Is Reciprocity a Foundation of International Law or Whether International Law Creates Reciprocity?

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Thesis submitted in the fulfilment of the requirements for the degree of Doctor of Philosophy in the Faculty of Social Sciences, Aberystwyth University

2013
Department of Law and Criminology
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Summary

The absence of a powerful uniform legal authority, to enforce international law and international agreements, has placed reciprocity in a pivotal position in inter-State relations and the extent to which States rely on reciprocity. This thesis examines the significance of reciprocity and the extent to which reciprocity manifests itself in international law, more specifically is this manifestation a foundation of international law or whether international law creates reciprocity. The present work argues how reciprocity in international law is a multifaceted concept. On the one side it is a principal tool incentivising States away from wrongful acts, and to abide by their obligations; alternatively it is a tool for establishing the right to a reciprocal response. Thus the study sets out to explore how international law shapes the international community’s interactions and how, in turn, these interactions shape international law.

Considering the important role that the rule of law plays in the context of international law, the thesis aims to provide an in-depth analysis of the rule of law particularly in its relationship with international law. This analysis will provide a useful discussion on the interactions between the rule of law and reciprocity.

The United Nations was established to enhance co-operation amongst the international community with the goal of maintaining international peace and security. This thesis will explore the role of reciprocity in international law on enhancing international commitment and international co-operation. The significance of this lies in reciprocal and ‘remedial’ options in international law that maintain States’ commitment to international obligations which in turn develops friendly relations and international co-operation.

This thesis will aim to contribute to scholarly works to bridge the existing gap in interdisciplinary studies exploring the connection between reciprocity, co-operation and the rule of law in the realm of international law.
DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed ................................................................. (candidate)

Date .................................................................

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Where *correction services* have been used, the extent and nature of the correction is clearly marked in a footnote(s).

Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

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Acknowledgements

First and foremost I would like to express my sincere gratitude to Dr. Marco Odello, my principle supervisor. He has unreservedly guided and supported me while writing up this thesis. With patience, knowledge and constructive comments he has supported me to deepen and broaden its depth and scope.

Additionally I would like to thank my secondary supervisor, Ms. Ann Sherlock for her comments, my previous supervisor Mr. Richard Ireland for helping me to lay the foundations for this thesis, and Professor Ryszard Piotrowicz, my personal tutor, for his continued academic support. My further gratitude goes to my examiners, Dr. James Summers and Professor Chris Harding, who devoted their time to examine the thesis and offering constructive feedback and comments.

It has been a pleasure for me to attend seminars in the Department of Law and Criminology at Aberystwyth University during my PhD studies. These seminars have helped me to critically reflect on my research and broaden its remit. Therefore, I would like to express my appreciation to everyone in the department not only for arranging and hosting these seminars but also for all their academic support over the years.

Special appreciation and thanks to my family. Words cannot express how grateful I am particularly to my mother, and brother as well as my partner who have always supported me with their words of encouragements to pursue this stage of my studies.
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<tr>
<td>UN Charter</td>
<td>Charter of the United Nations</td>
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<td>CIL</td>
<td>Customary International Law</td>
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<tr>
<td>Concert</td>
<td>Concert of Europe</td>
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<tr>
<td>DAT</td>
<td>Declaration on the Protection of All Persons from Being SubJECTED to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>DSB</td>
<td>World Trade Dispute Settlement Body</td>
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<td>GA</td>
<td>United Nations General Assembly</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>Genocide Convention</td>
<td>Convention on the Prevention and Punishment of the Crime of Genocide</td>
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<td>HR</td>
<td>Human Rights</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Tribunal for the Former Yugoslavia</td>
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<td>IP</td>
<td>International Politics</td>
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IRI
Islamic Republic of Iran

MFN
Most Favoured Nation

NGOs
Non-Governmental Organizations

NT
National Treatment Protection

OPEC
Organization of Petroleum Exporting Countries

P-5
United Nations Security Council Permanent Members

PCIJ
Permanent Court of International Justice

POWs
Prisoners of War

TRIPS
Trade-Related Aspects of Intellectual Property Rights

UN
United Nations

UNCAT
United Nations Convention against Torture

UNDHR
Universal Declaration of Human Rights

UNHRC
UN Human Rights Committee

UNSC
United Nations Security Council

VCLT
Vienna Convention on the Law of Treaties

WMD
Weapons of Mass Destructions

WTO
World Trade Organization
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Wall Opinion Case, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports, Advisory Opinion, Judge Buergenthal opinion, 2004
Introduction

The term reciprocity is multi-faceted and has different meanings in different contexts. Reciprocity plays a prominent role in a de-centralised system of public international law (IL) where there is no overruling legal authority to establish, adjudicate or to enforce all international rules. The clearest general definition of reciprocity is ‘returning like behaviour with like’.1 Reflecting more a specialist legal definition, reciprocity is defined as, ‘the mutual concession of advantages or privileges for purposes of commercial or diplomatic relations’.2 This specialist legal definition suggests that reciprocity in international relations (IR) would create an environment where States help and support each other under a reciprocal relationship, for a particular short or long-term advantage, through the means of balance in their rights, duties and interests. This specialist definition sets a theme for this thesis in order to explore inter-State relations and their collective international co-operation within the framework of IL.

This thesis explores how reciprocity manifests itself in different areas of IL, and asks whether reciprocity is a foundation of IL, or whether IL creates reciprocity. In simpler terms, is reciprocity a cause or effect in IL? This requires an understanding of what reciprocity is and its role within IL. Reciprocity is intertwined with IL and this will be evident from the discussion of reciprocity as an underlying principle of IL as well as its manifestation and significance in different IL sources. References to reciprocity in IL rule-making, IL sources and its enforcement mechanisms are at times either direct or indirect but the role they play can be equally significant. The significance of reciprocity in different stages of IL will be examined, encompassing 1) the role of reciprocity in IL sources and in the development and creation of IL rules, 2) the role of reciprocity in IL rules themselves and how IL requires obedience and compliance, 3) reciprocity as an alternative enforcement mechanism, and 4) reciprocity as a tool for enhancing co-operation amongst States.

With wider technological and economic inter-connections amongst the international community, there is a growing recognition of the importance of a global society of States and

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their interdependence. This interdependence brings about greater interactions and has contributed to the creation of reciprocal inter-State relations. As with any society, IR needs a framework and collection of rules for the conduct and behaviours of States which is provided by IL. Traditional IL revolved around bilateral relations, covering limited subjects such as diplomatic relations, law of war, treaties, and law of the sea. Contemporary IL has grown to encompass larger variety of issues for multilateral relations including space law, international nuclear energy, and intellectual property rights, whilst enhancing to cover areas such as Human Rights law (HR) which are outside inter-State relations. Contemporary IL is the result of an increasing need for closer inter-State links and their interdependency, coupled with the international community’s resolve to put an end to the individualistic ambitions that led to the World Wars.

The creation of the United Nations (UN) was a milestone in uniting the world through an international legal framework. Establishing the UN was an important part of the international concerted effort on pursuing international justice, peace and security, whilst promoting respect for international obligations and duties as set out by IL. As a backdrop to this effort, consideration of the nature and format of inter-State relations was needed, resulting in the uniqueness of IL. This uniqueness is in that States are the law-makers, law-breakers, and law-enforcers with particular contrast to national legal systems where the legislator, judiciary and administrator are distinct authorities and agencies. In IL, States, who are its primary subjects, formulate its rules and have the autonomy to choose the nature of obligation and duties set upon them. It is important to examine sources of IL to ascertain how these rules are created, changed and enhanced in the absence of a centralised legislative institution. Particular focus will be placed on the role and significance of reciprocity within these sources as well as how the role of reciprocity evolves and the rules of IL crystallise.

Reciprocity in IL can be best described as a creator of balance between the interests and actions of States. In effect, it creates a balance between the rights, duties and obligations of States where States can have a sense of balance and fairness in their respective duties and obligations but also with respect to their rights. Reciprocity plays a pivotal role in balancing interests of States, since inter-State negotiations include a degree of equalising gains and advantages in the light of the various interests of each State. In addition reciprocity has become a strong tool in targeting State behaviour by incentivising and encouraging them
towards compliance and away from wrong-doing. Throughout this thesis it will be explored how the mere existence and applicability of reciprocity in IL helps protect the right of States as well as diverting them away from thinking about their own personal interests only, since pursuit of their own agenda provides others with the opportunity to take reciprocal measures. In this thesis, it will be evident how reciprocity has many functions least of all in how it confines the rights being claimed by States since the equal rights will be made available to all States, also it influences how States go about proclaiming their rights and responding to the rights claimed by others. Under the principle of reciprocity States are likely to be cautious in what rights they claim given that others will have the same benefits and advantages, thus they are likely to only claim rights that they are willing to share with others as publicly available rights. As suggested by Baker, reciprocity can operate as a ‘powerful constraining factor on the activities of states’. Given the consensual nature of IL, and the importance of the ‘consent’ of States in every aspect of IL, one might presume that no State is willing to submit itself to any obligations, or that States’ commitment and obedience to IL rules are guaranteed, and deviation is minimal. Neither of these situations are the case. Indeed States do submit themselves to international duties and obligations and at times breaches of agreements and obligations do occur, but they are fewer than might be imagined. When assessing States’ conduct in general, it can be seen that the agreements and obligations are upheld in a manner that is not always in pursuit of maximising self-gain. The presence of reciprocity in IL is the contributing factor that influences State behaviours and why States follow through with their agreements and abide by their legal obligations rather than pursuing their individualistic self-interest.

IL relies upon key principles of equality, ‘consent’, balance of right and duties, and good faith within its framework for the establishment of a working legal order. The presence of these principles in IL will be examined together with how they are reflected within IL sources. Reciprocity is directly attributed and akin to the principle of balance of rights and duties and this relationship will be analysed throughout this thesis. Reciprocity is at the heart of rule-making, rule-changing and its enforcement as well as within the rules themselves. Linked together with the principle of equality, they bring about a sense of fairness and balance in State interactions. Reciprocity is more obviously applicable in bilateral agreements.

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in line with direct reciprocal relationship and responses; given how it directly creates specific obligations for the parties involved. However it does also manifest itself significantly in multilateral agreements and obligations. This thesis explores the nature and types of States obligations and relations ranging from bilateral, bilaterlisable multilateral, non-bilaterlisable multilateral and obligations *erga omnes*. The study then proceeds to explore the nature of possible reciprocal relationships in different contexts. It will be discussed how reciprocity manifests itself differently in relation to different obligations and relations particularly how reciprocity seems to take step back when protection of *fundamental rights*, human dignity or moral values are at play. It is important to iterate that these duties and obligations set for the protection of *fundamental rights* are essential elements in IL and reciprocal response to breaches of these responsibilities are not permissible.

The absence of an overruling legal authority to adjudicate and enforce legal rules undermines IL given its many constraints revolving around how States wish to maintain their right and control on parameters of their international obligations and duties. This notion is carried into IL enforcement where States do not have to surrender themselves to the authority of the International Court of Justice (ICJ), the main judicial organ under IL, because States’ ‘consent’ is essential for the jurisdiction of the Court. Moreover, the UN Security Council (UNSC), as the prominent enforcer of IL, is predominantly more concerned with maintaining peace and security. IL is based on a linear and horizontal format, lacking a governing and supreme legislator or enforcer. As such in this thesis some of the existing enforcement mechanisms of IL, categorised as central and non-centralised enforcement systems will be analysed. The thesis evaluates the effectiveness, weaknesses and limitations of these enforcement mechanisms. The effectiveness of IL is reliant on its enforcement mechanisms and how States are encouraged to comply and commit to their duties and

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5 This is the form of multilateral relations that is “as a bundle of interwoven bilateral relationships” and can bring bilateral obligations and responsibility between States. This terminology is referred to by Linos-Alexander Sicilianos, the Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility, *European Journal of International Law*, Vol. 13, No. 5, 2002, p. 1133.
6 International Court of Justice is established by the United Nations’ Charter and its Statute is annexed to the Charter, Article 1 of the Statute sets out that the Court ‘shall function in accordance with the provisions’ of the Statute.
7 Charter of the United Nations was signed on 26 June 1945 and entered into force on 24 October 1945, Article 92.
8 The Statute of the International Court of Justice, Article 36(2).
9 *Supra* note 7, Chapter V.
obligations. This is where reciprocity strongly manifests itself in IL in its role as an alternative enforcement mechanism.

If IL is primarily based on the ‘will’ and ‘consent’ of States, the challenge for the international community is how to preserve IL from international politics (IP), and from political interests of States. The thesis examines the relationship between these two disciplines. The role played by the rule of law in bridging these two disciplines will be subject to an in-depth analysis. Particular regard is given to how the rule of law and its constitutive elements provide a sense of stability to reciprocal relations of States by ensuring IL is not subject to arbitrary will of States. This leads the thesis to analyse the importance of valid interpretation of IL rules. A case study on the US ‘war on terror’ is presented in order to gain an understanding of why it is important for IL rules to be interpreted within the parameters set by IL.

