# Security Council Reform

*Prof. Dr. Yubaraj Sangroula*[1]

[1] Professor of International Law and Philosophy of Law at Kathmandu School of Law. Email: sangroula195@gmail.com

## UN ESTABLISHMENT AND ITS UNDERLINE POLITICS:

The formation of the UNITED Nations established after the failure of the League of Nations was a second chance, a revived hope for the international community for the attainment of the goal of international peace and security. Aftermath of the World War II the representatives of 50 Countries met in San Francisco at the United Nations Conference on International Organization to form the United Nations Charter. The basic proposal on which the delegates deliberated was worked out by the representatives of China, the Soviet Union, the United Kingdom and the United State at Dumbarton Oaks. Thus a United Nation as a new hope for international peace and security officially came into existence on 24th October 1945.

However on verge of 1945 San Francisco Conference, the acrimonious dispute existed, as to whether a security system founded on the large influence of Great power and dependent upon their unbounded authority along with unanimity, could make any substantial contribution to world security, the very aim for which it was established as stated in Art. 1.

One of the more controversial issues at the United Nations' founding conference in San Francisco during the spring of 1945 was how the process of amending its Charter should be structured and when a general review conference of the Charter's provisions should be called.[2] Article 108 of the charter talks about the amendments of the charter itself which can be done when adopted by 2\3rd of the GA and ratified respectively; include all permanent members of the Security Council. This particular provision has not only again made Security Council's Big Five more powerful but also indirectly if not de jure, de facto made this unbound power of permanent member perpetual. Same goes with the alteration of the charter as stated in Article 109(2) of the UN Charter. 'Those delegations unhappy with some of the compromises reached in San Francisco, especially concerning the inequities of the veto power granted the "Big Five" Permanent Members of the Security Council (P-5), wanted to schedule a general review relatively soon and to make the hurdles to amendment relatively low. The "Big Five" powers, on the other hand, naturally preferred to keep the barriers to Charter change relatively high.[3] From the very inception the United nations the major power hopped and planned for the UN's institutional and structural reform to make hard to be achieved may be because with the development of communication, intellectuals around the world, democratic practices being overwhelmingly appreciated, the major reform expected in UN would be the removal of permanent members in security council with veto power.

There were many other issues which were brought up by small nations which were not considered in the charter one of which being the inclusion of the human rights in UN charter. "The Dumbarton Oaks Proposals contained only one reference to human rights, which were circulated widely, and the New Zealand, Australia and France through their own effort added 7 references to human rights to proposed UN charter. Panama's delegation came to the San Francisco conference with a draft declaration of human rights (prepared by Chilean jurist Alvaro Alvarez), and many small states were disappointed that the UN charter was not amended to provide enforceable means of addressing human rights problems around the world."[4]This makes the very inception of UN being favoring to the big five which is natural because it was this big power that actually prepared the draft in Dumbarton Oaks Conference which was later discussed in San Francisco. But unfortunate the ideas of other countries were not included in the Charter. This questions the democratic value of the United Nations and its

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2 Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States, 1940-1945* (Washington, D.C.: The Brookings Institution, 1958), pp. 742-749

3 Reforming the United Nations:Lessons from a history in Progress pg1.

4 *Third World Quarterly, Vol 23, No 3, pp 437–448, 2002,*Reclaiming and rebuilding the history of the Universal Declaration of Human Rights,SUSAN WALTZ

legitimacy as a world organization. Also against the Social contract theory, of forming a sovereign body with the consensus of everyone because many countries were against the privileged power given the P5.With every country's consensus a body should have been elected which should have formed such a draft proposal of UN charter rather than the victors forming it and proposing at the San Francisco. Article 109 that offers the prospect of reviewing the UN charter seems to be a showing teeth of those who really don't want UN charter to be amended against their interest because the expectations of delegations at San Francisco that such a conference would take place within Organization's first decade became a far cry because of various reasons mainly being the polarization of membership during Cold war.

## SECURITY COUNCIL BACKGROUND

With major three major functions: mediation, peacekeeping, and enforcement Security Council aims to maintain international peace and security, and to take effective collective measures for the prevention and removal of threats to the peace.

Acting under Chapter VI of the UN Charter, the Security Council assists in the peaceful settlement of disputes by mediating conflicts and negotiating settlements. It also establishes and oversees UN peace-keeping forces and under article 25 of the UN Charter the members of UN agree to accept and carry out the decision of the Security Council in accordance with the charter. The Security Council is currently made up of 15 United Nation Member States out of which five countries China, France, Russia, the United Kingdom, and the United States were designated permanent members in the original charter and were given the power of veto. The remaining ten members of the Council are elected by the General Assembly to two-year non-renewable terms.

| Non permanent members | End of term date |
|---|---|
| Angola | (2016) |
| Chad | (2015) |
| Chile | (2015) |
| Jordan | (2015) |
| Lithuania | (2015) |
| Malaysia | (2016) |
| New Zealand | (2016) |
| Nigeria | (2015) |
| Spain | (2016) |
| Venezuela (Bolivarian Republic of) | (2016) |

http://www.un.org/en/sc/members/

The Security Council's extensive operational activities- such as the expanded mandates of peace keeping operations and the establishment of chapter VII UN interim administrations with broad powers- have now the capacity to violate fundamental rules of human rights and international humanitarian law or to cause damage, injury and death. The implementation of its decisions on sanctions, initially comprehensive, has had in the long term extensive and lasting effects on the populations targeted states. The subsequent move towards targeted sanctions against individuals rather than states, particularly in the context of counter terrorism, while partly addressing the problems arising from comprehensive sanctions, has raised human rights issues of its own, such as due process and property rights, particularly where resulting from the establishment and maintenance under resolution

1267 and 1390 of updated lists of specified individuals and entities linked to international terrorist networks whose funds are to be frozen.[5]

