Contemporary Existence and Relevance of the Law of Use of Force, the United Nations and the UN Charter

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Dengan semakin banyaknya pelanggaran atas Hukum Internasional khususnya dalam penggunaan kekuatan militer oleh Negara-negara, keberadaan aturan penggunaan kekerasan militer dalam hubungan internasional dirasakan sudah tidak relevan lagi. Bahkan PBB dan aturan dalam Piagam dianggap tidak berdaya menghadapi kenyataan dunia saat ini. Akan tetapi, pendapat tesebut tidak bisa dibenarkan karena sesungguhnya Negara-negara di dunia selalu berusaha untuk mencari justifikasi dalam hukum internasional atas segala tindakannya.

I. Introduction

It has been acknowledged that the central international regime for the use of force embodies in Article 2(4) UN Charter.[1] This provision restrains the UN's member States to use military force in their international relations.[2] This regime is important because it has primary aim to ensure horrible war experiences prior 1945 such as World Wars I and II are not occur again. Furthermore, the Charter

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[1] Article 2(4) the UN Charter, 26 June 1945, 59 Stat. 1031, T.S. No. 993. *See* Christine Gray, *International Law and the Use of* Force, (2nd edition, 2004) 29 and Wilhem G. Grewe, *The Epoch of International Law,* Walter de Gruyter, Berlin, 2000, 673-674.

[2] In the present development, DJ Harris argued that this provision is not only applied to member States but also to all States because it already becomes a rule of customary international law: D.J. Harris, *Cases and Materials on International Law,* 6th edition, Sweet & Maxwell, London, 2004, 889.

also encourages member States to solve their international conflict in peaceful mechanisms such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and "resort to regional agencies or arrangements".[3]

However, in the last ten years, international prohibition on the use of force above has been challenged by recent conditions which are likely undermining the regime's existence and also the United Nations' role as international organisation which had promoted it. It is apparent from the history that Security Council is not always be effective in upholding its mandate to maintain international peace and security[4] because of veto powers practices. This failure sometimes leads to the situation where States unilaterally or collectively with their allies to resort military force for the reason of their national security. This reason is based on the notion of self-defence or the recent controversial of humanitarian intervention. In the last decade, other issues that might exacerbate the international peace and security are the emergence of Weapon of Mass Destructions (WMDs) proliferation, international terrorism and what the so called "rogue nations".[5]

These conditions raise negative views in the international community concerning the relevance in the present situation of international prohibition on the use of force in particular and the UN Charter-based rules in general. Some had argued that the United Nations' rules on the use of force have become obsolete.[6] Even some scholars have noted that the Charter started its development

[3] Article 33 of the UN Charter.

[4] *Id*, Article 23.

[5] John C. Yoo, "Using Force" (2004) 71 University of Chicago Law Review 729, 734.

[6] John C. Yoo and Will Trachman, "Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations" (2005) 5(2) *Chicago Journal of International Law* 379, 381.

into obsolescence shortly after its initial formation.[7] They had argued that these rules are no longer relevant because threats are not mainly from States as the UN Charter is addressed to. Glennon had suggested that States are no longer regarded international regime concerning use of force as obligatory.[8] Therefore, by strictly applying rules on the prohibition on the use of force, UN Charter will loose its power to pull member States toward compliance. The stricter the rules, the more States intentionally violated them. This situation might be happen when superpower States unilaterally act in order to seek its national interests because they perceived the UN Charter-based system is no longer relevant to them.

However, it can be argued that the arguments above cannot be sustained. The UN Charter still and continues to be relevant in international relations especially the provision of use of force prohibition. This condition also showed by the States' practices. It is important to note from what Thomas Franck had argued in his article that "the normative system established by the UN Charter is not eroding. On the contrary, its legitimacy is rather consistently upheld in the rhetoric of all states and the behaviour of most."[9] Even though there are many violations to the Charter by States, these scofflaws eventually claim that their action is justified and within the normative obligations of the present rules.

This essay tries to examine the present condition of the existence of international use of force regime and the United Nations in relation to States' current practices. It begins with observation to some challenges for the UN such as the failure of its organ i.e. Security Council, unilateralism practices by the States and

[7] See Thomas M. Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States" (1970) 64 *American Journal of International Law* 809-837.

[8] Michael J. Glennon, "The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter" (2001-2002) 25 *Harvard Journal of Law & Public Policy* 539, 540.

[9] Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100(1) *American Journal of International Law* 88, 98.

other important issues like WMD proliferation, international terrorism and "rogue nations". Then, it will present some arguments to support the UN's role in international relations in several aspects. These aspects are law's relevance, realistic environment within the UN and UN's institutional reform. Finally, it will conclude some findings in order to maintain that the UN and its Charter still and continue to be relevant in international relations especially the international regime of use of force.

II. Challenges for the UN

As the biggest inter-governmental organisation, the UN has played significant roles since its establishment in the aftermath of World War II. Sweeney noted that at the initial formation, the UN Charter was designed to deal with extensive conflicts between major alliances of nation-states.[10] The Charter also had maintained the central role in managing States' right to resort military power in their international relations by setting out the prohibition in Article 2(4). From this provision, the UN promises each State's security against attack in exchange for its control on the use of force.