Reciprocity plays a pivotal role in modern inter-State relations which has been a significant contributor to international co-operation. Undoubtedly reciprocity is helpful in the negotiation and bargaining between States in their interactions to achieve co-operation and ‘policy coordination’. The international community has reached the understanding that long-term international peace and security requires co-operation but the challenge remains as to how best to secure and maintain this peaceful co-existence and co-operation. Interdependency of States is a contributing factor for encouraging and enhancing reciprocity in a positive format so as to expand international co-operation in the current globalisation era.

**Aims and Focus of the Study**

The thesis aims to explore the various roles and significance of reciprocity within the framework of IL. The research objectives are, firstly to identify how reciprocity manifests itself in different areas of IL; secondly whether reciprocity is a foundation of IL, or does IL create reciprocity. This objective will be achieved by addressing questions such as: What is the status and significance of reciprocity within IL? What is the role of reciprocity in IL? Is reciprocity a legal principle and/or a right in IL? How does the role of reciprocity evolve as

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11 *Supra* note 4, p. 89.
12 *Supra* note 3, p. 31.
legal rules crystallise? What is the nature of reciprocity in different relations encompassing bilateral, multilateral and *erga omnes* relations? How beneficial is reciprocity to IL in enhancing commitment of States to international rules? How does reciprocity support and aid enforcement of IL rules. In achieving the thesis aims and objectives and answering the central research question both IL system and reciprocity need to be explored in order to evaluate the role and nature of the latter within the former.

Analysis of reciprocity is fascinating, since it is an ill-defined concept. Firstly reciprocity is a tool balancing the rights of States whilst incentivising States away from wrongful acts and towards abiding by their obligations; alternatively it is a tool for a reciprocal response to a wrongful act or minimising unfair advantage. States play a fundamental role in creating customary international law (CIL) as well as choosing the content of their obligations and duties in line with the law of treaties. The perception of IL creates a paradox when IL is compared to national legal systems as to how the subjects of a legal system could be heavily involved in its formulation and enforcement. In national legal systems, the subjects are not able to create a law or limit their own obligations towards any law.

Reciprocity is an important factor that is attributed to limiting the pursuit of self-interest by States, thus this poses the questions that how can reciprocity play a role which affects States’ behaviour? Is this effect required to be just positive or negative? This leads the study to examine the uniqueness of IL, its nature and sources, following which the thesis considers the inextricable link between IL and IP. There have been many debates on the ineffectiveness and lack of independence of IL from IP, since States and their political interests are at the forefront of IL. This notion has been challenged by many who have argued that IL, underpinned by the rule of law, is independent in its own remit, and arguably since at national level the discussion is about the ‘rule of law, not men’, therefore at international level discussion must focus on the ‘rule of law, not States’.

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13 Please see Chapter Two for further detail.
The importance of the discussion on the rule of law revolves around the constituting factors of the legal system; hence it is based upon the values and principles of the international community. Essentially, not only is the rule of law the driving factor of IL, but also it is the dividing and distinguishing line between IL and IP in inter-State relations. Effectively, this study is interdisciplinary research which aims to bridge IP and IL through the rule of law. As it stands, even if States are involved in the formulation of IL, it does not necessarily suggest that the parameters of the rule of law are changeable by States. There is a clear argument that the rule of law sets the parameters against ‘arbitrary power’ rather than dictating absolute independence or distance between States’ practices and interests.\(^\text{17}\) Thus, the rule of law brings about a sense of stability and balance in reciprocal relationship that exists in inter-State relations by ensuring the ‘will’ of States are durable and not individualistic to their own objectives.

After considering the rule of law in general terms, the study proceeds to analyse the place of the rule of law in IL. This is further examined by considering well-founded methods for the valid and correct interpretations of international rules under the guidelines provided under IL. Rule of law is examined as the underlying foundation of IL and as such it is important to gain an understanding of the relationship between reciprocity and rule of law within the context of IL, particularly the role of reciprocity in the guidelines provided by IL for the interpretation of its rules.

The idealism in equality rights of States and a non-hierarchical structure have resulted in an absence of a uniform overarching legal authority to mandate the obedience of States to their international duties and obligations. The thesis takes into consideration some of the existing enforcement mechanisms of IL, which will be categorised as centralised and non-centralised enforcement systems. The thesis evaluates the effectiveness, weaknesses and limitations of these enforcement mechanisms. The effectiveness of IL is reliant on its enforcement mechanisms and how States are encouraged to comply and commit to their duties and obligations. The enforcement mechanisms must be able to deal with non-compliance and serving justice effectively, and particularly to support the injured parties. As a result of the

absence of a uniform legal authority to enforce IL and its agreements, reciprocity strongly manifests itself in IL,\textsuperscript{18} and can be seen as a strong alternative.

The objectives and focus of the thesis is further articulated below when explaining the structure of the thesis.

**Structure of the Thesis**

To conduct a systematic analysis of the aforementioned points, the research is structured in the following Chapters:

**Chapter One:** The concept of reciprocity in general terms is introduced by exploring the role and significance of reciprocity in a wider context, considering its impact on sociological, anthropological, historical and IR fields. This approach allows the study to contextualise reciprocity within ordinary human interactions in connection with inter-State relationships. The international community is a collection of complex relations amongst different actors and understanding the concept of reciprocity through anthropological, social and historical frameworks helps to gain an understanding of the journey to the present system of international relations. This Chapter provides the understanding of the significance and concept of reciprocity in interactions in general which serves as an introduction for reciprocity in IL.

**Chapter Two:** IL provides a collection of rules and a framework for the conduct of States, established for the international community. This Chapter aims to explore the unique nature and sources of IL to ascertain how it is created, changed and enhanced in the absence of a centralised legislative institution. Particular attention is paid to the role of reciprocity in how IL rules are developed. It is important to gain an understanding on the sources in detail together with exploring the status and role of reciprocity within the sources, coupled with how the role of reciprocity differs from one source to another.

\textsuperscript{18} Please see Chapter Four for further detail.
The present work seeks to explore the theoretical, as well as the practical, application of the elements constituting the sources. Emphasis will firstly be placed on the role of reciprocity in the law of treaties and the Vienna Convention on the Law of Treaties (VCLT) since it underpins all treaties. The Chapter continues to explore the role of States’ conduct in formulation of CIL and its constitutive elements (State practice and *opinio juris*). It is additionally important to engage with the debate of what is State practice. Furthermore, the doctrine of *opinio juris* and the paradox surrounding this doctrine in scholarly work challenging its necessity and helpfulness will be examined. This inter-link between States and formulation of IL will demonstrate a link between IL and IP leading the study to explore the relationship between these two disciplines. The questions that come to mind are: Is IL independent from IP, and if not, to what degree are they dependent on each other? The relationship between IP and IL has been subject of many scholarly works,19 dividing the scholarly community over the power, usefulness and necessity of IL and the appropriateness of the influence of IP.

**Chapter Three:** Having analysed the role of reciprocity in IL sources, this Chapter explores the role of reciprocity in the contents of IL rules and how IL requires obedience and compliance to its rules. This Chapter delves into the study of the principles and values, regarded as the rule of law, which strengthen the rules of IL and the obedience of States. The effectiveness and applicability of these laws are led from the legal values and principles generally accepted by the international community, and the laws are the tools through which these principles are thus promoted and enhanced. Regardless of which source of IL is under discussion, the fundamental constituting factor is that all of the sources are underpinned by the application of the rule of law. The questions to ask are: what constitutes the rule of law, and what is its relationship with IL? Answering these questions will encompass the examination of the constituting essential factors of the rule of law, which are legality and/or reason, consistency or uniformity, legitimacy, and justice. The focus of discussion is how these factors must co-exist within a legal system, for example a law that is based on legitimacy cannot be acceptable if it is not based on justice, or *vice versa*. The analysis of the rule of law in IL has received less attention than it deserves, considering that it underpins the

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framework that brings about a legal order through qualities such as rights, duties and justice.\textsuperscript{20}

This work continues to explore the dividing line between valid and invalid interpretation of IL based on specific guidelines provided within IL, namely \textit{jus cogens} rules, obligations \textit{erga omnes}, the principle of \textit{pacta sunt servanda}, including the notion of ‘good faith’. This facilitates the examination of reciprocity in principles provided for the interpretation of IL rules. This section continues to explore the role and nature of reciprocity in \textit{erga omnes} relations and its difference to bilateral and multilateral relations. The study then proceeds to examine the role of reciprocity and its relation to morality in IL relating to HR, International Humanitarian Law (IHL) and \textit{jus cogens}. Does morality operate in conjunction with reciprocity or does it provide an alternative to reciprocity as a basis for HR and humanitarian aspects of IL?

In emphasising the importance of valid interpretation of IL, the Chapter uses the US ‘war on terror’ as a case study on the Bush Administration’s interpretation and practices of torture-related laws. This examination demonstrates how interpretation of IL rules require an understanding and appreciation of the internationally shared values and principles, whilst highlighting a weakness in the enforcement of these values in the international legal system where the US has been able to circumvent IL with little effort and fear of repercussion. The reason for the weight given to such approaches is based on the US power as a permanent member in the UNSC with veto power, and particularly after it became a unipolar power in the international arena. The selected examples identify some contradictions and double standards between the US theoretical and practical approaches towards the rule of law and the application of IL. There are some changes in programmes and foreign policy between President Obama compared to President Bush. For instance, the reports outline the efforts undertaken by President Obama to close the Guantanamo Bay prison stating that ‘Guantanamo is not necessary to keep America safe...’ however, practically the Congress has blocked his efforts.\textsuperscript{21}

\textsuperscript{21} BBC News, Barack Obama says Guantanamo Bay prison must close, 30 April 2013, at: \url{http://www.bbc.co.uk/news/world-us-canada-22358351}. 
Chapter Four: Having discussed the IL sources and the rule of law it is important to shift the focus to the enforcement of IL and the role of reciprocity in securing continuous commitment and adherence to these rules. IL enforcement operates through centralised and non-centralised mechanisms where the former operates through the UN enforcement bodies and the latter through reciprocal remedial options set to encourage compliance and commitment of States of the wrong-doers, namely in the form of self-defence and counter-measure. The decentralised system of IL places reciprocity in a pivotal position as an alternative enforcement tool, particularly in today’s world where there are challenges to global co-operation. The motives of States are undoubtedly linked to their political interests, therefore reciprocity operates as a lever against self-gain and provides a level of control and limitations for States to pursue their individualistic interests and force their ‘will’ upon the international community. In this respect, reciprocity brings about a balance of interests and advantages between States whilst acting as a tool to encourage states away from wrong-doing.

The UN has tasked the UNSC to maintain international peace and security, with unlimited power to examine and establish whether a State’s action constitutes a ‘threat to the peace, breach of the peace, or act of aggression’,\(^\text{22}\) authorising it to decide upon the necessary actions. This is problematic since the UNSC is a political rather than a legal organ. In this Chapter the potential influence and interests of the permanent members of the UNSC (P-5) and the legality of some of their actions and decisions is evaluated. A further challenge is the working relationship between the UNSC and the ICJ, as the UN’s main judicial organ,\(^\text{23}\) and particularly taking into account the different practical IL interpretations adopted by these two organs. The Chapter examines the relationship between the UNSC’s actions and the rule of law by taking into account the constitutive elements of the rule of law as well as exploring the effectiveness of the current legal enforcement mechanisms.

Reciprocity manifests itself significantly in international trade relations, which is evident when looking at the World Trade Organisation (WTO) agreements and its dispute settlement system. The WTO Dispute Settlement Body (DSB) is the body responsible for resolving disputes between States but similar to other areas of IL, encouragement is made for States to reach agreements and compromises on their own before bringing their case to the DSB. In

\(^{22}\) *Supra* note 7, Article 39.

\(^{23}\) *Ibid*, Article 92; and *supra* note 8, Article 1.
this section, the working of the WTO and DSB is examined given the role of reciprocity in the framework of international trading system.

Throughout this Chapter the effectiveness, limitations and weaknesses of the existing IL enforcement mechanisms will be evaluated through both theoretical and practical analysis of interrelated cases.

Chapter Five: The Chapter examines co-operation and non-co-operation as forms of reciprocity. Keohane suggests that co-operation is achieved when actions of different States or institutions come together in unity through negotiation.24 In this context, each State moves away from its original position through negotiation or bargaining to reach a common and coordinated policy. This is eloquently phrased by Keohane as ‘intergovernmental cooperation takes place when the policies actually followed by one government are regarded by its partners as facilitating realization of their own objectives, as the result of a process of policy coordination’.25 Reciprocity, as a creator of balance between rights and duties, undoubtedly plays a pivotal role in the negotiation and bargaining in order to gain ‘policy coordination’, since inter-State negotiations include a degree of equalising gains and advantages in the light of the various interests of each State.

