somalia 1979, Tanzania and Uganda between 1978 and 1979, the Israeli invasion of Lebanon in 1978 and 1982, the conflict which broke out between Ecuador and Peru in 1995, are just some of the most obvious breaches of international peace in the sense of direct inter- state armed conflict, on which the SC did not make a determination under Article 39 of the Charter, or even discussed the matter. See M. D. White, *op. cit*., p.49.
[369] L. M. Goodrich *et al, op. cit*., p. 297
[370] Article 39 of the Charter
[371] A. Kaczorowska, *Public International Law* 4thedn.(London: Routledge, 2010) p. 755
[372] N. D. White, *op. cit*. p. 42

> the Tadic case to note that a declaration of a threat entails a factual and political judgment, not a legal one.[373]

The *travauxpreparatoires* and Article 39 of the Charter therefore, gives the SC complete discretion of determining what amounts to a threat to the peace. Thus, a threat to the peace is whatever the SC says is a threat to the peace.[374]

The question of the SCôs flexibility in determining threat to the peace is increasingly becoming complicated. This has resulted in the SC to widening its scope in order to accommodate new concepts and theories that were neither contemplated by the Charter nor existed in the previous decisions of the SC.[375] Hence:

> Following the fall of communism, the end of the cold war and the break-down of the Soviet Union, new states were created that were in conflict in some instances. Yugoslavia was torn into six independent states that got into conflict later on. Eritrea ceded from Ethiopia. The world witnessed many violent events through which many people were killed by their own nations and the conflicts shifted into intra-state instead of the classical inter-state conflicts. The twentieth century resulted in the murder of approximately 170,000,000 persons by their sovereign. Discrimination based on religion, race, or ethnicity has increased within a globalized world pushed the UN to deal with such problems that threatenedé the regional and international peace, stability, and security.[376]

It is therefore safe to conclude that threat to the peace is a constantly evolving concept as what constitutes a threat to the peace has tremendously shifted from a narrow concept of the use of armed force to a broader notion of situations that may lead to the use of armed force.[377] In other words, the absence of military conflicts and war among states does not necessarily ensure

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[373] J. Crawford, *Brownlie's Principles of Public International Law* 8thedn. (Oxford: Oxford University Press, 2012) p. 760.
[374] D. Schweigman, *The Authority of the Security Council under Chapter vii of the UN Charter* (The Netherlands: Kluwer Law International, 2001) p. 34
[375] E. Andakian, *loc. cit.*
[376] *Ibid*.
[377] S. Talmon, ñThe Security Council as World Legislatureò, available at http://users.ox.ac.uk/sann2029AJIL99(2005),175-193.pdf (assessed 15 June 2015).. See also J. Crawford, *op. cit*., p. 760.

international peace and security. Instability resulting from non-military sources (social and humanitarian fields), have become threats to international peace and security.[378]

In the practice of the United Nations Security Council, the range of situations which could give rise to a threat to the peace goes beyond the narrow confines of inter-state conflicts. In this connection, an internal situation in a state if allowed to continue may threaten the peace and stability of a particular region.[379] In the words of Shaw:

> Threat to the peaceé is also the category which has marked a rapid evolution as the perception as to what amounts to a threat to international peace and security has broadened. In particular, the concept has been used to cover internal situations that would once have been shielded from the UN action by article 2(7) of the Charter.[380]

In other words, extreme violence within a state may warrant the SC to invoke Chapter V11 enforcement measures.

Further, the SC has adopted various resolutions[381] declaring terrorism in all its ramifications as constituting one of the most serious threats to peace and security. In this vein, inaction of states such as the refusal to surrender persons suspected of committing acts of terrorism for prosecution amounts to threat to the peace.[382] In one of its resolutions,[383] the SC declared that the refusal of

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[378] *Ibid.*

[379] A. Kaczorowska, *op. cit*., p. 755. See SC/RES/733 (1992) where the Council determined that the civil war in Somalia constituted a threat to the peace. In Resolution 84(1993) the council declared that, serious threats to democracy in Haiti threatened international peace and security. In Resolution 912 (1994) the Council found that threat to peace was occasioned by genocide in Rwanda. Again in resolution 1556 (2004), the Council concluded that the humanitarian crisis in Darfur constituted a threat to peace and security. See also SC/RES/794 (1991) where the council determined that the magnitude of humanitarian catastrophe occasioned by the conflict in Somalia further aggravated by obstacles to the distribution of humanitarian assistance, constituted a threat to international peace and security. See also SC/RES/713 (1991) where the council determined that severe interstate violence such as the Balkan war which took place before the disintegration of Yugoslavia constituted of threat to the peace. Even though, all the above events were internal in character, the Security Council determined that they constituted threats to international peace and security. Thus serious internal fighting within a state, with the possibility of external intervention suffices to reach the threshold of Article 39. See B. Simma*et al* (eds.) *op. cit*. p. 723.

[380] M. N. Shaw, *International Law,* 5th edn. (Cambridge: Cambridge University Press, 2005) p. 1120. See also SC/RES/1973 (2011) where the Council determined that the situation in Libya Arab Jamahiriya continues to constitute a threat to international peace and security.

[381] SC/RES/1373 (2001), SC/RES/1377 (2001), SC/RES/1540 (2004), SC/RES/1566 (2004), SC/RES/1963 (2010).

[382] A. Kaczorowska, *op. cit*. p. 755.

the Sudan government to extradite to Ethiopia those involved in the attempted assassination of the Egyptian President in 1981 constituted a threat to peace and security.

In another resolution,[384] the SC stated that Libya by refusing the request made by the United States and the United Kingdom to handover suspected terrorists in connection with the Lockerbie bombing amounted to a threat to international peace and security.[385]

Finally, the SC has also adopted resolutions[386] declaring that, the proliferation of all weapons of mass destruction as well as their means of delivery, the nuclear tests and missile activities carried out by North Korea, India and Pakistan, constituted a threat to international peace and security.

Once there is a determination that there is a threat to the peace, the SC has the duty to maintain peace and security by preventing the outbreak of actual hostilities. If on the other hand there is a breach of the peace or an act of aggression, the Council is empowered by the Charter to restore international peace and security.

4.3 Action by the Security Council

A determination under Article 39 of the Charter gives the SC the competence to embark on the following courses of action namely, recommendations, provisional measures, measures short of use of force and measures involving the use of force. These measures are discussed hereunder.

4.3.1 Recommendations

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[383] SC/RES/1044 (1996).
[384] SC/RES/748 (1992)
[385] In chapter VI, we shall discuss more on the United Nations and terrorism
[386] See SC/RES/1540 (2004), SC/RES/1874 (2009), SC/RES/2094 (2013), SC/RES/1172 (1998).

When the SC is confronted with any of the situations described in Article 39 of the Charter, it has the competence to determine the existence of any threat to the peace, breach of the peace, or act of aggression.

The Charter also empowers, the SC to make recommendations, or decide what measures it shall take in accordance with Article 41 and 42,[387] so as to maintain or restore international peace and security.[388]

A careful analysis of Article 39 of the Charter reveals that, upon a determination of a threat to the peace, or breach of the peace or an act of aggression, the council is not bound to embark on an enforcement action as the SC is authorized to make recommendations which could include recommendations referred to in Articles 33(2), 36 or 37(2) of the Charter.[389] Thus the provision of Article 39 introduces another method for the pacific settlement of disputes or adjustment of situations in so far as the dispute or situation is adjudged to constitute a threat to the peace or a breach of the peace.[390]

Again under Article 40 of the Charter, the SC may call upon the parties concerned to comply with provisional measures. These measures may have the character of ordinary recommendations provided they are not issued by the SC under the sanctions mentioned in Article 39.[391] In other words, since recommendations could be issued within the scope of Chapter VI, the respective resolutions should clearly state on what basis the SC is acting in a particular situation.[392] It is also

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[387] Article 41 empowers the SC to apply measures not involving the use of force, such as, partial or complete interruption of economic relations and of rails, sea, air, and the severance of diplomatic relations, in order to maintain international peace and security. Article 42 on the other hand, empowers the SC to use force to maintain or restore international peace and security. Instances of such measures include; demonstrations, blockade, and other operations by air, sea, or land forces of member states of the United Nations.See M. N. Shaw, *op. cit*., p.1125

[388] Article 39 of the Charter

[389] H. Kelsen, *The Law of the United Nations,* (New Jersey: The Law book Exchange Ltd., 2009) p. 438

[390] *Ibid.*

[391] *Ibid.*

[392] B. Simma*et al* (eds.), *op. cit.,* p. 727

observed that within the framework of Article 39, such recommendations can be a precursor for future action, in particular enforcement action within the purview of Articles 41 and 42. However they often reflect the political complexities of adopting certain measures with binding effect.[393]

At times the recommendations adopted by the SC under the article authorize full scale military action by individual members of the UN peacekeeping operations.[394] A peacekeeping operation comprises military measures short of an enforcement action.[395] A clear instance of the former is the recommendation adopted by the SC after the attack by North Korea on South Korea. Hence after determining that the attack constituted a breach of the peace it recommended that members of the UN furnish such assistance to South Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.[396]

Further, the Charter makes a distinction between recommendations under Article 39 and enforcement measures under Articles 41 and 42. While the former has the character of non-mandatory suggestions, the later create binding obligations in the international order.[397] However, decisions of the SC such asrecommendations which are consistent with the Charter are not binding upon members but could assume a binding effect, if the SC under Article 39 is of the opinion that non-compliance with its recommendation is a threat to the peace and mayresort to enforcement measures against the recalcitrant member.[398] In this connection Kelsen has the following to say:

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[393] *Ibid*.
[394] As in the case of Cyprus in 1964. Peace keeping operations of the United Nations will be discussed in Chapter 4
[395] B.O. Okere, *loc. cit*. p. 17
[396] SC/RES/83 (1950)
[397] B. Simma*et al* (eds.), *op. cit*., p. 728
[398] H. Kelsen, *op. cit*., pp. 293 and 445

> If such enforcement action is interpreted to be a sanction, a recommendation of the Security Council may constitute the obligation to comply with the recommendation, that is to say, the so-called recommendation may have the same character as a decision of the Security Council, binding upon members under Article 25.[399]

4.3.2 Provisional Measures

Article 40 of the Charter expressly authorizes the SC to use provisional measures in dealing with a threat to the peace, breach of peace or act of aggression. Such provisional measures are adopted in order to prevent an escalation of the situation ñpresumably referring to any situation of the kind described in Article 39.ò[400] The Charter also makes it clear that such provisional measures shall be taken without prejudice to the rights, claims or position of the various parties. The primary purpose of Article 40 is to empower the Security Council to embark on measures so as to prevent a threat of peace from developing into an actual breach of peace.[401]

While it is clear that the SC may invoke Article 40 before making recommendations or taking decisions under Article 39, it is ambiguous if it may do so without first making a determination under Article 39 that a threat to the peace, breach of the peace or act of aggression is in existence.[402]

This goes to show that the relationship between Articles 39 and 40 is not so obvious. The practice of the SC reveals some degree of flexibility and discretion in the manner in which it performs its functions.[403]

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[399] *Ibid*., pp. 445 - 446
[400] L.M. Goodrich *et al, op. cit*., p. 368
[401] L.M. Goodrich *et al, op. cit*., p. 303
[402] *Ibid*.
[403] L. M. Goodrich *et al op. cit*., p. 369. In Resolutions 598 (1987) on Iran and Iraq, 1227 (1999), 1297 (2000) on Eritrea and Ethiopia, 1234 (1999) on the Democratic Republic of Congo the Security Council in ordering provisional measures, determined the existence of the kind of situations envisaged in Article 39. In other cases, the Security Council adopted resolutions ordering provisional measures without any specific finding under Article 39. See Resolution 459 (1947) on the fighting between Indonesia and the Netherlands,

However, the systematic position of Article 40 in Chapter VII gives credence to the view that provisional measures can only be adopted upon the fulfillment of the requirement of article 39 that is, if there exists at least a threat to the peace.[404] In this vein, it is the view of Simma*et al*, a view which finds our support that:

> These determinations are important not only from a systematic perspective but for practical reasons as well. In their absence, it is unclear whether certain measures have been taken under Art. 40- and might thus be endowed with binding force-or under Arts. 33 or 36 of Chapter VI, which allow only for recommendationsé Where the SC leaves openwhethermeasures are taken under Art. 40, States can easily dispute their binding effect by pointing to this lack of clarity. The Charterôs objective of providing for strong and effective provisional measures is therefore better served if the SC when taking them expressly determines that the conditions for the use of Chapter vii are met. Otherwise, a resolution would have to be interpreted narrowly and thus as of only recommendatory nature.[405]

It is therefore strongly suggested that, for the provisional measures to be effective and binding they must be predicated on the determinations outlined in Article 39 of the Charter.

Provisional measures may take the form of calling upon the parties to end fighting (calls for cease fires),[406]cessation of hostilities,[407]calls for the withdrawal of troops from foreign territory, the conclusions of armistices or truces and other measures to maintain such agreements.[408] Between 2008 and 2009, the SC adopted a number of measures beckoning on parties to comply with an order to prevent an escalation of the situation. These measures were assumed as having relevance to Article 40 of the Charter.[409]

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[404] B.Simma*et al* (eds.), *op.cit*.,p.731.
[405] *Ibid*., pp. 731 ï 732.
[406] As in the case of the Middle East in 1967 and 1973. See M.N. Shaw, *op. cit*., p. 1124. See also SC/RES/234 (1967) and SC/RES/338 (1973).
[407] As in the Korean Situation of 1950.
[408] L.M. Goodrich *et al, op. cit*., p. 308.
[409] See SC/RES/1812 (2008) on the situation in Sudan where the Security Council called upon the parties to withdraw their troops from the disputed January 1, 1456 border. See also SC/RES/1907 (2009) with regard to the situation between Djibouti and Eritrea where the Security Council called on all the parties to cease hostilities including support of armed groups in hostilities.

An important issue arising from the provision of Article 40 of the Charter is whether the adoption of a resolution which provides for provisional measures creates an obligation on the addressees. The legal effects of such resolutions calling for the application of provisional measures are not easily discernable. Thus it could be argued that, in the exercise of its powers under Article 40, the SC is doing no more than making recommendations to the parties concerned.[410] The better view is that, the legal character of the resolutions which deals with provisional measures depends on the intention of the SC and more on the consequences which it attaches on non- compliance with the call as spelt out in Article 40 of the Charter.[411] Hence the SC may make the call without any intention to create a legal obligation on parties concerned and without any intention to react with an enforcement action when a party refuses to comply. In this case, the call is recommendatory.[412] But when the SC makes the call by a decision within the meaning of Article 25 of the Charter and expresses its intention to take enforcement measure in the event of non-compliance, then the call becomes an order legally binding upon the parties since it is based on the sanction provided for in Article 39 of the Charter.[413]

In the determination of the legal nature of provisional measures, other learned authors have the following to say:

> While such formulae as órdersô or ódecidesô are evidence of the mandatory character of a resolution, and while órequestsô úrgesô or áppealsô point to the opposite intention such wording as ódemandô or ócalls forô often is ambiguous. The latter, however, is usually restricted to merely recommendatory measures. In contrast the formula demands is used for both mandatory measures and recommendations and the binding force is indicated mainly through a prior determination of a threat to peace and security.[414]

[410] L. M. Goodrich *et al., op. cit*., p. 306.
[411] H. Kelsen, *op. cit.,* p. 740.
[412] *Ibid*.
[413] *Ibid.*
[414] B. Simma*et al* (eds.), *op. cit*., p. 734.

In sum, no matter the legal situation, the fact that Article 40 provides that the SC shall duly take into consideration non-compliance with such provisional measures seems to indicate that their status is different from mere recommendations.[415]

4.3.3 Measures Short of Armed Force

It is a normal practice of international organizations, to collectively apply measures not involving the use of force, in order to bring sufficient pressure upon a state thus, inducing it to live up to its international responsibilities.[416] The Covenant of the League of Nationsprovides as follows:

> Should any member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15 it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant ï breaking state and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant breaking state and the nationals of any other state, whether a member of the League or not.[417]

In other words, the members of the League assumed the responsibility to severe all financial and trade relations with any covenant ï breaking state.[418]

Under the Charter the SC is empowered to use non-military measures to give effect to its decisions. The Charter provides as follows:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations

[415] L. M. Goodrich *et al.,op.cit*., pp. 307 ï 308.
[416] *Ibid*., p. 311.
[417] Article 16 of the Covenant of the League of Nations.
[418] L. M.Goodrich *et al., op. cit.,* p.311.

> and of rail, sea, air, postal telegraphic, radio, and other means of communication and the severance of diplomatic relations.[419]

The sanctions under Article 41 play a crucial role in the maintenance of peace and security. And without resorting to force, they exert pressure on states or entities to comply with their international obligations.[420] In contrast to measures provided for under Article 16 of the Covenant, those provided for under Article 41 of the Charter do not necessarily possess the attribute of sanctions.

This is because they need not to be directed against an offender of international law as they could be employed whenever this appears necessary in order to maintain international peace and security. Thus, they are better classified as enforcement measures rather than sanctions.[421]However in this work they are used interchangeably.

