OBSERVANCE OF FAIRNESS AND TRANSPARENCY IN UNITED NATIONS ORGANISATION: A CRITICAL APPRAISAL

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I. Introduction

United Nations Organization through its organizational set-up, Human Rights formulation and enforcement Mechanism, is now impliedly performing the role of global governance. The charter bodies' along with plethora of Human Rights Treaties has developed United Nation into a legal order regulating the behaviors of nations. Now it is taking decisions, which has practical implication for many countries, specially by adopting the Chapter VII instruments to protect international peace and security. It had protected some grave human rights violations in genuine cases but it has also failed in some cases. This is because of organizational set up (specially with reference to Security Council) and prevalent International Politics. U.N. was established in 1945 to prevent further occurrence of world war, and is success in this purpose since no world war has been occurred after II World War. Further, it has taken actions against states violating Human Rights specially on the ground of race, apartheid, genocide, religion and gained positive response. It has worked as watchdogs of International Community on the behaviors' of state towards their own Citizen. It was establish to ensure peace and security in the world and successfully performed this role to some extent. But everything is not good with United Nations Organization, specially in relation to fairness and Transparency in United Nations. Because the very purpose and principles for which it was established, is not followed by UNO. United Nations is based on the equality and sovereign rights of all the states with the object to promote peace and security. Its main purpose is to promote Human Rights, fundamental freedoms and justice in the world. Therefore it become important to examine whether UN is carrying out its objectives in a manner, which is just, fair and transparent.

II. Principle of Justice and United Nations

UN Charter under Art.(1) adopts the 'Principles of Justice' as a norm according to which organs of the United Nations shall act. Normally, the concept 'Principles of Justice' has very little to do with law independently. However, one could include justice within law only to mitigate conflict inside the law. For example, when the law is indeterminate, principles of justice or equity could come forward. In International Community where law is not

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much certain, principle of justice becomes very important to interpret the conduct of state. This principle of justice ensures the minimum standard to maintain just relation in international community.[2] According to Hart, justice is traditionally thought of as maintaining or restoring a balance or proportion, meaning to treat like cases alike and different cases differently.[3] In the Continental shelf case the ICJ has noted that justice of which equity is an emanation is not abstract justice but justice according to the rule of law. Which is to say that its application should display consistency and a degree of predictability even though it looks with particularity to the more peculiar circumstances in an instant case; it also looks beyond it to principles of more general application? This is precisely why courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms.[4] In his 1992 Agenda for Peace, the Secretary General pointed out that the principles of the charter must be applied consistently, not selectively, for it the perception be the latter, trust well wane and with it the moral authority which is the greatest and most unique quality of that instrument.[5] In San Francisco Conference it was argued that there is no real peace and security if these are achieved only at the sacrifice of justice. Insertion of the clause 'in conformity with Principles of Justice and International Law' at San Francisco was intended to provide a safeguard against the settlement of international question on the basis of political expediency.[6] Therefore, action of the UN bodies, where a judgement is made solely on the basis of political consideration disregarding principles of international law and justice, the judgement may provide serious concerns on the actions of the UN whether it has acted in good faith. For example, if the security council decides a case under Art. 39 and provides the reason why the situation creates a threat to the peace within the meaning of the Article, it incurs a moral obligation upon itself to treat other similar cases alike.

However the practices of the Security Council and other UN bodies show that they do not treat like cases alike. Specially the Security Council which enjoys broad discretionary power when it acts under Chapter VII of the charter. The legal competence of its decisions may not be questioned as long as the members of the Security Council, specially the five *permanent* numbers are in consensus. Although the Security Council is under no obligation to make a determination under Art. 39 even if a threat to breach of the peace

2 H.L.A. Hart, *Concept of Law* 157 (1961).
3 *Id* at 155.
4 Judgement of June 3, ICJ Reports at 39 (1985).
5 Agenda for Peace, available at: http://www.un.org./Dcr.SG/agpeace. html, viewed on 22nd March 2008.
6 Leland M. *Goodrich,* Charter of the united nations 93 (1969).

exists,[7] coherent action on the part of the council is nevertheless required for the greater legitimacy of its actions. But this is not the position, for example, a UN operation was sent to force out the junta that had ousted the winner of Hattie's UN supervised elections but no such action had been taken in Cambodia to remove Prime Minister Hun Sen. In Resolution 794 (1992), the council determined that the 'magnitude of the human tragedy caused by the conflict in Somalia' constituted a threat to international peace and security and similar determinations were made in Iraq by resolution 688 (1991). Yet no such determinations were made in respect to the genocide in Rwanda, use of force in Chechnya, or the continued occupation by Israel of Palestinian territories and Israel's oppressive measures.[8] This certainly raises the doubt whether Security Council follows the principles of justice.

III. Uniting for Peace Resolution and US Attack on Iraq

General Assembly also did not follow the principle of justice by coherent action on its part. Especially in case of US attack in Iraq in 2003, where uniting for peace resolution could be an effective remedy. But General Assembly could not pass the resolution. In this case some country urged the international community to call for an emergency session of the General Assembly to take action with regard to the threat to the peace posed by the US military action against Iraq, which had been taken without the explicit authority of the Security Council.[9] A uniting for peace resolution would clearly have operated in this case if one of the permanent members of the Security Council had exercised its veto, for such a resolution refers to the duty of the permanent members to seek unanimity as well as to exercise restraint in the use of the veto. The uniting for peace resolution procedure would also have applied if a permanent number had abstained, provided that the failure to seek unanimity or the abstention could be seen as meaning that the Security Council had failed to exercise its primary responsibility to maintain international peace and security because of lack of unanimity of the permanent members. The US led invasion in Iraq fulfilled the necessary requirements for the invocation of the Uniting for peace, act of aggression whether one considers the imminent invasion of Iraq by the US-led coalition forces or Iraq's non-compliance with council resolutions and proliferation of weapons of mass destruction and long range missiles as recognized by the Security Council in resolution 1441 (2002), secondly the impasse in the security council in which the United States, the United Kingdom and Spain, on the one hand and France

7 Rosalyn Higgins, Problem and Process of International Law and How we Use It, 719 (1994).

8 Elias Davidson; 'The Security Council's Obligations of Good Faith" *XV Flo. J. Int'l L.* (2003) available at, http://www.aldeilis.net/just/econsanc/goodfaith.pdf. viewed on 25 March 2008.