## NATO AND WARSAW PACT DIVIDE THE WORLD INTO TWO MAJOR BLOCS:

The prospect of further communist expansion after world war I and world war II promoted the United states and other 11 other western Nations to form the North Atlantic treaty Organization (NATO). As a counterpart, the Soviet Union and its affiliated Communist nations in Eastern Europe founded a rival alliance, the Warsaw Pact, in 1955. This alignment into one of the two opposing camps formalized the political division of the European continent that had taken place ever since World War II. This alignment continues throughout the cold war (1945-1990). Similar to NATO, the Warsaw Pact focused on the objective of creating a coordinated defense among its member nations in order to deter an enemy attack. There was also an internal security component to the agreement that proved useful to the USSR. The alliance provided a mechanism for the Soviets to exercise even tighter control over the other Communist states in Eastern Europe and deter pact members from seeking greater autonomy. Under such a conflict between the Western Nation led by United States and communist Eastern bloc led by Union of Soviet Socialists Republics or USSR divided world into two major blocs further paralyzed the UN system. As the inherent feature of cold war i.e. split and escalation, the breakdown of the great power unanimity which resulted in the collapse of the collective security system represented the quality of division within the UN system.[6] And the conversion of almost all the organs of the United Nations into forums for carrying out cold war propaganda against the member of other bloc, rather than for transaction of any serious business, represented the quality of escalation.[7] For an instance, Marshall Plan in 1947 was also one of the diplomatic initiatives that provided aid to friendly nations to help them rebuild their war-damaged infrastructures and economies. This initiative in one or the other way encourages the developing nations to take side of one great power to maximize their own benefits.

Also, the permanent members of Security Council frequently refrained from authorizing missions that could have become politically sensitive and \or financially costly. A central cause for mediocre or even bad performance lies in the fact that the UN does not have its own military capabilities. Instead the UN Secretariat has to rely on a stand –by system, which is still suffering from built –in deficits despite several remarkable reform initiatives."[8] But the phenomenon of the cold war, characterized by an alliance system, organized and pitted against each other and endowed with the ideological conflicts and institutionalized suspicious, distrust and hatred, resulted in the breaking of the 'great power' understanding which paralyzed the SC"[9]The crisis in the cold war created a situation that not only parlayed the functioning of SC but conclusively showed the future of UN where no decision could be taken without the concurrence of both the super powers. 'In many instances the great power

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5 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Vera Gowlland Debbas, p.34.

6 M.S.Rajan, *United Nations at 50 and beyond,* Lancers books, New Delhi,1996, pg.247

7 Ibid

8 Editors ; C Udhay Bhaskar, K Sanathanam,Uttam K Sinha , Tasneem Meenai, 'Strengthening the UN : Futile Attempt or Feasible Alternatives?"Tobias Debiel ,pp 574-594 ,Pg 581 book " United Nations Multilateralism and International Security "

9 United Nations: With and Without Cold War' S.J.R. Bilgrami , p 241-263, p 241 book "United Nations at 50 and Beyond " Editor : M.S. Rajan

themselves by their intense mutual dislike, fear and suspicion, nearly destroyed the Charter designated responsibility of maintenance of peace and security.'[10]

## SECURITY COUNCIL DURING COLD WAR AND POST COLD WAR:

In 1945, when UN charter was written, most of the today's countries were colonized by one or the other great powers and it was obvious for the dominant powers to overshadow other smaller and weaker states, thus UN continued to be a geo-political instrument of major powers. During the first forty-five years of its existence, the Council was paralyzed by the Cold War, which polarized many of the permanent Security Council members. During this time, world power was concentrated in the United States and the Soviet Union. [11]

Though UN Security Council was established to fill the gaps of League of Nations, the improvements were soon declined due to the onset of cold war, infringing the previously existing political solidarity between west and Soviet Union. The structure of UN also retained the elements of balance of power paradigm. This is evident from the veto rule provided to the five permanent members of Security Council. So, in most vital instances for the preservation of world peace and order the veto system renders collective security impossible. The inability of Security Council to deal with genocide in Rwanda in 1994, crime against humanity committed in Darfur region of Sudan from 2003 onwards and crime against humanity being committed in Syria in 2011 is evidence of continued failure of SC to take action in all cases of serious violation of international law.

After the Cold War when there was greater consensus among the members, the Security Council established numerous peacekeeping operations. In the mid-1990's there were over 70,000 peacekeepers deployed[i]. Under Chapter VII of the UN Charter, the Security Council can take enforcement measures against offending States or entities.[ii] For example, the Security Council has imposed economic sanctions against countries such as Iraq. Under Article 42 of the Charter, the Security Council also can use military force to promote peace and security. [12]

Successful UN efforts in resolving protracted internal conflicts in the late 1980s and early 1990s e.g. Namibia, El Salvador, Mozambique, Guatemala and initially Cambodia) however the UN was implicated in a series of horrendous failures like in Bosnia, Angola, Somalia, Rwanda. The Bosnian, Rwandan and Somalia episodes were particularly salient each spurring calls for greater UN action, contributing to- among other things- a proliferation of council resolution and peacekeeping mandates even in the absence of a coherent strategy or sufficient resources to pursue one.

- The failure with respect to conflict prevention was arguably the former Yugoslavia at each stage of its dissolution from the outbreak of the first war over Croatia and Slovenia through the second war inside Bosnia to the third war over Kosovo. The outbreak of a sequence of wars in the former Yugoslavia amounted to tragic failure of concerned international actors to avert war given a Yugoslav state on the verge of disintegration in 1991.
- Somalia also loomed large in shaping the conflict prevention agenda. The Somalia experience left an ambivalent legacy for conflict prevention, however. While thousand of Somalis received desperately needed food assistance, there was a rising criticism that a solely humanitarian approach failed to deal with underlying political conflict that generated famine in first place.