Prior to 1990 the SC applied sanctions only twice.[422] However, since 1990, Article 41 has experienced a surge[423] as the situation has significantly changed both in frequency and in scope. Hence the SC has applied sanctions for various purposes[424] which include:

i restoration of democracy as in the case of Haiti, following the overthrow of Jean Bertrand Aristide who won the 1990-1990 general elections,

ii handing over to a foreign jurisdiction suspected terrorists following the destruction of Pan Am Flight over Lockerbie, Scotland, and UTA Flight 772 over Chad and Niger, which implicated officials of the government of Libya,[425]

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[419] Article 41.
[420] A. Kaczorowska, *op.cit*., pp.756-757.
[421] B.Simma*et al*(eds.),*op. cit*.,p.739
[422] This was as a result of the cold war, when there was constant deadlock in the Security Council see SC/RES/221(1966) Sanctions against Southern Rhodesia and SC/RES/418 (1977)ï Sanctions against South African).
[423] A. Kaczorowska, *op.cit*.,p.758
[424]*Ibid*
[425]Again, on 26 February 2011 the United Nations Security Council (UNSC) adopted Resolution 1970 imposing sanctions against Libya including an open-ended embargo on the supply arms and military equipment to and from Libya. The sanctions were in response to the violence and use of force against the civilian population in the Libyan

iii to put an end to violations of human rights law and international humanitarian law occasioned by the conflict in the former Federal Republic of Yugoslavia;

iv to oust a military junta and to restore democracy as in the case of Sierra Leone;

v to force compliance with UNSC Resolutions 678 (1990) and 688 (1991) which pressurized Iraq to withdraw unconditionally from Kuwait and to end the repression and respect the human rights of its citizens

vi to stop nuclear tests and return to six-party talks as regards nuclear disarmament and to keep its pledge to scrap its secret weapons programme as in the case of North Korea,[426]

vii to restore law and order as in the case of Somalia. Thus, in 1992, the Security Council imposed a comprehensive arms embargo on Somalia, following the breakdown of law and order caused by civil war in that country.[427] However, in 2008, smart sanctions were imposed on some designated individuals thus, creating some exceptions to the embargo of 1992.[428] Again in March 2013, a new partial arms embargo was introduced against the

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Arab Jamahiriya, the gross and systematic violation of human rights, including the repression of peaceful demonstrations. See Sipri, ñUN Arms Embargo on Libyaò available at www.sipri.org/databases/embargoes/un_arms_embargoes/libya/libya_2011 (assessed 15 June 2015).

[426] ñIn 2006, the Security Council, condemning the nuclear test proclaimed by the Democratic Peopleôs Republic of Korea on 9 October 2006 and deciding that the Democratic Peopleôs Republic of Korea should abandon all nuclear weapons and existing nuclear programmes imposed targeted sanctions by Resolution 1718 (2006)é The Council also imposed travel restrictions and asset freeze on individuals associated with the Democratic Peopleôs Republic of Koreaôs nuclear related, other weapons of mass destruction ï related and ballistic missile ï related programmesé On 12 June 2009, by resolution 1874 (2009), the Security Council condemned the nuclear test conducted by the Democratic Peopleôs Republic of Korea on 25 May 2009 in violation and flagrant disregard of its relevant resolutions in particular resolutions 1695 (2006) and 1718 (2006). The Council expanded the arms embargo and refined the enforcement mechanisms including by ordering inspections of Cargo, to and from the Democratic Peoples Republic of Koreaò. See UN, ñRepertoire of the Practice of the Security Council, 16th supplement 2008 ï 2009, available at http://www.un.org/en/sc/repertoire/%20vii.pdg#page=25 (assessed 15 June 2015).
It should also be recalled that on March 7, 2013, the Security Council approved a new regime of sanctions on North Korea for its underground nuclear test on February 12, the third of its kind. The tougher sanctions impose penalties on North Korea banking, travel and trade. The resolution was passed in a, 15 ï 0 vote, thus reflecting the countryôs increased international isolation. See UN, ñNorth Koreaò, available at http://www.sanctionswiki.org/North-Korea (assessed 15 June 2015).

[427] SC/RES/751 (1992)

[428] SC/RES/1844 (2008)

> Somalian Government while maintaining the embargo on arms supplies to non-state actors in the country.[429]

Further, the current practice of the SC has been a shift from comprehensive sanction to more selective measures.[430] Thus, there is an abandonment of the use of general trade sanctions and a preference to targeted measures[431]or the implementation of the so-called ósmart sanctionsô which aims at targeting specific industries or individuals.[432]The so-called smart sanctionsô were introduced in order to avoid harsh humanitarian consequences on the civilian population.[433]For a learned author:

> Sanctions have a bad history. They inflict undeniable pain on ordinary citizens while imposing questionable costs on leaders. Indeed, often the leaders are enriched and strengthened on the back of their impoverished and oppressed people by the law of perverse consequences.[434]

In other words, sanctions shifted the burden of harmful consequences mainly to civilian population, as they occasioned death and suffering through structural violence such as starvation, disease and malnutrition on a magnitude far more than the alternative of war.[435]

It must be observed that Article 41 of the Charter mentions several instances of non-military enforcement measures which are by no means exhaustive. Thus, while the SC has always employed economic and diplomatic restrictions,[436]it has used such atypical measures as the

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[429]Sipri ñUN Arms Embargo on Somaliaò available at http://www.sipri.org/databases/embargoes/un_arms_embargoes/somalia (assessed 15 June 2015).
[430]See V.Lowe*et al* (eds.),*op.cit.,*p.210
[431]*Ibid*.,p.207
[432] Such as ófinancial assets freezes, **travel** ban, aviation sanctions, commodity boycotts, arms embargoesò. See i*bid*., p. 207
[433] ñIn the case of Iraq, sanctions contributed to severe humanitarian suffering among innocent and vulnerable populations é the combination of sanctions and Gulf War bombing damage caused a severe humanitarian crisis resulting in hundreds of thousands of preventable deaths among children. See *ibid.,* pp. 211 ï 212
[434] R. Thakur, *The United Nations, Peace and Security* (Cambridge: Cambridge University Press, 2008) p. 135.
[435]*Ibid.,* p. 143.
[436] On some occasions, the Security Council has called upon member states to reduce the number or level of staff at the consular or diplomatic missions of the offending state. See J. Crawford, *op.cit*. p. 764, B. Simma*et al.* (eds.); *op.*

establishment of international criminal tribunals,[437]and the creation of interim administrations of certain territories.[438]

Finally, decisions of the SC under Article 41 is binding on a state under international law thus contravention of a UN sanction enforcement law carries severe penalties and is regarded as a strict liability offence for corporate bodies.[439]

4.3.4 Measures Involving the Use of Armed Force

Article 42 provides as follows;

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate; it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations blockade and other operations by air, sea or land forces of members of the United Nations[440].

The Charter under the above provision empowers the SC to use force to maintain or restore international peace and security if in its opinion the measure provided for in Article 41 of the Charter, that is, measures not involving the use of armed forcewould be inadequate or have been proven to be inadequate.

This article was absent in the League of Nations. Thus,during the preparatory work on the Charter of the UN, special attention was given to it so as to remedy the demonstrated or obvious defects of the League system. One of such defects which is attributed to the failure of the League was the weakness of its enforcement mechanisms. But in the Charter system of collective

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cit. p. 741. See also SC/RES/748 (1992) on Libya; SC/RES/757 (1992) on Yugoslavia, SC/RES/1054 (1996) on Sudan; SC/RES/1333 (2000) on Afghanistan.

[437] Such as the International Criminal Tribunal for the former Yugoslavia and the International Military Tribunal for Rwanda

[438] As in Cambodia Somalia Eastern Slovenia, Kosovo and East Timor

[439] ñUN Security Council Sanction: Libyaò, *loc. cit.*

[440] Of the UN Charter.

security, the SC is furnished with the authority to enforce international peace and security by measures involving armed force if need be.[441] Hence, while the ñLeague Council could merely recommend that states apply armed force against an aggressor the newly created SC should é be able to take the necessary military measures itself.ò[442] The Charter therefore gives the SC a wide range of discretion in making the decision whether a particular circumstance calls for the application of armed force. The SC may apply military enforcement measures if it considers that the measures outlined in Article 41 of the Charter have proved inadequate. However, it need not wait for such proof.[443] Thus, in situations of urgent necessity such as a flagrant aggression which imperils the existence of a member of the United Nations, enforcement measures should be in place without delay.[444]

For the SC to effectively carry out military enforcement measures, member states are required to place troops directly at the disposal of the United Nations through the completion of agreements with the SC.[445] It must be observed that a state is not under any obligation to take part in military operations under Article 42 unless it has entered into special agreement with the Security Council under Article 43.[446] Up to the present, no such agreements have been made.The absence of special agreements has resulted in the reliance of the SC on volunteer forces recruited by voluntary contributions of member states.[447]

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[441] B. Simma*et al* (eds.), *op. cit.,* pp. 750 - 751
[442]*Ibid*., p. 751
[443] L.M. Goodrich *et al., op. cit*., p. 314
[444] UNICO, Document, xii, 507 in *ibid.*
[445] Article 43 of the Charter. See also Article 106 which provides that the permanent members of the Security Council were to consult one another and as occasion requires with other Members of the UN with a view to such joint action on behalf of the UN as might be necessary to the maintenance of international peace and security, pending the conclusion of agreements outlined in Article 43.
[446] A. Kaczorowska, *op. cit.,* p. 764
[447]D.W.Bowett,The *Law of International Institution* in H. MacDougall, ñLegal Aspects of Command of United Nations Operationsò in Y.LeBouthillier*et al* (eds.),*Selected Papers in International Law* (The Hague: Kluwer Law International Ltd, 1999) p. 417.

This delegation of enforcement action to member states acting individually or collectively has been a source of controversy. One view maintains that the non-conclusion of Article 43 agreements precludes the SC from taking enforcement measures under Article 42. In other words, Article 42 measures cannot take place without a standing force as provided for under Article43 of the Charter.[448] However, the better view seems to be that, non-conclusion of special agreements would not prevent the SC from obtaining and using forces contributed by states on an ad-hoc basis.[449] Hence the possibility of resorting to other means than those provided for in Article 43 was not expressly or impliedly excluded.[450] Thus, the competence of the SC to delegate its powers in chapter VII to member states is in accordance with the objectives and purpose of Article 42, which is, that the SC should be empowered to take military action if need be, so as to restore or maintain international peace and security.[451]

The delegation of enforcement powers to regional agencies is supported by Article 53 of the Charter. This provision gives the Security Council an express competence to delegate powers under Chapter VII of the Charter to regional agencies.[452] This arrangement gives credence to the delegation of enforcement powers to member states.[453] Thus:

> ñThe Charter would be open to serious allegation of inconsistency if the Council were able to delegate its Chapter VII powers to member States organized as a regional arrangement but not to member states acting individually or jointly (that is, not organized as a regional arrangement).ò[454]

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[448] D.Saroosi, *The United Nations and the Development of CollectiveSecurity* (Oxford: Clarendon, Press, 1999) p. 76
[449] D. W. Bowett, The Law of International Institutions (New York: Praeger, 1963) at 36 in H. MacDougall in Y.Le Bouthillier, *op.cit*., p. 417. In the Expenses case the ICJ was opposed to an approach that suggested a limitation on the substantive powers of the SC due to the non-conclusion of Article 43 agreements. Thus in the face of emergency, it cannot be said that the Charter has left the SC impotent when such agreements have not bee concluded.See D. Sarooshi, *op.cit*., p.76.
[450] H. MacDougall in Y.LeBouthillier, *op. cit.,* p. 417
[451] D. Sarooshi, *op. cit*., p. 148
[452] *Ibid.*
[453] *Ibid.*
[454] *Ibid*.

In other words, there is no substantial difference in the nature of a delegation of powers to member states in contrast to a regional arrangement.[455]

Strictly speaking, action under Article 42 has never occurred. Thus, its provisions ñremained something of a dead letter during the Cold War.[456] Prior to 1990, the only case in which large-scale military enforcement action followed a decision of the SC did not come under Article 42. Thus, in the Korean conflict, the SC merely made recommendations to states to provide assistance to South Korea in repelling the North Korean invasion on the basis of collective self-defense under Article 51 of the Charter.[457] However, since 1990, the SC repeatedly made use of Article 42 in various situations, though not expressly. The most obvious and prominent is the SCôs resolution which authorized member states to repel the Iraq invasion of Kuwait which followed an earlier decision to enforce economic sanctions against Iraq by a naval blockade.[458]

In sum, the absence of agreements pursuant to Article 43 of the Charter has necessitated the SC to find a different way of enforcing Article 42. The practice has been to authorize a state or

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[455] *Ibid*. see also SC/RES/1631 (2005) which acknowledged the necessity for greater involvement and cooperation of regional agencies with the United Nations which was reinforced by the 2006 report of the Secretary ï General of the United Nations. The title of the Report is ñRegional ï Global Partnership ï Challenges and Opportunitiesò

[456] J. Crawford, *op. cit*., p. 766

[457] See SC/RES/83 (1950) See also Frowein and Krisch in B.Simma*et al* (eds.), *op.cit*., p. 751

[458] See SC/RES/665 (1990), SC/RES/678 (1990). See also B. Simma et al (eds.), *ibid.*

Other instances where the Security Council has made use of Article 42 though not expressly include:

- The case of Somalia in 1993, where the Security Council authorized member states to undertake military operations in aid of the peace-keeping force of that country. And in the following year, conferred on the peace-keeping mission, enforcement powers. See SC/RES/794(1992), Sc/Res/814 (1993).
- In the Bosnian War, the Security Council authorized the use of force to help in the delivery of humanitarian assistance. Later it was expanded to the enforcement of economic sanctions and of a no-fly zone. Again, the use of force was included in the defense of certain areas which led to NATO air strikes in 1995. See SC/RES/770 (1992), SC/RES/787 (1992), SC/Res/816 (1993), SC/RES/836 (1993)
- The case of Haiti in 1994 where the large ï scale use of force was authorized by the Security Council in order to ensure the return of the President of Haiti. See SC/RES/875 (1993). See also B. Simma*et al* (eds.), *op. cit*., pp. 751 ï 752, J. Crawford, *op. cit.,* p. 766.
- In 2011, the Security Council authorized the use of force in Libya. The resolution authorized a no-fly zone over Libya and also called for all necessary measures excluding troops on the ground to protect civilians under the threat of attack in Libya. See SC/RES/1973 (2011).

group of states or regional organizations such as the OAS,[459] NATO[460] to utilize force in order to restore international peace and security. This kind of authorization is a necessary implication of the SCôs general competence to maintain international peace and security under Chapter VII of the Charter.[461]

However, the Charter requires members of the organization to hold immediately available national air-force contingents for combined international enforcement actions.[462] The combined effect of Articles 43 and 45 in the view of Shaw is to ñcreate a United Nations Corps to act as the arm of the Council to suppress threats to, or breaches of the peace or acts of aggressionò.[463] Also, Article 47 provides for the establishment of Military Staff Committee. It also provides for the composition of the Committee.[464] The duty of the Committee is to ñadvice and assist the SC in all questions relating its military[465] requirements. The Committee is also ñresponsible for the strategic direction of any armed force placed at the disposal of the Security Council.[466]

Further, members of the United Nations are placed under specific obligations in order to enable the SC carry out its primary responsibility as a maintainer of international peace and security. Thus, they are required to render assistance in any action taken by the United Nations in accordance with the present Charter and to refrain from rendering assistance to any state against which the United Nations is taking preventive or enforcement measures.[467] Under Article 25 of the Charter the member states agree to accept and carry out the decisions of the SC in accordance

[459] The OAS intervention in Haiti which was authorized by the Security Council in order to uphold democracy in that country.
[460] The NATO intervention during the Bosnian War and the enforcement action against Libya in 2011
[461] A. Kaczorowska, *op. cit*., p. 761
[462] Article 45 of the Charter
[463] M.N. Shaw, *op. cit*., p. 1133
[464] This Committee is composed of the Chiefs of Staff of the five permanent members or their representatives
[465] Article 47 (1) of the Charter
[466] M.N. Shaw, *op. cit.,* p. 1133
[467] Article 2(5) of the Charter

with the present Charter. Also Article 49 provides for the obligation of mutual assistance in carrying out the measures decided upon by the SC.

Finally, the collective security system as contemplated by the Charter has been malfunctional. Among the reasons given for the non-realization of ideal collective security system include:

(i) non-conclusion of agreements under Article 43 of the Charter;

(ii) the impotence of the Military Staff Committee;[468]

(iii) conflicts among some members of the permanent members of the SC.[469]

Thus, in place of the ideal collective security system as envisaged by the Charter, the United Nations designed an alternativemeans to the ñmalfunction of collective security system.ò[470] This is discussed in the next chapter.

[468] Though established in 1946, it soon ceased to play a significant role as far as enforcement actions under Article 42 are concerned. See A. Kaczorowska, *op. cit*., p. 765

[469] Which has often made it impossible to act collectively.

[470] A. Kaczorowska, *op. cit.,* p. 770.