9 http://www.ccr_ny.org/vr/reports/docs/uniting for peace viewpoint.pdf viewed on 19 March 2008.

and Russia, on the other, proposed different solutions in which it was clear that France would veto any resolution to use force in Iraq. There was a lack of unanimity among the permanent members, thirdly, the absence of any further resolution of the security council following resolution 1441 (2002) in light of the declared intentions of the US and UK to be prepared to proceed with the use of force without a further resolution, meant that the security council had failed to exercise its primary responsibility of maintaining international peace and security.[10]

Even after the US had attacked Iraq, the initiative for the use of a uniting for peace resolution remained active. Both the twenty two members' Arab group at the United Nations, and the fifty seven members Organization of Islamic Conference (OIC), decided to introduce a resolution to convoke an emergency meeting of the General Assembly of the United Nations demanding an immediate end to the US invasion of Iraq. Their intention was to demonstrate the overwhelming international opposition to US unilateral warfare and to discuss the means to bring about a withdrawal of all foreign troops from Iraq. The Non-Aligned Movement of 115 nations, as well as several national governments, including Russia, China, Indonesia and Jamaica had also expressed their support for an emergency UN General Assembly session under the 1950 UN resolution 377.[11] The General Assembly could have achieved a number of purposes by adopting such a resolution. Specifically, it could have:

1. Supported the intentions and strategies approved by Security Council in Resolution 1441 (2002),
2. endorsed an increase in the seizure of UNMOVIC weapons inspectors and their equipments and facilities,
3. Called upon Iraq to comply fully with the UNMOVIC weapons inspections regime,
4. Urged all member states to refrain from the threat or use of force against the territorial integrity or political independence of any state

10 Duncan Currie, 'Note: Convening an Emergency Session of the General Assembly Under the 'Uniting For Peace' Resolution 377 (A)(V)', 25 February 2003, available at; http://www.greenpeace.org./raw/content/international/press/reports/unitingforpeace resolution.pdf visited on 22 April, 2008.

11 Arab Group and the OIC had also published drafts of the resolutions they wished to introduce at the emergency UN General Assembly session. The Arab Group resolution reflected the Arab League resolution passed at its Cairo meeting on March 24 calling for an immediate end to the war, reaffirmation of Iraq's sovereignty and the return of UN inspectors and staff to run the oil for food programme. That resolution was passed unanimously, with Kuwail abstaining available at, http://www.iarovchepub.com/other/2003/301 un_res_377.html, visited on 2 March 2008.

5. Declared that the use of force against Iraq was a violation of Art. 2(4) of the UN charter
6. Condemned the use of force by any state against Iraq
7. Called upon all states to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control
8. Requested the Secretary General to keep member states informed as to the progress of the implementation of the resolution.

These steps could certainly have put pressure on the US and the condition led by it not to use force against Iraq in disregard of, on the one hand, the rules of international law and, on the other, the popular view expressed in the most representative international body i.e., the General Assembly of the United Nations. A resolution endorsed in the General Assembly by means of the Uniting for peace procedure and authorizing, for example resistance to an aggression provides moral and political weight when the question of legality or legitimacy is concerned.[12]

IV. Judicial Review and United Nations

In the legal system of states, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the charter to place the ultimate authority to interpret the charter in the international court of justice were not accepted, thus, opinion rendered by it is only advisory in nature but it has no binding effect. As anticipated in 1945, therefore each organ must in the first place at least determine its own jurisdiction.[13] This is against the rule of law and principle of justice. Since UN established different bodies to perform different functions, therefore there must be some organ with the power of judicial review to ensure that each organ of UN performs their function in conformity with UN charter. But neither the UN Charter nor the statute of the International Court of Justice directly addressed the question of judicial review. Chapter IV of the UN charter authorizes the General Assembly to make non-binding "recommendations" to member states or the Security Council[14] and suggests some limits on the Assembly's authority to make such recommendations[15] but it does not mention whether the validity of Assembly recommendations can be reviewed by the world court. Chapter V empowers the Security Council

12 See, http//hull.ac.uk/law/docs/mccoubreylecture03.doc, viewed on 3 April 2008.

13 *Geoffry R. Watson, "Constitutionalism, Judicial Review and World Court" 34 Harverd International Law Journal 33(1993).*

14 UN Charter Art. 10, Art. 13, Para.1, Art. 14.

15 UN Charter Art. 12, Para 1 prohibits assembly recommendations while the Security Council in handling a 'dispute or situation'.

to make decisions binding on all states[16] and suggests that this power is limited by the purposes and principles of the United Nations[17] which include compliance with International Law[18] but it does not indicate whether the world court can review council decisions for conformity to these "Purposes and Principles". Chapter VI, which contemplates recommendations (as opposed to binding decisions) by the council and the Assembly for the peaceful settlement of disputes, does envision some role for the court.[19] Art. 36 (3) provides that in making recommendations, the Security Council "should also take into consideration that legal disputes should as a general matter be referred by the parties to the international court of justice". This provision however, obviously falls for short of an explicit power of judicial review over Security Council and General Assembly recommendations for peaceful settlement of disputes. Chapter VII, which empowers the Security Council to either make recommendations or decide on measures necessary to maintain international peace and security, says nothing about any role for the court in reviewing council resolutions. Indeed it does not mention the court at all.