The emphasis is placed firstly on the factors that States must satisfy in complying with IL; and secondly, on those elements that facilitate co-operation between States and the reasons States choose to co-operate. Given the emphasis placed on maintaining international peace and security, particularly the effect of co-operation on long term stability, this leads the study to explore: 1) What is the role of IL in bringing about international co-operation? 2) How does reciprocity take a role in inducing States to co-operate? 3) What are the advantages and disadvantages of co-operation? 4) Why do States choose to deviate from co-operative objectives? To answer these questions, several factors concerning a co-operative environment and possible obstacles facing the international community, is scrutinised. The study considers the importance of co-operation in bringing about long-term advantages in politics, economic gains, peace, security and stability, based on the lessons learned throughout the evolution of international co-operation. Given the inextricable link between IL and IP in IR, the Chapter

25 Ibid, pp. 18 and 51-52.
assesses the role of co-operation in each of these disciplines, by focusing on different schools of thought in IR. This analysis enables this study to tackle the above questions in relation to the reasons for States’ co-operation, and their benefits and drawbacks for States, which may lead to specific barriers to co-operation.

**Final Conclusions:** The thesis at this stage presents the main conclusion for the findings, suggestions and recommendations of this work, highlighting the role of reciprocity and its significance in IL.

**Research Methodology**

This research takes into consideration both theoretical and practical approaches (legal cases), which need to be interpreted using qualitative methods. It will primarily rely on valid and logical deduction from the laws and their legal interpretations. The primary sources are international conventions and inter-related international rules relating to the aim of the research. The importance of the use of the primary sources is to gain an understanding of the closely associated source materials, relevant to the thesis, namely the Charter of the United Nations (UN Charter), the VCLT or the ICJ Statute. Given the role played by States in creation of a large number of the primary sources, it also provides insight into the mind-set of States, their values and objectives. When examining the sources of IL, the focus of the thesis will be on the role of reciprocity within the primary sources of IL since reciprocity manifests itself strongly in the primary sources. The thesis does not look at the subsidiary sources since they do not create reciprocity and they are not based upon reciprocity.

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26 Primary sources of international law, according to the International Court of Justice Statute, encompass treaty laws, customary international law and the general principle of law.

27 Judicial decisions and teaching of publicists are referred to as subsidiary sources of international law suggesting that they do not have law-making ability unlike customary international law or treaty laws. The limitation placed on the usage of judicial decisions is driven from Article 59 of the International Court of Justice Statute, relating to the provisions that the Court’s ruling ‘has no binding force except between the parties and in respect of that particular case’. Similarly the scholarly community does play a vital role by scrutinising international law as well as providing the international community with a set of coherent and reasonable approaches towards international rules through providing arguments and counter-arguments for the primary sources and the judgements, through comprehensive and comparative analysis. However, in the same spirit to the judicial decisions, interpretation and reasoning provided by the teaching of publicists do not create reciprocity and are not based on reciprocity.
The primary sources are often broad and general and can be open to various interpretations. This is where the relevance and importance of the secondary sources surface, providing arguments and counter-arguments for the primary sources, enabling a comprehensive and comparative analysis for this thesis. Therefore, the secondary sources include scholarly writings and their interpretations. In addition to these theoretical approaches a review of the practical cases, relevant to the subject of this thesis, have also been undertaken, examining the analysis and interpretation provided by the rulings. Given the emphasis placed on States in this work, the research assesses the factors underlying States’ conduct and the effect of their decision-making on IL. The research looks into debates and the extent to which reciprocity manifests itself in IL, as well as reviewing practical cases relevant to this subject.

When looking at previous judgement and cases in IL, there is a little attention paid to examining and assessing the role and significance of reciprocity within IL, demonstrating insufficient focus or direct contribution made to this important topic. IL development would have benefitted from attention on reciprocity and its application within IL in judgment of the cases as this would have been crucial in order to tie the theoretical and practical approaches to better assess the role of reciprocity in IL. Equally, even though there are many scholarly works on different areas of this thesis, there are however, limitations on interdisciplinary connection which constitutes the objective of this research. The primary gap revolves around the limited in-depth analysis of the role of reciprocity in IL relating to co-operation. In general, there is a gap in legal scholarly contribution on the role of co-operation in promoting international peace and security, considering this is suggested as one of the UN’s missions. The scholarly works on co-operation tend to be more focused on IR and its effect on factors such as economy or trade, rather than maintaining and promoting international peace. The thesis aims to broaden its scope to bridge the gap by highlighting the role of IL on promoting co-operation through reciprocity, resulting in minimising conflicts and ensuing international peace and security.

There are debates around the effectiveness and dependency of IL to IP, but few have debated the role of the rule of law as a bridge for the rightful place of IL in not submitting to the changing and arbitrary ‘will’ of States. The UN states that, with the support of its organs, promoting the rule of law is at the heart of its mission and establishing rule of law is a

28 Supra note 7, Article 1.
prerequisite for ‘durable peace’.²⁹ There is, however, no specific account given as to what rule of law is and what it represents. Additionally there is a lack of scholarly debate defining the rule of law and how it should be promoted by the UN. More importantly, there is an existing gap in what constitutes the rule of law and how legality and/or reason, consistency or uniformity, legitimacy and justice form its integral parts. Also there is a lack of literature on the place of rule of law within IL, which makes this research particularly relevant.

Chapter One: Principle of Reciprocity in General Context

1. Introduction

Reciprocity is a multifaceted term and is evident in many forms of interactions whether it is about two individuals, communities, organizations or States. This Chapter begins by providing a general definition of the term reciprocity, and exploring its manifestation in the social, anthropological, historical and IR fields. This approach allows the study to contextualise reciprocity within ordinary human interactions in connection with inter-State relationships. This is important since it provides the backdrop against which reciprocity is used within IL or international negotiations.

Members of a community, in general, share similar beliefs, commitments and values which become determinant norms in that community, operating as a unifying force impacting the common values of that community. These norms form a bond within the community and have a direct impact on what is deemed as acceptable behaviours and actions. Additionally a community operates on the basis of interactions and relationships between its members given the need for a level of co-existence and interdependency. These interactions are governed by the acceptable norms of that society which create parameters for the interactions of people and this is where reciprocity takes a role and helps to shape the nature of such interactions. The role of reciprocity in relationships amongst members of a community emanates because they need each other thus creating a sense of dependency. Social interactions bring about a sense of civility that is based on peaceful co-existence and reciprocal reactions. People tend to treat like with like and treat unkindness with unkindness, but at times may refrain from reacting towards unkindness because they may need each other in future. This level of co-existence and interdependency has transpired and grown within the international community. There are many reasons for this interdependency within the international community which is discussed in this thesis but least of all this stems from the need for peaceful co-existence based on the lessons learnt from the past relations and experiences, as well as the level of growth than can be achieved from a collective approach and co-operation.
2. The Role of Reciprocity in General Context

As mentioned reciprocity takes many forms and means different things in different contexts. The general definition of reciprocity is, ‘a situation in which two people, countries,...., provide the same help or advantages to each other’.\(^\text{30}\) When considering a specialist legal definition, reciprocity is defined as ‘the mutual concession of advantages or privileges for purposes of commercial or diplomatic relations’.\(^\text{31}\) This definition provides an explanation for the interdependency and inter-connection of States in order to maximise their individual gains either commercially or diplomatically. In today’s world the international community is no longer a number of individual countries who can afford to work independently and instead their international relations are very important to each country’s operations, security, stability and growth. The commercial growth or the safety of foreign diplomats as examples come from mutual co-operation and negotiations and cannot be achieved without mutual reciprocal agreements and respect. This theme is evident throughout this thesis where the evolution of inter-State relations is discussed.

The above definitions indicate that reciprocity relates to inter-relationships where people or States help and support each other for a particular short or long-term advantage. This mutual consideration is also referred to by the International Law Commission (ILC) where reciprocity is defined by them as sharing specific rights between States; that is to say when one State benefits from a right then others must share the same right.\(^\text{32}\) Effectively, reciprocity is about reciprocal treatment without any given restrictions or obligations, taking into consideration balancing of rights where mutual benefits are to be gained and no-one should be unfairly advantaged or disadvantaged. As will be elaborated throughout this thesis, reciprocity plays an important role in establishing and maintaining a sense of balance between the interests, rights, duties and obligations for the international community. Reciprocity is particularly relevant when there are no legal obligations but rather moral or social obligations. Given the notion that moral or social obligations exists prior to the creation of most legal obligations, therefore this would suggest that reciprocity is stronger in the law-making process and takes a weaker position once laws are established. This is equally

\(^\text{30}\) Sally Wehmeier et al. (eds.), *Oxford Advanced Learner’s Dictionary*, 2006, p. 1215.
\(^\text{31}\) *Supra* note 2, p. 1298.
applicable when discussing social interactions or international relations. Even though there is more at stake at an international level, nonetheless, moral and social aspects play an important role in international interactions or negotiations and must not be ignored.

Reciprocity surfaces in many aspects of human relationships in both negative and positive forms. Retaliation to an injustice, reciprocated kindness, gift exchanges are only some of the instances where reciprocity is seen in social interactions. Reciprocity is considered a fundamental concept that plays a dominant role in most aspects of social life, resulting from a social expectation that suggests individuals will react to each other in a similar manner; for example, offering advantages for advantages. Reciprocity is generally defined and known as a principle of interaction classified into positive and negative. The former involves responding positively to a positive action, like returning a kindness with kindness. The latter involves an adverse reaction to a negative action. Reciprocity, in this regard, is equally evident at an international level and this can be seen in political and economic negotiations as well as legal negotiations leading to the formulation of international treaties. The legal, political and economic relationships between States are strongly affected and influenced by the power of reciprocity. These aspects of international relations are significantly based on the concept of give and take, mutual advantages and a strong element of cost-benefit.

The international community is a collection of individuals connected to States, who share similar attributes and values since cultures and humans are coming closer together in their thinking, acting/reacting to situations both emotionally and rationally, influenced by technological advancement and closer global inter-link. Therefore the study of the role of reciprocity in inter-State relations is enhanced and benefits from understanding anthropological, social and historical perspectives. Hence the study sets out to develop the understanding of reciprocity within the international context, by investigating the role of reciprocity in smaller communities through anthropological, social and historical frameworks which would help gain an understanding of the evolution of IR which has led the international community to its current juncture. The following analysis individually addresses the existence of reciprocity in all of these fields. This is not to say that reciprocity is limited to these fields only, but these subjects are the focal points in this analysis due to the light they cast on interactions within a community of people or States, however large or small.
2.1. Reciprocity in Anthropological and Social Fields

The significance of anthropology is in its outlook of the world, enabling an understanding of cultures, promoting cross-cultural communications and interactions. Human beings belong to societies with intertwined lives. When looking at human relations and interactions, the interdependence of its members is the single most important factor that can be observed. It could be argued that reciprocity provides the basis of a civil society, whilst playing a vital role in achieving peace and harmony in communities. In social human interactions, the norms or customs play a leading role in determining how to behave or react.

The emphasis of the role of reciprocity is stressed in Kolm’s discussion on how the mutual respect of all society members is required to achieve a ‘free, peaceful and efficient’ stability. The scholar further emphasises mutual respect by indicating that people will respect if they feel respected. He has broadened the scope of the impact for mutual respect to markets and organizations by suggesting this is the reason why basic trust, honesty and fairness are reciprocated. Reciprocity can be evident in various social situations and communities, ranging from a small community such as a family, to the international arena. State social welfare and donations to charities are examples of altruistic behaviours stemming from wanting to be helpful towards others and feeling a sense of moral obligations towards others. As Malinowski suggested, everyone has a duty and an obligation to one another, bringing about ‘conformity with the norm’ and reciprocity means the duty that people feel towards each other.

On another point, Gouldner refers to Parsons’ study of reciprocity and indicates the study has enabled reciprocity to be differentiated from various other concepts. However, Gouldner is partially critical of Parsons’ study of reciprocity and considers this to be incomplete, since Parsons neglects to consider a dividing line between concepts of ‘complementary’ and reciprocity. In Gouldner’s view, the former refers to ‘one’s right as another’s obligations, vice versa’ and in comparison, however, reciprocity suggests that each person ‘has rights and

Gouldner believed in ‘generalized norm of reciprocity’ which outlines the obligations one feels on repaying the gift or favour. The scholar presumes that if one person’s requirements are not fulfilled by the other’s reaction then this will have an impact on the stability and the balance of the relationship. Through looking at a broader scope, it can also be seen how social stability is dependent on reciprocity which is termed very aptly by Gouldner as the ‘mutually contingent exchange of gratifications’.