The use of military force against another State is only justified if it is done collectively under the scheme of the Charter's rule. However, this control is not absolute because the Charter allows States to use force outside its control only in the circumstance of self-defence.[11] Koh had noted that, in theory, the UN's effort in encouraging states to enter into collective security commitments, future wars could be avoided.[12] To exercise its right to control the

[10] For a comprehensive summary of the benefits that States seek by joining the United Nations: *see* Joseph C. Sweeney, "The Just War Ethic in International Law" (2004) 27 *Fordham International Law Journal* 1865-1903.

[11] Article 51 of the UN Charter.

[12] For a description of the path from World War II to the United Nations, see Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106 *Yale Law Journal* 2599, 2612-2624.

use of force, an organ of Security Council was created as the institutional forum to play primary role in collective security decision making.[13]

The UN as a whole, including Security Council, however, faces many challenges in its role as facilitator in international cooperation especially its role in maintaining international peace and security. It is further important to examine that the central rules on the use of force prohibition is also under threat of its relevance in international relations. Most of these challenges are come from recent development such as the emergence of the sole Superpower State, the concept of humanitarian intervention, WMDs proliferation, international terrorism and "rogue nations". Other challenges such as Security Council failure in collective security decision making and the notion of self-defence are actually already known but they rapidly grow in importance in relation to the previous development. These challenges are important to be examined because they are the crucial situations which lead to the view that the UN and its Charter especially its rule on use of force prohibition are no longer relevant and States are likely disobey it.

II.1. Superpower State

The end of the Cold War had brought many changes in international relations especially to the distribution of powerful States.[14] During the Cold War, it is widely acknowledged that there were two Great Power States which balancing each other in all aspect of life especially political and weaponry power.[15] These States are the US and the USSR. Almost all interstate conflicts during the Cold War were involving these two States, either directly

[13] Article 24 of the UN Charter.

[14] Eyal Benvenisti, "The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies", (2004) 15 *European Journal of International Law* 677.

[15] Constantine Antonopoulos, "The Unilateral Use of Force by States after the End of the Cold War" (1999) 4(1) *Journal of Conflict and Security Law* 117.

or indirectly.[16] However, it is noteworthy that conflict among the Western states declined when so much the world was trapped in the bipolar tensions of the cold war[17] and that fact was not merely because the existence of prohibition on the use of force from the UN Charter.

After the collapse of the USSR, practically, the US became the only super power State in the world even though Russia and China, lately, are trying to emerge as superpowers. It is widely acknowledge that the US roles had extended in international relations in the aftermath of the Cold War. It can be argue that no individual States could balance the US's power especially in the military power. Some might argue that the US had played a new role as the world's police.[18] Unfortunately, the power that own by the US sometimes could undermine the existence of international law especially the rules on the use of force. The 2003 invasion to Iraq was the important example where the US-led coalition disregard the rest countries in the world that against that action because no State could prevent them. As one of the biggest donor countries to the UN,[19] the US might threatened its withdrawal from the UN and predicted that it will collapse without the support from the US. From this situation, Noelle had argued that this emergence as a hegemonic States had signalling "the degeneration of

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[16] L. Scott, "International History 1945-1990", in J. Baylis & S. Smith, *The Globalization of World Politics. An Introduction to International Relations.* 2nd Edition. Oxford University Press, New York, 2001, 79.

[17] B.M. Russet, J.R. Oneal and M. Cox, "Clash of Civilizations, or Realism and Liberalism Déjà Vu? Some Evidence", (2000) 37(5) *Journal of Peace Research* 584.

[18] Charles William Maynes, "Dateline Washington: A Necessary War?" (1991) 82 *Foreign Policy* 159-177.

[19] Volker Lehmann and Angela Mcclellan, "Financing the United Nations", April 2006, available at <http://www.globalpolicy.org/finance/docs/2006/04factsheet.pdf> at 12 September 2006.

international law and devitalisation of the system of collective security".[20]

II.2. Security Council's Failure

As noted above, Security Council was created to exercise the UN mandate on international peace and security by promoting collective security decision making. As the UN's organ which has a mandate to manage the governing rules of the use of force, Security Council designated by the Charter under Article 39 as the apposite "institution-the jury-for deciding" whether a situation has become a threat to the international peace and security that may possibly authorise action in the using of military force.[21] The Security Council consists of fifteen members of the UN with five among them are the permanent members like People's Republic of China, France, Russia, the United Kingdom (UK) and the United States (US).[22] These permanent members are entitled with veto right.[23] This veto right was intended to ensure the balance of powers among the great powers post the World War II. With these concurrent agreements from the permanent members, it is hoped that any collective security decision from this council ensures the maintenance of the world peace and security since it is backed up by the great powers.

However, in reality, this collective security decision making scheme is not always as success as it hope. Political powers among the permanent members are sometimes outweighed legal consideration in making its decision.[24] A clear example is that

[20] Noelle Quenivet, "The World after September 11: Has it Really Changed?" (2005) 16(3) *European Journal of International Law* 561, 577.

[21] Franck, above n 9, 95.

[22] Above n 4.

[23] Article 27(3) of the UN Charter.