CHAPTER FIVE

THE UNITED NATIONS AND PEACEKEEPING

5.1 Understanding Peacekeeping

The exercise of military power under international control for the enforcement of international decisions against breaches of peace, threat to the peace and acts of aggression was to be the distinguishing element between the United Nations and the League of Nations. The Charter system of ócollective securityô was frustrated by the Cold-War and a new means of peace maintenance emerged. This came to be known as peacekeeping.[471]

There is no express Charter provision for peacekeeping. Therefore,there is no constitutional definition of the term. Thus, lack of a clear international constitutional basis makes it difficult to arrive at a consensus definition of peacekeeping. This is because peacekeeping operations have been extemporaneous in response to the specific needs of individual conflicts.[472]

In spite of the fact peacekeeping is not defined in Charter, the term has come to be defined as

> an operation involving military personnel, but without enforcement powers undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict.[473]

This definition reflects the traditional notion of peacekeeping. But as peacekeeping has developed through the years, a better definition is that proffered by a former UN under-secretary-general. For this diplomat peacekeeping is

> United Nations field operations in which international personnel, civilian and/or military are deployed with the consent of the parties and under United Nations command to help control and resolve actual or

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[471] T. G. Weiss *et al*., *The United Nations and Charging World Politics, 5th*edn. (U.S.A: Westview Press, 2007) p. 33).

[472] *Ibid.,* p. 34.

[473] See the Review of United Nations Peacekeeping published by United. Nations in N. D. White, *Keeping thePeace: The United Nations and the Maintenance of International Peace andSecurity* (United Kingdom: Manchester University Press, 1977) p.207.

> potential international conflicts or internal conflicts which have a clear international dimension[474]

These operations are voluntary and are predicated on the consent and cooperation of the parties to the conflict or states where those forces are to be stationed. Even though they involve the use of military staff, they achieve their objectives not by force of arms. This feature contrasts such operations with the enforcement action of the United Nations under Article 42 of the Charter.[475]

Peacekeeping operations of the United Nations have tremendously evolved over the years. Writers are quick to divide them into three or four groups which they often refer to us generations[476] of peacekeeping operations. The word generations with regard to peacekeeping could be misleading as it refers to clear chronological progression rather than the parallel existence of various forms of operations.[477]

The evolution of peacekeeping has seen three major kinds of peacekeeping operations. The first is the traditional or classical peacekeeping operations. Most of the peacekeeping operations during the Cold-War come underthis traditional model. Their tasks were non-military in character involving:

(i) observation, monitoring and reporting;

(ii) supervision of cease-fire and support to verification mechanisms;

(iii) interposition as a buffer and confidence building measure. It therefore means that the basic function of traditional peacekeeping is to act as a buffer between parties to the conflict and to monitor ceasefires. Classical peacekeeping is dependent on the consent of

[474] See M. Goulding, Peacemonger (London:) John Murray 2002) in T.G. Weiss *et al*, *op. cit*., p. 34.
[475] N.D. White, *op.cit*., p. 207.
[476] J. M. Hanhimaki, *The United Nations* (Oxford: Oxford University Press, 2008) p. 76.
[477] *Ibid*.

> parties to the dispute at least the consent of one of the parties and the toleration of the other.[478]

Since peacekeeping is an umbrella world for unarmed military observer missions and armed peacekeeping missions, the origin of the former could be traced to the United Nations Truce Supervision Organization (UNTSO). This UN mission was deployed in the Middle-East in May 1948 to supervise the truce between Israel and her Arab neighbours as a result of the armed attack on Israel by some Arab countries in the same year.

The earliest armed peacekeeping operation was the United Nations Emergency force in the middle (UNEF 1). This mission was deployed in 1956 to address the Suez crisis.[479] An Observation mission has a limited role of reporting on the state of hostilities while armed peacekeeping is more intrusive as it involves separating the parties to a cease-fire without force or the mission is generally empowered to enforce the peace.[480]

Secondly, there is the integrated multidimensional (multifunctional) force which combines the traditional approach with peaceful solution. As the nature of conflicts changed after the Cold-War,[481] the mandate of the UN peacekeeping missions also changed. During this period, the UN was faced with internal conflicts rather than inter conflicts among states. This gave rise to

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[478] A. Kaczorowska, *Public International Law* 4th edn. (London: Routledge, 2010) p.770.

[479] The Suez crisis resulted due to the nationalization of the Suez Canal by Egypt in 1956. This provoked an attack by Israel, France and the UK. During this time the Security Council was paralyzed, and the General Assembly on the basis of the Uniting for Peace Resolution, adopted Resolution 998 on November 4 1956 establishing UNEFI. The mandate was to secure and supervise the cessation of hostilities. The proposal resulting to the adoption of the resolution originated with Lester Pearson the then Canadian Ambassador to the United Nations who is regarded as the father of modern peacekeeping

[480] See ñHistory of Peacekeepingò, available at http//www.org/en/peacekeeping.org/operations/history.shtm (assessed 1 July 2015).

[481] With the end of the Cold-War the Security Council was freed from the binding constraints of super-power rivalry and he Council enjoyed unparalleled cooperation among the super-powers. This made it possible for Security Council to authorize larger complex operations with expanded mandates. See Peace Operations Monitor,ñThe Ongoing Evolution of Peace keepingò available at http://pom.peacebuild.ca/bestpracticesevolshtml (assessed 1 July 2015).

multidimensional peacekeeping operations to aid countries emerging from conflicts make the necessary transition to a sustainable peace.

The task of multidimensional UN peacekeeping operations includes the following:

(a) creating a secure and stable environment while strengthening the ability of states involved in the crisis to provide security with full respect for the rule of law;[482]

(b) facilitating the political process through dialogue and reconciliation;[483]

(c) providing a framework which ensures that all actors in the conflicts go about their activities in a coherent and coordinated manner.[484]

However, these tasks are not prejudicial to the task of monitoring and observing cease-fires

Further, peacekeeping missions now undertake various demanding tasks such as helping to maintain security,[485] restoring law and order, monitoring human rights compliance,[486] coordinating elections,[487] reorganizing military and police (security sector),[488] building sustainable institutions of governance,[489] assisting in the disarmament, demobilization, and reintegration of former combatants[490] etc.

The expanded nature of peacekeeping operations has bought about an expansion in the composition of peacekeepers. It has thus been noted that:

> Although the military remains the backbone of most peacekeeping operations, there were now many faces of peacekeeping including

[482] See UN,ñUnited Nations Peacekeeping Operations, Principles and Guidelinesò available at http://www.peacekeepingbestpracticeunlb.org/bps/librar/capstone-docrine-eng.pdf (assessed 1 July 2015).
[483] *Ibid*.
[484] *Ibid.*
[485] See UN Angola Verification Mission I (UNAVEM) and UN Angola Verification Mission II (UNAVEM II)
[486] See UN Observation Mission in El Salvador (ONUSAL), UN Transitional Authority in Cambodia (UNTAC), United Nations Mission in Haiti (UNMIH).
[487] United Nations Transitional Authority in Cambodia (UNTAC)
[488] See UN Operation in Mozambique
[489] See UN Transition Assistance group in Namibia (UNTAG)
[490] See UN Organisation Stabilization Mission in Democratic Republic of Congo (MONUSCO), UN Operation in Cotedô Ivoire (UNOCI).

> administrators and economists, police officers and legal experts, de-miners and electoral observers, human rights monitors and specialists in civil affairs and governance, humanitarian workers and experts in communications and public information.[491]

In other words, an expanded partnership is now reflected in the composition of all peacekeeping operations undertaken by the UN.[492] These missions now consist of a military component, civilian police and civilian experts. Multidimensional peacekeeping operations just like the first model are also dependent on the requisite consents.

The third form of peacekeeping is the quasi-enforcement operation where the force combines military and humanitarian components. In carrying-out such quasi-enforcement operations, the UNforce is given a more aggressive mandate. Examples of such operations include the United Nations Operations in Somalia (UNOSOM II 1992 - 1994), and the United Nations Protection Force in former Yugoslavia (UNPROFOR-1992 - 1995).

These operations were authorized to take enforcement actions under Chapter VII of the Charter, thus, consent is not necessary. However, such operations are predicated on Article 39 determination as regards threat to the peace, breaches of the peace and acts of aggression.[493]

There is a remarkable difference between peacekeeping and other peace operations by the UN such as preventive diplomacy, peace enforcement,peacemaking, peace building and enforcement actions. As we have seen, peacekeeping is the use of international armed force as a buffer between warring parties pending troop withdrawals and negotiations. This classical notion of peacekeeping has greatly evolved due to the changing nature of international conflicts.Till date,

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[491] See UN, ñHistory of Peacekeeping-Post Cold-War Surgeò available at http://www.un.org/en/peacekeeping/operations/surge.shtml (assessed 1 July 2015

[492] *Ibid.*

[493] B. Kondock ñHuman Rights Law and UN Peace Operations in Post ï Conflict Situationsò available at http://peacekeepingboris.beepworld.defiles/ch21/condock.doc (assessed 1 July 2015)

there have been sixty-eight peacekeeping operations since 1948.[494] Currently, there are sixteen peacekeeping operations going on.[495]

Preventive diplomacy on the other hand is a diplomatic action which has the objective of preventing disputes from developing between parties. Where disputes have already arisen, preventive diplomacy prevents such disputes from escalating into conflict, thus limiting the expansion of disputes when they occur.[496]

Peace enforcement is the use of force authorized by the SC in situations that fall into the grey area between full-scale enforcement measures and traditional peacekeeping situations. This grey area between peacekeeping and enforcement action could be traced to Article 40 of the Charter which provides for provisional measures.[497] Therefore, peace enforcement is used to explain operations of the UNwhere force is applied however, short of full-scale enforcement measures as in the response of the United Nations to the Iraq-Kuwait War, but more than peacekeeping.[498] The purpose of peace enforcement is to secure compliance with some aspects of a SCôs mandate

[494]UN, ñPeacekeeping Fact Sheetò available at http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml (assessed 1 July 2015)
[495] United Nations Mission for the Referendum in Western Sahara (MINURSO), United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), United Nations Multidimensional Integrated Stabilization Mission in Mali (NINUSMA), United Nations Stabilization Mission in Haiti (MINUSTAH), United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), African Union United Nations Hybrid Operation in Darfur (UNAMID), United Nations Disengagement Observer Force (UNDOF), United Nations Peacekeeping Force in Cyprus (UNFICYP), United Nations Interim Force in Lebanon (UNIFIL), United Nations Interim Security Force in Abyei (UNISFA), United Nations Mission in the Republic of South Sudan (UNMISS), United Nations Operation in Cote dô Ivoire (UNOC), United Nations Interim Administration Mission in Kosovo (UNMIK), United Nations Mission in Liberia (UNMIL), United Nations Military Observer group in India and Pakistan (UMOGIP), United Nations Truce Supervision Organization UNTSO). See UN, ñCurrent Peacekeeping Operationsò available at http://www.un.org/en/peacekeeping/operations/current.shtml (assessed 1 July 2015)
[496] See An Agenda for Peace: Preventive Diplomacy and Related Matters (GA/RES/47/120A).
[497] J. Boulden, Peace Enforcement: *The United Nations Experience in Congo, Somalia andBosnia* (USA: Praeger Publishers, 2001) p. 2.
[498]*Ibid;* pp. 2-3

or agreement among the parties. Like peacekeeping, it respects the principle of impartiality. But unlike peacekeeping, it does not necessarily require the consent of the parties involved.[499]

Peacemaking is an action which has the objective of bringing hostile parties to reach an agreement essentially through such peaceful means as contemplated in Chapter VI of the Charter of the UN.[500] Thus, peacemaking is a diplomatic effort which aims at moving a violent conflict into non-violent dialogue so that disputes could be put to rest through diplomatic representative political channels.[501]

Peace building has become a familiar concept within the UN as a result of the report of the former Secretary-General of the UN ï Boutros Boutros ï Ghali titled ï An agenda for Peace. In that report peace building is defined as ñan action to solidify peace and avoid relapse into conflict.ò[502]

Instances of peace building efforts of the United Nations include; the United Nations Interim Administration Mission in Kosovo[503] and theUnited Nations Transitional Administration in East Timor.[504]Both missions were established under Chapter VII of the Charter of the United Nations

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[499] *Ibid;* p. 3

[500] This is the United Nations Understanding of Peace making as stated by J. Ouellet, ñPeacemakingò available at http://www.beyondintractability.org/bi-essay/peacemaking (assessed 1 July 2015).

[501] *Ibid*.

[502] UN, ñPeace building and the United Nationsò available at http://www.un.org/en/peacebuilding/pbso/pubn.shtml (assessed 1 July 2015). See also the Brahimi, Report, 2000, officially called the Report of the Panel on United Nations Peacekeeping Operations.Note also that in 2005, the General Assembly voted in favour of the establishment of the Peace building Commission (PC). Itôs mission include; bringing together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peace building and recovery. See UN, ñMandate of the Peace building Commissionò available at http://www.un.org/en/peacebuilding/mandate.shtml (assessed 1 July 2015).

[503] 1999 - date

[504] 1999 - 2002

by the SC and these missions exercised all legislative and executive powers of both territories including the administration of justice.[505]

The difference between peacekeeping and enforcement action is obvious. Enforcement actions are measures taken after the SC has made an Article 39 determination that there exists a threat to the peace, break to the peace or an act of aggression. Such measures are taken in order to maintain or restore international peace and security and they could either be economic sanctions or full-scale international military actions.

While in peacekeeping, the three cardinal principles of consent, impartiality and use of force only in self-defense are vital,in enforcement actions, consent is dispensed with and there is a full-scale enforcement measures.

Finally, peacekeeping operations are as a rule established by a resolution of the SC, although in exceptional cases,[506] the GA has created peacekeeping operations. Once the need arises, a new mission is put in place. For this purpose, the United Nations relies on member states as it has no army or police force of its own and depending on the mandate of the mission there is a recruitment of international and national civilian staff.[507]

5.2 Legal Basis of Peacekeeping

[505] ñHuman Rights Law and UN Peace Operations in Post- Conflict situationsò *loc.cit.*
[506] B. Simma et al (eds.), *op. cit*; p. 681.
[507] UN,ñUnited Nations (UN) Peacekeeping Documentationsò available at http://www.un.org/Depts/dhl/resguide/spechP.K.htm (assessed 1 July 2015

The point has been made that there is no express provision in Charter as regards the concept of peacekeeping. Nonetheless peacekeeping has become one of the prominent activities of the UN to the extent that the term is almost synonymous with the UN.[508]

However, only a few of the UN peacekeeping missions approximate the type of conflicts contemplated by the founding fathers of the organization (inter-state conflicts). Consequently, the majority of the UN operations are concerned with intra-state conflicts and seemingly inconsistent with the rule of the domestic jurisdiction of states. Hence one could posit the question of the legal basis of peacekeeping under the Charter.[509]

The general view as regards the legal basis for peacekeeping is that since it is not mentioned in the Charter, it therefore has no place in the constitutional instrument establishing the organization. The concept developed as an improvised and practical experiment invented out of necessity.[510]

The absence of any specific reference to peacekeeping in the Charter, warranted a former Secretary-General of the United Nations ï Dag Hammarskjold to declare that peacekeeping operations belong to óChapter six and halfô of the Charter.[511]This therefore places the UN peacekeeping missions between the traditional methods of resolving conflicts peacefully under chapter six and more forceful action as authorized by the SC under chapter seven of the Charter.[512]

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[508]C. Tsokodayi, ñThe Legal Basis of the United Nations Peacekeeping Operations?ò available at http://www.examiner.com/article/the-legal-basis-of-united-nations-peacekeeping-operations (assessed 3 July 2015).
[509]*Ibid.*
[510] H. Nasu, *Legal Basis of Peacekeeping: A study of Article 40 of the UN Charter* (The Netherlands: IDC Publishers, 2009) pp. 27 ï 28.
[511] T. G. Weiss, *op. cit*., p. 34.
[512]C. Tsokodayi, *loc.cit.*

However, the use of observer groups and peacekeeping operations represent an element of the maintenance of international peace and security which is not explicitly provided for in the Charter but could be justified under the general provisions defining the powers of different organs[513]especially that of the SC and the GA. Under the Charter, the SChas the competence to establish subsidiary organs as it deems fit for exercise of its functions.[514] These functions include; powers of investigation,[515] powers to recommend appropriate procedures or methods of settlement,[516] powers to recommend such terms of settlement as it may consider most apposite,[517]powers to make recommendations with a view to a peaceful settlement and powers of recommendation or decision for the purposes of maintaining or restoring international peace and security.[518]

Attempts have also been made to locate the legal basis of peacekeeping in the provision of Article 40 of Charter. In this vein, there is a strong resemblance between neutral, non-coercive peacekeeping operations and the provisional measures.[519] Thus, Article 40 states that:

> In order to prevent an aggravation of the situation, the Security Council may, before making recommendations or deciding upon the measures provided for in Article 39 call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.[520]

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[513] B. Simma*et al* (eds.), *The Charter of the United Nations: A Commentary* 2nd edn. *vol.1* (Oxford: Oxford University Press, 2010) p. 684.
[514] Article 29 of the Charter.
[515] Article 36, *ibid.*
[516] Article 37, *ibid.*
[517] Article 38, *ibid.*
[518] Article 39, *ibid*. See also *M.N. Shaw, International Law* 5th edn. (Cambridge: Cambridge University Press, 2005) p. 1107.
[519] H. Nasu, *op. cit.,* p. 32.
[520] Of the Charter.