A similar trend is visible in Fuller’s observation where he regards reciprocity as the ‘mediating principle’ linking exchange and duties, both moral and legal. An interesting example of moral duty is given in the duty of voting in democratic elections where individuals have a moral duty/obligation to participate in voting even if there is no specific legal obligation in place. This essentially is an exchange of promises between the citizens of the country to ensure the right people and right policies govern their country. However the follow through of exchange of promises and duties is generally stronger with the presence of reciprocity, suggesting that where there is possibility of reciprocity, promises are better fulfilled and duties are better observed. The suggestion is that societies bond better with reciprocity, where self-interest gives way to mutually beneficial exchange of promises and duties, particularly in societies with inter-links and interdependencies. In this context, the power of reciprocity is in creating a sense of balance and equality between rights and duties of individuals, irrespective of their personal power, economic strength or influence; as such everyone can be deemed equal in relation to the execution of their promise and duties and unfair advantages and imbalance of interests are minimised.

Reciprocity, though, is not always positive and there is a counter-side to wanting to do good and be helpful, based on revenge or retaliation to a negative action. Kolm differentiates positive and negative reciprocity by suggesting that, in as much as a return gift is to encourage future giving, retaliation is an act to deter future harm. Narotzky and Moreno

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38 Supra note 36, p. 170.
41 Ibid, p. 19.
42 Ibid, p. 20.
43 Ibid, pp. 22-23.
44 Supra note 34, pp. 89-90.
offer a different perspective by expressing that the difference between positive and negative reciprocity is in the break of morality in social relations. The scholars regard morality as a factor that differentiates reciprocity from an exchange, in the sense that through both positive and negative reciprocity morality is upheld and is shared in any relations. This is an interesting view that bonds morality with reciprocity, in the sense that for upholding morality the balance between the parties must be maintained which is achieved through reciprocity.

On another point, Kolm develops this discussion through his analysis that reciprocity in a positive manner is sequential, whereas negative reciprocity is ‘one shot’. In other words, reciprocity in a positive form is an encouragement for future repetition of actions, whereas negative reciprocity is intended to be a one-off retribution act to discourage a repeat of negative action. These discussions are particularly relevant when discussing the role of reciprocity in IL as deterrence for disobedience and encouragement for compliance and the respective remedial reciprocal measures allowable in IL. These approaches lead the discussion to evaluate the reasons for the existence of reciprocity in this framework, and how it is initiated. Arguably reciprocal actions result from judgement, sentiments and attitudes which are all rooted in the nature of the relationships and experiences, thus determining the positivity or negativity of the reaction to an action. An example of this is in Kolm’s statement, describing reciprocity as a ‘basic force of interaction that maintains a…society’, and the basis of this force is seen in values shared by people originating from wanting to be liked, doing the right thing, mutual respect, compassion, moral obligation, fairness and a sense of balance. Kolm considers moral conduct or obligation as the motives behind reciprocity stemming from liking or wanting to be liked, compassion, social standing amongst wider society, and in some cases personal self-interest.

Academic literatures on the motivation behind reciprocal actions suggest that different terminologies are used to describe it but in essence, motives are categorised into three following areas of propriety, stimulated (induced) liking, and self-interest. The first motive

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46 Ibid, p. 301.
47 Supra note 34, pp. 89-90.
48 Ibid, p. 17.
49 Ibid, p. 17.
50 Ibid, pp. 54-55.
51 Ibid, p. 97.
stems from wanting to belong and bringing about a sense of balance and fairness. This motive is ignited when there is a positive sentiment towards returning a gift or a favour as well as a negative form of retaliation and revenge. The second motive stems from liking or wanting to be liked. If someone gives a gift or does a favour, the sentiments are rooted in liking the person and/or wanting to be liked by them. Also often, social standing and how you are perceived in your community or by society plays a vital role in judging how to reciprocate or act. The third motive is self-explanatory which addresses self-interest in either giving or receiving which will be part of a series of exchanges depending on the nature of the relationship.52

Once a gift, kindness or a favour is returned, scholars argue on what the return value should be. An explicit agreement amongst scholars exists that the value of the return gift should be in line with the original that has been received.53 Gouldner refers to two types of equivalence as ‘tit for tat’ and ‘tat for tat’, where the former is about identical exchange in value but not in type, yet the latter is an identical exchange in both type and value.54 Either way the idea is about establishing a balance in the gift exchange. It is often accepted that a poorer person returns a gift in line with what they can afford which does not take anything away from the sense of balance between the giver and the receiver.55 Gouldner expressed the point that the debt we each feel to one another is based on the history of our interactions and the obligation this has created. This obligation thus brings about the ‘generalized norm of reciprocity’.56

Looking at cultural similarities and diversities, a common observing feature relating to the concept of reciprocity is how each culture has its own norms, yet similarities which cannot be ignored. For instance, in any culture when a gift is given it is reciprocated in one form or another. Mauss’ vast ethnographic study demonstrated how extensive the culture of gift-giving and receiving is by asking ‘what power resides in the object given that causes its

54 Supra note 36, pp. 171-172.
56 Supra note 36, p. 171.
recipient to pay it back’. Answering this question drew the focus to the value of gift-giving and its material concept. Gift-giving was regarded by the scholar as a socially binding factor in people’s relationships, exceeding the value of the gift, and thus he claimed that gifts are never ‘free’ since a gift that was not returned would not bring about the same social binding factor as gift exchange. His assessment demonstrates how the reciprocal gift exchange connects people spiritually and awakens a sense of honour between the giver and the receiver.

Mauss has classified three actions of ‘giving, receiving and reciprocating’ as the obligations of gift exchange. Giving indicates the beginning of a social interaction, receiving indicates that the social interaction is not being turned down by refusing to accept, and finally, reciprocating indicates the generosity and the honour one feels. Lebra has the same approach emphasising that these terminologies are more relevant in relation to reciprocity rather than terminology of ‘selling, buying or paying’ given that reciprocity is in contrast to market exchanges. It needs to be stressed that Mauss’ generalization of gift exchange obligations is not shared by all scholars, questioning the accuracy of this generalization. The criticism targets Mauss’ supposition that such obligations are characteristics of all societies. Additionally Levi-Strauss, Sahlins and Lebra have each connected sociability to reciprocity and have argued that the reason for giving, receiving and reciprocation relates to wanting to be sociable by giving, wanting to be sociable by not refusing, and finally wanting to be sociable by reciprocating. In a broader context, this can be likened to what the countries perceive as their international standing or status so acting in a way for wanting to be regarded as a State of such standing, whether positive or negative.

Sahlins has led the way for categorising reciprocity in three forms which are; ‘generalized reciprocity, balanced reciprocity and negative reciprocity’. The generalized reciprocity is described as giving or returning a gift or a favour on the basis of wanting to be liked or liking

62 *Supra* note 55, p. 97.
63 *Supra* note 61, p. 550.
the receiver through generosity; encompassing a closer knit community or group such as family members where a specific return is not expected. The balanced reciprocity is described as returning a gift or a favour with the intention of restoring a balance; based on an informal timeline or framework. Negative reciprocity is described when individuals try to maximise their own gain. Sahlins further classifies three characteristics of the ‘kinship proximity, solidarity and generosity’ which he claims exists in all three of the different forms of reciprocity on a varying level. The intensity of the degree of these characteristics depends on how far out the concentric circles you travel, starting with family, extended family, tribe, country and so on, which MacCormack refers to as ‘degree of personal relationship’. Despite the general acceptance of Sahlins’ model amongst anthropologists, scholars namely Lebra, have referred to its shortcomings using the examples that generosity is often seen amongst strangers in charitable situations who may never come across each other again, or another example that theft happens amongst kinsmen.

A prominent anthropological significance of reciprocity is in its universal applicability since numerous evidences of reciprocity exist when looking at different societies and cultural norms. Scholars have recognised and attributed application of reciprocity as cross-cultural and universal. Accordingly the requirement of the norm of reciprocity is that people should help and not hurt those who have helped them; which incidentally is evident in an ‘all value systems’ as a basic requirement. This leads the discussion to moral reciprocity based on the universally recognised maxim of the human tendency which is wanting to act or reciprocate both positive and negative actions based on the assessment of morality or immorality of the action. That is to say, the assessment of an action and its respective return will be based on the moral values underlined by what individuals will do based on what they wish to have

67 Supra note 55, p. 99.
68 Supra note 61, p. 551.
69 Edward Westermarck, The original and Development of the Moral Ideas, Vol. 2, 1908, p. 2; and supra note 36, p. 171.
70 Supra note 36, p. 171.
71 For further information on this subject please see an interesting research which is conducted on the role of morality and human social behaviour in connection with reciprocity by Herbert Gintis, Joseph Henrich, Samuel Bowles, Robert Boyd and Ernst Fehr, Strong Reciprocity and the Roots of Human Morality, Social Justice Research, Vol. 21, No. 2, 2008, pp. 241-253.
returned or reciprocated. This is what distinguished a mere exchange from a morally based reciprocal action. There are two underlying factors that require attention here. Firstly what derives the decision that an action or behaviour is right/moral or wrong/immoral? Secondly how is the response to the original action calculated or assessed? To understand these issues, it is important to understand the value system of people, societies and communities but also to understand the principles applied in assessing actions or behaviours. Essentially attention must be paid to what is considered in a society as moral and immoral actions/behaviours and how positive and negative responses would look like. It is universally acknowledged that one should return kindness with kindness but how should one return unkindness? How can communities avoid unkind or immoral actions or behaviours? This is where the universal principle of reciprocity is credited to bring about a sense of stability to societies.

There does, however, remain the issue of the judgement of the morality of the action/behaviour and its right reciprocal response. This is where the principle of utility plays an important role which underpins how right and wrong can be assessed in relation to its moral status. In essence this principle dictates that a right action, behaviour or rule is right when it provides maximum happiness to majority of people and in most of the time; similarly a wrong action, behaviour or rule is wrong when it provides least pleasure but instead pains most people and in most of the time. People are likely to do the right thing, behave in right ways or feel the right obligations based on their value system underpinned by morality even if it is more costly; for example people choose to not deal in stolen goods, to contribute to charities, respect elders, and so on. Altruism is not a legal requirement but since it based on the social value system of every community, it is observed by the majority. Similarly one does not treat those who have bestowed kindness unkindly but would treat them with the same kindness they have shown. Those who do not observe or respect the society’s moral value system are often isolated or shunned as a form of punishment. In short, reciprocity acts as creator of obligations towards right behaviours or actions but also as a punishment tool. Reciprocity restores the sense of balance between individuals where kind action is returned with kindness but also acts towards punishment or deterrence for any future unkind or immoral actions since this is likely to be reciprocated. An important point to note is that these are tools that are at the disposal of a society or community, which is not necessarily part of

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72 For a comprehensive analysis on this theory please see Jeremy Bentham, *The Principles of Morals and Legislation*, 1789.
the legal code but is put into action to encourage right actions and behaviours based on the norms and values of that society. Even though the principle of utility is more concerned with rules and legal principles, it is nonetheless useful as a principle to understand right and wrong actions/behaviours. The detailed analysis of this principle is a vast subject in its own right and is outside the scope of this thesis, however, suffice to say that this principle provides a useful tool in assessing the right/wrong of actions/behaviours in the framework of morality.

The varying degrees of reciprocity across cultures have been the subject of much scholarly research, for instance a case study by Johnson which analyses Japanese culture has identified the strong reciprocity norm that exists within that culture, for example their belief in ‘I will treat you kindly and you will do the same with me’.

73 However using another cultural example, Gouldner identified that in American culture, the norm of reciprocity is less dominant.

74 Does this have an impact when diverse cultures meet and interact in the international arena?

The discussion on the role of reciprocity norms in the social and anthropological fields has highlighted that a prominent significance of reciprocity is linked to its universal applicability. In this case, a pertinent question would be, whether these norms would be respected and followed if the stakes are too high for one or more of the parties involved. Would a hungry destitute individual feel and obey the same social and cultural refrains as a wealthy individual? Considering the universal application of reciprocity, placing the role of reciprocity in State-relations in a more global approach as an example, the question now becomes whether States would break reciprocal obligations if the stakes were too high? Such questions have been the subject of experiments designed by Diekmann where he assesses the degree of reciprocity and the role that stakes have in the equation. The conclusion reached by Diekmann on his experiments demonstrates that stakes indeed play a role in the level of altruistic reciprocity. His experiments allowed the importance of reciprocity to be highlighted in daily life, and illustrated the ‘power of reciprocity’.