[24] Michael J. Glennon, "Why the Security Council Failed" (2003) 82 *Foreign Affairs* 16.

during the Cold War, the Security Council practically paralysed because of the usage of or threat of veto.[25] Even after the end of the Cold War, these problems continue to happen.[26]

It is interesting to note that Yoo and Trachman have argued that there are two factors which failed the decision making in the Security Council.[27] Firstly, the permanent members are likely to have different interests based on economic or political considerations in different parts of the world. The examples of this are the threats of veto from Russia in the case of Kosovo in 1999 and France together with Russia in the case of invasion to Iraq in 2003. Their reasons are likely because of the historical and economical background respectively. Secondly, permanent members of the Security Council might be using their veto to limit the power of the United States as a sole hegemonic State in order to make a balance of power in the international community.

It can be concluded that this failure tend to encourage States to act unilaterally against another State in the reasons for protecting their national interests. States, which feel threatened by the Security Council's failure in making decision, are likely to resort force individually or collectively without the Security Council's authorisation based on the right of self-defence to protect their national interests or values. The notorious example of unilateral action by States was the US and its coalition's invasion to Iraq because Saddam's regime had threatened them.

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[25] Gray, above n 1, 196 and Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, Dartmouth, Alderhot, 1992, 23.

[26] Interestingly to note that Henkin had argued that during the Cold War eventually the prohibition under article 2(4) had successfully restrain and neutralised the use of nuclear weapons by the US and the USSR: Louis Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated" (1971) 65(3) *American Journal of International Law* 544, 545.

[27] Yoo and Trachman, above n 6, 386.

II.3. Self-Defence & Humanitarian Intervention

It is acknowledged that States have the right of self-defence under Article 51 of the UN Charter. However, this right also subject to some limitation which requires the occurrence of armed attack and report to the Security Council soon after self-defence measures taken place.[28] Further, the International Court of Justice (ICJ) in its certain decisions and opinion had reaffirmed and outlined the conditions for the legitimate use of self-defence in international law.[29] It is unfortunate to note that parallel with the frequent Security Council's failure to address international conflicts, the exercise of right to self-defence is also become more frequent. States had considered that they ought to act promptly to address the conflict because they found that there was no hope for Security Council's authorisation while the effect of the conflict had reached worse situation and might threatened their security.

Five years ago, there was a development of the notion of self-defence which is important to note i.e. unilateral pre-emptive self-defence where it was become known as the Bush Doctrine.[30] This doctrine was introduced by the President of the US in 2002 as a response of the new threats of global terrorism by widening the original right of self-defence.[31] It contends that "the greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's

[28] Article 51 of the UN Charter.

[29] Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, "Exploring the Limits of International Law relating to the Use of Force in Self-Defence" (2005) 16 *European Journal of International Law* 499, 522.

[30] *See* Christian Henderson, "The Bush Doctrine: From Theory to Practice" (2004) 9(1) *Journal of Conflict & Security Law* 3-24.

[31] "The National Security Strategy of the United States of America", 20 September 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf>, at 27 September 2006.

attack."[32] This new concept is quite controversial in nature because it is not only develop an extensive approach of using force[33] but also allows the US in resorting military force against other State's territory where the US might claim the right to launch pre-emptive strikes on States which believed a threat before it had been attacked.[34] It is interesting to note that Arend had concluded that "if the charter framework no longer accurately reflects existing international law, then the Bush doctrine of preemption may, in fact, be lawful - even if it is politically unwise."[35] Even the US had not yet act based on this doctrine, its emergence is likely threatening the present rules on self-defence if States start to apply it in the future.

In 1999, there was an important event which showed how NATO States act in resorting military force without authorisation from the Security Council.[36] This event was a response to the repression of ethnic Albanians in the region of Kosovo by the federal government of Yugoslavia under President Milosevic.[37] The Security Council had tried to address this issue. However, Russia prevented the Security Council from issuing a resolution

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[32] *Id.*

[33] Olivier Corten, "The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate" (2005) 16(5) *European Journal of International Law* 803, 804.

[34] "Remarks by the President at 2002 Graduation Exercise of the United States Military Academy at West Point", 1 June 2002, available at <http://whitehouse.gov/news/releases/2002/06/ 200206013.html>, at 27 September 2006.

[35] Anthony Clark Arend, "International Law and the Preemptive Use of Military Force" (2003) 26(2) *The Washington Quarterly* 89.

[36] Peter Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?" (2001) 12(3) *European Journal of International Law* 437, 440.

[37] Gray, above n 1, 37.

authorizing the use of force because of its historic ties to Serbia.[38] Because of this deadlock, NATO decided to resort military intervention what they so called "Operation Allied Force".

NATO justifies its action by stating that the crisis in Kosovo was a threat to the peace and security of the region and thus NATO's action was to bring to an end the violence and prevent a humanitarian disaster.[39] These reasons might be claimed as the new post-modern just cause that is human rights.[40] It is significant to note the Slovenia's justification of NATO's action. It said that the Security Council's responsibility in maintaining peace and security was primary but not exclusive. Therefore, NATO had been entitled to act.[41] It has also been suggested that, even though NATO failed to achieve a UN Security Council Resolution endorsing its action, NATO had succeed to claim a degree of legitimacy for its action.[42] For this legitimacy, Glennon further argued that if a power is used to do justice then the law will follow.[43] This achievement of legitimacy was supported by the reality that in this case most international lawyers remained obviously silent on the strict legality of the action.[44]

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[38] Yoo and Trachman, above n 6, 386.

[39] Gray, above n 1, 38.

[40] Costas Douzinas, "Postmodern Just Wars: Kosovo, Afghanistan and the New World Order", in John Strawson (ed), *Law after Ground Zero*. GlassHouse Press, Newport, 2002, p.25.