However, Art. 92 of the UN charter declare the International Court of Justice to be "the principles judicial organ" of the United Nations. Art. 93 provide that all state parties to the UN charter are profacto parties to the statute of the court. Art. 94 obliges state party to dispute before the court to abide by its judgments and allows the prevailing party by its judgments and allows the prevailing party to seek assistance from the Security Council in the event the losing party fails to comply with, the judgments, Art. 96 authorize the political organs of the UN to seek advisory opinions from the court on various questions. No provision of Chapter XIV explicitly addresses judicial review. Nevertheless the term "principles judicial organ" in Art. 92 might imply a power of judicial review particularly if other states agree that some "judicial" body must have the authority to examine the validity of acts of other organs of government.[20]

Further other provisions of the UN charter provide little additional guidance on whether the court can exercise any power of judicial review. Art. 103 of the charter provides that "obligations under the present charter" shall 'prevail' over conflicting treaty obligations, but nothing in the text of the provision suggests it is to be enforced only by the court. Moreover the provision by its terms obliges to the obligations of states, not the acts of UN organs.

16 Art. 25 of UN Charter.
17 Art. 24, para 2 of UN Charter.
18 Art. 1, para 1, Art. 2, parat 3 of UN charter.
19 Art. 36, para 2 and Art. 33 -38 of UN charter.
20 Ebere Orieka, "The Legal Validity of Ultra Virus Decisions of International Organizations" *77 Am. J. Int'l L*. 239- 242 (1983).

Even during the negotiating history of the UN Charter Belgium made proposal to permit judicial review, which were rejected. In its suggestions on the Dumbarton Oaks Proposals Belgium urged that whenever the Security Council intervened to settle a dispute, its action should become "final" only after the parties had on opportunity to "ask an advisory opinion from the International Court of Justice as to whether the decisions respected its independence and vital rights". Belgiam also proposed amendment to the Chapter on Pacific Settlement of disputes" in the draft UN charter which provided:

"Any state party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the court considers that such rights have been disregarded or are threatened, it is for the council either to reconsider the question or to refer the dispute to the Assembly for decision. The Belgium delegate justified this amendment proposal on the ground that if matter would be remanded to the Security Council or the General Assembly after the Court's decision, indicating that the amendment would not "limit" the powers of the Security Council, but rather would "strengthen the juridical basis" of Security Council decisions. Three states, all of which expected they would become permanent members of the Security Council spoke against the Belgium amendment.[21] The Soviet delegate "felt that the Security Council should receive the full confidence" of the members of the organization, and that "there should be no question in the minds of any delegates that the Security Council might wish in any way to infringe the rights of a sovereign state. The Belgiam Amendment, according to the Soviet delegate, would "weaken", the Council, which might even be made a "defendant before the Court", The U.S. delegate noted that the working drafts already required the Security Council to act in accordance with the purposes and principles of the organization" and with due regard for principles of justice and international law." The French delegate expressed "sympathy" with the amendment, but argued it would be ineffective, "especially since it involved a dispersal of responsibilities in the organization". The French delegate suggested clarification of the difference between Security Council recommendations and decisions, and suggested that the subcommittee on drafting" endeavor to give the most complete guarantees possible that the Security Council accomplish its task according to law and justice.[22]

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21 *Leland M. Goodrich, Charter of the United Nations* 667-68(1969). The Original framework for the charter, the Dumbarton Uaks Proposals, included as permanent members of the Security Council the United States, the U.K., the Soviet Union, the Republic of China, and France.

22 Hans Kelson, *the Law of the United Nations* 446-47 (1954).

The withdrawal of the Belgian proposal can hardly be interpreted as a determination by the framers that judicial review was unacceptable. Instead, it simply reflects Belgian's realization that judicial review of Security Council recommendations taken under what is now chapter VI was unnecessary since those recommendations would not be binding anyway. Withdrawal of that proposal had nothing to do with the acceptability of judicial review for binding Security Council such as those taken pursuant to chapter VII of the charter. Thus negotiating history of the relevant UN instruments do not rule out all forms of judicial review. Instead, they suggest that any UN Organ, including the court should ignore a "generally unacceptable" interpretation of the charter by another organ. Instead the argument during the drafting of charter that Security Council shall act in accordance with purposes and principles of charter impliedly suggest that for legitimacy and enhancing confidence of state parties there should be judicial review. How can a body, which has no democratic representation, take binding decisions?

However, the International Court of Justice has addressed the question of judicial review in some cases. In the Certain Expenses Case[23] the General Assembly requested an advisory opinion from the Court on whether member states were responsible for expenses relating to UN Operations in the Congo in 1960-61 and in the Middle East in the late 1950. Art. 17(2) of the UN Charter provide that "the expenses of the organization shall be born by the members as apportioned by the General Assembly." The legal question posed by the General Assembly was whether expenses for the Congo and Middle East Operations were "expenses of the organization" within the meaning of Art. 17(2).

At the outset of its opinion, the court noted that the Assembly had rejected a French amendment to the resolution requesting an advisory opinion. The amendment would have asked the court to decide whether the expenditures were "decided on in conformity with the provisions of the charter" that is, whether the Assembly and the Security Council had acted ultra virus in authorizing the expenditures and only thereafter to consider whether the expenditure were "expenses of the organization" within Art. 17(2). The court states that rejection of the French amendment did not preclude it from considering whether the expenditures were "decided on in conformity with the provisions of the charter, if the court finds such consideration appropriate." The court added that it must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.[24] However, by upholding the Assembly and Council resolutions in question, the court said that in the legal system, there is often some procedure

23 1962 ICJ at 156.
24 *Id* at 168.

for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposal made during the drafting of the charter to place the ultimate authority to interpret the Charter in the International Court of Justice was not accepted; the opinion, which the court is in the course of rendering, is an advisory opinion. Therefore each organ must, in the first place at least, determine its own jurisdiction.