This provision provides a workable legal framework with which the SC can authorize peacekeeping operations for the purpose of prevention on its own initiative, without having to seek the consent of states and other parties to the conflict.[521]

Also, the powers granted to the GA under Articles 10, 11 and 14 are wide enough to accommodate any situation in which observer missions and peacekeeping operations have been established.[522] However, the GA can only make recommendation and may not take binding decisions on these matters.[523] Again under Articles 22 and 98, the GA is given wide powers which seem to cover the creation of peacekeeping forces and observer groups as subsidiary organs of the GA.[524] In the opinion of a learned author:

> All these may be theoretical possibilities but in practice, there has been no express reference to any of these in the resolutions establishing peacekeeping forces and the debate seems to be without practical significanceé .[525]

This is because peacekeeping as an institution has greatly evolved through the practice of the UN and its legality is no longer questioned by any state.[526]Moreover its constitutional finality was confirmed in the *Certain Expenses of theUnited Nations'* case.[527] In this case, the GA exercised its power under article 17 of the Charter to assess the financial contribution of members to the running of the organization. Some statesnotably the Soviet Union refused to pay their contributions in respect of two peacekeeping forces established under the authority of the GA. Their argument was that the GA lacks the competence to levy contributions as regards such entities since the SC under the Charter has the responsibility of maintaining international peace

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[521] H. Nasu, op. cit., p. 33.
[522] B. Simma*et al* (eds.), *op. cit*. p. 685.
[523]*Ibid.*
[524]*Ibid.*
[525] See Gray International Law and the Use of Force, 2nd edn. (2004 pp 201 - 227) in D. J. Harris, *Cases and Materials* on *International Law,* 7th edn. (London: Sweet & Maxwell, 2012), p. 827.
[526]*Ibid.*
[527] ICJ Rep 1962, 151

and security. In order to resolve this dispute the GA requested an advisory opinion from the International Court of Justice.

The Court issued an opinion maintaining that the financing was constitutional and that the expenses were expenses of the organization within the meaning of the Charter, since they were made in relation to one of the purposes of the UN, that is, the maintenance of international peace and security.

Further, peacekeeping missions are dependent on three fundamental principles that contribute to their constitutionality[528]namely; consent, impartiality, and minimum use of force. We shall discuss these hereunder.

5.3 Fundamental Principles of Peacekeeping Operations

5.3.1 Consent

Generally, peacekeeping operations are established with the consent of the host state. As a result of a change in the nature of international conflicts, other consents became necessary. Thus, the consent of the host country and the main parties to the conflict is required for the establishment of a UN peacekeeping missions. This requirement of consent is traceable to the first UN Emergency Force. The debate in the GA pursuant to the establishment of that force made it clear that the requirement of consent is one of the fundamental principles of the UN system.[529]

Consent of the host state and the main parties to the conflict requires a commitment by the parties to a political process and their acceptance of a peacekeeping mission mandated to aid that

[528] N. Yamali, ñThe Use of Force, Collective Security and Peacekeeping at the End of the Twentieth Centuryôô available at http://www.justice.gov.tr/e-journal/pdg/lw7042.pdf (assessed 3 July 2015).
[529] D. Zaum, ñThe Security Council, the General Assembly and War: The Uniting For Peace Resolutionò in V. Lowe *et al* (eds.), *The United Nations Security Council and War (*Oxford: Oxford University Press, 2008) p. 170.

process.[530] The required consent provides a UN peacekeeping force with the necessary freedom of action be it physical or political to carry out its mandated tasks.[531] Without such consent, a UN peacekeeping force will be at risk of becoming a party to the conflict. Thus, its role as a peacekeeping force will be vitiated as the force is likely to be drawn into enforcement action.[532] In this vein, Yamali stated that:

> The emplacement and the continuous presence of a peacekeeping operation requires the statesô consent, otherwise it will be a violation of Article 2 (7) of the Charter which prevents the UN to intervene in matters within the domestic jurisdiction of the States.[533]

However, obtaining a formal consent for the deployment of a peacekeeping operation is only the starting point.[534] What guarantees the success of the mission is the cooperation on the ground. When this is not given, the SC may turn to Chapter VII of the Charter to secure obligation to comply with its resolution and to cooperate with the peacekeeping forces. This practice does not in any way detract or diminish the fact that a peacekeeping force depends on the host state consent and that of the main parties to the dispute.[535] Further, the deployment of a UN peacekeeping operation based on the consent of the main parties does not guarantee that there will also be consent at the local level, especially when the main parties are affected with internal divisions or have weak command and control systems.[536] Thus, universality of consent could be

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[530] H. J. Langholtz (ed.), *Principles and Guidelines for UN Peacekeeping Operations* (USA: Peace Operations Training Institute, 2010) p. 41.
[531] *Ibid.*
[532] *Ibid.*
[533] M. Yamali, *loc. cit.*
[534] C. Gray, ñHost-State Consent and United Nations Peacekeeping in Yugoslavia,ò *Duke Journal of InternationalLaw*, Vol. 7 (1996), pp. 241 ï 270 at 244.
[535] *Loc. cit.*
[536] UN, ñUnited Nations Peacekeeping Operations Principles and Guidelinesò available at www.zif-berlin.org/fileadmin/uploads/analyse/documente/UN_Capstone_Doctrine_ENG.pdf (assessed 3 July 2015)

less probable in volatile situations evidenced by the presence of armed groups who are not under the control of any of the parties or by the presence of other spoilers.[537]

Even though the consent of all the parties is necessary for the establishment and deployment of a peacekeeping force, it should be noted that it is only the consent of the host state or states that forms the legal basis for such operations. Thus, the consent of other parties in the conflict is crucial as a matter of practical necessity, without which the mission would not be able to function or carry out its mandate.[538] In other words, the peacekeeping mission cannot function effectivelywithout the cooperation of all the parties on the ground.[539] In sum, it must be observed that, since the end of the Cold-War, peacekeeping missions have increasingly been established under a Chapter VII mandate, thus making government consent formally unnecessary.[540]

5.3.2 Impartiality

In the principles and guidelines of the United Nations peacekeeping operations, impartiality implies that peacekeepers must endevour to carry-out their mandate without favour or prejudice. Hence they must shun activities that could undermine their image of fairness.[541] The principle of impartiality helps peacekeepers to maintain the consent and cooperation of the main parties. In other words, impartiality is necessary in order to maintain the consent and cooperation of the main parties in the conflict.[542]

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[537] *Ibid.*
[538] C. Gray, *loc.cit.*
[539] In the case of Yugoslavia, it was the host-stateôs consent that contributed the legal basis for the peacekeeping operation in the country and later in the former Republics. Again, when the consent of the host ï state (Croatia) was withdrawn the peace-keeping force had to be withdrawn from its domain. See *ibid;* p. 245.
[540] D. Zaum, in V. Lowe(eds.) *op. cit.,*p.171
[541] ñUnited Nations Peace-keeping Operationsò, *loc. cit.*
[542] H. J. Langhottz, *op. cit*., p. 42.

Commenting on the connection between impartiality and consent, Johannessen[543] maintains that the principle of impartiality is inter-twined with the principle of consent. Once consent is given by the conflicting parties, the peacekeepers could easily claim to act in keeping with the principle of impartiality toward the parties. On the other hand, where consent is absent, the principle of impartiality becomes more problematic.[544]

However, impartiality should not be mistaken for neutrality or inactivity or even equal treatment of all parties in all cases for all time. This is because at times, local parties may comprise of moral un-equals as in the case of aggressors and victims.[545] In such a situation, peacekeepers may not only be operationally justified to use force but are under moral compulsion to do so. Thus, it is debatable whether it is possible for a UNpeacekeeping operation to be neutral in situations of humanitarian crisis and genocide.[546] Consequently:

> As a good referee is impartial but will penalize infractions, so a peace-keeping operation should not condone actions by the parties that violate the undertakings of the peace process or the international norms and principles that a UN peacekeeping operation upholds.[547]

Further, it must be noted that, traditional peacekeepers have been faithful to the principle of impartiality between the parties, without prejudice to the positions and claims of the disputing parties[548] hence the terminology of non-prejudicial attitude has been interpreted into the concept of impartiality.[549]

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[543] A. M. Johannessen, ñNeutrality and Impartiality of the United Nations Peacekeeping Operationsôô available at http://amjohanness.wikidot.com/neutrality-and-impartiality-of-the-United-Nations-Peacekeeping (assessed 3 July 2013).

[544] As in the case of Afghanistan and Iraq. In Iraq for instance, the deployment of the UN Operations in 2003 was faced with the critical challenge of being involved in a highly political conflict and humanitarian crisis.

[545] See paragraph 50 of the Brahimi Report.

[546] In Rwanda for instance, the United Nations Assistance Mission in that country left at a time genocide was taking place and this caused the slaughtering of about one million civilians.

[547] H. J.Langholtz, *op.cit.,* p. 43.

[548] See Goulding, ñEvolution of United Nations Peacekeepingò, p. 454 in D. Zaum, in V. Lowe *et al* (eds.), p. 170. Also, UNEF did not take side in the dispute between all - the parties. It only provided a face ï saving escape route for France and the UK. See A. Parsons, ñThe UN and the National Interest of Statesò in A. Roberts *et al* (eds.),

Notwithstanding the above observation, the impartiality of peacekeepers has been greatly undermined since the end of the Cold-War. The reason for this is that, peacekeeping missions have been deployed in civil conflicts in aid of the government and against rebels in order to end a civil conflict, as evidenced in the case of the RUF[550] rebels in Sierra Leone.[551] Also, in Bosnia, the combined factor of the establishment of safe havens and the extension of the mandate of UNPROFOR[552] greatly put a question mark on the impartiality of the mission.[553]

5.3.3 Minimum Use of Force

This principle is traceable to the first UN peacekeeping operation in 1956 (UNEF 1). Originally the principle states that UN peacekeepers are only allowed to use force in self-defense. Presently it has an extensive connotation hence, peacekeepers are allowed to apply force in defense of the mandate.

The UNEF 1 made a clear explanation of the use of force only in self-defense. Thus;

> Men engaged in the operation may never take the initiative in the use of force but are entitled to respond with force to an attack with arms, including attempts to use of force to make them withdraw from positions which they occupy under orders from the commander, acting under the authority of the Assembly and within the scope of its resolution.[554]

The essential element in this definition is that peacekeepers should not take the initiative in the use of force. This is a distinguishing factor between peacekeeping and enforcement action.[555] In other words, peacekeeping missions or operations are not enforcement actions. But such

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United Nations, DividedWorld:The UN's Role in International Relations 2nd edn. (Oxford: Clarendon Press, 1993) 106 in D. Zaum, *loc.cit., p.171*

[549] A. M. Johannessen, *loc. cit.*

[550] Revolutionary United Front.

[551] D. Zaum, in V. Lowe, *loc. cit*., p. 172.

[552] United Nations Protection Force.

[553] D. Zaum in V. Lowe, *loc. cit.,* p. 172.

[554] See J. Sloan, ñThe Use of Offensive Force in U.N. Peacekeeping: A Circle of Boom and Burstò in N. Yamani, *1oc.cit.*

[555] *Ibid.*

operations may resort to force at the tactical level when authorized by the SC, if acting in self-defense and in defense of the mandate.[556]

The jurisprudence of the principle of minimum use of force has been graphically illustrated in the following words.

> The environment into which United Nations peacekeeping operations are deployed are often characterized by the presence of militias, criminal gangs and other spoilers who may actively seek to undermine the peace process or pose a threat to the civilian population. In such situations, the Security Council has given United Nations peacekeeping operationsñrobust mandatesò authorizing them to use all necessary means to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack and/or assist the National authorities in maintaining law and order.[557]

The SC has adopted the practice of involving the enforcement provisions outlined in Chapter VII of the Charter of the UN when establishing peacekeeping missions.[558] It has also mandated some peacekeeping operations to undertake tasks which may entail the use of force such as the protection of civilians exposed to physical violence and the protection of safe areas. Such robust mandates under Chapter VII allow them to use force.[559] In spite of the seeming similarities, robust peacekeeping should not be confused with enforcement actions taken under Chapter VII of the Charter. The former involves the use of force at the tactical level with the approval of the SC and the consent of the host nation and the main parties to the conflicts while the later does not need consent and may involve using military force at the strategic or international level. Without authorization of the SC such action is prohibited under Article 2 (4) of the charter.[560]

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[556] UN, ñUnited Nations Peacekeeping Operations: Principles and Guidelinesò, *loc.cit.*
[557] H.J. Langhaltsz (ed.), *op.cit*, p.44.
[558] See SC/Res/1270 (1999)- Sierre-Leone SC/Res/1509 (2003) ï Liberia, SC/RES/1528 (2004)- Ivory Coast, SC/RES/1545 (2004)- Burundi SC/RES/1590 (2005)- Sudan, SC/RES/2010 (2013)-Mali
[559] United Nations, *The United Nations Today* (New York: United Nations Department of Public Information, 2008), p.78.
[560] H.J Langholtz, *op.cit*, p.44.

5.4 United Nations Peacekeeping Operations duringthe Cold War Era

One of the purposes of the UN is to maintain international peace and security. In order to achieve this, a system of collective security was envisaged under the Charter. The Charter contains provisions which guarantee the formation of pre-arranged UN force that would be available to the SC when the need arises. This expectation became unrealistic during the Cold War.[561] In the words of Lewis:

> UN was unable to effectively engage in collective action because of the East West division that existed within the Security Council as a result of the Cold War between the US and the Soviet Union. Peacekeeping was created as a way to overcome the stalemate that was plaguing the Security Council at the hands of the two great powerrivals who could simply veto any operation they deemed to be unfavourable to them.[562]

In other words, peacekeeping essentially came into existence during the Cold- War as an acceptable, non- aggressive measure of the UN. As enforcement measures were not generally acceptable to the superpowers during the Cold ï War, some other less intrusive options were developed by the world body to maintain international peace and security.[563] This less intrusive option which came to be known, as peacekeeping comprises unarmed military observe missions and armed peacekeeping missions.

During this period and the initial thaw[564] a total number of eighteen UN peacekeeping operations took place.[565] The peacekeepers essentially performed two functions namely; observing the

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[561] J.E Fink, ñFrom Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Securityòô19 *Md.J. Int'l L* (1995).
[562] S. Lewis, ñThe Utility of Peacekeeping in the Post-Cold War Eraò available at http://atlismata.org/online-of-peacekeeping-in-the-post-cold-war-era (assessed 5 July 2015).
[563] N.D. White *op. cit.,* p. 210.
[564] See T. G. Weiss et al., *op. cit.,* p. 35.
[565] 1948 ï Present United Nations Truce Supervision Organisation (UNTSO, based in Jerusalem)
1949 ï Present United Nations Military Observer Group in India and Pakistan (UNMOGIP)
1956 ï 1967 United Nations Emergency Force (UNEF, 1, Suez Canal)
1958 United Nations Observation Group in Lebanon (UNOGIL)
1960 ï 1964 United Nations Operation in the Congo (ONUC)
1962 ï 1963 United Nations Force in NEW West Guinea (UNSF, in West Iran)
1963 ï 1964 United Nations Yemen Observation Mission (UNYOM)

peace that is, they had the duty of monitoring and reporting on the maintenance of cease-fires, and keeping the peace, thus they provided an inter-positional buffer between belligerents and establishing zones of disengagement.[566] This is otherwise known as traditional or classical peacekeeping operation.

Peacekeeping operations during this period were largely successful in that they helped in reducing conflicts and protecting lives. However, they were a few operations in which UN peacekeeping forces were ineffective in completing their mission.[567] The success of the UN during the period under review as regards its peacekeeping operations was graphically illustrated by Hanhimaki as follows:

> The good news was that fatalities were relatively few: between 1948 and 1990, 850 peacekeepers died. Moreover UN forces diffused and ñfrozeò a number of violent conflicts and, at a minimum, made negotiations between conflicting parties possible. By doing so, they saved lives and promoted the overall cause of peace; a much belated recognition of this role was the awarding of the Noble Peace Prize to UN Peacekeepers in 1988.[568]

Certain factors have been attributed to the operational success of peacekeeping during this era. Some of these are that:

1964 ï Present	United Nation s Peacekeeping Force in Cyprus (UNFICYP)
1965-1966	United Nations India-Pakistan Observation Mission (UNIPOM)
1965-1966	Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP)
1973-1979	Second United Nations Emergency Force (UNEF II, Suez Canal and later the Sinai Peninsula)
1974-present	United Nations Disengagement Observer Force (UNDOF, Golan Heights)
1978-present	United Nations Interim Force in Lebanon (UNIFL)
1988-1990	United Nations Good Offices Mission in Aghanistan and Pakistan (UNGOMAP)
1988-1991	United Nations Iran-Iraq Military Observer Group (UNIMOG)
1989 -1990	United Nations Transition Assistance Group (UNTAG, in Namibia)
1989-1991	United Nations Angola Verification Mission (UNAVEM I)
1989-1992	United Nations Observer Group in Central America (ONUCA). *Ibid.*

[566] *Ibid.,* p. 34.
[567] As in the case of Cyprus in 1974 and Lebanon in 1982. See Yilmaz, 2005 in S. Lewis, *loc cit.*
[568] J.Hanhimaki, *op. cit*., pp. 80 ï 81.