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Having addressed the significance of reciprocity in sociology and anthropology, and in cross-

74 Supra note 36, p. 171.
cultural norms, it can be seen that many similarities exist between individuals’ relations in small communities compared to international relations. States, similar to individuals, in general are willing to accept obligations and duties that are within a reciprocal framework, in the sense that others would consider themselves similarly obligated. Similar to the social or anthropological analysis of human interactions, this form of reciprocal framework tends to provide a form of rules that are based on and promote stability and longevity. The motivations, risks, and rewards of relations are within the same sphere, even though the interdependencies might be somewhat different. As such, universal reciprocity norms provide the basis for interactions both nationally and internationally. The understanding of reciprocity in our cultures, customs and beliefs enable us to better connect with one another and bridge our global dividing gaps. If we lived in perfect societies with equal stakes at risk, aiming for positive reciprocity in all instances would be possible. However given the imperfect world and the varying stakes involved, altruistic reciprocity is undoubtedly and continuously tested.

2.2. Reciprocity in Historical and International Relations Fields

This section provides an analysis of the evolution of reciprocity through co-operation. The evolution of co-operation is examined in-depth in Chapter Five, hence in the interest of avoiding unnecessary repetition, the study in this section presents its objective concisely. The history of the world is filled with animosity, tribal or religious feuds and wars. The basis of this is rooted in self-interest, lack of co-operation and inability to co-exist peacefully. In light of the aim of this study, the questions that need to be addressed are how does reciprocity manifest itself throughout the history of States’ interactions, and what is the significance of reciprocity in this context? Has the expansion of the interdependencies of States had an impact in the evolution of international co-operation leading to a more reciprocal relation between States?

The evolution of mankind shows how human beings’ view was limited to self-preservation and self-growth. Human beings were faced with inevitable growing interactions with each other, which led to the necessity of an expansion of their reciprocal relations and this requirement manifested itself through the need to give and receive. Reviewing world history provides numerous examples that demonstrate the extent to which States’ perceptions were limited to maximising self-gain resulting in many wars and conflicts, and needless to say the
infliction of long-term damaging consequences. This is to say that negative reciprocity is more evident in States’ history than its positive form. In this section, the post Westphalia European history is used to provide an example for the gradual evolutionary process of a shift in interactions towards positive reciprocity through co-operation. The example of the European historical review of the evolution of reciprocity, the development of thinking and vision towards promotion of rights, solidarity and co-operation by means of reciprocity can be observed. European States recognised the underlying requirement to stand united, not only to minimise their loss, but also to achieve, growth, progress and peace.

The modern concept of international State system and relations have been attributed to the Peace of Westphalia which has contributed to much change and achievements in Europe, one of which was the move towards the recognition of nation’s sovereignty referred to in history as ‘Westphalian Sovereignty’. This is recognised as the turning point in history for establishment of contemporary international States systems. Furthermore, the Westphalia treaty is a demonstration of a shift towards positive reciprocity in Europe, when the principle of ‘benefit of the other’ was enforced through this agreement. One important point to note in this treaty was the significant formation of ‘a real family of nations’. The idea of positive reciprocity through this evolutionary process led the European nations to reach a collective attitude away from individualism.

The next strong movement, following the Napoleonic Wars in 1815, was for the European nations to establish and maintain peace. There was an acceptance that peace can only be achieved through collective security and co-operation between States. This vision of co-operation amongst States was further enhanced by the creation of the Inter-Parliamentary:

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76 This evolutionary process is evident in influential factors that led to agreement such as Treaty of Westphalia (1648), Treaty of Tilsit (1807), Chaumont Treaty (1814), Versailles Peace Treaty (1919), Treaty of Trianon (1920) and Treaty of Riga (1921), these treaties and their contents demonstrate a point of departure for States wanting to shift towards reciprocal exchange and to move away from self-view and to a more collective vision.
81 An example of this can be seen in the initiative that led to the creation of the Concert of Europe and the League of Nations, which will be discussed in Chapter Five.
82 For further information please see Chapter Five.
Union in 1899, with the particular aim of increasing peace and co-operation. The continuation of the evolutionary process directed States towards the importance of IR and this movement gained momentum particularly over the last century. Despite the efforts towards maintaining peace and co-operation between States, World War I broke out amongst the great powers of the world, which ended with the Paris Peace Conference in 1919. In Chapter Five, it will be discussed how the League of Nations was founded on the backdrop of the Paris Peace Conference, with clear objectives which included preventing war, promoting collective security and settlement of disputes. The world found itself in the grip of another devastating war, World War II, in 1938 lasting till 1945. Following this war, the urgency of structured relations emerged with the aim of regulating and developing States’ conduct. The creation of the UN, the Council of Europe, the European Economic Community and the European Union, were the pivotal steps taken towards this goal and objective. The UN was established to ‘save succeeding generations from scourge of war’, ‘to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person’ and ‘to promote social progress and better standards of life’. This also captured the importance of the moral aspect of human rights and value of humanity which has led to the creation of legal rules outlining and protecting fundamental rights.

The evolutionary process discussed, demonstrates the belief within the international community in maintaining and promoting positive reciprocity through co-operation across the wider group of States. IR and reciprocity is still undergoing evolution, and even though steps have taken place to promote co-operation, the international community has a long way to go to see the benefit from the power of positive reciprocity at an international level.

83 The Inter-Parliamentary Union is the international organization of Parliaments, established in 1889, with the focal point for world-wide parliamentary dialogue and works for peace and co-operation among peoples and for the firm establishment of representative democracy, for further information please see: http://www.ipu.org/english/whatipu.htm.

84 For further information on Paris Peace Conference, 1919, please see http://www.ctevans.net/Versailles/League/League.html.

85 The Council of Europe was founded on 05 May 1949 with the aim to develop consistent and democratic principles on Human Rights and on the protection of individuals, available at: http://www.coe.int/; European Union was created following the WWII starting with encouraging co-operation economically through the European Economic Community which was created in 1957 following the treaty of Rome, for further information please see http://europa.eu/about-eu/eu-history/index_en.htm, and http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecc_en.htm.

86 Supra note 7, Preamble.

3. Conclusion

This Chapter looked at reciprocity in general context from the social, anthropological, historical and IR perspectives. Reciprocity was introduced as a multifaceted term and its presence is evident within many forms of interactions, be it about two individuals, communities, organizations or States. Reciprocity surfaces in many aspects of social relationships in both negative and positive formats, an example of the former is in retaliation to an injustice and an example of the latter in reciprocated kindness. In effect, reciprocity in a positive form is an encouragement for further repetition of actions, whereas negative reciprocity is intended to be a one-off retribution act to discourage any repeat of negative action.

Reciprocity plays a role in creating a balance for expectations and obligations based on morally acceptable norms, thus indicating how individuals will react to each other in a similar manner. This is best seen in Malinowski’s reasoning that everyone has a duty and an obligation to one another, bringing about ‘conformity with the norm’ and reciprocity means the duty that people feel towards one another. There is, however, the issue of morality of the action/behaviour, its true judgement and the valid right reciprocal response. The principle of utility was discussed for the role it plays underpinning how rights and wrongs can be assessed in relation to their moral status. In essence, this principle dictates that a right action, behaviour or rule is right when it provides maximum happiness to most of people and in most of the time; similarly a wrong action, behaviour or rule is wrong when it provides least happiness but instead pain to the most people and most of the time.

The understanding of social interactions provides a platform to understand the inter-State relations given how the international community is a collection of individuals connected to States. The international community is faced with inevitable growing interactions amongst States, which has led to the necessity of an expansion of their reciprocal relations and this requirement manifested itself through the need to give and receive. Mankind has become inter-connected and shares similar attributes and values since cultures and humans are coming closer together in their thinking, acting/reacting to situations both emotionally and rationally, influenced by technological advancement and closer global inter-link. In today’s world the international community is no longer a number of individual countries who can
afford to work independently and instead their international relations are very important to each country’s operations and growth. Their growing interdependencies gives rise to greater reciprocal interactions and these interactions bring them together through a number of diverse issues. The commercial growth, environmental concerns, fight against transnational terrorism and crime, and the safety of foreign diplomats comes from mutual co-operation and negotiations and cannot be achieved without mutual reciprocal agreements and obligations. Retrospectively, this growth cannot be achieved without international peace and stability. IR’s evolution demonstrates the vision for change and the belief within the international community that co-operation and positive reciprocity is a key to maintaining and promoting long-term peace and stability. The international community faces continuous challenges and has a long way to go to see the benefit from the power of positive reciprocity at an international level but concrete steps have already been taken to achieve this goal.
Chapter Two: Reciprocity in Nature and Sources of International Law

1. Introduction

IL in its contemporary format is the result of an increase in the need for closer links between States, coupled with the international community’s attempt to put an end to the individualistic ambitions that led to the two World Wars whilst uniting the international community through an international legal framework. Thus, the creation of the UN was a considerable effort on pursuing international justice, peace and security, as well as promoting respect for the obligations and duties of States, as applicable to them, by IL.\(^88\)

IL provides a collection of rules and a framework for the conduct of States whether the rules are written or unwritten, under the form of treaties and customary law. This Chapter focuses on the reasons why IL is required, by exploring its nature, characteristics and sources particularly with the aim of exploring the role of reciprocity within IL. Given the difference in the formation of laws between IL and national legal systems, the study will focus on the sources of IL as embedded in the Statute of the ICJ,\(^89\) commonly acknowledged as a comprehensive statement on the sources.\(^90\) The study examines the theoretical, as well as the practical application of the elements constituting IL sources. There are other possible sources not referred to in the ICJ Statute, namely ‘soft law’ where there is effective impact on reciprocal obligations and soft enforcement in matters such as environmental treaties and issues, however this thesis will concentrate on the Statute, since ‘soft law’ is an extensive subject and it is outside the scope of this research. Also ‘soft law’ does not carry a strict legally binding nature, and does not impose enforceable obligations on States, however, throughout the thesis there are references made to ‘soft law’, when it becomes relevant.\(^91\)

\(^{88}\) Supra note 7, Preamble.
\(^{89}\) Supra note 8, Article 38(1).
\(^{90}\) Ian Brownlie, Principles of Public International Law, 2008, p. 5.
The Chapter will also consider an evaluation of the unique character of IL and how it aims to set out universal rules for sovereign States which have the autonomy and the authority to apply their own policies. Subsequently, to gain a better understanding of the formulation of IL, a comparative differentiation between IL and national law is considered, particularly regarding the way these two legal systems are formed, governed and enforced. The substantive differences is evident in how IL is set through international treaties, together with customary rules based on States’ conduct, which have thus become accepted norms for States to follow. IL is based on a consensual framework where States’ ‘consent’ plays a pivotal role in the legal system. The uniqueness of IL is vitally important to understanding the role of reciprocity in IL, since it is this uniqueness that renders itself greatly for the manifestation of reciprocity in IL. This analysis provides the foundation for this thesis, particularly when assessing the role of reciprocity in the different sources of IL.

Particular attention is given to CIL given its evolving and flexible nature, and how in contrast to treaties, it is open to creation and change through States' practices. According to the ICJ Statute, CIL is ‘international custom, as evidence of a general practice accepted as law’, thus the emphasis is placed on ‘evidence’, ‘custom’ and ‘general practice’. This is where the doctrine of opinio juris manifests itself as a constitutive element of CIL. There is a common paradox surrounding opinio juris in scholarly works, where some challenge its necessity and helpfulness, as discussed in this Chapter. The evolving and flexible nature of CIL gives rise to an interesting analysis of the role of reciprocity in this area of IL. This is to say that the study, in this section, shows how the inter-link between opinio juris and reciprocity not only encourages States towards fulfilling their legal obligations, but it also discourages or minimises unfair advantages. Reciprocity takes a different role in CIL and treaty law which is discussed when looking at each source in turn.

The above analysis highlights the consensual nature of IL to emphasise the extent to which the ‘will’ and ‘consent’ of States play a pivotal role in two of the primary sources, treaties and CIL, where States are involved in treaty negotiation, signing and ratification of treaties as well as how CIL rules are the result of State practice. This inter-link between State practice and IL leads this work to explore the relationship between IL and IP in the context of the reciprocal framework of international legal system. It is, therefore, relevant to clarify how the two disciplines function. Is IL independent from IP? To what degree are they dependent on
each other and how does this dependence influence reciprocity in inter-State relations? The aim of the study at this stage is to reflect on the scholarly debates on this subject, to ascertain the inextricable connection between the two disciplines, as discussed later in this Chapter. The importance of this exploration clarifies the nature of direct interactions that underline the theme of this thesis, and the role and significance of reciprocity in IL.