[41] Gray, above n 1, 41.

[42] Chris Brown, "Self Defence in an Imperfect World" (2003) 17(1) *Ethics & International Affairs* 2, 6.

[43] Michael J. Glennon, "The New Interventionism: The Search for a Just International Law" (1999) 78 *Foreign Affairs* 2, 7.

[44] Michael Byers and Simon Chesterman, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law" in J.L Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003, 177.

However, this event had brought controversial debate about the legality of the action among States.[45] Gray had noted that many arguments were put forward against the NATO's use of force. They claimed that this action was a clear violation of the UN Charter especially Article 2(4). This action was undermined the primary role of the Security Council under Article 24(1) of the UN Charter and it cannot be justified in the absence of the Security Council's authorisation.[46] In the other side, Berdal had argued that this action was clearly as the promotion of a broader humanitarian objective.[47]

II.4. WMDs, International Terrorism, and "Rogue Nations"

The events of 11 September 2001 have brought many important changes in the international spheres especially to the discourse of use of force.[48] These events have made clear to the international community that the main threat to international peace and security in the present day does not come from the threat of conflict between States. As noted above, current threats arise from international terrorist organisations, proliferation of WMDs, and "rogue nations". It is important to note that these problems are related to each other and form comprehensive threats to the international peace and security.

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[45] *See* N.D. White, "The Legality of Bombing in the Name of Humanity" (2000) 5(1) *Journal of Conflict and Security Law* 27-43 and Steven Wheatley, "The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention" (2000) 5(2) *Journal of Conflict and Security Law* 261-273.

[46] Gray, above n 1, 39.

[47] Mats, Berdal, "Lessons not Learned: The Use of Force in 'Peace Operations' in the 1990s" in Adekeye Adebarjo and Chandra Lekha Sriram (eds.), *Managing Armed Conflicts in the 21st Century*, Frank Cass, London, 2000, 57.

[48] *See* Michael Byers, "Terrorism, the Use of Force and International Law after 11 September" (2002) 51 *International and Comparative Law Quarterly* 401-414.

When the terrorist attacks brought so many casualties, States started to pay attention to States which allegedly acquire unconventional weapons since the former have difficulties to detect the terrorists. The situation was exacerbated by the latter by refusing the international weapon inspection agency to prove that they do not have the weapon which they could use for terrorist action. These States are called as "rogue nations" such as Afghanistan, Iraq, Iran and North Korea.[49]

The refusal to cooperate from these "rogue nations" had created uncertainty to the international peace and security. Yoo and Trachman argued that this uncertainty which come from the rogue nations may have the effect of forcing powerful nations to attack in order to prevent the development of a situation in which WMDs might fall into the hands of terrorists.[50] It is important to note that the Bush Doctrine of pre-emptive self-defence was a response to the uncertainty concerning the status of WMDs held by rogue nations.[51]

The 2003 invasion to Iraq by coalition forces led by the US was a notorious example of the response to rogue nation which possess WMDs and allegedly have a link to international terrorist organisation, Al-Qaeda. Once again, the Security Council had tried to address the resistance from Iraq and produce a compromise resolution among the permanent member States. This resolution was Resolution 1441 which affirmed that Iraq had violated previous related resolution such as 678 and 687 and might face "serious consequences".[52] Soon after this resolution, the US and its allies finally invaded Iraq based on this resolution. However, many States

[49] While Afghanistan and Iraq have already invaded by the US and its allies, Iran and North Korea could prevent the atrocities by accepting the IAEA to inspect their nuclear power plant. However, this does not make the US stop from paying attention to them because of its other interests.

[50] Yoo and Trachman, above n 6, 389.

[51] Henderson, above n 30, 7.

[52] UNSC Resolution 1441.

and scholars had opposed this action and condemn it as illegal action without any clear authorisation from the Security Council.[53]

This action had highlighted the problem concerning the existence of the UN Charter where States can resort force against another State without legal justification under the Charter. The proponent of the Iraq war had claimed that if the use of force requirements in the Charter is strictly applied and it neglect global aggressive threats before they become imminent especially threats from international terrorism, the UN has loosing its opportunity to maintain its relevance in the international security area.[54]

III. The Support for the UN's Role

It is apparent from the discussion above that there are many States practices which clearly in breach of UN Charter on prohibition the use of force. One of the reasons why these States resort force without legitimate authorisation from the Security Council are dissatisfaction from those States when Security Council fail to produce agreement in addressing a conflict while the situation had threatened the international peace and security. At the end, it is believed that States are no longer obeying the UN Charter provisions in resorting force in particular.

However, it can be argued that even though there are many violations to the UN Charter, States are actually in compliance with it. It can be equally argued that States, when undertook its action, always tried to justified based on the present international normative obligations especially the rules governing the use of force. Therefore, it is crucial that the UN, where all States in the world as its member, could still and continues to maintain its role in implementing its admirable mandates and goals in international relations by realising its law's relevance in actual condition,

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[53] Thomas Franck, "Terrorism and the Right of Self-Defence" (2001) 95 *American Journal of International Law* 839.

[54] Yoo and Trachman, above n 6, 385.

modifying its target by creating realistic atmosphere when it deals with States especially great power States and implementing its institutional improvement in order to bring back international community's reliance in maintaining international peace and security.