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10 Ibid pg246

11 United Nation Security Council Reform, Michael Teng, EDGE Autumn 2003, Professor Bruce Lusignan, p 3.

12 United Nation Security Council Reform, Michael Teng, EDGE Autumn 2003, Professor Bruce Lusignan, p. 5.

- When a civil war broke out in Rwanda in 1994 which was of relatively low intensity turned quickly into genocide of unimaginable proportions. UN's failure was precisely to prevent the conflict's exponential escalation into genocide, especially in a context where there was already an UN mission the UN Assistance Mission in Rwanda UNAMIR on the ground.[13]

## DEVELOPING COUNTRIES ALLY WITH SUPER POWERS:

Developing countries started making their benefits in one or the other way being allied to some super powers like USA and Russia. For instance, India does not believe in policing its region or any other part of the world but contributes greatly to the UN peace keeping forces. On the other hand, USA in a straight line involves itself in keeping regions stable and in safe hands but course for their own interest and so this does create a sense of bigotry and betrayal sometimes in the minds of people around the world whose interest are not being served and who become victims due to their activities[14]. Developing countries followed a policy of playing one side off against the other to extract them maximum gain possible for itself. Nehru's policy, for example was always about national interest and finding out what is most advantageous to the country. Thus, when china threatened India's north border in 1952, Nehru's reliance on American military assistance, which Abadi regards as a damning example of the emptiness of non-alignment, could instead be seen as a kind an individual one.[15]

In the same way, developing country's main dynamics was cynically setting one side against another to reap the most rewards. Being the member of NAM, countries take the side of one bloc. South East Asia takes the side of USA for its financial support. Pivot appeared to reinforce a formula that, crudely put, ran thus: Americans would make the peace; Asians would make the money. Accordingly, if the actual purpose of Obama's pivot could be summarized in a single word that word is *inclusion*, in terms of both security and economy.

Correspondingly, developing countries take the privileges of aid and loan from the developed countries.

To consider the example of US aid to India, the acceptance if military aid could hardly be considered a decision to unquestioningly support US policy. India maintain equidistant from US and USSR in order to obtain maximum benefits. Other small countries also started seeking benefits; ultimately it divided the whole world into two major blocs.

## ECONOMIC DYNAMICS OF UN

'The arrears are of two types : first from a large member of very poor member countries which are unable to pay, and the second , from handful of top contributors which are capable of making payment but are withholding their contribution as a standing blackmail against UN. Among the top contributors US is the biggest defaulter and also the most persistent black mailer. These top contributors deliberately hold back their dues to compel the UN to reduce their sized, adjust their agenda and alter the trusts of their activities in order to receive payment to their dues. Since a part of the dues is permanently held

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13 (https://books.google.com.np/books?id=iww8h3E8MBMC&pg=PA102&lpg=PA102&dq=confrontations+in+security+council+during+cold+war&source=bl&ots=0omvbjGQxT&sig=YP3U3emqHSCmiCEf5908IP6SGss&hl=en&sa=X&ei=c3XxVLKGGNC7uAS2-oHADA&ved=0CCcQ6AEwAg#v=onepage&q=confrontations%20in%20security%20council%20during%20cold%20war&f=false, pg 103-104)

14 http://www.quora.com/India-maintains-good-relationships-with-the-USA-China-and-Russia-How-do-they-make-that-possible

15 Ibid

back, the pressure on the UN organizations to restructure their agenda and activities has become the permanent feature of UN system. Developing world is under the constant fear that major nations would use the eroding sovereignty, as a result of upheaval within, to legitimize a new kind of colonialism; the case of Iraq haunts them.'[16]

It is not an easy task of economic management for an organization cogently qualifying as universal organization. The member of United Nations contribute through two ways first being assessed through which each member state has an obligation to pay proportionate to the GDP of their nation where by US contributes the highest amount that is 22% and second being the voluntary contribution. But the economic dynamics of UN is not limited to just how it gets its fund rather it is as vast as the Charter provision to the administrative transparency, from oil-for-food program's alleged widespread corruption and abuse issue to the assistance provided by UN which is often criticized 'dollar imperialism'.

Article 19 of the Charter gives an impression of penalty to member countries which are in arrears in the payment of its financial contributions squeezing the least developed and developing countries where their already exists the problem of corruption and lack of good governance. There are ample of instances where the UN aid and assistance were more influenced by the underlying vested interest of the P5.

In the book written by Benazir Bhutto 'Daughter of East' discuss that how the aid to Pakistan was stooped since 1979 when Carter administration enforce its nuclear non-proliferation policies and cut off Pakistan. But after the Soviet invasion in Afghanistan the non-proliferation were overshadowed and aid started overflowing in Pakistan from UNHRC ,The World Food Program and US for the Afghan refugees but only 1\3rd of it reached to the intended when country was under Zia military coup. This shows UN has become a platform for power balance deviating from its actual aim of maintaining peace and security.

The oil-for- food project was criticized for the corruption and abuse on Iraq's natural resources through its project. The project was proposed in 1991 through Security Council for the humanitarian protection in Iraq that was in miserable condition after the economic sanction and oil embargo done by SC after Iraq invasion in Kuwait. The oil politics seems to prevail in the humanitarian project. 'In deciding whether to place a hold on a contract, the U.S. representative on the Sanctions Committee consulted with agencies of the U.S. government to determine whether Iraq could use the requested items for military purposes.'[17] How UN has converted into a political platform rather than being a platform to work for the welfare of the member nations.

The global institutional order allows for the inequality among people from developed and developing countries. As pointed out by Thomas Pogge there are at least three sources of the first source being consists of the international economic bodies, such as the world trade organizations which has enabled the exacerbations of deaths from the global poverty through monetary agreements that favors affluent states at the cost of poor states.[18]

Aid leakage, development wastage and assistance mainly governed by the interest of few powerful nation and underlying vested interest being fulfilled through actions coated as assistance is a major problem in relations between nations and UN.

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16 United Nations: With and Without Cold War' S.J.R. Bilgrami , p 241-263, p 241 book "United Nations at 50 and Beyond " Editor : M.S. Rajan pg249

17 Oil for food

18 Thomas Pogge, World Poverty and Human Rights: Cosmopolitian Responsibilities and Reform; Cambridge: Polity 2002 p.19

As stated by, Father d'Escoto before the UN General Assembly at present two attitudes hovers around the UN's functioning. Smaller member states have lost hope in the UN; they believe two or three stronger member states have control of the entire organization and their vote, their voice, is "worthless." The larger member states, although their governments‟ support the UN, their people do not. Citizens of most of the stronger member states are afraid participation in the UN will compromise their nation's legitimacy and sovereignty.