(i) these operations had the political support or acquiescence of the five permanent members of the SC more especially the United States which at the time was the principal financier of the operations;[569]

(ii) during this era, the United States and Soviet Union tried not to be involved in escalating conflicts which had the potentials of occasioning a nuclear third world war. In order to maintain, their non-involvement, neither state supplied troops to UN peacekeeping operations. Such measure inhibited the operations of the United Nations since both countries were the strongest states militarily after the WW11. However, this was regarded as a necessary sacrifice for international security;[570]

(iii) theseoperations received the consent of the local parties to the conflict;[571]

(iv) impartiality was a key factor in an effective peacekeeping operation.

Most of the United Nations operations which subsequently became known as peacekeeping operations observed these principles. However ONUC became an exception for departing from these principles and showed the dangers of doing so.[572] Hence, the UN peacekeeping operation in Congo was the first United Nations operation involved in peace enforcement[573] and as such needs especial attention.

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[569] J.E. Fink, *loc. cit.* p. 14.
[570] S. Lewis, *loc. cit.*
[571] For instance, ñthe mandate of ONUC was seriously frustrated after the Congolese government collapsed in September 1960. As such peacekeepers were considered distinct from troops in an enforcement action and were limited to ñproportionate and necessaryò self-defenseò. See Oscar Schachter, ñAuthorised Uses of Forces by the United Nations and Regional Organizationò in Law and Force in the New International Order 67 (Lori Fisler Damrosch & David J. Scheffer, Eds. 1991) in J.E. Fink, *loc. cit.,* p. 15.
[572] See Gray in D. Harris, *op. cit.,* p. 828.
[573] A. Kaczorowska, *op. cit.,* p. 772.

5.4.1 United Nations Mission in Congo (ONUC)[574]

Congo gained its independence from Belgium on the 30th of June 1960. Five days after the Congolese independence, the Congolese army mutinied causing extensive internal unrest which included a number of attacks against Belgian citizens. This resulted inBelgian intervention. The matter became complicated when Katanga, Congoôs most mineral-rich province aided by outside forces, seceded.

In reaction to Belgiumôs intervention, both the President, Joseph Kasavubu and Prime Minister Patrice Lumumba appealed to the UN for help, declaring that the action of Belgium amounts to an act of aggression against Congo. The then Secretary- General Dag Hammarskjold invoking Article 99 of the Charter called an urgent meeting of the SC. The SC in agreement with the Congolese government called for the withdrawal of Belgian troops in one of its resolutions.[575] The Council authorized the creation of a multinational force.[576].Additional resolutions[577] on the Congo crisis were passed by the SC. These resolutions dealt with the increasing deteriorating situations in the Congo and called upon Belgium to withdraw its troops from Katanga. They also authorized the Secretary-General to take all necessary steps to actualize this.

However by September 1960, unanimity among the permanent members of the SC was not guaranteed. Thus, there was disagreement over the extent and nature of the activities of ONUC which caused the USSR to veto a proposed resolution calling on states not to intervene

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[574] See ñUnited Nations Mission in the Congo (ONUC)ò available at http://www.polity.co.uk/up2/casestudy/onuc-case-study.pdf (assessed 5 July 2015). See also A. Kaczorowska, *op. cit*., p. 772.

[575] SC/RES/143 (1960). This Resolution was very vague as it made no reference to any article in the United Nations Charter. It merely called for the withdrawal of the Belgian Troops, no deadline was given. However it authorized the Secretary ï General to take all necessary steps to provide the government of Congo with military assistance. Thus the Secretary ï General interpreted the resolution as authorizing him to establish a peacekeeping mission modeled on the UNEF. See S-Fargo, ñAn Analysis of the United Nations Two Peace Operations in the Congoò available at http://scholarcommons.usf.edu/cgi/viewcontent.cigi?article=4621&content=etd (assessed 5 July 2015).

[576] This force included troops from thirty states and comprised almost twenty thousand soldiers and some two thousand civilians and technicians.

[577] SC/RES/145 (1960 and SC/RES/146 (1960).

unilaterally but to act through ONUC. The impasse in the SC led to an emergency session of the GA of the UN pursuant to the Uniting for Peace Resolution which adopted a resolution requesting the Secretary-General to take all necessary action in keeping with the previous resolutions of the SC to help the central government of the Congo in the restoration and maintenance of law and order and to protect the unity and territorial integrity and political independence of the country, in the interest of international peace and Security.

Though, the mission (ONUC) was fashioned after the UNEF 1 model, there were remarkable differences between the two.[578] Firstly, there were no clear instructions given to the Secretary-General due to the exercise of veto in the SC. Thus, in the Congo crisis, theSecretary- General had to take all sorts of decisions which in the case of UNEFI, were taken by the GA.

Secondly the principle of consent which is one of the principles of peacekeeping was difficult to observe due to the disintegration of the Congolese government into warring factions. Hence on one occasion, the Prime Minister was fired by the President and in other occasion, the President was fired by the Prime Minister.

Thirdly, the force was originally authorized to fight only in self-defense. However, it was empowered to fight in order to prevent civil war and to expelforeign mercenaries. In this vein, the mission engaged itself in elaborate military operations against a secessionist movement in Katanga.

Commenting on the extensive military operations carried out by ONUC a learned author observed that:

> The ONUC in Congo was an example of where a peacekeeping operation went into a raging conflict and got its fingers seriously burnt.

[578] See generally M. Akehurst, *A Modern Introduction to International Law,* 6th edn. (London: Routledge, 1995) pp.227-228.

> The initial mandate of the ONUC as prescribed in the Security Council Resolution of July 1960, was to help the *de jure* Congolese government headed by Patrice Lumumba to maintain law and order but the mandate later created difficulties because in the discharge of its obligations under the mandate, the ONUC was caught in the crossfire of the warring factions prompting the UN at different times to be accused by both President and Prime Minister of favouring one or the other side and of interfering in Congoôs internal affairs.[579]

In other words, while the cardinal principles of peacekeeping such as consent, minimum use of force and impartiality provided the original basis for the UN engagement, ONUC became inexorably drawn into the crisis,[580] as it was the first case in which the UN was involved in ñpeace enforcementò mission.ò [581] The ONUC was also the deadliest UN peacekeeping operation in the Cold War era as it recorded two hundred and fifty casualties. Among the casualties was the then Secretary-General,[582] who died in a plane crash as he was transversing the region in an effort to bring an end to the conflict.

5.4.2 United Nations Peacekeeping Operations since the End of the Cold- War

The context for the UNpeacekeeping saw a dramatic change as a result of the end of the Cold-War. During this period there was an increase in the peacekeeping activities of the UN.[583] Some reasons have been put forward for this development. Firstly, a thaw in the Cold-War signaled a crucial period of transition for the UN.[584] Thus, Cold-War cooperation cemented big power collaboration and occasioned the movement toward bolder UNoperations.[585]

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[579] See C.S. Jha, ñUNôs Peace- Keeping Hazardsò *World Focus*, Vol. 15, No.10, October 1994, p.8 in F.A. Agwu, *World Peace Through World law* (Ibadan: University Press Plc, 2007) p.26.

[580] M. Berdal,òThe Security Council and Peacekeepingò in V. Lowe et al (eds.), *The United nations Security Counciland War (*New York: Oxford University Press, 2008) p.18.

[581] J.M Hanhimaki, *op.cit*, p.78.

[582] Dag HammarsKjold.

[583] During the initial thaw of the Cold War, there were five UN peacekeeping operations. (1988-1989). From 1991-2005, there were forty - two UN peacekeeping operations. And from 2006 till date, nine UN peacekeeping operations have been established. See. T.G. Weiss *et al,op.cit*, pp 35 and 47. See also UN, ñList of Peacekeeping Operations, 1948-2013ò available at http://www.un.org/en/peacekeeping/documents/operationslist.pdf (assessed 5 July 2015) .

[584] T.G. Weiss *et al*, *op.cit*., p.45

[585] *Ibid*.,p. 46.

Secondly, there was a readiness on the part of the SC to address issues which were previously deemed to be within the domestic jurisdiction of member states.[586] Hence, the growing emphasis on the international scene on good governance, the protection and promotion of human rights, democratization and the utilization of military force based on humanitarian grounds, reflect this development.[587]

The efficacy of traditional peacekeeping was challenged after the end of the Cold-War due to the changing nature of international conflict which became more complex. Also, there was a change in the nature of conflicts at the international level and as such, UNpeacekeeping forces were sent to countries involved in intra state conflicts and civil wars. Peacekeeping operations during this period in addition to being much more complex became multi-dimensional as peacekeepers engaged in humanitarian work, monitoring of elections and a number of reconstruction operations etc. Atdifferent times, UN operations assumedtemporarygovernance functions over territory as in the case of Bosnia, East Timor (now,Timor-Leste) and Kosovo, making the pursuit of straight forward goal of the mission much more cumbersome.[588] This and other factors underlie the difference between classical peacekeeping and the now complex and multi-dimensionalpeacekeeping which involve both military and numerous civilian personnel. The complexnature of such operations made peacekeeping during this period more dangerous than traditional missions since consent of all parties to the conflict is not guaranteed and force is sometimes used by peacekeepers.[589]

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[586] M. Berdal, ñThe Security Council and Peacekeepingò in V. Lowe *et al,op.cit.,* p.189.
[587] *Ibid.*
[588] S. Lewis, *loc. cit.,*
[589] See Migst, 2008, 330 in *Ibid.* See also the report of UN Secretary, General Boutros-Boutros Ghali published in 1992, titled An Agenda for Peace. This report recognizes the fact that classical peacekeeping should be complemented by a move coercive measures which may require preventive deployments and peace enforcement.

In keeping with the complex and multi- functional nature of peacekeeping during the post-Cold War era, the views of a learned author is worth quoting extensively. In his view:

> Because most peacekeeping after the Cold-War had been within states, challenges had arisen that had not been encountered since the Congo operation in the 1960s. UN forces were faced by irregular forces rather than regular armies,civilians were the main victims of the conflicts, civil conflict brought humanitarian emergencies and refugees, state institutions collapsed. All these factors meant that international intervention had to go beyond military and humanitarian operations to bringing about national reconciliation and reestablishing effective government. Peacekeeping in such contexts was more complex and more expensive than more limited operations such as monitoring a cease fire or controlling a buffer zone.[590]

In other words, peacekeeping operations are no longer viewed as strictly military interventions, but rather they are seen as coordinated multi-dimensional interventions. The implication of this is that, the distinction between peacekeeping and peace enforcement can become blurred.[591]

A review of UN peacekeepingoperationsin Somalia in 1992 and 1993, and in Bosnia-Herzegovina in1992-1995, shows a departure from the classical principles of peacekeeping namely; impartiality of peacekeeping forces, consent of parties to the conflict and minimum use of force, thus, revealing the blurring of functions and consequentproblems.[592]

In Somalia for instance, a single ethnic group having a common heritage in religion, history and language split into heavily armed clans which resulted on a civil war that dragged on for many years. In the absence of a meaningfulgovernment and the humanitariandisaster caused by the

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Thus: ñSince 1989, Namibia, Cambodia, Angola, Rwanda, Mozambique, Bosnia, Croatia, El Salvador, Nicaragua, Guatemala, Liberia, Sierra-Leone, East Timor and Kosovo have each hosted multidimensional missionsò. See Paris 3003: pp. 449-450 in O. P.Oran, ñHow have United Nations Peace Operations Evolved Since the End of the Cold War and With What Consequences?ôô available at http://wwwacademia.ed/085376/how-have-the-United-Nations-Peace-operations-evolved-since-the-end-of-the-Cold_War_and_with_what_consequences (assessed 5 July 2015).

[590] See Gray in D. J. Haris, *op.cit.,* P.828.

[591] S. Lewis, *loc. cit.*

[592] See Gray in D.J. Haris,*op.cit.,* p. 830.

civil war,[593] the United Nations Operations in Somalia[594] was established in 1992 to protect the delivery of humanitarian aid under Chapter VII of the charter.

As the situation in Somalia deteriorated into total anarchy and due to the fact that the safety of the humanitarian aid workers could not be guaranteed, there was the creation of Unified Task Force (here-in- after, UNITAF).[595] UNITAF achieved partial pacification and thus a limited success was realized in securing the delivery of humanitarian relief, but the force operated in Mogadishu and in the Southern parts of Somalia. The force was also unable to secure the disarmament of the war lords in Somalia.[596] By Resolution 814,[597] the SC took over the situation in Somalia by creating United Nations Operation in Somalia (here-in- after, UNOSOM II) in 1993, which replaced UNOSOM I and UNITAF. In addition to the classical peacekeeping duties such as monitoring cessation of hostilities and compliance with cease-fire agreements, helping the provision of humanitarian assistance, mine- sweeping, conciliation, protection of UN civilian personal etc., the mission had a limited enforcement mandate such as, the complete disarmament of factions. This mandate saw UNOSOM II become involved in serious fighting and saw the mission causing the death of civilians.

In sum, Resolution 794 (1992) of the SCwhich authorized UNITAF to the use all necessary force or means to establish a secure environment for humanitarianpurposes and the SC Resolution 837 (1993) which authorized UNOSOM II to take every necessary measure to arrest and try those

[593] Millions of civilians risked death due to starvation and b lack of basic health care.
[594] UNOSOM, see SC/RES/751 (1992).
[595] The creation of UNITAF was authorized by the Security Council permitting States who were willing to use necessary action including the use of force, to restore normalcy in Somalia. UNITAF consisted of troops from other states and the United States in particular. See B. Simma*et al*, (eds.), *op.cit,* p.675.
[596] T.G. Weiss et al. *op.cit.,* p.830, B. Simma*et al*, (eds*.), op. cit*., p. 675.
[597] 1993.

responsible for the killings of UN peacekeepers,are adeparture from traditional peacekeeping and they tend to blur the distinction between peacekeeping and enforcement actions.

Also the United Nations Protection Force (here in-after, UNPROFOR) was the first UN peacekeeping in Croatia and Bosnia- Herzegovina during the Yugoslav Wars. The operational mandates of this mission extended to five republics of the former Yugoslavia namely Croatia, Bosnia-Herzegovina,Montenegro, Macedonia, and Serbia, while a Liaison office was maintained in Slovenia. However, the situation in Bosnia-Herzegovinawas more complex and dangerous as a result of fighting in Bosnia whichbegan in 1991 when the republic followed Croatia and Slovenia and declared independence from Yugoslavia. This was opposed by the Serbs in Bosnia who, supported by the Yugoslavia national Army, declared war on Bosnia.

All efforts to broker peace proved abortive. Thus, in 1992 the SC established the UNPROFOR[598] for an initial period of twelve months to prevent further progression of the crisis into other parts of Bosnia-Herzegovina

Initially UNPROFOR was established as a traditional peacekeeping mission but due to the incessant violations of the UN resolutions and the fact that the lives of mission personnel could not be guaranteed, the SC authorized the force to utilize a wide range of forceful measures; the use of military force inclusive, not only in self-defense but also to ensure security at Sarajevo airport, protection of humanitarian convoy, the enforcement of the no-fly zone (banning all military flights over Bosnia and Herzegovina), and to ensure a stable environment for the delivery of humanitarian assistance.

[598] See the following Security Council Resolutions- Res 743 (1992(, Res, 762 (1992), Res 779 (1992) Res.758 (1992(. Note that between 1991 and 1995, more than one hundred and forty Security Council resolutions and Presidential Statements as regards the former Yugoslavia were passed and majority of these had to do with the crisis in Bosnia .

The impartiality of UNPROFOR has been questioned since it protected only one ethnic group, that is, the Bosnian Muslims.[599] It has also been argued that as there was no cease-fire and consent of all the parties to the conflict. Thus, the deployment of UNPROFOR departed from the principle of consent.[600]

The lessons drawn from the deficiency of Yugoslavia and Somalia missions are well articulated by a learned writer as follows:

> Peacekeeping and enforcement force may not be compatible é It is not possible gradually to increase the functions of peacekeeping forces to include elements of enforcement without endangering the impartiality of the force. If a peacekeeping force is to be given chapter vii enforcement functions, it must be given commensurate forces,equipment and logical support.[601]

Thus, the deficiency of these operations in Bosnia Herzegovina and Somalia led to a period of self-examination and reflection with regard to UN peacekeeping operations.[602] Hence, pursuant to the Brahimireport of 2000, the SCestablished a Peace BuildingCommission[603] which works in*tandem* with the peacekeeping forces in host countries. As peacekeeping operations create a stable environment peace builders create the conditions that guaranteesustainable peace.[604]

In 2010, there was a major reform initiated by the Department of Peacekeeping Operations and the Department of Field Support titled, ñPeace Operations, 2010ò. The purpose of this reform is to find the best ways of strengthening and professionalizing the planning, management and execution of UN peacekeeping operations and at the same time, to know how best to respond to an ever increasing demand for UN peacekeeping and peace building. [605]

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[599] See Gray in D. Harris, *op. cit.,* p.830. See also A. Kaczorowska, *op.cit*, p.774.
[600] *Ibid.,* p.774.
[601] Gray in D. Harris, *op.cit.,*p.831.
[602] A. Kaczorowska, *op.cit*.,p.775.
[603] SC/RES/164 (2005).
[604] A. Kaczorowska, *op.cit* .,p.775.
[605] I*bid.*

CHAPTER SIX

CHALLENGES TO INTERNATIONAL PEACE AND SECURITY

6.1 Human Rights Violations

6.1.1 Conceptual Analysis

One of the most notable developments to have taken place since the end of the Second World War is the emergence of human rights law in the international arena.[606] The terminology, ñhuman rightsò is derived from two words namely; human and right. Human refers to things relating to or characteristic of human kind.[607] While the word right, refers to a legal claim or entitlement.[608] Therefore, human rights universally stand as legal entitlements or claims of man or mankind irrespective of race, religion, gender or colour.[609]

The importance of human rights is seen from the fact that some aspects of it have been accorded prominence in various constitutions of the world to the extent that they have become justiciable. These aspects of natural rights which by their nature are annexed to the very essence of human beings have been identified either as human rights, fundamental rights, or fundamental human rights. These rights are vital to manôs existence and are necessary for his fulfillment.