III.1. Law's Relevance

It has been acknowledged that many violations to the UN Charter especially the prohibition on the use of force had happened and they become intensified in the last ten years. Two notorious examples of this are the 1999 NATO's military intervention to the Former Republic of Yugoslavia and the 2003 US-led coalition's invasion to Iraq. These events were lead to the consideration where the UN Charter as part of international law has lost its relevance as the law because States are no longer obey it. However, this argument cannot be justified because in reality States do obey and always try to act within their normative obligations.

It is recognised in international law spheres that there is no international police to enforce the law. Thus, its enforcement is based on common beliefs such as good faith and *pacta sunt servanda* where treaties among States are binding because they respect and implement them in positive intention at any time.[55] It is significant to note that the US as the sole Superpower State in the present time still deeply concerns and let herself bound by norms and rules in international law which may not always produce benefit for its national interests. States still comply with international law because they still have the belief to it where international law provides the prediction of States behaviour. From this belief, it is the law's power as the explanation of why States in compliance voluntarily.[56] Without this belief, it can be argued that

[55] Stuart Ford, "Legal Process of Change: Article 2(4) and the Vienna Convention on the Law of Treaties" (1999) 4(1) *Journal of Conflict and Security Law* 75, 101-103.

[56] Franck, above n 9, 91.

the situation will lead into lawlessness. However, as Franck had argued, these non-compliances do not prove the ineffectiveness of the rules because eventually the law is never flawlessly conformed.[57]

In the cases of NATO in Kosovo and the US with its allies in Iraq where they choose to act without clear authorisation from the Security Council, it can be argued that they are not causing the international prohibition on the unilateral recourse to force by states become meaningless. This is shown by so many States remain against those actions and based on the present rules.[58] Even the participants of this action experienced a legal and moral dilemma between international law prohibitions on the use of force and the goal of preventing or stopping widespread grave violations of international human rights.[59] It is significant to note that, in the former case, many States claimed that this action was a clear violation of the UN Charter especially Article 2(4) and undermined the primary role of the Security Council under Article 24(1) of the UN Charter. In the later case, it is equally significant to note that the UN Security Council persistently refuse to validate the invasion and thus demonstrates that most states' continue to rely on the Charter rules. These oppositions show that States still maintain the UN Charter's designation of the Security Council, in accordance with Article 39, as the appropriate institution to be the jury for deciding on whether or not the situation is a "threat to the peace" and could authorise the recourse to force.

Franck had examined that in most events, states which have violated Article 2(4) of the Charter have claimed their innocence either by altering the facts to conform to the self-defence right given

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[57] *Id.*

[58] Tarcisio Gazzini, "NATO's Role in the Collective Security System" (2003) 8(2) *Journal of Conflict and Security Law* 231, 262-263.

[59] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 *American Journal of International Law* 824, 834.

by Article 51 or by interpreting that right creatively.[60] Besides self-defence claim, States are also never challenged the legitimacy of the law which they were violating but rather insisted that their action were in full compliance with it. It is apparent that law's legitimacy is not conserved by rejection to rule's change but rather as the results of widespread recognition of the reformed rules as the universal application. Therefore, law's change through States' practice will not undermine a rule's legitimacy.[61] Finally, in the present international rules on the use of force, it can be concluded that this rule is remain and continue to be relevant in international relations since the States which insisted to the present rules are outnumbered the States which considered this rule had obsolete.

III.2. Realistic Environment

It is recognised that the UN had a remarkable purpose to maintain international peace and security and includes taking effective control of collective measures whether military force or not.[62] At the same time, it is inevitably that, in the present days, powerful States had unilaterally recourse to force in order to pursue their national interests based on various reasons and justifications. It seems that the UN will gain nothing from its purpose if it strictly demanding States especially powerful States to obey the present rules of which they consider to be irrelevant in facing current threats that come from international terrorists and "rogue nations" with WMDs proliferation.

It is important to maintain that the existence of the UN as international organisation should be preserved including its Charter-based system. This is based on the history that the UN had been played significant roles in maintaining relative international peace

[60] Franck, above n 9, 96.

[61] *Id.*

[62] Article 1(1) of the UN Charter.

and security especially in the end of the Cold War.[63] In achieving this purpose, it can be argued that the UN might modify its ambition to be more realistic in preventing interstate wars. It is the failure of UNSCOM which had a mandate to disarm Iraqi WMDs that showed the Security Council should modify its goals.[64] The UN remains capable to play a significant role in resolving disputes between states before they are escalating into military conflict without forcing States to obey its formal legal rules.

This role shows that the UN provides comprehensive information about the conflict to the conflicting parties while it maintains its impartiality a neutral institution.[65] The information, that the UN can provide, is about the relative power of nations and the disadvantages and advantages if they go to be armed conflict and thus it is believed that it could help encourage negotiation for settlements. This role is consistent with theories about the role of international institutions in facilitating bargains between member States.[66]

When dealing with "rogue nations", the verification role from the UN is essential to be considered. This verification measure could cover the interests of many contracting parties by ensuring that no party is cheating on international agreements which might

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[63] Katherine E. Cox, "Beyond Self-Defence: United Nations Peacekeeping Operations & the Use of Force" (1998-1999) 27 *Denver Journal of International Law & Policy* 239, 240.

[64] Charles Duelfer, "Arms Reduction: The Role of International Organisations, the UNSCOM Experience" (2000) 5(1) *Journal of Conflict and Security Law* 105, 106.