In his speech before the UN General Assembly, Father d'Escoto talked of the two attitudes of the member states with the current function of the UN. Smaller member states have lost hope in the UN; they believe two or three stronger member states have control of the entire organization and their vote, their voice, is "worthless." The larger member states, although their governments‟ support the UN, their people do not. Citizens of most of the stronger member states are afraid participation in the UN will compromise their nation's legitimacy and sovereignty. (d'Escoto 2009)

There is criticism regarding the economic transparency within the UN system. And under its context the article 19 of the Charter which acts as penalty for member countries which is in arrears in the payment of its financial contributions seems to be squeezing the least developed and developing countries where their already exists the problem of corruption and lack of good governance.

## NEED FOR REFORM:

Roberto R. Romulo, foreign Minister of the Philippines told the general assembly: "It is ironic that in the midst of the rapid spread of Democracy in recent years and the expanding membership of the United Nations, the [19]Security Council remains unrepresentative in its size and the geographic distribution of its membership, and undemocratic in its decision making and working methods."

Calls for council reform began in early 1990's in response to the council's growing activity in the post cold war period. Critics of the council made seven demands- that the council could be: [20]

i. More representative
ii. More accountable
iii. More legitimate
iv. More democratic
v. More transparent
vi. More effective
vii. More fair and even handed

➔ The five permanent members, with their vetoes and many special privileges, now arouse widespread criticism as a self appointed oligarchy. They have two well known council advantages- continuous membership and veto power, both privileges provided in the charter. The P5 have wrested many more special privileges and perks for themselves. They insist on the right to control high ranking UN posts and name the tenants in those posts (or at least have a large influence over who among their nationals may occupy them). They intervene regularly in

19 James A.Paul, Veto Analysis, *Security Council Reform: Arguments about the Futue of the United Nation Syestem*

20 Theses towards a democratic reform of the UN Security Council, James Paul and Celine Nahory,Global policy forum, 2005, p. 1, available at https://www.globalpolicy.org/security-council/%20security-council-reform/41131-%20theses%20to-background, accessed on 2/28/2015.

the workings of the secretariat and disproportionately influence the wording of reports and the shaping of initiatives. They insist on the right to have one of their nationals sit as a judge in the world court, so that their interest will be represented there. And they have their private lounges at UN headquarters.[21]

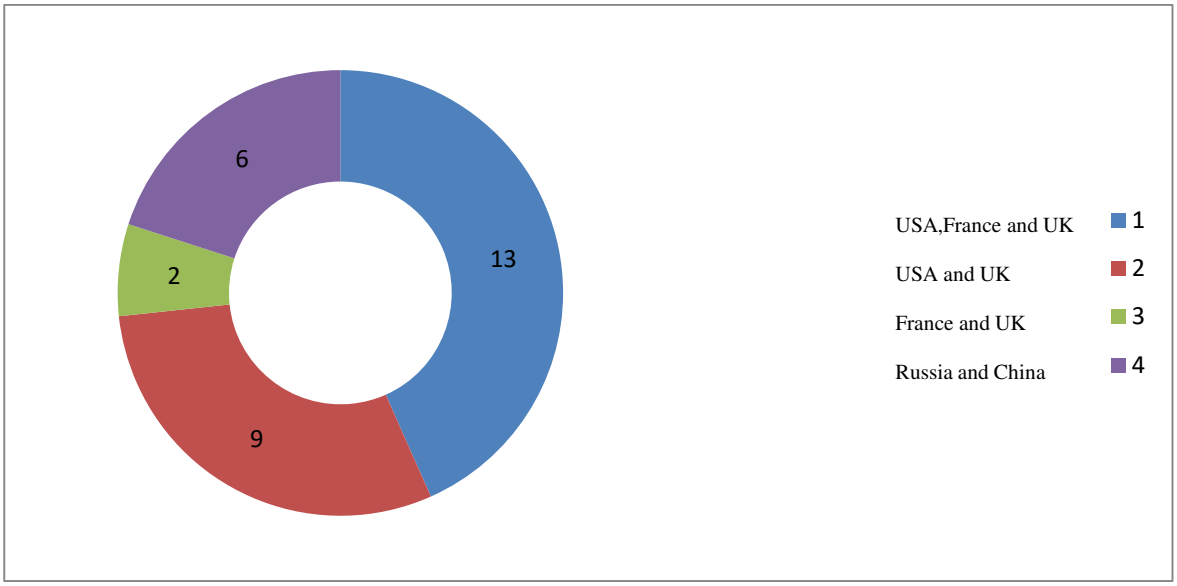


Fig: Veto used by the union since 1945

➔ Similarly, there remains a situation where the UN engages in the making of general international law and then, from the same exercise, claims to derive a law making power. Thus, e.g., an anti-terrorism resolution adopted by the council may latter pave the way for an argument that the UN has the competence to combat terrorism, or that the council has the competence to legislate more generally. In the same manner, there is the consideration that while engaging in informal reform; possibly general international law may be affected. To the extent that norm can be positively identified as belonging to this category, it seems clear that no UN organ is at liberty to violate them.[22] Also, jus cogens norms rest on the consent of "the international community of states as a whole", as article 53 of Vienna convention on the law of treaties puts it, it might be argued that once such norms are disrespected by the UN, they obviously no longer meet with this consent, and cease to be jus cogens norms: while violation by single state would not immediately affect their jus cogens nature, violations by the UN might.[23]

➔ Member states can only be expelled, or have their rights and privileges under the charter be suspended, by the two leading organs together (articles 5 and 6 UN); the two have to work in tandem in order to appoint a new secretary General (article 97 UN) and members of the ICJ (article 4 ICJ statute), and while there is a room for a secondary responsibility of the assembly in matters relating to peace and security, nonetheless primary responsibility rests with the council.[24]

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21 ibid

22 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Jan Klabbers, p.13.

23 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Jan Klabbers, p.13.