The Blackôs Law Dictionary defines human rights as:

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[606] See Lauterpacht, International Law and Human Rights (F.A. PREAGER, 1950) in J. Rehman, *International HumanRights Law* 2nd edn (London: Pearson, 2010) p. 3.

[607] C. Soanes*et al* (eds.), *Concise Oxford English Dictionary*, 11th edn. (Oxford: Oxford University Press,2008) p. 693.

[608] *Ibid*; p. 1238.

[609] See Articles 1 and 2 of the Universal Declaration of Human Rights which state that all human beings are born equal in dignity and rights and are entitled to all the rights and freedoms set forth in the declaration without distinction of any kind such as race, sex, colour, religion, language, political or other opinion, national or social origin, property, birth or other status.

> The freedoms, immunities and benefits that according to modern values (esp. at an international level) all human beings should be able to claim as a matter of right in the society in which they live.[610]

This definition accords with the definition of human rights by Eze but with some modifications.According to the learned writer:

> Human rights represent demands or claims which individuals or groups make on society some of which are protected by law and have become part of *lexlata*, while others remain aspirations to be attained in the future.[611]

An analysis of the above definition reveals that some aspects of human rights are given protection under the law hence they are justiciable while others are not. The latter impose no obligation on the government but are considered goals or objectives which the government should consider in formulating policies. Indeed writers are unwilling to call them ñlegal rightsò. They are seen as needs which the government might provide if resources are available but which are not justiciable unless they are established by contract. However,Eze in his definition clearly avoids the controversy as to whether the term ñrightò can be applied when it is so obvious that the state is patently not able to attain it due to economic constraints or otherwise.[612] Though such rights may be aspirational thus unenforceable at the moment, the minimum requirement imposed on state is to show a programme of implementation.[613]

In sum, human rights are those rights which are considered inherent in all human persons by the mere fact of their humanity alone. They are inherent in the sense that the mere fact of being a human person makes you competent to enjoy human rights. Thus, they do not have to be

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[610] B. N. Garner *et al* (eds.), *Black's Law Dictionary* 7thedn. (St Paul Minnesota: West Group Publishing Coy, 1999) p. 1322.
[611] O. C. Eze, *Human Rights in Africa* (Lagos: Macmillan Nigeria Publishers Ltd., 1984) p. 5.
[612] F. I Asogwa*et al*., *Criminal Justice and Human Rights Law in a Globalised System* (Enugu: Institute for Development Studies, 2011) p. 95.
[613] *Ibid.*

purchased or granted.[614] In this connection, a one-time Chief Justice of Japan said that: ñhuman rights were not created by the state but are external and universal institutions common to all mankind and antedating the state and founded upon natural law.ò[615] As a universal institution, human rights (that is the same rights) are enjoyed by all humans irrespective of cultural economic, social or other factors.[616] As regards the universal nature of human rights, the view of Higgins is illustrative. According to him:

> The non-universalist, relativist view of human rights is in fact a very state-centered view and loses sight of the fact that human rights are human rights and not dependent on the fact that states, or groupings of states may behave differently from each other so far as their politics, economic policy and culture are concerned. I believe, profoundly in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter to be able to speak freely; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion or stage of development. They are as keenly felt by the African tribesman as by the Europeans city-dweller, by the inhabitant of a Latin American shanty- town as by the resident of a Manhattan apartment.[617]

Higgins thesis therefore presupposes that human rights are not the gift of any particular government or legal instrument they derive from the mere fact of being human. Thus, the notion of human rights reflects our common universal humanity, for which no human person must be excluded. As observed by Khan:[618]

> The whole human rights edifice is founded on the principle of the equal dignity of all human beings.The logical and inescapable consequence of this principle is this universality of human rights.[619]

However, the growing tendency to ethical relativism seems to undermine the universality of human rights.[620]

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[614] A. Kaczorowska, *Public International Law,* 4th edn. (London: Routledge, 2010) p. 499.
[615] Cited in M.C. Anozie, *Notes on Nigerian Constitutional Law*, vol. 1 revised edn. (Enugu: Pymonak Printing and Publishing Co., 2000) p. 176.
[616] *Ibid.*
[617] See Higgins, Problems and Process: International Law and How we Use it (1994, p. 96-97) in D. Harris, *Case andMaterials on International Law,* 7th edn. (London: Sweet & Maxwell, 2010) p. 537.
[618] S. Tharoor, ñAre Human Rights Universal?ò available at http://www.worldpolicy.org/tharoor.ltml (assessed 7 July 2015)
[619] H. Khan, ñThe Role of the Judiciary in Promotion and Protection of Human Rights,ò in M. Y. Khan, *loc. cit.*

6.1.2 Classification of Human Rights

Generally, human rights can be classified into five categories namely; civil, political, economic, social and cultural. However, the most common categorization of human rights is that given by KarelVasak.[621] According to him, there are three generations of human rights namely; the first generation rights, the second generation rights and the third generation rights.

The first generation negative rights consist of the individual civil and political rights. They are called first generation rights, because these rights were the first to be endorsed in municipal constitutions. They are termed negative because these rights especially civil rights do not allow the interference of public authority with the private person in civil society.[622] Examples of such rights include rights to life and liberty, freedom of thought, speech, religion privacy and assembly, political participation etc.

The second generation positive rights are the economic, social and cultural rights. They are called second generation because they emerged during the various twentieth-century revolutions which emphasized a redistribution of material benefits of economic growth.[623] They are termed positive because they impose obligation on government to take positive steps to ensure minimal food, shelter, and health care.[624] While these rights are rhetorically emphasized in many developing countries, some European states and Canada have incorporated these rights in their

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[620] A. Kaczorowska, *op.cit*., p. 499.
[621] See Globalization 101, ñThree Generations of Human Rightsò available at www.globalization101.org/three-generations-of-rights/ (assessed 7 July 2015).
[622] T. G. Weiss *et al., The United Nations and Changing World Politics 5th edn.* (USA: Westview Press, 2007) p. 151
[623] *Ibid.*
[624] *Ibid*.

welfare states.[625] They include: the right to participate in culture, the right to education, the right to work etc.

The third generation rights deal with issues of solidarity as they are related to collections of persons (like indigenous peoples rather than individuals).[626] Later formulations house claims to a right to development, a healthy environment and peace as the common heritage of mankind.[627]

Many writers and commentators have posited that human rights are interrelated, interdependent and indivisible, which means that no right is more important than the other. Thus, political and civil rights cannot be dissociated from socio-economic or cultural rights, as the enjoyment of the former guarantees the satisfaction of the latter and *vice versa.*

6.1.3 Human Rights and International Peace and Security

The Charter of the United Nations makes copious references to human rights and fundamental freedoms.[628]Therefore, it is safe to conclude that the purposes of the organization as intended by the founding fathers include the promotion and protection of human rights and maintenance of international peace and security.

However, the close connection between human rights and international peace and security is highlighted in the Charter thus:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self- determination of peoples, the United Nations shall promoteé universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[629]

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[625] *Ibid*.
[626] *Ibid.*
[627] *Ibid.*
[628] Article 1, 13, 55, 62, 68.
[629] Article 55 (c).

In keeping with Article 56, all members of the organization have the obligation to take joint and separate action in co-operation with the UN for the realization of the purposes spelt out in Article 55. It seems that Articles 55 and 56 when read together, are the only provisions in the Charter imposing clear legal obligations on members to promote respect for human rights.[630] Article 55 in particular underlies the fact that the observance of the basic human rights and fundamental freedoms is a condition precedent for the maintenance of international peace and security. For Weiss:

> The relationship between human rights and peace has intrinsic importance to world politics. A clear correlation between at least some human rights and peace has importance not only for a direct and ñmicroò contribution to human dignity but to human dignity in a ñmacroò sense by enhancing international ï andperhaps national ï security and stability by eliminating violence.[631]

In other words, the recognition and observance of human rights and human dignity is the foundation of justice, freedom and peace in the world.[632]

Though human rights and fundamental freedoms are the birth rights of all human persons, it is trite that individuals and groups around the globe are most often victims of human rights abuses. Such human rights violations often lead to extreme humanitarian catastrophe.The United Nations Security Council (hereafter, the SC) pursuant to its primary role of maintaining international peace and security, has extended the interpretation of what constitutes a threat to the peace to include wide-spread human rights violations within the confines of a state in situations of purely international armed conflict.[633]

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[630] See Humphery, ñThe UN Charter and Universal Declaration of Human rightsò in Laurd (ed.), The International Protection of Human Rights (Thames and Hudson, 1967) pp. 39 ï 56 at p.42 in J. Rehman, *op. cit*., p. 29.
[631] T. G. Weiss, *op. cit.,* p. 148.
[632] See the Preamble to the Universal Declaration of Human Rights.
[633] The post-cold war era (1990-2010) saw an increase in non-military threats such as gross and systematic violations of human rights and obstructions in the delivery of humanitarian assistance. See D. Golebiewski, ñHumanitarian Interventions of the UN: A Look at the Security Councilôs Haphazard Response to Somalia and Rwandaò available at http://thepolitic.org/the-security-council-humanitarian-intervention/ (assessed 7 July 2015).

There have been occasions where the SC has connected human rights situation to a threat or breach of peace. As long as the SC links human rights to peace and security issues, it has a wide mandate to act under Chapter VII.[634] In Resolution 688 (1991) for instance, the SC declared that the international repercussion of human rights violation in Iraq, constituted a threat to international peace and security.[635] This seems to be the councilôs first express and clear declaration that human rights violation constituted a threat to international peace and security.[636]

Also in Resolution 827, (1993), the SC expressing its grave alarm at the reports of gross violations of human rights such as mass killings, massive, organized and systematic detention and rape of women, and practices of ethnic cleansing within the territory of former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, thereby determined that the situation continues to constitute a threat to international peace and security.

Further, the SC determined that the situation in Mali such as the abuses and violation of human rights including extrajudicial killings, arbitrary arrests and detentions, sexual and gender-based violence, forced amputations, as well as killing, maiming, recruitment and use of children, forced displacement, and destruction of cultural and historical heritage, constitutes a threat to international peace and security.[637]

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[634] T. G. Weiss, *op. cit.,* p. 167

[635] ñThe Resolution was designed to address Sad am Husseinôs repression of the Kurdish population in the Northern Iraq which led to the flight of up to a million civilians in any into neighbouring Turkey é Turkey insisting that the movement of so many civilians was affecting regional security. Following the passage of the resolution, the US, in cooperation with the UK and France sent troops into northern Iraq to provide for the safety of Kurdish refugees and facilitate the delivery of humanitarian assistanceò. See J. M. Welsh, ñThe Security Council and Humanitarian Interventionò in Lowe *et al* (eds.), *The United Nations Security Council and War* (Oxford: Oxford University Press, 2008) p. 538.

[636] T. G. Weiss, *op. cit*., p. 168.

[637] SC/RES/2100 (2013). See also the following Resolutions where the same conclusion was reached as regards violations of human rights-SC/RES/1199 (1998) SC/RES/1973 (2011), SC/RES/2098 (2013) on Kosovo, Lybia and Democratic Republic of Congo respectively.

As discussed earlier,[638] it is within the province of the SC to determine that a situation constitutes either a threat to or a breach of the peace. Once such determination is made, it can invoked its Chapter VII powers and arrive at a decision which is binding on member states of the UN.

In addressing violations of human rights as they affect international peace and security, the SC has been influenced by the increasing importance of human rights coupled with the declining domain of domestic jurisdiction, in arriving at the conclusion that purely internal situations may constitute a threat to the peace.[639] In such a situation the UNSC under the doctrine of humanitarian intervention or responsibility to protect, may authorize states to take forceful measures to stop the human rights abuses and bring an end to the humanitarian crises.[640]For instance, the humanitarian intervention in Libya was due to gross and systematic violation of human rights including the repression of peace protesters. On the 15th of February 2013 there were protests in Benghazi against the government of Colonel Gadhafi. These protests led to clashes with security forces that opened fire on the crowd which led to the death of some civilians and security personnel. The international community in response to the crackdown by Gadhafi on anti-government protesters registered its condemnation. The SC relying on the doctrine of responsibility to protect, adopted resolution 1973 which authorized members either acting alone or through regional arrangement to take all necessary actions to protect civilians under threat of attack in that country including Benghazi. Hence on the 19th of March 2013 an *ad hoc* coalition of states which include the US, UK and France launched series of air strikes against

[638] In Chapter Three of this work.
[639] R. N. Attoh, ñHumanitarian Intervention and the United Nations Charter: Re-Examining the Legality of theUseof Force in Human Rights Enforcementò (unpublished) LL.M Dissertation, Faculty of Law, University of Nigeria Nsukka (2013) p. 133.
[640] *Ibid.*

military targets in Libya, and by the end of March, the international military operation in Libya was overtaken by NATO.[641]

6.2 International Terrorism

One of the constant features in the discussion of terrorism is the inability of the international community to agree on a common or universal definition of the termsñterrorism, óinternational terrorism and óterrorist actsô.[642] For Rehman,[643] the term óterrorismô is difficult to define. This difficulty arises from the varied perceptions associated with the characterization of terrorist acts, the motivation and purpose of such acts and the variable identity of the perpetrators of such acts.Hence one manôs freedom fighter is another manôs terrorist.

The inability to arrive at a common definition of terrorism is not a new development. The League of Nations produced a draft treaty which defines terrorism as ñall criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.ò[644]The draft treaty did not enter into force due to insufficient ratifications coupled with the dissolution of the League of Nations.

A clear definition of the concept of terrorism has eluded the UN. However, since international law and norms succinctly prohibit deliberate attacks on civilians, the High Level Panel on Threats, Challenges, and Change addressed to Secretary- General[645] (hereafter, the HLP) reinforces the prohibition by describing terrorism in the following words:

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[641] See SC/RES/1970 (2011), See also C. H. Fosund, ñThe Implementation of the United Nations Security Council Resolution 1973 on Libya, available at http://www.duo.uion.no/bitstream/Landle/10852/22701/144655.pdf?sequence=1(assessed 7 July 2015

[642] M. J. Peterson, ñUsing the General Assemblyò in J. *Boulden Terrorism and the UN*, (Indiana: Indiana University Press, 2004), p. 177

[643] *Op. cit.,* p. 881

[644] Article 1(1) of the Convention and for the Prevention and Punishment of Terrorism.

[645] The HLP on threats challenges, and change was created by Kofi Anna a former UN Secretary ï General in September 2003 to ensure that the United Nations remains capable of fulfilling its primary purpose of taking

> Any actioné that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[646]

The HLP in defining terrorism makes reference to existing Conventions on aspects of terrorism, the Genera Conventions and the SC resolution 1566 (2004). Hence prohibited actions in these international instruments may amount to terrorism. In other words, the international community has come to an agreement on prohibited targets of violence thereby by-passing disagreement on a comprehensive definition on terrorism.[647] The difference in the definition of terrorism in the draft treaty of the League of Nations and that proffered by the HLP is that, the later refuses to adopt the qualification that the terrorist actions must be directed against a state.[648]

Inspite of the lack of a universally accepted definition, terrorism, has been universally accepted as a threat to international peace and security. Thus in 1992 when Libya was implicated in the bombing of Pan American Flight which killed 259 people on board as well as eleven people on ground, the United States and United Kingdom made a request to Libya to hand over two Libyans who had allegedly acted as agents for Libya. Initially the SC supported the request of both countries through a non-binding resolution. But upon the refusal of Libya to comply, the SCdetermined that the non-compliance of Libya and failure to demonstrate by concrete actions its renunciation of terrorism constitute a threat to international peace and security.[649]

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effective collective measures for the prevention and removal of threats to the peace. In the report of the panel, terrorism was identified as one of the global threats. See J. M. Hanhimaki, *The United Nations: A VeryShort Introduction* (Oxford: Oxford University Press, 2008) p. 138.

[646] See paragraph 164 (d) of the HLP, More Secure World. This definition was endorsed by Kofi Annan, a former Secretary-General of the UN in his report: In Larger Freedom: Towards Security, Development and Human Rights for All. See UN doc.A/J9/200J of 21 March 2005. Para. 26.

[647] See T. G. Weiss et al., *op. cit.* p. 97.

[648] M. J. Peterson, ñUsing the General Assemblyò in J. Boulden*, op. cit.,* p. 177.

[649] See SC/RES/748 (1992).