2. **Nature of International Law**

Contemporary IL, which is the subject of this thesis, has grown and encompasses a larger variety of issues based on multilateral and international interconnection. New laws, including international space law governing outer space,\(^{92}\) international nuclear energy,\(^{93}\) HR, environment, international trade and intellectual property rights\(^{94}\) provide examples of the need for a move from traditional IL to its contemporary form. The twentieth century has witnessed major developments and changes in the world in many areas, particularly transport, technology, communications, weaponry and media. The contemporary world has linked States economically, technologically and politically more so than ever before, and has required them to work more closely together. This dynamic change in State relations has had a profound effect on IL, requiring it to expand into new areas. At the early stages of modern IL, States were the only subjects in its remit;\(^{95}\) however, with the development of the international community and its activities, there has been a clear need to include other factors and entities within its function. Other players have gained the attention of the international community and thus laws such as HR laws were introduced.\(^{96}\) It is important to note that despite these new players entering the arena, States still remain the primary focus and subject of IL.

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92 International Space Law is the body of international law applicable to and governing space-related activities encompassing the rules, principles and standards of international law, for further information please see [http://www.oosa.unvienna.org/oosa/SpaceLaw/index.html](http://www.oosa.unvienna.org/oosa/SpaceLaw/index.html).

93 International Atomic Energy Agency aims at ensuring nuclear verification and security, safety and technology transfer, for further information please see [http://www.iaea.org/About/](http://www.iaea.org/About/).


95 L. Oppenheim, *International Law: A Treatise*, Vol. 1 (Peace), 2006, p. 17; as suggested by Oppenheim ‘since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subject of international law’.

96 International Human Rights Law is the result of the increase in the human rights movement and the adoption of the Universal Declaration of Human Rights by General Assembly through resolution A/RES/217(III) on 10 December 1948.
IL is divided into private and public. The first relates to elements within the domestic law of States relating to particular disputes between individuals and/or organizations where an element of foreign law is involved.\(^97\) By contrast the primary subject of the latter is inter-State relations and issues involving States, as well as regulation of the function of international institutions,\(^98\) and this area constitutes the focus of this thesis.

The closer connections and interactions between States required the development of a framework in which States should operate. As with any community, law is the most important provider of such a framework, and in the international arena, IL aims to provide States with a framework that sets out parameters for their rights and duties. IL established the legal principles and guidelines for States’ conduct which they are obligated to follow, obey and adhere to.\(^99\) Additionally IL encompasses the rules for international organizations in their relations with each other, States and individuals, together with the obligations on States for individuals’ human rights.\(^100\)

States are defined as collections of individuals who act in authority on behalf of a nation, and as such have a legal personality.\(^101\) Contemporary IL aims to address the common concerns of the international community on matters that affect more than one State. Clearly, the aims and interests of each State differ from another, primarily driven from their distinct geographical, cultural, economic, and political parameters. IL aims to bring about uniformity and reciprocal respect and co-operation amongst the international community. The international community has gained the vision that on subject matters such as humanitarian issues, terrorism, nuclear ambition, and world trade, a universal approach and acceptance of uniform norms are essential. Infringement of such universal norms has a wider effect and needs to be dealt with through a united front by the international community as a whole.\(^102\)

\(^100\) Joseph Gabriel Starke, *Introduction to International Law*, 1989, p. 3.
\(^101\) In international law a State is an entity which has a permanent population, a defined territory and a legitimate government, with capacity to engage in formal relations with other States, the Montevideo Convention on Rights and Duties of States, signed 26 December 1933, entered into force 26 December 1934, Article 1, Organization of American States, Law and Treaty Series, No. 37.
\(^102\) In the aftermath of World War II, the international community reached the understanding that international unity was essential for achieving international peace. As such the Charter’s Preamble stipulates the agreement of the international community to unite their strength to maintain international peace and security. Additionally in the Preamble, there is a direct reference to determination of the international community to reaffirm faith in
IL serves to bring about a sense of order, based on stable and uniform norms which are considered to benefit the international community by avoiding costly wars and conflicts, and endorses mutual respect and co-operation through reciprocity; an instance of this is in the ‘Declaration on Principles of IL concerning Friendly Relation and Co-operation among States…’. This declaration sets out the parameters and principles that are important to the international community which will bring about co-existence and co-operation leading to peace, justice and prosperity at international level. Taking into consideration the principle of utility, the rightness of IL is in its ability to establish rules not only to bring about a sense of order in international relations but also to enhance the benefit for all States by encouraging the right behaviours and conduct that will benefit the international community as a whole. That is to say, for the IL system to be a success then it must operate in a manner that facilitates the right process for the creation of rules, the correct method of governing for the required rules and the correct enforcement mechanism to encourage adherence to the rules. In de-centralised system of IL, how is this to be achieved?

The key aims of IL are to establish and maintain the balance between the rights and duties of States. Drawing from the Jeremy Bentham’s utilitarian argument, this goal is achieved through promoting and establishing rules and duties where States should not harm or create injury to other States since retrospectively this will lead to harming themselves in return; and similarly encouraging and incentivising States to do the greatest good possible to other States insofar as their own interests are not at risk. IL retrospectively also establishes legal rights and legitimate expectation for States that they should not expect to be injured by other States and that they are likely to receive the greatest good possible so long as that is not detrimental to other States. This theme of utility general is applicable in war and peace times but at the times of war it changes its focus on setting rules which ensure adequate protection that minimise harm.

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104 For further information on the Principle of Utility please see Jeremy Bentham, An introduction to the principles of morals and legislation, Volume 1, 1823, p. 3; and Jeremy Bentham, The Principles of International Law, Essay I: the Objects of International Law, 1789.

105 This is based on utilitarian argument presented by Jeremy Bentham for the Objects of International Law, Jeremy Bentham, The Principles of International Law, Essay I: the Objects of International Law, 1789.
Given the distinction between IL from national laws, particularly in the way it is legislated, governed and enforced, it can be observed how the national law of civil societies are passed by a legislative body and are upheld by national institutions; disputes are addressed through a series of hierarchical Courts ascending in authority which provide States with a legal enforcement system. IL is formed differently and not set through a legislative body.\textsuperscript{106} The following section discusses how IL is formed through international treaties as well as through CIL based on States’ conduct which, then, becomes accepted norms for States to follow. As for enforcement of IL, although the ICJ is empowered by the UN Charter,\textsuperscript{107} this Court is limited to dealing with disputes in cases where both parties have agreed on the jurisdiction of the Court, and it is unable to ensure its judgement is complied with.\textsuperscript{108} In sharp contrast to national law a further characteristic difference of IL can be observed where, in cases of non-compliance, the responsibility of responsive action falls onto other States. These issues highlight the significance of reciprocity and the extent to which it lends itself as a necessary tool to encourage the right behaviours and actions by each State for the benefit of the international community whilst minimising self-interest or self-gain. As will be discussed in Chapter Four, IL allows reciprocal action by a State to act aggressively in the form of self-defence in response to a wrongful act by another State.\textsuperscript{109} This form of reciprocal response is not permissible within the framework of national law and will even be deemed as a \textit{vigilante} action.

The dynamic of IL and its uniqueness is due to the desire for setting out universal rules for sovereign States which have the autonomy and the authority to apply their own policies.\textsuperscript{110} Given this autonomy, IL cannot and does not act as the world supremacy to prescribe and impose a set of internal rules. Thus ‘consent’ of States plays an important role in the creation, acceptance and the fulfilment of IL. In the acceptance of the autonomy and sovereignty of States, IL has made States’ ‘consent’ a central element in the law-making process, by

\textsuperscript{106} Supra note 98, pp. 2-3.
\textsuperscript{107} Supra note 7, Chapter XIV.
\textsuperscript{108} This weakness and limitation of the ICJ will be analysed in Chapter Four when examining international law enforcement mechanisms.
\textsuperscript{109} Supra note 7, Article 51 clearly stipulates the ‘inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations’.
allowing them to be exempt from certain obligations.\textsuperscript{111} A clear example of this can be seen in the VCLT where the right to place a reservation exists when treaties are being ratified or accepted, unless a treaty specifically forbids any reservation or such defeats the purpose of the treaty.\textsuperscript{112} These measures function as encouragement for States to be seen as law-abiding and to forego short-term gains, since their long-term advantage is better served by belonging to the international community.\textsuperscript{113}

The promotion of peace and co-operation in IL benefits the international community as a whole; hence the international community has an interest in encouraging the existence of IL, as well as complying with its rules. Examples of such encouragements can be seen in the incentive for States to provide political and legal immunity to foreign diplomats that eventually led to the formation of the Law of Diplomatic Relations.\textsuperscript{114} The emphasis on the element of ‘consent’ in the formulation of IL is an interesting subject, since it demonstrates a direct involvement of States which are simultaneously the primary subject of IL. This direct connection between law makers and their subject should encourage obedience, and in return discourage breach of the international rules. Furthermore, compliance with IL is encouraged through the contemporary IL system where non-compliance is confronted with the threat of worldwide condemnation, isolation, sanctions and penalties imposed by the international community.\textsuperscript{115} Each State possesses an international legal personality and enjoys privileges and rights but simultaneously that legal personality specifies obligations and duties to the international community.\textsuperscript{116}

\textsuperscript{111} There are numerous references to the importance of consent in international law, particularly when discussing how States must provide their consent to accepting obligations. For example International Court of Justice made a direct reference to the necessity of consent in treaty relations, \textit{Genocide Case, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide}, ICJ Reports, Advisory Opinion, 1951, p. 21; and \textit{Ibid.}

\textsuperscript{112} Vienna Convention on the Law of Treaties adopted on 22 May 1969, entered into force on 27 January 1980, United Nations - Treaty Series, Vol. 1155, No. 18232, Article 21; since the adoption of the Convention, the International Law Commission has undertaken efforts to review and develop the treaty reservation practice there have been further \textit{Guide to Practice on reservations to treaties}, \textit{Yearbook of the International Law Commission}, 2011, Vol. II, Report of the Commission to the General Assembly on the work of its sixty third session, A/66/10, Chapter IV.

\textsuperscript{113} \textit{Supra} note 110, p. 532.


\textsuperscript{115} Example of such cases is the strong sanctions against the Islamic Republic of Iran and diplomatic routes in bringing them back to the discussion table. Please see Chapters Four for further debates on this subject.

\textsuperscript{116} \textit{Reparation for injuries suffered in the service of the United Nations}, ICJ Reports, Advisory Opinion, 1949, pp. 177-180; Hahn articulates the link between the presence of international personality with international obligations stating that ‘the proof of the presence of an international personality…appears to be identical with
3. Sources of International Law

The creation of IL laws is driven from a de-centralized legal system. This does not mean that IL does not possess a clearly identifiable, recognisable or enforceable legal structure. The sources of IL provide the legal framework for the international community, and it is thus the focus of this section to ascertain how IL is created and enhanced without a centralised legislative institution. This leads the thesis to explore the role and significance of reciprocity within each of the sources of IL.

The prominent authority for these sources is outlined in Article 38(1) of the ICJ Statute:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although the role of the Statute was to set the rules governing the work of the ICJ, the above Article is commonly acknowledged as a comprehensive statement on IL sources. Subsequently, the legally binding rules for the sources identified by this Article are the conventions known as treaties, customary international law, ‘general principles of law’ (which are considered as primary sources), as well as judicial decisions and scholarly literature which are regarded as subsidiary sources. The ILC, by reflecting on Article 24 of the Statute of the Commission, expands the scope of CIL by encompassing the judicial decisions as an extension of customary law, in contrast to the ICJ Statute which separates this from CIL and

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117 Peter Malanczuk, Akehurst’s Modern introduction to international law, 1997, p. 35.
118 Supra note 8, with reference to Article 38(1) compared to Article 38 of the Statute of its predecessor Permanent Court of International Justice, the inclusion of the clause indicating that ‘whose function is to decide in accordance with international law such disputes as are submitted to it’ is highlighted.
119 Supra note 8, Article 59 states: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case’. The primary focus of this thesis will be to analyse the role of reciprocity within the primary sources of IL which are considered as treaty law, customary international law and the general principles of law.
120 Supra note 90, p. 5.
regards it as subsidiary source.  

3.1. International Treaty Law

The first IL source is ‘international conventions’, or more commonly referred to as treaties. Treaties are in written format and documented so they tend to function as direct sources of reference and therefore, by their very nature, act as formalised and evident sources. Treaties are often categorised in two forms of ‘law-making’ and ‘treaty-contract’, where the former has law-making character given its multinational nature, encompassing a large group of States, and the latter, however, is between small groups of States, covering limited subject-matters. Law-making treaties bring obligations for States to abide by and in essence, such treaties address the collective conduct towards a particular issue addressed by the treaty. In this work the focus will be on ‘law-making’ treaties since the objective is to ascertain the sources for obligations on States. There are numerous examples of law-making treaties discussed throughout this thesis, which have increased in number since World War II and the establishment of the UN, and subsequently the creation of the ILC, which was tasked with progressive development and codification of IL.