These statements indicate that court did not deny that it might have some authority to interpret the charter. Only that it did not have the final authority to do so. If each organ must determine its own jurisdiction "in the first place at least", it seems plausible that some other organ might pass on Jurisdictional question after a political organ makes a prima facie determination that it has jurisdiction to act. The court gave other indications that it might consider exercising a power of judicial review. In particular, the Court held that when the Organization takes action, which warrants the assertion that it was appropriate for, the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultravires. Presumptions can certainly be overcome. The court's language suggests that such a presumption might not apply to action that is not "appropriate for the fulfillment of one of the stated purposes" of the United Nations that is, action which is manifestly ultra virus.

V. Lockerbie Case

Lockerbie case is very important so for as principle of judicial review and United Nations is concerned. Because this case presented the complex interrelationship between fundamental legal norms and vital ongoing political and security concerns.[25] This case concerns a dispute arising from a joint request by the United States and the United Kingdom, dated November 27, 1991 that Libya, inter alia, surrender for trial to either the United States or the United Kingdom two of its nationals charged with the bombing of Pan American Flight 103 on December 21, 1988 over Lockerbie, Scotland, accept responsibility for the actions of those designated as "Libyan officials" and pay appropriate compensation. These demands were endorsed by Security Council Resolution 731, adopted on January 21, 1992 which urged Libya to provide a full and effective response to those requests.[26] In response, Libya informed the Secretary General on February 27 that it had "no objection in principle" to handling over the two subjects, but would do so only if the Secretary General established a committee of Impartial judges to inquire into

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25 Vera Gowlland Debbas, "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" *88 American Journal of International Law,* 644 (1994).

26 SC Res. 731 (Jan.21, 1992) 31 ILM at 732 (1992).

the charges against the two subjects, and only if the subjects were extradited to a "third party".[27] On March 2, Libya further explained its failure to extradite by noting that "Libyan Law which had been in force for more than 30 years does not permit the extradition of Libyan nationals. Libya argued that such a law "cannot be altered by a decision of the Security Council, whether a recommendation or a binding resolution.[28]

After this, on March 3, Libya filed suit against the United States in the World Court seeking a judgment that U.S. efforts to obtain custody of the fugitives violated the Montreal convention on aircraft sabotage, which provides that a requested state may choose either to extradite a fugitive charged with sabotage or submit that person to its own authorities for prosecution.[29] Libya also sought an order "indicating provisional measures" that is, an order temporarily restraining the United States from taking any further steps against Libya, such as the imposition of economic sanctions.

On April 14, 1992, the World Court handed down its decision on Libya's request for preliminary relief, rejecting the application by a vote of eleven to five. The majority declined to rule on the U.S. contention that the court lacked jurisdiction because the Montreal Convention called for a six-month delay before submission of a dispute to the court. The majority said it could rule on the application for the indication of provisional measures without deciding whether it had jurisdiction to hear the merits. The majority then held that Libya was not entitled to provisional relief stressing Art. 103 of the UN Charter, which provides that obligations under the Charter prevails over treaty obligations such as those in the montreal convention, the court held that "whatever the situation previous to the adoption of Security Council Resolution 748, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures. The court added that the indication of provisional measure would "be likely to impair" U.S. rights under the Council Resolution.[30]

The brief majority opinion revealed less about the Court's thinking than the separate opinions of individual judges. Several of the judges were satisfied that the Security Council resolutions were controlling, these judges apparently saw no need to inquire into the validity of the council's acts. Judges Evenson, Tarassov, Guillaurne and Aguilar Mawdsley signed an opinion that

27 31 ILM at 737-38 (1992).

28 *Id* at 739-40.

29 *Id* at 116. Libya also argued that U.S. violated Art. 8 of the Montreal Convention, which permits the requested state to refuse extradition if there is no relevant bilateral extradition treaty in force and if the requested state's law conditions extradition on the existence of an extradition treaty.

30 *Id* at 127.

endorsed the reasoning of the majority opinion without exploring the charter basis for the Council's resolutions. Acting President Oda, too, asserted in his concurring opinion that the Security Council resolution was dispositive.[31] But even he hinted that the court might have to exercise a power of judicial review if a state argued that the council had deprived it of "sovereign rights" under general international law.[32]

However, several judges, felt obliged to clarify their belief that the rejection of Libya's application for provisional relief did not imply that the court was abdicating its role as the chief judicial organ of the United Nations.[33] A number of judges believed that court should at least consider whether the council's acts were valid. Citing the Namibia Case, Judge Shahabudden concluded that the Council resolution at issue was entitled to a presumption of validity. Relying on this presumption, and mindful of the preliminary procedural posture of the case, he concurred in the majority opinion but clearly implied that the court should have some role in enforcing the limits of Security Council power.[34]

Judge Bedyaoui expressed similar reservations, also conceding that the council resolution imposing sanctions on Libya was entitled to a presumption of validity, particularly because the case had not yet reached the merit phase. He added, however, that even at the preliminary stage of the suit the resolution should not be considered prima facie binding if its 'object' or 'effect' was 'to prevent the exercise, by the court itself, of the judicial function.'[35]

Judge Weeramantry echoed this view, noting that the framers clearly intended the Security Council to operate in accordance with the Charter. He seemed less certain that the court should play any role in reviewing Council acts.[36]

However judge El-Kosheri, the ad hoc judge named by Libya, went so far as to declare invalid the Security Council's resolution imposing sanctions.