Kofi Annan saw terrorism as a global menace and called for a united global response to deal with it.[650] Hence in 2001, a day after the attacks on the territory of the United States, the SC passed resolution 1368 (2001) which condemned in the strongest terms the horrific terrorist attacks which took place on September 11, 2001 in New York and Pennsylvania and regarded such acts, like any act of international terrorism, as a threat to international peace and security.

6.2.1 United Nations' Response to Terrorism

6.2.2 The General Assembly

The issue of terrorism was dealt with almost entirely by the General Assembly (GA). It was only the 1990s that the SC became more involved in the problem of terrorism. The GA has always approached the issue as a general problem of international law rather than one which relates to particular events or conflicts.[651]

The GA has focused on terrorism as an international problem since 1972 on the initiative of Secretary-General Kurt Waldheim in connection to the attack of Lod airport in Israel and the capture and killing of Israel athletes at the 1972 Summer Olympics in Munich Germany. From the 1970s till date it has addressed the problem through resolutions which could be comfortably categorized under three headings namely;

i Resolutions to Prevent Terrorism.[652]

ii Resolutions on Human Rights and Terrorism.[653]

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[650] See UN Press Release SG/SM/7962/Rev.1, September 18, 2001
[651] T. G. Weiss, op. cit., p. 96
[652] See Resolution 3034 (xxvii) (1972), 31/102 (1976), 32/147 (1977), 34/145 (1979), 36/109 (1981), 38/130 (1983, 40/61 (1985) 42/159 (1987), 44/29 (1989), 46/51 (1991), 57/83 (2003), 58/48 (2004), 58/80 (2004), 60/158 (2006), 66/50 (2011).

iii Resolutions on Measures to Eliminate Terrorism.[654]

The resolutions on Measures to Prevent Terrorism and Measures to Eliminate Terrorism outline a normative framework which encourages governments to see terrorism as a kind of criminal activity. These resolutions also enjoin them to suppress terrorism by the utilization of police methods and mutual cooperation among states.[655] However, resolutions on measures to eliminate terrorism avoids the conundrum associated with the definition of the term ćterrorismô by designating certain acts widely regarded as likely to be committed or attempted by terrorists as unlawful and at the same time soliciting for an international cooperating against those who commit such acts.[656] On the other hand, the resolutions on Measures to Prevent Terrorism seek international cooperation in preventing terrorists from acquiring weapons of mass destruction and radioactive materials and sources.

The GA has also adopted counter-terrorism related Conventions[657] which seek to punish offences against internationally protected persons, prohibit hostage taking, suppress terrorist bombings, prohibit the financing of terrorism and suppress acts of nuclear terrorism.

In 2006, the GA of the UN adopted Global Counter-Terrorism Strategy. The strategy contains a plan of action and other measures which will enhance national, regional and international efforts

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[653] Resolutions under this heading include; Resolutions 48/122 (1993), 49/185 (1994), 50/186 (1995), 57/133 (1997) 54/164 (1999) 56/160 (2001), 58/174 (2004), 62/159 (2008), 65/221 (2011) 56/171 (2011).

[654] Resolution under this stream include; Resolution 49/60(1994), 50/53 (1998), 51/210 (1996), 52/165 (1997), 55/159 (2000), 58/88 (2001), 56/88 (2001), 57/27(2002) 60/43(2006), 63/129 (2009), 66/105 (2011), 67/99 (2012).

[655] M. J. Peterson in J. Boulden, *op. cit*., p. 182

[656] *Ibid*., pp. 182-183.

[657] The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; 1979 International Convention Against the Taking of Hostages; 1997 International Convention for the Suppression Of Terrorist Bombings;1999 International Convention for the Suppression of the Financing of Terrorism and the 1999 international Convention for the Suppression of Acts of Nuclear Terrorism. In all there are fourteen universal legal Instruments and four amendments to prevent terrorism. These instruments were developed under the auspices of the United Nations and its specialized agencies and the International Atomic Energy Agency.

to counter terrorism.[658] In the Plan of action, the members of the UN unequivocally condemnedterrorism in all its forms and manifestations no matter the persons involved and wherever it may occur and irrespective of the purpose.[659] They also resolved to take urgent steps to prevent and combat the menace of terrorism by:

i. considering becoming parties without delay to the existing international conventions and protocols against terrorism and implementing them, and to reach an agreement on the conclusion of a comprehensive convention on international terrorism;[660]

ii. implementing all GA resolutions on the measures to eliminate international terrorism;[661]

iii implementing all SC resolutions relating to international terrorism.

The strategy also contains the following:

(i) measures to address the conditions conducive to the spread of terrorism;

(ii) measures to prevent and combat terrorism, i.e.,

i. measures to build statesô capacity to prevent and combat terrorism and to strengthen the role of the UNsystem in this regard;

ii. measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the right against[662] terrorism.

It should be noted that the adoption of the strategy is a fulfillment of the commitment made by heads of state and government at the 2005 summit and it is founded on many elements proposed

[658]UN, ñUnited Nations General Assembly Adopts Global Counter-Terrorism Strategyò available at https://www.un.org/en/terrorism/strategy-counter-terrorism-shtml (assessed 7 July 2015).
[659] *Ibid.*
[660] *Ibid.*
[661]*Ibid*.
[662]*Ibid*.

by the Secretary-General in his 2006 report titled; Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy.[663]

6.2.3 The Security Council

International terrorismwas placed on the agenda of the SC in the early 1990s. During this period the SC became more focused on terrorism and recognized that international terrorism was a threat to international peace and security and unequivocally condemned such acts.[664] This active approach to the issues of international terrorism was a result of aerial incidents in the late 1980s,[665] the attempted assassination of the President of Egypt ï Hosni Mubarak ï in 1995, and the bombings of the embassies of the United States in East Africa in 1998. The response of the SC in each case was to impose sanctions against some states such as Libya and Sudan for their refusal to extradite suspects and against the Taliban government in Afghanistan for supporting terrorism and refusing to extradite Osama bin Laden. It is the view of learned authors that while sanctions must have contributed in curbing state terrorism, they have had little impact on behaviour of groups such as Al-Qaida and Taliban that situate themselves outside the global system and do not accept its institutions and norms.[666]

After the September 11 attack on the United States, the approach of the SC as regards terrorism changed. The Council denominated the attack as a threat to international peace and

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[663] *Ibid.*
[664] See SC/RES/1269 (1999).
[665] ñOn December 27 1985, four gun men walked to the shared counter for Israelôs EL AL Airlines and Trans World Airlines at Fiumicino Airport outside Rome, Italy, fired assault rifles, and threw grenades. This incident led to the death of sixteen people, while ninety-nine people were injured. Minutes later, at Schwechat Airport Vienna, Austria, three terrorists carried out a similar attack. See World Public Library, ñRome and Vienna Airports Attacksò, available at www.worldlibrary.org/article/rome_and_vienna_airport_attacks (assessed 7 July 2015)
[666] C. de J. Oudraat, ñThe Role of the Security Councilò in J. Bonlden*et al*, *op. cit.,* p. 158.

security[667]and endorsed measures ranging from approval of the use of force in self-defense, to requiring members states to embark on comprehensive measures to checkmate terrorism.

The remarkable aspect of the resolution is that it recognized the inherent right of individual or collective self-defense. However, it is the view of one writer that the response of the Security Council suffers two major shortcomings. According to him:

> The first was the determination that the situation was a threat to peace, when actually some attacks had taken place, attacks that were in every material detail qualified to be an armed attack, and thus an aggression *simpliciter*é the second pitfall, of the Security Councilôs response resides in the fact that, having determined a threat to peace, it thereafter, in the same breath, recognized the United Statesôright to self defense against the non state actors (the al-Qaeda) which perpetrated the attack. The fact is that the determination of threat and the recognition of the right of self-defense are contradictory to Article 51 of the UN Charter which recognizes the right of defence only of an armed attack occurs.[668]

In other words, having determined a threat to peace instead of an armed attack,the ceding of the right of self-defense to the United States was inconsistent with the jurisprudence of the use of force as enshrined in the Charter of the United Nations.[669] The SC should not have only determined that an armed attack and breach of the peace has occurred, it ought to have taken up the responsibility to act under Chapter VII of the Charter.[670] In sum, resolution 1368 has become a very important legal instrument thus giving legitimacy to the unilateral use of force in responding to terrorism.[671]

A further SC resolution[672] on ways to fight international terrorism was adopted a forthnight after September 11 attack on the United States. Resolution 1373 requires states to embark on three main types of action[673] namely;

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[667] SC/RES/1368 (2001).
[668] F. A. Agwu, *World Peace Through World Law* (Ibadan: University Press Plc, 2007) p. 273.
[669] *Ibid*.
[670] *Ibid.* pp. 273 ï 274.
[671] C. de J. Oudraat, The Role of the Security Council in J. Boulden et al., *op. cit.*, p. 160.
[672] SC/RES/1373 (2001).

i) the prevention and suppression of the financing of terrorist act, including the criminalization of provision or collection of funds for acts of terrorism, freezing of financial assets of terrorists and the prohibition of nationals or persons or entities within their territories from making funds and assets available to terrorists;

ii) the adoption of national measures which prohibit support to terrorists, including denial of safe heaven, prosecuting those involved in terrorism, rendering assistance to other states in criminal investigation and providing adequate security at borders so as to prevent the movement of terrorists;

iii) the adoption of cooperative measures among states which include exchange of information and early warning, the cooperation and implementation of relevant international conventions and protocol relating to terrorism and SC Resolutions 1269 (1999) and 1368 (2001), and ensuring that terrorist are not abusing the asylum and refugee status system.

The importance of Resolution 1373 has been graphically illustrated as follows:

> Whereas the Council could previously have been said to be looming on the outskirts of what was the General Assemblyôs purview, it was firmly within it. Resolution 1373 was not only binding on all states ï in contrast to the Assembly ï generated conventions which many members states had yet to sign but also departed from the usual council language that calls on states or requests that states undertake certain measures to indicate that the council ódecides that state shallô implement the following measures.[674]

It is therefore humbly submitted that the resolution was the first legally binding resolution addressing international terrorism as a global problem, without making reference to a particular state or regime; and by adopting a set of anti-terrorism measures, the SC took on a quasi-

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[673] J. Boulden ñThe Security Council and Terrorism in V. Lowe *et al* (eds.), *op. cit.,* p. 612.
[674] *Ibid.*

legislative function in an unprecedented way.[675] Again, since the resolution was adopted under ChapterVII of the Charter, it imposed notable requirements on member states within their national jurisdiction. Thus, even though some states have not signed or ratified some of the Conventions relating to terrorism,Resolution 1373 made many of the provisions of these Conventions binding on states.[676]

The resolution established the Counter Terrorism Committee (CTC) whose functions include; the monitoring of the implementation of the resolution and to increase the capacity of statesto combat terrorism. States are obligated under the resolution to submit reports on the steps they had undertaken to implement the provisions of the resolution to the committee. It is encouraging to note that almost every state has complied with this requirement. Information arising out of these reports and which were submitted to the committee go a long way to ascertain the practices of state as regards terrorism. To consolidate the role of the CTC, the SC established the Counter-Terrorism Committee Executive Directorate (here-in-after, the CTED). Its main functions include; providing expert advice to the CTC on all areas covered by the resolution 1373 and facilitating technical assistance to countries.[677] It is our humble view that the CTC should be properly funded, as this will go a long way in aiding the committee to creditably discharge its duties.

Finally, it must be noted that the action of the SC as regards terrorism is not a substitute or alternative to state action. The SC works as a facilitator or supporter to state action.[678] Hence its ability to have an impact on terrorism is necessarily intertwined with the ability of member states

[675] N. Schrijver, ñSeptember 11 and Challenges to International Law ñin J. Boulden, *op. cit.,* p. 58.
[676] C. de J. Oudraat, ñThe Role of the Security Council ñin *ibid.,* p. 161.
[677] See SC, ñCounter Terrorism Committeeò available at http://www.un.org/en/sc/ctc (assessed 8 July 2015)
[678] J. Boulden, ñThe Security Council and Terrorismò in V. Lowe *et al* (eds.), *op. cit*., p. 623.

to adopt an effective and functional counter-terrorism strategy based on clear and sufficient understanding of its causes and nature.[679]

6.3 Nuclear Proliferation and other Weapons of Mass Destruction

Nuclear proliferation has been defined as;

> the spread of nuclear weapons and weapons applicable to nuclear technology and information, to nations which are not recognized as ñnuclear weapons statesò by the Treaty on the Non Proliferation of nuclear weapons, also known as the nuclear non- proliferation Treaty or NPTò.[680]

Thus, it is the spread of nuclear weapons among states in so far as such spread is inconsistent with their obligations under the Non Proliferation Treaty.

According to the High Level Panel on Threats, Challenges, and Change, such proliferation could arise in two ways namely;

(i) illegal development of full scale weapons programme, or the acquisition of all materials and expertise needed for weapons programme by states and then withdrawing from the Treaty on the Non-Proliferation of Nuclear Weapons when they are ready to proceed with weaponization;[681]

(ii) the erosion and possible collapse of the whole treaty regime.[682]

Although nuclear weapons have not been used as a means of warfare for more than seven decades, the proliferation of nuclear weapons is an indication of the inability of the UN especially the permanent five, to live up to the 1946 goal of abolishing nuclear weapons.[683] Thus as at June 2015, there are four hundred and thirty-eight nuclear plant units in thirty-one countries

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[679] *Ibid.*
[680] US Legal, ñNuclear Proliferation Law and Legal Definitionò available at http://definition.uslegal.com/nuclear-proliferation%20 (assessed 8 July 2015).
[681] See para.108
[682] Para. 109
[683] J. M. Hanhimaki, The *United Nations: A Very Short Introduction* (Oxford: University Press, 2008) p. 65-66

and sixty-seven nuclear plants under construction in sixteen countries.[684] Most nuclear energy states have the knowledge and infrastructure to build nuclear weapons at a short notice should they decide to do so.[685]

Again, it is observed that all the permanent members of the SC are members of the nuclear club while India and Pakistan in 1988 declared their nuclear capabilities by conducting nuclear tests. States like North Korea, Iran and Israel have worked hard to acquire nuclear capabilities and many others from South Africa to Sweden have romanced with the idea of developing their own nuclear weapons at some stage.[686] Thus in 1988, the SC following the nuclear tests conducted by India and Pakistan reaffirmed its earlier position that the proliferation of all weapons of mass destruction constitute a threat to international peace and security.[687]Similarly when North Korea signaled her intention to withdraw from the NPT, the SC reaffirmed the contribution of non-proliferation to the maintenance of international peace and security. Again in response to the nuclear tests conducted by the same country in 2006, 2009 and 2013, the Security Council condemned these tests and determined that they show a clear threat to international peace and Security. Acting under Chapter VII of the Charter, the Security Council imposed series of sanctions on North Korea.[688]

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[684] See European Nuclear Society, ñNuclear Plants, World Wideò available at https://www.euronuclear.org/infro/encyclopedia/n/nuclear-power-plant-world-wide.htm (assessed 8 July 2015)

[685].See J.Conca, ñThe Nuclear Weapon States-Who Has Them and How Manyò, available at http://www.forbes.com/sites/jamesconca/2014/09/25/the nuclear-states-who-has-them-and-how-many (assessed 8 July 2015

[686] J. M. Hanhimaki, *op. cit.,* p. 65

[687] SC/RES/1172 (1998)

[688] In SC/RES/1874 (2009) for instance, sanctions were imposed on North Koreaôs arms Sales, luxury goods and financial transactions related to its weapons programs.
In SC/RES/2094 (2013), the SC approves tougher sanctions against North Korea. The Resolution places new constraints on the countryôs banking, trade, and travel transactions and pressurizes countries to search suspicious North Korea cargo . See M. B. Nikitin, ñNorth Koreaôs Second Nuclear Test: Implications of U.N Security Council Resolutionò available at www.fas.org/sgp/crs/nuke/R40684.pdf (assessed 8 July 2015)

At the international level the non-proliferation regime is supported by the Treaty of Non-Proliferation of Nuclear Weapons (NPT)[689] with the International Atomic Energy Agency (IAEA) which provides the organizational infrastructure for ensuring that nuclear weapons and technology do not proliferate. The objectives of the NPT are as follows;

(i) to prevent the spread of nuclear weapons and weapons technology;

(ii) to promote cooperation in the peaceful uses of nuclear energy and;

(iii) to bring about nuclear disarmament as well as general and complete disarmament.[690]

The IAEA as the UN nuclear watchdog monitors and verifies through its inspectorate functions, whether states who are party to the Treaty are complying with their obligations under the treaty.[691] Such obligations include safeguard mechanisms to prevent the diversion of fusile materials for weapons use.[692] For instance, Iran has been on the front burner as regards its nuclear programs. While some western countries notably the United Kingdom are of the view that Iran has an ulterior motive behind its nuclear programme that is, the development of nuclear weapons, Iran maintains that its nuclear programme is for peaceful purposes.