Treaties are contractual agreements between the parties either in a bilateral or multilateral context set to codify and govern the rights and obligations of the parties. Reciprocity plays a vital role by providing States with a negotiation tool in their bilateral and multilateral inter-State relations. The negotiations of States begin at the very early stage of their interactions and continue into different stages relating to treaties, such as what treaties should be drafted, what provisions are contained within these treaties, as well as in the signing and/or ratification stage of a treaty. IL does not operate as a role of majority, and as sovereign States each State must give ‘consent’ to the provisions of the treaties. There is a great deal of reciprocity involved in building consensus amongst the international community in order to

122 Hugh Thirlway, The Sources of International Law, (ed.) Malcom D. Evans, International Law, 2010; and Supra note 98, p. 93.
125 The International Law Commission was established by General Assembly Resolution 174 (II), 2nd Session, 21 November 1947, A/RES/174(II).
engage States to sign and ratify treaties. The best example of consensus building can be seen in relation to environmental or climate change matters. Often it is seen how a preliminary treaty is introduced as to gain consensus that a problem does exist which requires attention without necessarily enforcing extensive obligations upon States.\textsuperscript{126} There are subsequently additional treaties that delve into the problem and provisions needed relating to this subject. It does not follow that States that sign the original treaty automatically must come forward and sign the additional treaties but there is an element of unofficial or unwritten obligations upon them to give ‘consent’ for the provisions that are created to help with the original problem accepted by them already. Additionally this is where peer-pressure and inducements come to play a role in increasing consensus and incentivising as many States as possible to accept the treaties.\textsuperscript{127} This is where reciprocal give and take plays a prominent role from the early stages of treaty negotiation to its conclusion. The reciprocal give and takes can be in many forms such as providing additional funding or economic support to developing countries, easing of political tension, and/or provision of access to technology by more technologically advanced States.

The framework for treaty law is provided by the VCLT,\textsuperscript{128} which underpins all treaties and as such provides the underlying factors that are to be considered when analysing, interpreting and applying all treaties as it provides the framework for ‘nature and characteristics’ of international treaties.\textsuperscript{129} The adoption of the VCLT brought about the conceptualisation of many existing customary international rules in a treaty format. The VCLT defines treaty as, ‘an international agreement concluded between States in written form and governed, by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.\textsuperscript{130} In other words, a treaty sets out the legally binding rules under IL for how the contracting parties are obliged to conduct based on the context and the nature of their agreement. Not only do treaties provide rules of conduct, they also provide them with guidance as to how other contracting parties will act;

\begin{thebibliography}{9}
\bibitem{126} Abram Chayes, Antonia Handler Chayes, \textit{The New Sovereignty: Compliance with International Regulatory Agreements}, pp. 5-8 and 15-17.
\bibitem{127} There are other internal and international bodies and institutions that exert pressure upon States such as non-governmental organisations, institutions and economic or political powerful countries but these do not form part of the scope for this thesis.
\bibitem{130} Supra note 128, Article 2(1a).
\end{thebibliography}
Furthermore, in cases of non-compliance, treaties can provide the reciprocal steps available to the contracting parties.  

The VCLT is observed to stipulate and include the existing customary rules which regulate and govern the treaty making. Reciprocity is evident in many aspects of the VCLT and as this treaty underpins all treaties, it can be concluded that reciprocity is observed in the law of treaties. Indeed this view can be seen in Simma’s observation that ‘international law provided a reciprocity-based framework for legal transactions in the form of treaties’.  

Indeed it can be observed how treaties set about the parameters of bilateral and multilateral agreements between States in a contractual and reciprocal framework outlining how the contract must be conducted by all parties, what are the rights and obligations of the parties and what can be done in case the agreement is not followed through or is not fulfilled either partially or fully. Such a view is expanded by Greig when discussing the role of reciprocity in treaty law in the level of deviation permissible from treaty obligations in response to a breach by the other party. This is in response to the role of treaties as legal instruments for setting the obligations for States, as well as balancing the rights and obligations as set out in the provisions of each treaty, which is achievable through the principle of reciprocity. The rules apply to all equally from the outset but if one State wishes to restrict its obligations, duties or demanding more rights, then reciprocity manifests itself in equalising and balancing the rights and duties of the parties.

The underlying principles of treaty law as set out in the VCLT are in recognition of principles of ‘free consent’, ‘good faith’, ‘pacta sunt servanda’, as well as ‘rebus sic stantibus’, and ‘denunciation or withdrawal’ from a treaty. According to the VCLT, a State expresses

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134 Ibid, p. 327.
135 The principle of ‘pacta sunt servanda’ and ‘good faith’ are underlying parameters for how international law must be interpreted and applied. See Chapter Two and Three for further detail.
136 This principle states that ‘agreements are concluded with the implied condition that they are binding only as long as there are no major changes in the circumstances’; supra note 2, p. 1295.
137 Supra note 128, Article 60.
its ‘consent’ to a treaty through its ‘ratification’, ‘acceptance’, ‘approval’ and ‘accession’. Furthermore, a State is able to insert ‘reservations’ into particular elements within the treaty, which will exempt them from those provisions. On reflection, this reiterates the point made earlier regarding the ability of States to choose or limit their international obligations under treaty law. This is reflective of the strongest evidence of reciprocity in the VCLT where the conditions for ‘reservation’ of treaties are defined. In multilateral treaties it would not be feasible to achieve an absolute ‘consent’ for the provisions of the treaties by all States, thus the VCLT aims to bring about a situation where ‘will’ and ‘consent’ of States is preserved without a tedious and long stretched out voting process, yet maximum participation and inclusion of States in the treaties are achieved. Reservations enable States to limit their obligations but still be part of the treaty. States assess what the terms of the treaties mean to them and adopt the terms to their own best advantage. Therefore, a question is raised as to whether States commonly place reservations to limit their obligations? Evidently, States do not always resort to placing reservation on every article in a treaty which might not be in their best interest. As will become evident, the main reason for this is due to the presence of reciprocity in the treaty law, where any reservation placed will limit the duty of others in relation to the reserving State whilst any advantage sought through reservation is also made available to the non-reserving States. Hence States tend to assess carefully what reservations they are likely to place given how this will be reciprocally available to others.

Under the VCLT, the right to place a reservation exists when the treaties are being ratified, unless a treaty specifically does not allow any reservation or such reservation defeats the purpose of the treaty. An example of the former type of treaty forbidding the use of

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138 Ibid, Article 2(1b) and Articles 11-18 provide the framework for expression of consent by a State conveyed through its signature, accession and ratification.
139 Ibid, Article 2(1d) states that ‘reservation’ ‘means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’; Articles 19-23 of the Convention provide the conditions for a state to place a reservation before ratification of a treaty.
140 Ibid, Articles 19-21; this form of reciprocity, where the obligation is limited as a result of non-commitment of a State, is referred to as obligational reciprocity by Sean Watts, Reciprocity and the Law of War, Harvard International Law Journal, Vol. 50, No. 2, 2009, pp. 371 and 374.
141 General Assembly Meeting, Sixty-sixth General Assembly Session, Sixth Committee Meeting, GA/L/3422, the representative of Bangladesh commented on how reservations promote ‘the goal of maximum participation of the States in the multilateral treaties’; also see Francesco Parisi and Catherine Sevcenko , Treaty Reservations and the Economics of Article 21 (1) of the Vienna Convention, Berkeley Journal of International Law, Vol. 21, Issue 1, 2003, p. 25.
142 Supra 128, Article 21.
143 Ibid, Article 26.
reservation can be seen in the World Intellectual Property Organization Copyright Treaty, and an example of the latter where the use of reservations defeats the purpose of the treaty can be observed in the International Convention on the Elimination of All Forms of Racial Discrimination. However, the important point to note is that the options available to States are shared and reciprocal in nature. If reservations can be placed, then every State can do so. If reservation cannot be placed then no State is able to place a reservation. Equally the rights of non-reserving States are not undermined when a reserving State chooses to limit its own obligations by placing a restriction through reservation, since this reduced obligation is made available to all non-reserving States in relation to the reserving State. This strongly demonstrates the reciprocal nature of treaty law. An important point to note is that there are treaties that either allow reservations or stay silent on this subject; however, as has been stipulated in the general comment of the UN Human Rights Committee (UNHRC), ‘the absence of a prohibition on reservations does not mean that any reservation is permitted’.

Furthermore, the ICJ has emphasised that the intention and object of the treaty must be paramount when placing reservations, thus reservations that violate and defeat the purpose and intention of the treaty must not be permissible. This view was further emphasised by the UNHRC stating ‘reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant’. This is a fundamental issue when discussing the protection of HR and fundamental rights of individuals, and to this effect, the UNHRC

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144 The World Intellectual Property Organization Copyright Treaty, WO033EN, Adopted on 20 December 1996, under its Article 22 no reservation is admissible on this treaty.
145 International Convention on the Elimination of All Forms of Racial Discrimination, Adopted by General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force 4 January 1969, under its Article 20(2) ‘a reservation incompatible with the object and purpose of this Convention shall not be permitted’.
147 The Committee refers to Article 19(3) of the Vienna Convention on the Law of Treaties, by asserting that ‘where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations’; The United Nations Human Rights Committee General Comment on International Covenant of Civil and Political Rights, General Comment No. 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, para. 6, CCPR/C/21/Rev.1/Add.6.
149 The United Nations Human Rights Committee General Comment on International Covenant of Civil and Political Rights, General Comment No. 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para. 8.
continues to assert that ‘although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general IL, it is otherwise in HR treaties, which are for the benefit of persons within their jurisdiction’. Therefore it is important to conclude that mere ability to place a reservation is not an automatic right, if it is likely to infringe the fundamental rights or HR that the treaty aims to preserve. The ILC efforts on reservation practices on treaties has been significant particularly highlighting that reservations placed on non-reciprocal obligations do not impact on the obligations of other parties. Effectively the nature of the obligations dictate whether or not reciprocity is permissible even if reservations are placed.

A practical example of this is seen in the ICJ’s advisory opinion with regards to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), mentioned earlier, where placing a reservation would contradict and jeopardise the key purpose of the treaty. The ICJ’s reasoning was that since ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’. The ICJ iterated the importance of the object of such conventions which re rooted in ‘purely humanitarian and civilizing purpose’; whereby the aim is to ‘endorse the most elementary principles of morality’. The ICJ cited that such obligations are binding on all States, even without this convention, since the principles at stake are recognised by the international community to be undignified, and there is an obligation to eradicate such acts. The notion of ‘civilized nation’ and their accepted ‘general principles’ are important sources of IL, and as such the principles accepted by the international community, should be disseminated as binding obligations, without any specific treaty or convention. The recent development by the ILC has gone further, by suggesting that ‘the object and purpose of the treaty is to be determined in good faith’, and thus in further support of the fundamental rights, ‘a State…may not formulate a reservation to a treaty

150 Ibid, the Committee’s comment clearly states that ‘a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language’.
151 Supra note 123, para. 3.1.5.1.
152 Supra note 148, pp. 23-24.
153 Ibid, p. 23.
provision concerning rights from which no derogation is permissible under any circumstances’. This new development, in essence, aims to delimit the use of reservations in cases where the international community has demonstrated its resolve to protect and uphold HR, in particular *fundamental rights*.

As discussed briefly earlier, Article 21(1a) in the VCLT establishes and highlights how the reservation ‘modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation’, and it continues in Article 21(1b) to clarify how the reservation ‘modifies those provisions to the same extent for that other party in its relations with the reserving State’. Reservation to this effect is to limit the scope of the treaty by the specific reservation placed between the parties in the treaty. This limitation of a reservation was also referred to in the *Legality of the Use of Force* case where the ICJ stipulated that, ‘the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties’. Such reciprocal exchanges of rights and obligations in view of reservations are further cemented in the ILC’s recent work. In effect, the reservations provide reciprocal entitlement and set obligations to all parties.