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31 *Id* at 129.

32 *Id* at 131.

33 *Id* at 139. (Lachs, J. Concurring). Judge Lacks accepted the majority's reasoning, but call for cooperation between the court and the Council, noting that these are the only two U.N. Organs with authority to issue binding decisions.

34 *Id* at 140 (Shahabuddeen, J. Concurring).

35 *Id* at 156. Judge Bedyaoui dissented no because he thought the council resolution was prima facie invalid though he clearly had doubts on that score but because he thought the court could indicate provisional measures other than those requested by Libya. ID at 158. In particular, he argued that the court could order both parties to refrain from any action that might extend or aggravate the dispute.

36 *Id* at 174-75. (Weeramantry, J., dissenting).

He asserted that states had the right to disobey council resolutions lacking a basis in the charter, since Art. 25 provided that states agree to obey council decisions "in accordance with the present charter".[37] He also argued that the court had the power to invalidate council acts inconsistent with the charter. He said that council resolution imposing sanctions was *ultra virus* because it violated Libya's right of "sovereignty" under the charter.[38] He relied in particular on Art. 1(2) and Art 5 of the Charter, which speak of "equal rights and self determinations" of peoples, as well as Art. 2 (7), which forbids the United Nations to "intervene in matters which are essentially within the domestic jurisdiction of any state".[39]

Thus this decision marked for the first time a significant portion of the world court intention that it could exercise a power of judicial review in contentious cases. It is important not simply because a contentious case has arguably greater presidential value than an advisory case, it also suggests that the court does not think that judicial review should be exercised only when implicitly or explicitly endorsed by a U.N. organ seeking an advisory opinion on the effect of that organ's acts. Infact for observance of principle of justice and equality the ICJ should be invested with the power of judicial review to enhance the legitimacy of United Nations.

VI. Principle of Good faith, Legitimacy and UN Bodies

The principle of good faith has a long history which is in some way related to the theory of abuse of rights. The theory of abuse of rights has three facets (A) The malicious exercise of a Right (B) The Fictitious Exercise of a Right (C) Interdependence of Right and Obligation and (D) Abuse of Discretion. These grounds become very relevant in relation to United Nations especially when all the organs of UN within their domain are not responsible to anyone. The apparent expectation that the UN will function under the Rule of law cannot be reinforced by the normal legal safeguards one would expect to find surrounding the exercise of executive powers in a democratic, constitutional system.[40] These circumstances provide a compelling reason for subjecting the council to the test of good faith. Specially in case of the Security Council which possesses a wide margin of discretion to determine when collective action for the maintenance of peace is necessary. In other way it possesses certain right such as to characterize circumstances as threatening international peace and security, to select measures in response to such circumstances and to implement or order member states to implement

37 *Id* at 174-75. (weeramantry, J., dissenting).
38 *Id* at 206-070. (weeramantry, J., dissenting).
39 *Id* at 210-211.
40 Derek Bowett, "The Impact of Security Council Decisions of Dispute Settlement Procedures" *5 Eur. J. Intl'l L.* 89 (1994).

such measures. There are a number of occasions in which the Security Council might abuse such right. This may arise when it determines the existence of a threat to the peace, breach of the peace or act of aggression or fails to do so. The security council would thus not be acting in good faith if it were to fraudulently characterize a situation as a threat to international peace and security, which by any reasonable standard does not constitute such a threat states exercising their veto power, or threatening to do so, would equally breach their obligations of good faith, if by such conduct they prevent the council from responding effectively to serious threats to, or breaches of the peace.

Under the provision of the UN Charter, the Security Council is entitled to initiate collective enforcement measures when having determined either one of three situations, the threat to the peace, a breach of the peace or an act of aggression. While the UN General Assembly adopted in 1974 a definition of "aggression", its use is not binding on the council. Moreover, the council has never made a determination that a given situation or use of force by any state constituted an act of aggression. The council in order to retain the highest degree of discretion in responding to such acts designates even blatant acts of aggression as "breaches of the peace". In spite of distinguishing between aggression and a breach of the peace in its terminology, the council has responded to various breaches of the peace in a similar manner as if they were acts of aggression.[41] For example the invasion and occupation of Kuwait by Iraq in August 1990 was not characterized as an act of aggression but as a breach of the peace.

After the demise of the Soviet bloc, a perceptible widening could be observed in the interpretation by the Western-dominated security council of the concept of threat to the peace. Whereas formerly the concept was mostly limited to blatant interstate threats, the council widened its interpretation to selected internal conflicts and other circumstances in which no direct threat is leveled at any particular state. For example by resolution 794(1992), the Security Council determined that the 'magnitude of the human tragedy caused by the conflict in Somalia" constituted a threat to international peace and security. Therefore it becomes necessary that the Security Council's powers to characterize a situation as a threat to the peace must be assessed in the light of the principle of good faith. Good faith in this context requires that the council act responsibly, effectively, objectively, fairly and with a sense of proportion. To act responsibly would mean to place international peace and security at the center of its concerns, and not its permanent member's particular interests. To act effectively requires that the council achieve its aims with the

41 Elias Davidsson, "the U.N. Security Councils obligations of Good Faith" *15 Florida Journal of International Law* 545 (2005).

least human and material costs and refrain from adopting measures unlikely to restore the peace. To act objectively would mean that its assessments must be based on verifiable facts, conduct or threats, rather than on speculations. To act with a sense of proportion would be to adjust responses to the immediacy and severity of the threat to the peace that has been determined.[42]