Thus in 2006, the IAEA found that Iran repudiated its obligations under the NPT and reported such non-compliance to the SC. Iran was mandated by the SC to suspend its nuclear enrichment

[689] The NPT entered into force in March 1970. The treaty has a near-universal membership with only South Sudan, India, Israel, and Pakistan remaining outside the treaty. North Korea ratified the treaty in 1985 but withdrew from it in 2005. See Arms Control Association, ñThe Nuclear Non Proliferation Treaty (NPT) at a Glanceò, available at https://www.arms control.org/factsheets/nptfact (assessed 8 July 2015).

[690] See Atomic Archive,ñNuclear Non Proliferation Treaty (1968)ò available at http://www.atomicarchive.com/Treaties/Treaty6.shtml (assessed 8 July 2015)

[691] J.G.Quilop, ñWeapons of Mass Destruction: A Challenge to Global and Regional Securityò, available at http://www.academia.edu/184232/weapons_of_Mass_Destruction_A_Challenge_to_Global_and_Regional_Security (assessed 8 July 2015)

[692] The work of the IAEA is centered on three areas namely; nuclear verification and security, nuclear safety and nuclear technology.

activities. As Iran refused to comply, the SC imposedsanctions on Iran. These sanctions were tightened subsequently as Iran failed to comply with SCôs resolutions.[693]

At present, there are series of negotiations between the P5+1 that is, the permanent members of the SC, Germany and Iran on Iranôs nuclear programme. So many proposals have been made and rejected. However on November 24, 2013 the parties reached a deal on Iranôs nuclear programme. The deal comprises a short-term freeze of portions of Iranôs nuclear programme in return for decreased economic sanctions. The *terminus ad quem* of the agreement is to arrive at a mutually agreed long term comprehensive solution that will make sure that Iranôs nuclear programme is for peaceful purposes.[694] In July 14 2015 the P5+1 reached an agreement called the ñIran nuclear agreementò which is meant to resolve that year ï long fight to prevent Iran from acquiring a nuclear bomb but allows it to undertake a very small nuclear programme for peaceful purposes. The gist of deal is as follows:

(i) Iran will give up the bulk of its nuclear programmme, namely its enriched uranium (nuclear fuel) and its centrifuges (which turn fuel into weapons material). This will leave Iran with a program that is too little to build a bomb.

(ii) Iran will subject itself to extremely invasive inspection to secure compliance and avoid cheating.

(iii) In exchange the world will remove a lot of economic sanction it has placed in Iran.[695]

The greatest tension in the arms control regime is that between non-proliferation and disarmament.[696] The NPT hinges on an asymmetric consensus between the non-nuclear and

[693] See the following resolutions: SC/RES/1696 (2006), SC/RES/1737 (2006), SC/RES/1747 (2007), SC/RES/1803 (2008), SC/RES/1835 (2008), SC/RES/1929 (2010), SC/RES/1984 (2011), SC/RES/2049 (2013).
[694] See Arms Control Association, ñImplementation of Joint Plan of Action at a Glanceò available at www.armscontrol.org/implementation_of_the_joint_plan_of_Action_At_A_Glance (assessed 8 July 2015).
[695] M. Fisher, "Iran's Nuclear Deal, Explained in Fewer than 500 words", available at http://www.vox.com/2015/7/14/8962035/Iran-nuclear-deal-500-worlds (accessed 14 July 2015).

nuclear states. While the latter are to pursue a regime of complete disarmament, the former are meant to for-swear the nuclear weapons option.[697] The lack of progress on the disarmament side of the divide indicates the lack of commitment on the part of nuclear weapons states to eliminate their stockpiles.[698] Thus: ñOne cannot worship at the altar of nuclear weapons and raise heresy charges against those who want to join the sect.ò[699]

The NPT suffers some constraints which include; the possibility of a state that is a party to the treaty withdrawing from the NPT in order to develop nuclear weapons as in the case of North Korea. However, Resolution 1540 (2004) of the SC addresses some of these loopholes and obligates all States to support the norm of non-proliferation as it notes that the proliferation of nuclear, chemical and biological weapons as well as their means of delivery constitutes a threat to international peace and security.[700]

Apart from nuclear weapons, there are other components of weapons of mass destruction[701] such as chemical and biological weapons. According to the Chemical Weapons Convention (here-in-after, CWC), the term chemical weapon is applied to any toxic chemical or its precursors, munitions and devices that can cause death, injury, temporary incapacitation or sensory irritation through its chemical action.[702] Toxic chemical refers to any ñchemical which through its chemical action on life can cause death, temporary incapacitation or permanent harm to humans

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[696] R. Thakur, The United Nations, Peace and Security (Cambridge: University Press, 2008), p. 173.
[697] T. G. Weiss *et al; op. cit*., p. 99, J. M. Hanhimaki, *op. cit*., p. 65.
[698] T. G. Weiss et al.,*op.cit.,* p. 99.
[699]See Brazilian statement quoted by Douglas Roche (former Canadian ambassador for disarmament) in R. Thakur, *op. cit.,* p. 159.
[700] See W. Walker, ñWeapons of Mass Destruction and International Orderôô in R. J. G. Quilop, *loc. cit.*
[701] Weapon of mass destruction is defined as ña nuclear, biological, or chemical weapon able to cause widespread devastation and loss of life. See C. Soanes*et al*, *Concise Oxford English Dictionary,* 11th edn., revised (Oxford: University of Press, 2008). P. 1635.
[702] Art. 1 (a) and (b) of the Convention.

and animals.[703] The most notable toxic chemicals which have been used or developed for use as chemical weapons are categorized as choking, blister blood, or nerve agent.[704] On the other hand, precursors are those chemicals involved in the production process of toxic chemicals. Hence any chemical used for purposes prohibited under the CWC is regarded as a chemical weapon. The main objective of the parties under the convention is the prohibition of the use and production of chemical weapons as well as the destruction of all chemical weapons. The destructive activities are verified by the Organization for the Prohibition of Chemical Weapons (OPCW).[705]

However, biological weapons ñare complex systems that disseminate disease-causing organismsé to harm or kill humans, animals or plantsò.[706] In other words, a biological weapon disperses organisms or micro-organisms which produce disease in human beings animals and plants.[707]

Biological weapons comprise of two parts namely; a weaponised agent and a delivery mechanism. The former refers to any disease ï causing organism such as viruses, bacteria, fungi

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[703] Art. 2 of the Convention.

[704] Examples of choking agents are chlorine and phosgene; Blisters agents (mustard and lewisite); Blood agents (hydrogen cyanide); Nerve agents (sarin, somaneti).

[705] See OPCW, ñAbout OPCWò, available at http://www.opcw.org/about-opcw (assessed 8 July 2015).
Recently, the United Nations confirmed that chemical weapons were used in the August 21 attack in Syria. However the inspectors stopped short of mentioning who actually used such weapons. This finding resulted in the agreement reached by the U.S and Russia in September 14, 2013 on the framework to secure and destroy Syriaôs chemical weapons by the middle of 2014. Consequent upon the agreement Syria acceded to the CWC and ostensibly provided a list of its chemical weapons to the OPCW which adopted a decision to destroy Syrian chemical weapons. Destruction of Syrian chemical weapons began sometime in October 2013 and at the time of writing Syrian has only given up less than five percent of its chemical weapons arsenal. See C. Dann, ñUN Report Confirms Chemical Weapons Use in Syriaò available at www.nbcnew.com/news/other/un-report-confirms-chemical-weapons-use-in-Syria-f8C11169027 (assessed 8 July 2015). See also A. Deutsch, ñSyria has Shipped out Less than 5% of Chemical Weaponsò available at www.dnaindia.com/world/report-syria-has-shipped-out-less-than-5-of-chemical-weapons-1958205 (assessed 8 July 2015).

[706] UNOG, ñWhat are Biological and Toxin Weaponsò, available at www.unog.ch/80256EE00585943/(httppPages)/29B727532FECBE96(1257186600355A6DB?OpenDocument (assessed 8 July 2015).

[707] B. R. Schneider,ñBiological Weaponò, available at www.britannica.com/tecnology/biological-weapon-of-mass-destruction (assessed 8 July 2015).

etc., which could be used as biological weapons, while the latter refers to biological weapon delivery system which can take various forms such as;

(a) the construction of bombs, missiles, hand grenades and rockets for the delivery of biological weapons;

(b) the construction of spray tanks to be fitted to aircraft, cars, trucks and boats;

(c) the development of delivery devices for assassinations, injection systems and means for contaminating clothing and food .[708] Biological weapons are regulated by the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction. This is an international treaty that bans the use of biological weapons in war and prohibits the development, production, acquisition and stockpiling or transfer of such weapons.[709]

It is an indubitable fact that the world today is threatened by the continued existence of WMDs. Thus, it has been observed that:

> they share one deadly trait: they are indiscriminately lethal. They recognize no difference between military uniforms and mufti, between tanks and ambulances, between the old and the young, between the invalid and the healthy, or between man and woman, mother and child or even plant and animal.[710]

The above postulation reinforces the argument that the possession of weapons of mass destruction does not only raise serious moral questions, but have profound consequences for international law.[711]

CHAPTER SEVEN

[708] UNOG,ñWhat are Biological and Toxin Weaponsò, *loc. cit.*
[709] See Art. 1 of the Convention.
[710] J. Dhanapala, ñInternational Law, Security and Weapons of Mass Destructionò, available at http://www.un.org/disarmament/HomePage/HR/docs/2002/2002May09_NewYork.pdf (assessed 8 July 2015)
[711] *Ibid.*

FINDINGS, RECOMMENDATIONS AND CONCLUSION

7.1 Findings

In course of this dissertation, the following findings were made

(a) The founders of the United Nations(here-in-after the UN) created an organization that was designed to take effective collective measures in the face of any threat to the peace, breaches of the peace and acts of aggression. However, the collective security system envisaged under the Chapter was shattered and indeed went into complete paralysis as a result of the Cold War between the West and the East especially the US and the defunct Soviet Union. Thus, it could be rightly said that the veto held by the permanent members of the Security Council(hereafter, the SC) is not the real problem. The real problem is, disagreement among those with power.

(b) For the collective security system as contemplated by the Charter to work effectively, there must be cooperation among the members of the SC, especially the permanent members.

(c) As the ideal collective security system became malfunctioned, the UN designed a new means of peace maintenance called peacekeeping

(d) Strictly speaking, Article 42 of the Charter which provides for large scale military enforcement action following a decision of the SC under Article 39 of this Charter has not been utilized. Thus, during the Cold War, it remained a dead provision under the Charter. During this era, the only case of a comprehensive military enforcement as in the Korean crisis did not come under article 42, but rather it came under Article 51. However, the end of the Cold War saw Article 42 being repeatedly put into action.

Notable examples are the resolutions of the SC[712] which mandated member states to stop the invasion of Kuwait by the Iraqi forces.

(e) Again, the undertaking made by members of the organization to contribute to the maintenance of international peace and security in making available to the SC on its call and in keeping with a special agreement or agreements,armed forces, has never happened, as no such agreements have been made. The absence of such agreements has occasioned some improvised arrangements which have seen the SC rely on voluntary contributions of member states.

(f) Further, the Military Staff Committee(hereafter, the MSC) provided under Article 47 of the Charter whose functions include; advising and assisting the SC in all questions as regards its military requirements has never been put into effective use. Commenting on the impotence of the MSC, Hanhimaki stated thus:

> None of the P ï 5 saw an independent military force serving their interests. The mistrust and tensions of the early Cold War including the creation of such military alliances as NATO and the Warsaw Pact ï meant that none of the p ï 5 provided the required forces[713]

(g) Peacekeeping which was designed by the UNas a substitute for collective security was largely successful during the Cold War era. These missions helped in reducing conflicts and protected lives. Cooperation among the permanent members among other reasons has been given as the reason for this success. However, UN peacekeeping was unsuccessful in addressing the root cause of conflicts and detailing out plans for long-term political solutions. A vivid illustration of the weakness of UN peacekeeping in this area is the peacekeeping missions that are still in operation for decades. These include; United Nations Truce Supervision Organisation (UNTSO), established in 1948 to supervise Arab

[712] SC/RES/665(1990), SC/RES/678(1990).
[713] J. M. Hanhimaki, *The United Nations: A very short Introduction* (Oxford: Oxford University Press).

Israeli truces, the UN peacekeeping force in Cyprus, which was established in 1964, still provides a buffer zone between Turkish and Greek communities of the Island of Cyprus.[714] Therefore, peacekeeping which was contemplated to be a mechanism for buying time, so as to allow diplomats to work on a permanent solution to disputes, became a substitute and an alternative for political inaction.[715] However, the success of traditional peacekeeping was challenged after the Cold War as a result of the changing nature of international conflicts, hence the evolution from classical peacekeeping to integrated multidimensional peacekeeping and quasi- enforcement peacekeeping operations.

(h) This evolution has made the nature of peacekeeping to be more complex, dangerous and expensive. In this vein, the distinction between peacekeeping and peace enforcement has become blurred as was in the case of Somali, Bosnia ï Herzegovina etc.

7.2 Recommendations

1 The members of the UN should embrace collective security and international diplomacy in settling conflicts. No nation should adopt the unilateral use of force except as permitted under the Charter.

2 For the Security Council to effectively carryout its primary responsibility of maintaining international and security, we strongly recommend that there should be cooperation among the members of the Security Council especially the five permanent members of the Security Council. National interest should give way to what is the best interest of the international community.

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[714] E. Y. Kutbay, ñMaintenance of International Peace and Security. A Historical Assessment of the Evolution of Unitedò available at www.ontimedergi.com/MakaleDosyalari/51/PDF2004_112.PDF (assessed 14 July 2015

[715] See Abi ï Saab, 1995:5 in E. Y. Kuthay, *loc. cit.*

3(i) Peacekeeping which has become an alternative to collective security must be adequately funded.

3(ii) It is therefore suggested that every member of the United Nations should set aside one percent of its defence budget to the United Nations for peacekeeping purposes.

4 In the event of the deployment of peacekeepers, the consent of all the parties the dispute as a matter of practical necessity should be sought and if possible, obtained.

5 The United Nations Security Council should be restructured to make it more democratic and representative.

6 The United Nations Security Council should be reorganized to reflect the present changes on the basis of power or strength or state which have occurred during the past decades.

7(i) As regards terrorism it is strongly suggested that the responses of the UN should be all encompassing and comprehensive.

7(ii) In this vein, the responses of the United Nations should not be limited to military actions which are mainly punitive and reactionary. Preventive measures must be adopted.

7(iii) The United Nations should approach the issue of terrorism within the broader context of international peace and security by helping to eliminate the appeal of one of the platforms commonly referred to by terrorists which is poverty. The UN should also rise up to the responsibility of strengthening weak states and rebuilding collapsed ones as such states may become attractive to terrorists when their activities in other states stand at a risk[716].

8 The Counter Terrorism Committee should be sufficiently staffed and properly financed. Without this, the CTC will be left with no other option than to provide minimal services.

[716] J. Boulden*et al* (eds), Terrorism and the UN (USA: Indiana University Press, 2004) p.15

7.3 Conclusion

The primary purpose of the UN asenshrined in the Charter is the promotion and maintenance of international peace and security. At the formation of the organization, the founding fathers were primarily concerned with inter-state disputes which could threaten the peace. Recent threats to peace and security such as internal disputes, human rights violations, humanitarian disasters, terrorism and nuclear proliferation were uncontemplated. Thus, the conception of threat to the peace has undergone a considerable dynamics.[717] In other words, the UN has to operate in an international environment that is more complex, challenging and demanding compared to the world of 1945.[718]

If we compare the real record of success of the UN to the lofty goals enumerated in the Charter,the UN is bound to be subjected to destructive criticisms or even derision.[719] However, when we consider the fact that the UN actions depend largely on state foreign policies which are even sensitive to the calculus of narrowly conceived national interests, and that most often the world body is confronted with onerous tasks which states have been unable to solve on their own, then the criticism will be minimal.[720] In our assessment of the UN, we should always recall the remarkable words of a former Secretary General of the UN ï Dag Hammarskjold that the purpose of the creation of the UN was not to take us to heaven but to save us from hell. For the world to get close to the Utopian state of life where according to the prophet Micah, nations ñwill hammer their swords into ploughshares and their spear into bill- hooks. Nation will not lift sword

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[717] B.Simma*et al*. (eds.), *The Charter of the United Nation A Commentary*, 2nd edn., vol. 1 (Oxford: Oxford University Press, 2010) p. 726.
[718] R. Thakar, *The United Nations, Peace and Security* (Cambridge: Cambridge University Press, 2008) p. 293.
[719] T. G. Weiss *et al, op.cit.,* p. 370.
[720] *Ibid.,*pp 370 ï 371.

against nation or even again be trained to make warò,[721] the UN must receive greater support from member states especially the permanent members. Hence, Norman Cousins declares:ñif the United Nations is to survive, those who represent it must bolster it; those who advocate it must submit to it and those who believe in it must fight for it.[722]

Our thesis therefore is that, under Charter, the Security Council has the primary responsibility in the maintenance of international peace and security. However, the other organs of the United Nations have a secondary or residual in this regard. Again, inspite of the fact that the collective security system of the United Nations has been vitiated leading to an improvised mechanism called peacekeeping, the Security Council is still relevant in the maintenance of international peace and security, subject to the cooperation of the permanent members of that council.

[721] Jerusalem Bible, Micah, Chapter 4:3
[722] Saturday Review April 15, 1980 in J. M. Hanhimaki, *op cit.,* p. 135.

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