24 Ibid, p.10.

➔ Moreover when it comes to the use of force, e.g., aggression is sometimes said to be prohibited under jus cogens, whereas self- defense is held to be legitimate. This places a premium on being able to separate the two, yet practice is often resilient enough to blur the boundary. Things become even more problematic still when the UN gets involved: can the US action in Iraq in 2003 be designated as giving effect to earlier Security Council resolutions? If this is considered implausible, can the relative silence by the Council since 2003 be interpreted as tacit approval? Is so, does that render the council somehow co- responsible? And how then would this affect the jus cogens nature of the aggression prohibition? Similarly, does the refusal by the council to condemn NATO's operation over Kosovo somehow implicate the council?[25]

➔ The use of force-prohibition of article 2(4) should, according to a majority opinion, be given an extensive interpretation yielding an absolute prohibition. However, under other provisions of the charter there would be two exceptions available:

a) The right to individual or collective self defense under article 51 and

b) The right to act, individually or collectively, on the basis of a Security Council decision under chapter VII.

Another restrictive and liberal interpretation of the 2(4) prohibition was put forward during the cold war era by the west. It was restrictive in the sense that it restricted the scope of the use of force- prohibition; and it was liberal in its approach to unilateral action. It was argued that a contextual reading of 2(4) would allow unilateral or regional military intervention (humanitarian, pro-democratic or others) which are not directed against another state's "territorial integrity or political independence", or "in any other manner inconsistent with the purposes of the united nations", to use the language of the provision. [26]

➔ Although countries are pledged to defend each other, many countries will refuse to do so, if such an act is not in their own best interests or thought to be too risky or expensive. In addition, they argue that collective security arrangements will turn small struggles into large ones, and prevent the use of alternative problem solving, relying instead on the much more costly approach of military confrontation. In addition, there is always a danger that alliances formed by the purpose of collective security can also serve as a basis for an aggressive coalition.

➔ The international security situation since 1990 is infact quite different. It is actually two systems- UN and US security systems operating in parallel while conjoined at several points and where the UN collective security system apparatus seems weaker than US security guarantee. The UN security system is both limited in its scope and relatively stable in its work because of the parallel US security guarantee. The US offers a hegemonic yet parallel system .It is hegemonic rather than imperial ,hegemonic without rejecting UN collective security as such, "hegemonically co-operative" with UN security most of the time rather than constantly competitive with it."This wave of American-styled security by domination in place of collective security creates both anxiety and curiosity over the weakness of the United Nations Collective Security as "sine qua non" for world peace and security.

➔ On the other hand both Africa and Latin America lack a permanent seat on the council, while Europe is overrepresented and Asia is underrepresented. These problems are not easily

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25 Ibid, p.14.

26 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Ove Bring p.56

addressed because the P5 of the council do not want to see their power diminished. As a result little progress has been made since 1993 in spite of the number of proposals that have been suggested like:[27]

- Uniting For Consensus Proposal On Security Council Reform (April 2009),
- Small-5 Group On Reform Of Working Methods Of Security Council (April 2009),
- Tabled Uniting For Consensus Draft Resolution On Security Council Reform (July 2005),
- Tabled African Union Draft Resolution On Security Council Reform (July, 2005),
- Tabled G-4 Draft Resolution On Security Council Reform (July 2005),
- Italy's Regional Model (April 2005), United For Consensus' Green Model (April 2005),
- United for Consensus' Blue Model (April 2005)

## HISTORY OF COLLECTIVE SECURITY:

Collective security has been developed in both conceptual and institutional form from the late seventeenth century onward. In normative form, the term can be traced back to the various schemes for perpetual peace proposed by William Penn and Immanuel Kant. Kant's famous essay on 'perpetual peace' argued that peace was an aim that mankind could realize, but only incrementally. In the absence of law and maintenance of peace, it was necessary to provide a substitute solution; a substitute can only be created by organizing the common defense of all states against the illegal use of force. The institutional origins of collective security may be traced to the efforts of European powers to maintain peace and security within the 19th century international system known as the 'Concert of Europe. It was not until after the First World War, however that an institutionalized system of collective security was realized by the formation in 1919 of the League of Nations. The creation of League made efforts to reduce the effects of war on belligerents and civilians alike by adopting new rules of humanitarian law and outlawing war and interstate aggression under international law. Though intended to be collective security arrangement, the League was in reality close to balance of power arrangement which lacked centralized decision making procedure to apply sanction against aggressors. League thus failed to provide collective security which is evident from the inability of League to prevent Italy from invading Ethiopia in 1936.After the failure of League, UN was established to fulfill the lacunas of League through two innovations: first, drafting new charter completely prohibiting use of force except self defense and creating a new security council that has the authority to determine if the act of aggression has occurred and what measures ought to be taken by member states in response.

The principle of collective security found in Article 48 and 49 of the Charter of the United Nations states that, "the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine; such decisions shall be carried out by the members of the United Nations directly or through their action in the appropriate international agencies of which they are members."

Rourke and Boyer (1998) assert that collective security is based on four principles: First, all countries forswear the use of force except in self-defense; second, all agree that peace is indivisible, an attack on

[27] https://www.globalpolicy.org/security-council/%20security-council-reform/49885-background, accessed on 2/28/2015

one is an attack on all; third, all pledge to unite to halt aggression and restore the peace; fourth, all agree to supply whatever material or personnel resources that are necessary to form a collective security force associated with the United Nations or some IGO to defeat aggressors and restore the peace.[28]

UN Secretary General Perez de Cuellarargued in 1991 said that sovereignty could not be a shield behind which human rights could be massively and systematically violated. He suggested that there was a "collective obligation of states to bring relief and redress in human rights emergencies". He added that any international protective action had to be taken in accordance with the UN charter and could not be unilateral.[29]

According to Karen Mingst collective security consists of some assumptions that: wars are prevented by restraint of military action; aggressors must be stopped; the aggressor is easily identified; the aggressor is always wrong; aggressors know that the international community will act against them (Mingst, 1999). As asserted by Van Dyke (1957), "they wanted states to abandon narrow conceptions of self interest as a guide to policy and to regard themselves as units in a world society having an interest in preserving law and order everywhere."

## LEGAL BASIS OF A UNIVERSAL SYSTEM OF COLLECTIVE SECURITY

A universal system of collective security which covers all international actors cannot be based on the UN Charter as a treaty which is open only to States and which not all States have acceded to. This leaves the question of the legal basis of such a universal system.