VII. Right of Veto and Principle of Sovereign Equality

The first principle of the United Nations is that the organization is based on the principle of the sovereign equality of all its members. According to these principles, all the members of the United Nations are equal in the eye of law irrespective of their size or strength. They are all equal in the eye of Law and no discrimination can be made on any basis. But there are certain provisions in the charter, which are inconsistent with this principle. In the charter permanent members have been conferred upon some special privileges and rights. China, France, Russia, the United Kingdom and the United States (The permanent 5 or P. 5), possess two crucial assets as members of the Security Council: a permanent seat and the right of veto, which ensures their immunity against U.N. coercive action. According to Art. 27, for the decision on all-important matters in the Security Council, the affirmative vote of all permanent members is essential. In accordance with this provision all members are not infact equal. Thus although in principle the United Nations organization is based on the principle of sovereign equality of states but the great powers are legally and actually unequal to the smaller states. This is the biggest problem in relation to fairness and transparency in United Nations. It leads to the question of weighting of power against legitimacy.[43] All the 5 permanent members are the most powerful country of the world. They are the main weapon exporters, and each of the P. 5 is a nuclear power. Each of the P. 5 has committed at various times serious breaches of the UN charter and of international law. Such as, acts of aggression, military occupation, international terrorism, war crimes and complicity with genocide. They have provided massive military and economic support to governments known to engage in unlawful belligerent occupation, racial discrimination, war crimes and complicity with genocide or gross violations of human rights. It sometimes hearts the soul of the community of nations. At the time of Cold war, this veto power performed the role of checks and balance between separate branches, the reciprocal operation of the veto during the cold war and the resultant paralysis of the Security Council created a system that was its functional equivalent.

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42 Htt://www.icrc.org/web/eng/siteengo.nsf/iwp List 163/D9DAD 4 EE 8533 DAEFC 1256 B 66005 AFFEF (April 7, 2000).

43 Thomas M. Frank, "The Power of Legitimacy and the Legitimacy of Power; International Law in an Age of Power Disequilibrium" 10 *American Journal of International Law* 91 (2006).

The effect of this paralysis in particular cases was often tragic, the resulting system however, at least from the standpoint of elites from many smaller states was apparent acceptable. If nothing else, it created a space for them, an area of relatively free operation.[44]

But now in Unipolar world dominated by U.S. and its allied partner has through its veto power and economic power has kidnapped the UN organization. U.S. attack on Iraq to restore democracy without approval of United Nations has shocked the world and exposed the power dominated Security Council. The continuous conflict of Iraq from 5 years, in which a lot of HRs violation has taken place, frustrated the UN fundamental purpose to promote peace and security.

Further after cold war another problem has arisen in the light of U.S. domination. During the cold war the two political and economic powers because of their different interest were never made collaboration. Therefore open discussions always took place in Security Council. But now with the U.S. influence the Security Council has become more secretive. Like a parliamentary matryoshka (doll), it now contains ever-smaller "mini council", each meeting behind closed doors without keeping records, and each taking decisions secretly. Before the plenary council meets in "consultation", in a special room assigned to it near the Security Council, the P. 5 have met in "consultation" in a special room now assigned to them outside the security council, and before they meet, the P-3 composed of the United States, the United Kingdom and France, have met in place in camera and no common minutes are kept. After the fifteen members of the council have consulted and reached their decision, they adjourn to the council's chamber, where they go through the formal motions of voting and announcing their decision. Decision that appear to go further than at any time in the history of the United Nations are now ultimately being taken, it seems, by a small group of states separately meeting in secret.[45] This practice is against the principle of fairness and transparency. Since security council is in implied way performing the function of global government must act with fairness and transparency.

VIII. Security Council Legislation and Democratic Accountability

Since now security council is in some way performing the legislative functions, objection may be raised as to how can a patently unrepresentative and undemocratic body such as the security council is able. It can hardly be maintained that authorizing the use of force requires less democratic legitimacy than imposing an obligation to prevent and suppress the financing of terrorist

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44 Notes and Comments, "The constitutional Crisis in the United Nations" *87 American Journal of International Law* 84 (1993).

45 *Id* at 86.

acts. It any also be argued that the international court of justice does not know of legislative resolutions as a source of international law. This contention does not take into account that council resolutions are legally based in the United Nations charter, an international convention in the sense of Art. 38 (1) (a) of the ICJ statute, which makes them classifiable as "secondary treaty law." The fact that the ICJ has been able to apply resolutions of the council without remarking upon the incompleteness of Art. 38 strongly suggests that binding council resolutions, both of a general and of a particular character are still properly regarded as coming within the scope of the traditional sources of international Law.[46] This quality would change only if the council expressly purported to legislate outside the charter framework, that is to say, for nonmembers of the United Nations. Thus council practice may be criticized as contrary to the basic structure of international law as consent based legal order. It overlooks the nature of all binding decisions of the council as, according to Art. 25 of the UN charter, based on the consent of the member states. Therefore the assumption of legislative powers by the council may be said to be difficult to reconcile with its general role under the charter as a "policeman" rather than a legislature or jury.[47]

IX. Enforcement Measures under Chapter VII and Fairness

To prevent gross Human Rights violation and to maintain or restore international peace and security, UN charter under its Art. 41 and 42 empowers the Security Council to take enforcement measures. Chapter VII provides that the Security Council is empowered to primarily take measures not involving use of armed force in accordance with Art. 41 of the charter, if the measures under Art. 41 of the charter prove to be inadequate; the council may go further and take military action under Art. 42. Art 42 states that when the measures provided for in Art. 41 would be inadequate or have proven to be inadequate the council may take such action by air, sea or land forces as may be necessary. However the Mechanism whereby UN military actions are taken has been detailed in Art. 43 of the charter which specifies that armed forces are to be made available by a 'special agreement' between the members of UN and the Security Council. However, the Security Council has never acted explicitly under Art. 42. Art. 106 of UN charter expressly envisages that Art. 42 Agreements between member states and the United Nations will enable the council to begin the exercise of its responsibilities under Art. 42. Since no such agreement have ever been concluded, therefore condition precedent to the use of Art. 42 have never been met.[48] However to overcome these situations the Security Council invented a new mechanisms to make

46 *Encyclopedia of Public International law* 1255 (1955).