[65] *See* William J. Aceves, "Institutionalist Theory and International Legal Scholarship" (1997) 12 *American University Journal of International Law & Policy* 227.

[66] James D. Fearon, "Bargaining Enforcement and International Cooperation" (1998) 52(2) *International Organisation* 269, 269-270.

harmed other nations.[67] The UN could encourages "rogue States" to cooperate with its agency in verifying the facts that all allegations of possessing WMDs. This effort is not only help "rogue States" to prove that their nations are neither hostile nor harbour terrorist groups but also provide information to other States to take into account to their decision making in judging these "rogue nations".

The Iraqi case under Saddam Hussein's administration provides a perfect example of this role. In the widespread allegations that Iraq had developed WMDs, the UN inspection teams, UNMOVIC, sought to provide more information about Iraq's capabilities, particularly whether it had developed it or not. If the Iraqi government at that time was willingly to cooperate, it might prevent the US and its allies undertook military actions. Unfortunately, by delaying and impeding the inspections, Iraq created the opposite expectation and leading to the impression where it was close to achievement of a practical WMD system. Nevertheless, this would rather encourage war, rather than a negotiated settlement.

If the UN exhaustively provides information about the conflict, States should have made a correct conclusion about threats to their country. However, if the findings lead to negative information, it is not consider as another justification for States to act unilaterally recourse to force but rather as the basis for concern for collective security decision making within the UN's system, i.e. Security Council. This transparency information availability could strengthen the UN's ability to encourage States' compliance toward the Charter's rules especially the prohibition on the use of force.

III.3. UN Reform

It is the Security Council's mandate to manage the implementation of the rules on the use of force prohibition.[68] Even

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[67] Kenneth W. Abbott, "Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreement" (1993) 26 *Cornell International Law Journal* 1, 17-20.

[68] Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-Fires and the Iraqi Inspection Regime" (1999) 93 *American Journal of International Law* 124, 125.

if this prohibition is considered to the part of *jus cogens*,[69] it always be the central of controversial debate among States recently because this rule become frequently violated in the name of various justifications.[70] Facing threats that the UN will lose its legitimacy among member States because of States' unilateralism in recourse to force, it can be argue that the UN especially the Security Council is in need of a reform.[71] When different political interest for different part of the world from the Security Council permanent members are inevitably, the continuity of the present veto-right system will only jeopardise the Security Council than strengthen it as the appropriate agency for maintaining international peace and security. However, it is important to note that Blokker has suggested that, in addressing threats to international peace and security, member States often express their aspiration for greater UN (Security Council) control.[72]

It has been acknowledged that the veto-right system in the UN Charter was intended to maintain the balance of power from victorious States after the World War II.[73] However, this veto-right

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[69] Bruno Simma, "NATO, The UN and the Use of Force: Legal Aspects" (1999) 10 *European Journal of International Law* 1, 3. *See* Decision of the ICJ in *Case Concerning Military and Paramilitary Acts in and Against Nicaragua* (Nicaragua v USA), 1986 ICJ Reports 14, par. 99-100.

[70] John D. Becker, "The Continuing Relevance of Article 2(4): A Consideration of the Status of the UN Charter's Limitations on the Use of Force" (2003-2004) 32(3) *Denver Journal of International Law & Policy* 583, 608.

[71] See Arie Afriansyah, "Developing Countries in the UN Security Council's Reform". Paper presented in the 4th Asian Law Institute (ASLI) Conference, 24-25 May 2007, Faculty of Law University of Indonesia.

[72] Niels Blokker, "Is the Authorisation Authorised? Powers and Practice of the UN Security Council to Authorise the Use of Force by "Coalitions of the Able and Willing" (2000) 11(3) *European Journal of International Law* 541, 568.

[73] Bruno Simma (ed), *The Charter of the United Nations*, 2nd edition, Oxford University Press, New York, 2002, p. 481.

system could no longer support the mandate of the Security Council because it will impede the collective security decision making and thus other permanent members which dissatisfied with the result, whether the resolution was vetoed or threatened to be vetoed, will carry out its own action without the authorisation of the Security Council to use force in the name of national security or as an act of self-defence.

It is become visible that the emergence of terrorism and WMD's proliferation had made the requirement of the occurrence of armed attack to justify self-defence irrelevant.[74] This is because those threats are greatly unpredictable behaviour and might result in a big number of casualties. Again, this should not be the justification for States to act unilaterally based on excessive right of self-defence. It is the opportunity for the Security Council to take action without waiting for the threat to become imminent or even occurring. This action is to determine the present clues are already become the threat to international peace and security and thus the Security Council might authorises measures to address the threats including the use of collective force. That determination, however, is reserved to the judgment of the Council acting as jury, and not to individual states.

However, in the aftermath of September 11 events, the Security Council had shown its reform to meet new crises even if the time for reform of the veto has not yet come.[75] It is the Security Council's response, where the Charter did not foresee, to the problem of self-defence against terrorist groups which are not states and work across national boundaries. By its Resolution 1368 and 1373, the Security Council made clear the responsibility and liability of those who are sponsoring the terrorist attacks or engaging in support or harbour the perpetrators. In response to

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[74] Michael J. Glennon, "Platonism, Adaptivism, and Illusion in UN Reform" (2006) 6(2) *Chicago Journal of International Law* 613, 615.