1. The 'Reparations for Injuries' Approach: Objective Security Order

In its advisory opinion in the Reparation for Injuries case, the ICJ held that 'the vast majority of the members of the international community [assembled in the UN] had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone'. Following that dictum, one could argue that the vast majority of the members of the international community were also able to create an 'objective' or universal system of collective security and that, in light of the language of the Charter, they intended to do so. This view finds some support in statements of delegations at the San Francisco conference who considered the UN as representing 'the authorized expression of the international community' or even as the 'collective conscience of humanity' which had the right to impose obligations on third-party States. It has been said that these statements show that there was 'legislative intention' present at San Francisco.

### Failure of Security Council to provide collective security:

Arguments about security and having a place for "the collective" to hold such arguments are different from actually providing collective security. The reason for why collective security is not actually provided (or at least not very effectively) is perhaps because collective security needs of nation-states are overstated and the territorial integrities of countries today is actually greater than one might have thought.

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28 The Failure of Collective Security in the Post World Wars I and II International System Joseph C. Ebegbulem

29 UN secretary general report to the General assembly, UN GAOR,46th Sess.,Supp.No.1;DOC A/46/1(6 September 1991).

In order to understand the underlying jurisprudence of collective security, it is useful to distinguish collective security from two closely related terms: balance of power and global government. In case of balance of power, states act as separate units without subordinating their autonomy or sovereignty to any central agency established for the management of power relation. On the other hand, global government or nations of "global constitutional order" posit the creation of a centralized institutional system superior to individual states. There are 3 necessary but insufficient conditions for the effective functioning of any collective security system:

1. Degree of political solidarity or consensus among member states

2. Sufficiently strong peace-keeping force which at a minimum is strong enough to 'balance the military power of the aggressor in order to render military success for the aggressor impossible'

3. Sufficiently determine criteria to enable an objective determination of when an act constitutes "aggression" or "self defense".

The discussion then turns to ask why, given the propensity of such collective action–failures, the UN collective security system does not simply break down and go the way of the League of Nations and other such efforts. The suggested answer is that a constituency of key players does not rely on UN collective security and need not worry for themselves about the promise, or lack thereof, of collective security. These players, starting with North Atlantic Treaty Organization ("NATO") members, rely upon the US's post–World War II role, which guarantees the security of a wide array of countries in a cascade of stronger-to-weaker ways, starting with NATO at the "top." Even countries that do not directly benefit from the NATO–style US security guarantee nonetheless benefit from the security provided by the US, including, for example, the freedom of the seas.

**Responsibility to protect** :central element of 2005 summit outcome document, fundamental normative innovation in the area of international law and politics; the use of force to address massive human right violation in member states. NATO intervention in Kosovo brought the question surrounding who could intervene to stop or prevent a humanitarian crisis took on great urgency in 1999. It brought the dual dilemma first, was the fundamental issue of whether or not a norm of humanitarian intervention existed .second was the question of who could invoke the norm, only Security Council or individual state? The latter was crystallized when a threatened Russian veto precluded any Security Council authorization to use force. [30]

This debate was made more complex and more divisive by the unilateral military action taken against Iraq. By 2003 November, the worry over the lack of agreement amongst member states on the proper role of the United Nations in providing collective security prompted the UN Secretary General to create to high level panel on threats, challenges and change. The panel was mandated:

1. To examine contemporary global threats and future challenges to international peace and security, including the connections between them
2. To indentify the contribution that collective action could make in addressing these challenges
3. To recommend the changes necessary to ensure effective collective action, including a review of the principal UN organs.

[30] Norms, Institutions And UN Reform: The Responsibility To Protect, Jutta Brunnee and Stephen Toope p. 123

The concept of the responsibility to protect survived the difficult negotiations leading to the adoption of the 2005 summit outcome document, but not so subtle shifts in emphasis occurred.[31]

The responsibility to protect is now described as primarily a responsibility of individual states to protect their own populations from genocide, war crimes, ethnic cleansing and crime against humanity.[32]

The 1503 procedure in the human rights commission allowed states to investigate the internal human rights abuses of other states, at least in extreme cases.

Yet the responsibility to protect could well be of a different order. It could entail a fundamental conceptual shift, rooted in prior developments, but going much further and calling upon states to reconsider the essentials of their role and powers. For example if the responsibility to protect is fully implemented, Sudan owes obligations of protection to its own people. But the responsibility to protect also implies that Sudan is accountable to other states if it fails to protect its people. Thus the accountability is not simply at the level of state responsibility, it can actually trigger the duty of third party to intervene. This implies as well an *erga omnes* obligation on the part of other states to act whether collectively or unilaterally remains uncertain- in the face of a limited category of massive human rights abuses.[33]

It is instructive to recall that the definition of aggression, another fundamental challenge to sovereignty emerged as a resolution of the general assembly. Like the responsibility to protect, the definition was an attempt to shape the practice the SC on questions of the use of force. While it is true that the definition did not have immediate normative impact, it was used by ICJ to define 'armed attack' in the Nicaragua case, so the definition had at least tangential effects that are still being played out in international law.[34]

Proponents of any charter-based reform plan will face great difficulty in winning the necessary two-third vote in the General Assembly and still more difficulty obtaining ratifications from two-third of all member states, including the mandatory endorsement of the five permanent members.

In spite of public declaration to the contrary, the P-5 are content with the present arrangements and oppose any changes that might dilute or challenge their power or expand their 'club'. China has already announced it will block permanent membership for Japan[35], believing that imperial Japan's occupation of china makes it ineligible for a permanent seat.