47 *Bruno Sima (ed), The Charter of the United Nations: A Commentry,* 705-06 (2002).

48 Frederic L. Kirgis, "The Security Councils first fifty years" 89 *Am. J. Intl'l L.* 520 (1995).

use of Art. 42 for use of force without necessarily involving Art. 43 agreements. The council started authorizing use of force when the action was undertaken by the states willing and able to do so. For example in the Aftermath of the Iraq invasion of Kuwait in 1990, the Military action was taken under the UN authorized command but not strictly under Art. 42 of the Charter. The Council's resolution authorized the members co-operating with Kuwait to use 'necessary means', meaning use of armed forces necessary.[49] However this authorization mechanism has not worked fairly. For example the Genocide in Rwanda in the year 1994 did not attract much forceful reaction on the part of the security council, mainly due to lack of readiness by states to provide sufficient troops.[50] On the other hand, in the same year a large scale use of force was authorized in order to ensure the return of the elected president to Haiti.[51] However Security Council has authorized forces on plenty of other occasions. For example, during the Bosnian war, it authorized the use of force to facilitate the delivery of humanitarian assistance.[52] This authorization mechanism without Art. 43 Agreement to use force is not legal. It is colorable exercise of power. Therefore the every authorization, which involves use of, force Art. 43 Agreement is necessary. Because the armed action in Gulf crisis at first sight would seem to be an action under Art. 42 of the Charter. However this would require a further resolution of the Security Council which right has been vetoed by any permanent member. Even some members of the Security Council spoke frankly that they were afraid of facing a veto if military action under Art. 42 were proposed in the Gulf crisis. The term used in the security council resolution 'to use all necessary means' indicates that military measure are presumably included in 'all necessary means' but there was no reference to Art. 42 of the charter.[53] As there was no agreement concluded under Art. 43 with the member states for providing forces and other facilities to undertake military measures. Thus it can be said that Security Council Resolution and military action taken thereafter was not based on transparency and fairness. The Military action against Iraq was not based on Art. 42 but it was colourable resolution to avoid veto that might have been used if military action taken had been proposed under Art. 42.

X. General Assembly and Human Rights Protection

General Assembly may discuss any question relating to the maintenance of international peace and security brought before it by any member of the UN, or by the Security Council or by a state which is not a member of the UN in accordance with Art. 35 and may make recommendations

49 See, Security Council Resolution 678 (1990).

50 *Supra* note 46 at 752.

51 SC Res. 770 (1992).

52 SC Res. 787 (1992).

53 *Rosalyn Higgins, Problem and Process of International law and How we use it,* 260 (1994).

with regard to any such questions to the Security Council or to both.[54] Thus if a Human Rights violations in a country endanger international peace and security then General Assembly may discuss that matter. But if Security Council is considering that matter then General Assembly may not discuss. Therefore it can be said that General Assembly is assigned a sub-ordinate role as was envisaged in Dumbarton Oaks proposals.[55] Because the primary responsibility in relation to international peace and security is with Security Council. The General Assembly functions in this respect must be viewed in conjunction with its broader authority under Art. 13, especially its mandate to 'initiate' studies and make recommendations for promoting international co-operation in the economic social, cultural, educational and health and assisting in the realization of Human Rights. In establishing the interim committee the Assembly conferred on it the functions of considering and reporting on methods to be adopted to give effect' to both these charter provisions. Recommendation adopted pursuant to the uniting for Peace Resolution, largely on the basis of the work of the collective measure committee, have also concerned methods that might be used to maintain and strengthen international peace and security. Members have tended to favour a broad interpretation as to what questions are related to the maintenance of peace and security, especially in connection with Human Rights. According to Art. 15[56] of the charter the General Assembly shall receive and consider annual and special reports from the Security Council and from the other organs of the UN.[57] By authorizing the General Assembly to receive and consider reports from the other organs of the UN the charter entrusts the Assembly with the function of overall review of the work of the organization. The special emphasis on Art. 15 upon reports from the Security Council as well as the inclusion in Art. 24(3) of a specific provision obliging the council to submit reports to the Assembly stemmed from the desire to assure that those members not represented on the council would be fully informed of its activities. If this is the intention then General Assembly role should be strengthened to ensure fairness and transparency.

XI. Rule of Law and United Nations

Broadly speaking the meaning of rule of law is the regulation of human conduct by legal norms through the working of a legal system.[58] The prevalence of the Rule of law is a precondition for the democratic governance of both intra-state and inter-state system. In international relations the ideal of the Rule of law prohibits the arbitrary exercise of power by any participant in the international system. Every actor, be it a state or an international

54 Art. 11 (2) of UN Charter.
55 *Supra* note 20 at 115.
56 Art. 15 (1) (2) of UN Charter.
57 Art. 15 (1) (2) of UN Charter.
58 Mathew H. Kramer, "On the Moral Status of the Rule of Law". 63 *Cambridge Law Journal* 65 (2004).

organization or a non-governmental organization has to act in accordance with agreed rules of law that collectively constitute international law.[59] Specially under the UN regime where, of course there are dramatic instance of the violation of the international rule of law set by UN charter. The invasion and occupation of Iraq by the coalition forces led by the United States is clear violation of rule of law set by UN charter. Art. 2(4) of the UN charter clearly proscribe the use of force in international relations. The two permissible exceptions to it were not available in this case, that is, the war was neither permissible self defense under Art. 51 of the UN Charter nor authorized by the UN Security Council under chapter VII. The doctrine of pre-emptive self defense advanced to justify the war has been deemed, especially against non-imminent threats, an unacceptable interpretation of Art. 51 of the UN charter. In the Nicaragua case, decided in 1986, the ICJ held that self defense is only permissible against an armed attack. In the Iraq case there was no armed attack on the US. There is also an overwhelming consensus that the Security Council resolution 1441 of 8 November 2002 did not authorize the use of force.[60] The existence of weapons of Mass Destruction, used as an excuse for the war, has never been found.