[75] Eric P.J. Myjer and Nigel D. White, "The Twin Towers Attack: An Unlimited Right to Self-Defence?" (2002) 7(1) *Journal of Conflict and Security Law* 5, 6. *See also* Karel Wellens, "The UN Security Council and New Threats to the Peace: Back to the Future" (2003) 8(1) *Journal of Conflict and Security Law* 15, 67-68.

them, the right of individual and collective self-defence was deemed to be as applicable as if they were states.[76]

IV. Conclusion

It can be concluded that the central rules on the use of force in international relations are still relevant and comply by States. The UN and its Charter-based system remain needed their existence in maintaining international peace and security even some might predicted its destiny would be the same with its predecessor, the League of Nations.[77] Thomas Franck believed that the Charter system has proven flexible in the face of changing fundamental circumstances to which it has learned to adapt by its principal organs'[78] practices and sometimes aided by the ICJ.[79] Thus, in order to address new threats, it is unnecessary for States seeking a new international legal order. The latter effort might be counterproductive because the present legal order encompasses a great many aspects which make a fairly successful fight against those new threats including terrorism.[80]

It is important to argue that the basic rules on the use of force, however, should not be changed because if it becomes the

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[76] Resolutions 1368 (12 September 2001) and 1373 (28 September 2001), respectively, recognise the right to take individual and collective measures in the aftermath of the attack by Al-Qaeda on the US.

[77] James S. Sutterlin, *The United Nations and the Maintenance of International Security: A Challenge to be Met,* Praeger, London, 1995, 2.

[78] Its principal organs such as the Security Council, the General Assembly, and the Secretary-General.

[79] Thomas M. Franck, "When, if ever, may States Deploy Military Force Without Prior Security Council Authorisation?" (2001) 5 *Journal of Law & Policy* 51, 68.

[80] Peter J. Van Krieken, *Terrorism and the International Legal Order with Special Reference to the UN, the EU and Cross-Border Aspects.* The Hague: TMC Asser Press, 2002, 482

negotiable subject, the existing international peace and security would be in jeopardy.[81] Global challenges also require global solutions and few indeed are the situations in which the US or any other country can act completely alone. As the world's most excellent international organization, the UN embodies world opinion, or at least the opinion of the world's legally constituted states. When the UN Security Council passes a resolution, it is seen as speaking for humanity as a whole and in so doing it confers a legitimacy that is respected by the world's governments and usually by their publics.[82]

BIBLIOGRAPHY

Anthony Clark Arend, "International Law and the Preemptive Use of Military Force" 26(2) *The Washington Quarterly* 2003.

Arie Afriansyah, "Developing Countries in the UN Security Council's Reform". Paper presented in the 4th Asian Law Institute (ASLI) Conference, 24-25 May 2007, Faculty of Law University of Indonesia.

B.M. Russet, J.R. Oneal and M. Cox, "Clash of Civilizations, or Realism and Liberalism Déjà Vu? Some Evidence", 37(5) *Journal of Peace Research* 2000.

Bruno Simma (ed), *The Charter of the United Nations*, 2nd edition, Oxford University Press, New York, 2002.

[81] David J. Scheffer, "The Great Debate of the 1980s", in Thomas Ehrlich & Mary Ellen O'Connell, *International Law and the Use of Force*. Little, Brown & Company, New York, 1993, p. 114.

[82] Shashi Tharoor, "Why America Still Needs the United Nations" (2003) 82 *Foreign Affairs* 67, 68-69.

Bruno Simma, "NATO, The UN and the Use of Force: Legal Aspects" (1999) 10 *European Journal of International Law* 1999.

Charles Duelfer, "Arms Reduction: The Role of International Organisations, the UNSCOM Experience" 5(1) *Journal of Conflict and Security Law* 2000.

Charles William Maynes, "Dateline Washington: A Necessary War?" 82 *Foreign Policy* 1991.

Chris Brown, "Self Defence in an Imperfect World" 17(1) *Ethics & International Affairs* 2003.

Christian Henderson, "The Bush Doctrine: From Theory to Practice" 9(1) *Journal of Conflict & Security Law* 2004.

Constantine Antonopoulos, "The Unilateral Use of Force by States after the End of the Cold War" 4(1) *Journal of Conflict and Security Law* 1999.

Costas Douzinas, "Postmodern Just Wars: Kosovo, Afghanistan and the New World Order", in John Strawson (ed), *Law after Ground Zero*. GlassHouse Press, Newport, 2002.

D.J. Harris, *Cases and Materials on International Law*, 6th edition, Sweet & Maxwell, London, 2004.

David J. Scheffer, "The Great Debate of the 1980s", in Thomas Ehrlich & Mary Ellen O'Connell, *International Law and the Use of Force*. Little, Brown & Company, New York, 1993.

Eric P.J. Myjer and Nigel D. White, "The Twin Towers Attack: An Unlimited Right to Self-Defence?" 7(1) *Journal of Conflict and Security Law* 2002.

Eyal Benvenisti, "The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies", 15 *European Journal of International Law* 2004.

Gray, Christine, *International Law and the Use of* Force, 2nd edition, Oxford University Press, New York, 2004.

Harold Hongju Koh, "Why Do Nations Obey International Law?" 106 *Yale Law Journal* 1997.

Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict,* Dartmouth, Alderhot, 1992.

James D. Fearon, "Bargaining Enforcement and International Cooperation" 52 *International Organisation* 1998.