## CHALLENGES:

### Enlargement may not be an effective route to better representation:

With 15 members the council is already past the outer limit of the size efficiency range for an executive body with such big responsibilities. Ample academic literature makes the same point- when committees get too large, they give rise to executive committees that do all the serious work, or else the original body becomes dysfunctional and irrelevant. At the UN, an enlarged ECOSOC stands as a clear example of how greater size detracts from effectiveness. Also adding more members will adds more states with their own state interests. Such members only weakly 'represent' their region or state type (poor, island, small, etc), since there is no system of accountability. Instead, they act primarily on the

31 Norms, Institutions And UN Reform: The Responsibility To Protect, Jutta Brunnee and Stephen Toope,p. 124

32 Ibid, p, 126

33 Ibid, p, 128

34 Norms, Institutions And UN Reform: The Responsibility To Protect, Jutta Brunnee and Stephen Toope,p, 134

35 Theses towards a democratic reform of the UN Security Council, James Paul and Celine Nahory,Global policy forum, 2005, p. 2, available at https://www.globalpolicy.org/security-council/%20security-council-reform/41131-%20theses%20to-background, accessed on 2/28/2015

basis of their own national interest. If they are large regional hegemon, they may seek to increase their hegemony at the expense of other regional states.[36]

## Council reform is a work in progress not a quick fix:

Council reform is a process for the long haul, not a quick fix. It must be based on the ideas for a more democratic global future, not outworn concept from the past like permanency and great power oligarchies.[37] Amending the UN charter through the prescribed procedure is not an easy exercise. Under article 108 of the charter, amendments can only enter into force upon ratification by the P5 members of the Security Council; this effectively provides them with a right to veto any amendment, and as a result, it is not coincidence that formal amendment of the charter has only occurred three times and related to relatively minor institutional changes.[38]

In 2007, the venerable magazine The Economist published a rather critical review of a book by John Bolton, one- time US ambassador to the UN. The reviewer highlighted that Bolton had asked much of his time at the UN on the two ideas for reform: first, he wanted to introduce weighted voting in the GA; second, he thought all UN programs should be run on voluntary contributions. Both would have been disastrous for the UN as we know it weighted voting in the GA would do away with the faintest idea of the assembly being a representative body, the closest thing the world has to a parliament; in Bolton's plan, it would become a mere shareholder's meeting. Likewise to have programs only to run on voluntary contributions would make a mockery of any notion of solidarity between member states and would also bring an end to any comprehensive policy making; it would put a premium on categorizing and fencing off issues into but- sized, manageable components, ignoring the basic idea that, say, there might be a link between poverty and the absence of military security. But then again, maybe that was precisely why Bolton launched his idea. Bolton's plans would have involved a serious measure of UN reform, and are a useful reminder of the fact that not all reforms are equally blissful.[39]

When legal competence is not lacking, effective action may be prevented by formal barriers to decision making, such as the veto rule in the Security Council. When the decision making process is not thus handicapped, essential policies may yet to fail to command the support needed to put them into effects, as a result of bias, lack of courage, lack of vision or whatever other factors may influence the votes of member states.[40]

## Techniques to overcome the risk of veto:

The Peace Building Commission (PBC) emerged from a reform agenda initiated by UN Secretary-General Kofi Annan partly as a response to the turmoil created by the Security Council's failure to endorse the United States invasion of Iraq, and partly to create an 'Annan Legacy'. This project began with the Secretary General establishing a 'High Level Panel on Threat, Challenges and Change' in

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36 Theses towards a democratic reform of the UN Security Council, James Paul and Celine Nahory,Global policy forum, 2005, p. 3, available at https://www.globalpolicy.org/security-council/%20security-council-reform/41131-%20theses%20to-background, accessed on 2/28/2015

37 Ibid

38 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Jan Klabbers, p.8.

39 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Jan Klabbers, p.7.

40 Ibid, p.8.

September 2003. The Panel noted a 'Key institutional gap' within the UN: the lack of any mechanism devoting to preventing states collapsing into conflict, or supporting countries in the transition from conflict to peace.[41]

- Prima facie, the most obvious technique to overcome the risk of the veto concludes agreements affecting the UN but to do so outside the UN. After all, while the P5 have a veto within the UN, they do not have such a veto outside the UN, and under articles 30 and 59 of the Vienna Convention on the Law of Treaties, it is perfectly possible to conclude a later treaty in order to supplement, or even abrogate, an earlier one. There are two caveats though. The first is that in order to be fully effective, the new treaty must involve all UN members.[42] Otherwise, the older version (i.e. today's Charter) will continue to apply between those who remain outside the supplementary treaty, and in relation between parties to the old version and the new version. Second, there is article 103 of the UN charter, confirmed in article 30 of the Vienna Convention, and holding that in the event of a conflict between obligations arising under the charter and another treaty, obligations under the charter shall prevail. In other words, any agreements departing from the charter will automatically be overruled by the charter, except perhaps in the unlikely circumstance that there would be agreement among the member states that the treaty at issue does not affect obligations under the charter- but that will effectively give all states a veto.[43]

- As the ICJ has stated in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Para 37* that international organization as international persons are 'as such bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.' The ILC Report on Responsibility of international organizations adds that the rules of organization include also the decisions and resolutions adopted in accordance with them, and established practice of the organization.[44] The charter has also inbuilt legal constraints on the Security Council both substantive in the form of charter's purposes and principles (article 24(1)) and procedural in terms of voting procedures.

Enacting general open-ended regulations with no time limits binding on all member states, a legislative competence distinct from its enforcement powers on the basis of which it adopts temporary binding decisions in respect of specific crises under chapter VII. This trend was initiated by S/RES/1373 (2001) in the face of the global threat of terrorism but has been extended to other areas, e.g. weapons of Mass Destruction, International Humanitarian Law etc. where this affects treaty obligation the Security Council may appear to bypass the *Pacta tertiis* rule. Moreover, Security Council as a non-representative body can hardly claim to fulfill the customary law requirements of general practice and *opinion juris*. [45]

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41 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Hilary Charlesworth, p.29.

42 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Jan Klabbers, p.14.

43 Ibid, p.15.

44 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Vera Gowland Debbas, p.35.

45 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Vera Gowland Debbas, p.34.