A final justification that was offered is the liberation of the people of Iraq from an extremely oppressive regime. Here again, apart from the fact that the Human rights record of the occupation forces has been dismal, the ICJ in the Nicaragua case had made it clear that the unilateral use of force could not be justified in the name of the enforcing human rights. But disputing these arguments the US proceeded to invade and occupy Iraq showing its disdain for the international Rule of Law. In this process the US has also violated the rules of the international Humanitarian Law with Abu Gahrib and Guantanamo Bay abuses.[61] Thus it can be said that UN though it sets standard of rule of Law but when it comes for powerful countries it is not effective.

XII. Conclusion and Suggestions

United Nations, which is, based on the sovereign equality of all nations, but the very organization and functioning of Security Council Negates this principle. Specially in relation to double Veto power, which hampers the ability of UNO to act as global representative. Because 5 permanent member of Security Council having veto power are more powerful than rest of the members of UNO. This unequal power conferred on Security Council is led to the many problem of United Nations. Specially fairness, transparency and

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59 B.S. Chimni, "International Relations and Rule of Law" in NR Madhava Menon (ed.) *Rule of Law in a free society* 175 (2008).

60 "Iraq war is illegal, says Annan," available at http://www.un/org/sq/ sgstats. asp/ nid=1088

61 *Ibid*.

due process. Security Council works on the basis of power Politics. Now in this Unipolar world when there is no power equilibrium, the Security Council is greatly influenced by power domination. Therefore, it does not work in some cases according to principle of justice. Sovereign equality which is the basis of UN Organization is diluted by Power domination. Specially in case of Iraq, where in the name of promotion of Democracy and threat to the peace, its sovereign rights was violated.

This is the greatest problem in relation to UNO. Especially in relation to Chapter VII enforcement measure, where member of Security Council interpret the relevant situation as per their interest. Further the purposes of the charter are so broad that they may give rise to ambiguous and conflicting interpretations. As a political body, the Security Council may become selective and arbitrarily adopt an interpretation that best serves its political goals.[62] Inger Osterdahl points out: "it is not illegal on the part of the Security Council to be arbitrary, but if it becomes apparent that its choice of situations in which to intervene is arbitrary, both in the sense that some situations are intervened in but others presenting the same characteristics, and that the situations in which the council does intervene are very different from one another and the council does not convincingly or consistently show in its resolutions why it intervenes in these situations, or precisely what makes these situations worthy of Security Council Consideration, then the decisions and possible follow up action of the security council risk losing a large measure of legitimacy.[63]

Thus the determination of legitimacy and fairness lies in the consistency of Security Council decisions. Moreover, resort to measures in violation of International Law or authorizing an action in breach of general legal principles is simply not justified. The charter nowhere states that the council may act beyond the law. The founders of the United Nations intended the Security Council to guard a new world order based on the International rule of law. However this International Rule of Law must not be defined by power in realizing particular interest. Further the object of conferring veto power was to ensure that major power work unanimously where wishes of everyone should be respected. It was not conferred for self-interest of major power. Therefore it becomes important that they use their veto power to further the spirit of the world community. Apart from this the General Assembly,

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62 See, Kaskenniemi, "*The Police in the Temple*", 6 Eur. J. Int'l L. 327 (1995). Where he states that the relationship between domestic jurisdiction in Article 2(7) and Human Rights under Article 1(2), 1(3) and Article 55056, for example can only be determined by successive acts of application by UN Political organs in accordance with the political logic of the moment.

63 Inger Osterdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*, 105 (1998).

which is the only representative body of all members of UNO, should have final authority in relation to any matter covered within the ambit of UNO and its activity.[64]

Since a grave responsibility is conferred on UNO and Security Council, they must act with fairness, transparency and due process. Because,the faith in law's ability to predict state behaviour is the key to its ability to pull nations toward voluntary compliance. And this is true of all law, not just the law of nations. The real power of law to secure systematic compliance rest on the general belief of those to whom the law is addressed that they have a faith in the rule of law itself.[65] Same is true in relation to UN also. It is not just about whether a universal treaty adhered to by 191 countries is a disposable instrument. It is a struggle for the soul of the community of nations.

Further the functioning of the Security Council and General Assembly should be more democratic. It can be ensured through substantive participation of all the states. When the status of development of the right to political participation have been enhanced by pronouncement of the ICCPR Human Rights Committee, the Human Rights Commission and the UN General Assembly on strengthening the role of the UN in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization. The UDHR also articulate this basic precept of democratic theory when it state, "the will of the people shall be the basis of the authority of governments". Thus if political participation and promotion of democratic norms are the purpose of UN then democratizing the UNO itself become key issue. Because it is argued that if individuals are affected by exercise of political authority, then there exist a legal argument for the democratic legitimization of that authority. Some argument may be advanced in relation to UNO as well because if they affects the nation state, then they must provide legal justification through fairness, transparency and due process.

64 See, Security General's address to the UN General Assembly, Tuesday, 21 September 2004 available at http://www.un/org/apps/rg/sgstats.asp?Nid=1088.

65 Supra note 42 at 91.