James S. Sutterlin, *The United Nations and the Maintenance of International Security: A Challenge to be Met,* Praeger, London, 1995.

John C. Yoo and Will Trachman, "Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations" 5(2) *Chicago Journal of International Law* 2005.

John C. Yoo, "Using Force" 71 University of Chicago Law Review.2004.

John D. Becker, "The Continuing Relevance of Article 2(4): A Consideration of the Status of the UN Charter's Limitations on the Use of Force" 32(3) *Denver Journal of International Law & Policy* 2003-2004.

Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo" 93 *American Journal of International Law* 1999.

Joseph C. Sweeney, "The Just War Ethic in International Law" , 27 *Fordham International Law Journal* 2004.

Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-Fires and the Iraqi Inspection Regime" 93 *American Journal of International Law* 1999.

Karel Wellens, "The UN Security Council and New Threats to the Peace: Back to the Future" 8(1) *Journal of Conflict and Security Law* 2003.

Katherine E. Cox, "Beyond Self-Defence: United Nations Peacekeeping Operations & the Use of Force" 27 *Denver Journal of International Law & Policy* 1998-1999.

Kenneth W. Abbott, "Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreement" 26 *Cornell International Law Journal* 1993

L. Scott, "International History 1945-1990", in J. Baylis & S. Smith, *The Globalization of World Politics. An Introduction to International Relations.* 2nd Edition. Oxford University Press, New York, 2001.

Louis Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated" 65(3) *American Journal of International Law* 1971.

Mats, Berdal, "Lessons not Learned: The Use of Force in 'Peace Operations' in the 1990s" in Adekeye Adebarjo and Chandra Lekha Sriram (eds.), *Managing Armed Conflicts in the 21st Century,* Frank Cass, London, 2000.

Michael Byers and Simon Chesterman, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law" in J.L Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas,* Cambridge University Press, Cambridge, 2003.

Michael Byers, "Terrorism, the Use of Force and International Law after 11 September" 51 *International and Comparative Law Quarterly* 2002.

Michael J. Glennon, "Platonism, Adaptivism, and Illusion in UN Reform" 6(2) *Chicago Journal of International Law* 2006.

Michael J. Glennon, "The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter" 25 *Harvard Journal of Law & Public Policy* 2001-2002.

Michael J. Glennon, "The New Interventionism: The Search for a Just International Law" 78 *Foreign Affairs* 1999.

Michael J. Glennon, "Why the Security Council Failed" 82 *Foreign Affairs* 2003.

N.D. White, "The Legality of Bombing in the Name of Humanity" 5(1) *Journal of Conflict and Security Law* 2000.

Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, "Exploring the Limits of International Law relating to the Use of Force in Self-Defence" 16 *European Journal of International Law* 2005.

Niels Blokker, "Is the Authorisation Authorised? Powers and Practice of the UN Security Council to Authorise the Use of Force by "Coalitions of the Able and Willing" 11(3) *European Journal of International Law* 2000.

Noelle Quenivet, "The World after September 11: Has it Really Changed?" 16(3) *European Journal of International Law* 2005.

Olivier Corten, "The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate" 16(5) *European Journal of International Law* 2005.

Peter Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?" 12(3) *European Journal of International Law* 2001.

Peter J. Van Krieken, *Terrorism and the International Legal Order with Special Reference to the UN, the EU and Cross-Border Aspects*. The Hague: TMC Asser Press, 2002.

Shashi Tharoor, "Why America Still Needs the United Nations" 82 *Foreign Affairs* 2003.

Steven Wheatley, "The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention" (2000) 5(2) *Journal of Conflict and Security Law* 2000.

Stuart Ford, "Legal Process of Change: Article 2(4) and the Vienna Convention on the Law of Treaties" 4(1) *Journal of Conflict and Security Law* 1999.

Tarcisio Gazzini, "NATO's Role in the Collective Security System" 8(2) *Journal of Conflict and Security Law* 2003.

Thomas Franck, "Terrorism and the Right of Self-Defence" 95 *American Journal of International Law* 2001.

Thomas M. Franck, "When, if ever, may States Deploy Military Force Without Prior Security Council Authorisation?" 5 *Journal of Law & Policy* 2001.

Thomas M. Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States" 64 *American Journal of International Law* 1970.

Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" 100(1) *American Journal of International Law* 2006.

Volker Lehmann and Angela Mcclellan, "Financing the United Nations", April 2006, available at <http://www.globalpolicy.org/finance/docs/2006/04fact sheet.pdf> at 12 September 2006.

Wilhem G. Grewe, *The Epoch of International Law,* Walter de Gruyter, Berlin, 2000.

William J. Aceves, "Institutionalist Theory and International Legal Scholarship" 12 *American University Journal of International Law & Policy* 1997.

UN Charter, 26 June 1945, 59 Stat. 1031, T.S. No. 993.

UN Security Council Resolution 1441.

Decision of the ICJ in *Case Concerning Military and Paramilitary Acts in and Against Nicaragua* (Nicaragua v USA), 1986 ICJ Reports 14.

"The National Security Strategy of the United States of America", 20 September 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf>, at 27 September 2006.

"Remarks by the President at 2002 Graduation Exercise of the United States Military Academy at West Point", 1 June 2002, available at <http://whitehouse.gov/news/releases/2002/06/20020613.html>, at 27 September 2006.