The security council's activism combined with the binding nature of its Chapter VII decisions and the hierarchical nature of the charter as embodied in article 103, has resulted in certain tensions between public policy concepts, in particular, between human rights and security.[46]

The need for proposal has been addressed in some of the reform proposals, e.g. the 2005 Summit Outcome document has called for regular monitoring and review by the Council to ensure accountability for the way in which sanctions decisions are implemented. The High Level Panel Report states in Para 152: 'the way entities or individuals are added to the terrorist list maintained by the council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.' [47]

## Prospective of future reform through practice:

Effectiveness was preferred to broader representativeness when the SC was created, on the grounds that it was to perform mainly a police function: silencing the guns and leaving the political or legal resolution of a conflict to others. The council forays into dispute resolution, judicial functions and legislation, and into areas quite beyond the confines of particular conflicts, certainly challenges this initial rationale and requires a rethinking of the normative framework beyond attempts merely to bring SC membership into line with the changed geopolitical circumstances of the 21st century as compared to 1945. The broader the functions are that the council performs; the stronger will be demands for a broader, more representative composition as well as greater transparency and accountability to the UN membership as a whole. [48]

Given that the SC is the only organ with string decision- making and enforcement powers, a gradual expansion of its functions is probably inevitable, unless other well- functioning bodies with binding powers are created. It may thus be more promising to pursue models of cooperative decision making between the SC and the GA than to try to uphold a separation of powers model that has long been eroded from both sides.[49]

Also, the ICJ has an important role to play as a principal organ of the UN, bound both to give effect to UN resolutions and to guard charter legality. [50]The latter task appears to have acknowledged by all the parties concerned.

## Modification development since 1945:

The law as it was understood in San Francisco has been modified over the years by the institutional practice of the Security Council followed by acceptance of this practice by UN member states. In other words, the council's handling of a certain situation *in concreto* has been followed by a state practice *in abstracto* (through acquiescence or normative statements in the UN or other international fora). [51]

Any formal amendments of the charter concerning the use of force are highly unlikely as a matter of politics, bearing in mind the veto power of the P5 Security Council members. The only form of legal

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46 Ibid

47 Ibid

48 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, p.45.

49 Ibid, p.46.

50 International Law Associattion, United Nations Reforms Study group, pg 36

51 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Ove Bring p.57

development that seems possible is through state practice, implying an adaptation to evolving needs in the line with purposes of the United Nations.[52]

The first Charter modification occurred as early as the period 1946-1950 and concerned 'the concurring votes' requirement of article 27(3). A former legal adviser at the US state Department noted that in 1946,"and consistently thereafter, abstentions were treated as 'concurring votes'. Valid Security Council decisions could materialize irrespective of whether a permanent member of the council "abstained, declined to vote or was absent". The ICJ confirmed the new legal situation regarding abstentions in 1971 (*Advisory opinion on Namibia, ICJ* reports 1971, p. 10)

This 'informal amendment' has made it easier to authorize the use of force, as was seen at the outbreak of the Korean War in 1950 and after the Iraqi invasion of Kuwait in 1990. (p 57)[53]

## Dilemma in collective self defense:

In 2001 the terrorist attacks of 9/11 were characterized by the Security Council (in two resolutions) as a threat to international peace and security. The right to individual or collective self defense under article 51 was confirmed (generically) in that context. The president of the council summarized the situation, after receiving the report from the USA and UK, as required by article 51, on their military action against targets in Afghanistan as: 'the members of the Security Council were appreciative of the presentations made by the United States and the United Kingdom'. [54]

However, in 2004, when the ICJ delivered its advisory opinion on the Israeli Wall in Palestine, it seemed to confirm a traditional strict interpretation of article 51, as did the UN High Level Panel Report the same year. When the ICJ touched upon the question of non- state actors in the *Congo v. Uganda Case* in 2005, it saw no need to clarify the issue "whether and other what conditions contemporary international law provides for a right of self- defense against large scale stacks by irregular forces." The **vagueness** of the legal situation has to be clarified through state practice, but it is clear that some development in terms of self defense against terrorism has taken place after 9/11. At the same time, it is clear that neither state practice nor *opinion juris* has licensed any doctrine on the pre-emptive war against international terrorism or, for that matter, against states developing weapons of mass destruction.[55]

In its advisory opinion on the Israeli Wall the ICJ seemed to suggest that, under article 51, self defense in only allowed against an armed attack carried out by another state. The formulation in question was not completely clear and seemed incomplete. [56]

In 2007 the ICJ majority view, in its strictest interpretation, was quietly challenged by state practice in the conflict between Turkey and the non- state actor PKK (the Kurdistan Workers' Party). PKK incursions into Turkish territory from bases in Iraqi Kurdistan highlighted the issue of non state actors and the use of force in self defense. The Turkish right to self defense was not denied by other states, although a large scale Turkish invasion would probably be condemned as a violation of the proportionality requirement of self-defense. The prognosis is that, irrespective of this particular case,

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52 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Ove Bring p.57

53 Ibid.57

54 Ibid p.58

55 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Ove Bring p.59

56 Ibid

state practice will clarify the legal situation in a manner at variance with the ICJ Wall opinion and more in line with the 2001 view of the Security Council.[57]

Interestingly, Responsibility to Protect (R2P) was addressed in paragraph 138-139, in the chapter on human rights and the rule of law not in the chapter on collective security and the use of force.[58]

It has been argued that international law could not accommodate a legitimization of 'humanitarian intervention' since the use of force- prohibition of article 2(4) is a peremptory norm, jus cogens. No deviations would be possible. The counter argument, put forward by some scholars, is that only the core content of the rule of law, i.e. pure aggression, constitutes jus cogens. That argumentation implies a distinction between aggressive purposes and other more benign purposes to save a state's own nationals or civilians in general.[59]

**Total no. of veto by US** - 57

USA, France and UK- 13

USA and UK- 9

**Uk alone**- 5

France and UK- 2

USSR- 90

Russian federation-5

China and Russian federation-6

France-1

China : 3

Total number of veto during cold war- 164 (USSR alone 90, china alone 1 in 1972 for the admission of new member Bangladesh, USA alone 41, UK alone 5 concerning the situation of southern Rhodesia, and other in a

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57 Ibid p. 59-60

58 Ibid p. 60

59 United Nation Reform through Practice, report of the International Law association Study Group on United Nations Reform, December 2011, Ove Bring p.61