The VCLT in Article 20(4c) signifies the element of ‘consent’ in the reciprocal impact of a reservation, asserting that ‘an act expressing a State’s ‘consent’ to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation’. Consequently, the binding reciprocity in placing a reservation originates from the element of ‘consent’ expressed by the reserving State. It is worth highlighting that every State has a right to object to reservations placed by other States, and ‘may oppose the entry into force of the treaty as between itself and the author of the reservation’. The effect of a severe objection would mean that the objecting State can oppose the entirety of the treaty obligations between itself and the reserving State, or alternatively allow the treaty to exist but limit its obligation to the reserving State in line with

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156 *Ibid*, para 3.1.5.4.
157 *Supra* note 128, Article 21.
159 *Supra* note 123, para. 4.2.4.
160 *Supra* note 128, Article 20.
162 *Supra* note 123, para. 2.6.
the reservation. Interestingly, there is little evidence of objection to reservations excluding a State from a treaty in its entirety but the usual practical approach to an objection is that the reserving State is part of the treaty but its obligations exclude the reserving obligations. Examples of such objections can be seen in the case of nine States raised objections to the US reservations for Article 7 of the International Covenant on Civil and Political Rights (ICCPR), claiming that the US approach is against the object and purpose of the treaty. Also similar objections were protested by some States against the US reservations on the Genocide Convention. The basis of the US reservations was to emphasise the need for the US to give prior ‘consent’ for the dispute referred to the ICJ, as well as limiting the obligations of the US to its own constitution, by suggesting that the national constitution overrides the international legal obligation as was ruled in the US Supreme Case Reid v. Covert. The objections of States revolve around the limitations of international obligations on this subject sought by the US, particularly suggesting limitations on the ICJ’s power to deal with disputes.

The reciprocal entitlement given in the VCLT to non-reserving States clearly identifies how a reservation stipulated by a State brings similar advantages of the reservation to other States in their relation to dealings with the reserving State. As mentioned by Bilder, placing a reservation acts to reduce the potential future risk from international obligations faced by the reserving State and enables deviation from the full treaty obligations. It has been argued that through this process, reserving States do not gain an unfair advantage and there will be a balance in obligations and duties, signifying that the process is heavily based on reciprocity. Essentially, reservations amend the treaty between reserving States and others, where the reserving State, by excluding itself from a specific obligation, releases others from a similar obligation. This is referred to as ‘induced reciprocity’ by Parisi, suggesting a similarity to

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163 Germany, Italy, Denmark, Finland, the Netherlands, Spain, Norway, Portugal, and Sweden have objected to the United States reservations; International Covenant on Civil and Political Rights, United Nations - Treaty Series, Vol. 999, p. 171, and Vol. 1057, p. 407.
166 The United States Supreme Court, Reid v. Covert Case, 354 U.S. 1, 1957, is a landmark Case where the Court ruled that the United States Constitution supersedes international treaties ratified by the Senate, citing that ‘this Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty’.
reciprocity defined by Keohane as ‘specific reciprocity’.\textsuperscript{168} Parisi correctly maintains that Article 21(1b) demonstrates the constraints necessary to bring about automatic and ‘induced reciprocity’ where no State benefits from ‘unilateral defection’.\textsuperscript{169} This will prevent States from finding themselves in a prisoner’s dilemma situation and are likely to maintain a balance of rights and duties, dependent on specifics of a treaty, go as far as creating a situation where a non-reserving State has no obligation towards a reserving State; thus any obligation in treaty toward a reserving State is automatically lifted once the State places a reservation.\textsuperscript{170} In other words, placing a reservation, and its result in bringing about a form of reciprocity constraint, produces a tit-for-tat strategy without directly resulting in an overwhelming retaliation by non-reserving States.\textsuperscript{171} The main advantages, therefore, for the inclusion of the reservation right is that many States can be part of the treaties but are able to exclude themselves from certain elements that are objectionable to them. However, the principle of reciprocity is preserved by retrospective exclusion of the obligation by the non-reserving State towards the reserving State.\textsuperscript{172}

The second principle of treaty law, ‘good faith’, combined with the third principle ‘\textit{pacta sunt servanda}’, dictate the obligations on member States as to how a treaty must be applied, observed and interpreted. ‘Good faith’ requires States to fulfil their obligation on the basis of honesty, sincerity, reasonableness and fairness,\textsuperscript{173} similarly ‘\textit{pacta sunt servanda}’ requires States to perform and fulfil their obligations. States have agreed to fulfill international obligations in ‘good faith’ under the Declaration on Principles of International Law concerning Friendly Relations and Co-operation,\textsuperscript{174} under which ‘good faith’ is regarded as one of the underlying principles of IL. The instilling of the notion of ‘good faith’ and ‘\textit{pacta sunt servanda}’ in the treaty law establishes a sense of obligation upon States that they must perform their duties in line with the provision of their agreement. This way the balance in the  

\begin{itemize}
\item \textsuperscript{169} Supra note 1, p. 107.
\item \textsuperscript{170} Ibid, pp. 106-107; Prisoner’s dilemma situation, as a well-known notion, arises where two individuals/States might not co-operate even though co-operation would be in their best interest.
\item \textsuperscript{173} John O’Connor, \textit{Good Faith in International Law}, 1991, p. 124.
\item \textsuperscript{174} General Assembly Resolution 2625(XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 25th Session, 24 October 1970, A/RES/2625(XXV).
\end{itemize}
obligations and the duties will be preserved as long as the agreements are upheld and interpreted based on ‘good faith’. The non-fulfilment of the obligations or misinterpretation of the terms of the treaty will undoubtedly disturb the balance in the agreement between the parties and is likely to lead to unfair advantage. The presence of these two principles, in the VCLT, is yet again strong evidence of the presence of reciprocity in treaty law; the aim is to direct contracting parties to follow through with their obligations, and additionally to ensure the provisions of these agreements are always interpreted in ‘good faith’ as to preserve the balance between the right and duties of the parties involved.

Given the role of ‘consent’ in acceptance of the terms of the treaties by States, once a State has given ‘consent’ to an obligation or a duty, treated as equal amongst the community of nations is it totally unexpected for the international community to put faith and trust in the fulfilment of its international legal duties and not to be confronted with wrong-doing or non-fulfilment? Is accepting the rule through ‘consent’ by States not a form of promise which creates binding obligations? Therefore ‘good faith’ and ‘pacta sunt servanda’ is vital in the application and delivery of obligations and duties of States. Similarly the existence of these principles in IL will provide a sense of expectation by other States on how their counterparts will perform their obligations and duties, thus creating a sense of reciprocal balance of rights and duties amongst States. Further evidence of this can be seen in the principle of estoppel where States cannot deny their obligations based on previously accepted duties and obligations. Estoppel is regarded as a general principle of IL and plays a vital role.\textsuperscript{175} Whilst the principle of ‘pacta sunt servanda’ looks at whether obligations have been fulfilled appropriately, Estoppel looks at the nature of conducts that would have led a State to the understanding and the reliance that the wrong-doing or non-obedient State has an obligation that has not been fulfilled.\textsuperscript{176}

A common issue facing the legal community is how the laws are to be interpreted. The principles of ‘good faith’ and ‘pacta sunt servanda’ provide the necessary tools to ensure States do not interpret the rules exclusively to their own benefit and interest. There are many examples within the VCLT demonstrating these framework and obligation on States; namely stressing how every ‘treaty in force is binding…and must be performed…in good

\textsuperscript{175} North Sea Continental Shelf Cases, Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands, ICJ Reports, Separate Opinion of Judge Ammoun, 1969, p. 120.

\textsuperscript{176} Temple of Preah Vihear Case, Cambodia v. Thailand, ICJ Reports, Merits, 1962, pp. 31-33.
Equally a ‘party may not invoke the provisions of its internal law as justification for its failure to perform’; and ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Moreover, the commentaries on the Draft Articles to the VCLT gave an insight into how various interpretations of the treaty texts would be possible. The principle of ‘pacta sunt servanda’, therefore, was considered essential as an established guideline for interpreting treaty laws. The significance of the inclusion of this principle is twofold. Firstly, the VCLT is recognised as the codification of existing CIL already in practice; and secondly, the rules within the VCLT underpin all other treaties.

In addition to the theoretical approach to a valid interpretation, assessing the collective approach to the interpretation of the rules by the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), provides practical insight. Previously, the PCIJ in the Polish Postal Service in Danzig case made a clear statement that, ‘words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd’. Observations on the history of the ICJ indicate a number of cases that have made references to ‘good faith’, namely in the Nuclear Test case, and in the North Sea Continental Shelf cases. In the latter case, the ICJ relied upon ‘good faith’ to express the opinion that States must partake in useful and helpful negotiations and should not be providing limitations for self-serving purposes, and that States should provide scope for change from their own position for the overall good. This balance of interests is what is sought by the principle of reciprocity.

The prerequisite of ‘good faith’ in treaty laws provides the basis for the application of reciprocity, particularly where the terms of treaties provide the withholding or retraction of

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177 Supra note 128, Article 26, there is additional reference in the Convention to good faith Article 31(1); the United Nations’ Charter, in Article 2(2), stresses the application of good faith by States in fulfillment of their obligations; supra note 7; also the International Court of Justice has further reiterated the notion of good faith in the Gabcikovo-Nagymaros Project case, Hungary v. Slovakia, ICJ Reports, 1997, paras. 140-143.

178 Supra note 128, Article 27.

179 Ibid, Article 31(1).


181 Polish Postal Service in Danzig, PCIJ Reports, Series B, No.11, 1925, p. 39.

182 Nuclear Test Case, Australia v. France, ICJ Reports, 1974, para. 46.


184 Ibid, para. 85.
the obligation upon the breach of the other party.\textsuperscript{185} An example of this can be seen in \textit{Gabcikovo-Nagymaros Project} case between Slovakia and Hungary, where Hungary was not allowed to abandon its obligation under the existing 1977 treaty between the two States and the ICJ ruled that the two States must engage in negotiations in ‘good faith’.\textsuperscript{186} Furthermore, if no settlement was reached, Hungary should compensate Slovakia for abandonment of the project.\textsuperscript{187} In other words, if parties to a treaty have interrelated obligations as part of the treaty, then one State can withhold or retract from its obligation if the other State has not fulfilled its obligation. The importance of ‘good faith’ in relation to the principle of reciprocity lies in the notion that respect and fairness in interpretation and application of treaties is paramount. This notion instils the obligation on States to abide by the spirit intended by the treaty and avoid gaining unfair advantage by misinterpretation.

Therefore, the valid interpretation of IL is of greatest importance. The rules of IL, like other legal systems, are open to interpretation and valid interpretation of these rules, particularly in relation to the correct intended duty and obligation is the cornerstone of IL. As suggested by Judge Bedjaoui ‘good faith is a fundamental principle of IL, without which all IL would collapse’.\textsuperscript{188} The ICJ in the \textit{Competence of the Assembly Regarding Admission to the United Nations} reiterated the principle of valid interpretation by stating that ‘the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur’.\textsuperscript{189} The importance of these principles is to ensure consistency and uniformity of approach by States to the provisions of IL as well as to reduce self-benefitting interpretation and application in different instances to gain unfair advantage. The significance of this is how a group of States have been brought together, under a treaty, and agree to be bound by its rules. Thus, States must apply uniform laws that are reflective of a co-operative approach to avoid inconsistent interpretation or application.

The fourth principle of treaty law, ‘\textit{rebus sic stantibus}’, refers to the conditions allowing for a

\textsuperscript{185} Supra note 133, p. 320.
\textsuperscript{187} Ibid, para. 151.
A treaty to be terminated based on exceptional circumstances. An emphasis in the VCLT is given to create and maintain peace and co-operation between States. However, there are instances where a ‘material breach’ in agreements occurs and allowances have been made in the VCLT for ‘the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate’ either between the breaching party and other parties or between all parties. The VCLT permits termination or suspension of a treaty either through mutual ‘consent’, ‘material breach’ by one of the parties, and/or through ‘fundamental change of circumstances’. An example of such circumstances is provided by Brownlie, where a change occurs when a State party to a military and political alliance has a change of government which is no longer compatible with the provisions of the alliance. In these circumstances, the termination or suspension of the treaty is feasible and justifiably acceptable.

The role of reciprocity with respect to ‘material breach’ is twofold. On the one hand, it has an influential role in encouraging States to fulfil their agreed obligations and to fully observe the provisions of the treaty. On the other hand, it has another important role and impact whereby allowing a State to terminate or suspend certain provisions or in extreme cases to be able to affect the entire treaty, therefore allowing the obligation to be removed from the party which has been subject to ‘material breach’ by another State. Both of these roles are in essence vital to maintain and support the balance between the rights and duties of States which are party to a treaty and to enhance compliance with international agreements as well as minimising unfair advantage being gained by one party over others.

The right of the party to terminate or suspend its obligations relies once again on a State acting against the rules of the agreement, in trying to achieve unfair advantage. This right to the injured party is granted under the VCLT; however, there is a lack of clarity on the

190 Supra note 128, preambular.
191 Ibid, Article 60(3) states ‘A material breach of a treaty…consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty’.
192 Ibid, Article 60; this form of reciprocity, where the obligation is dependent upon the obedience of a State, is referred to as observational reciprocity by Sean Watts, Sean Watts, Reciprocity and the Law of War, Harvard International Law Journal, Vol. 50, No. 2, 2009, p. 375.
193 Ibid, Articles 60-62, Conditions for termination under this principle contain ‘material breach’ under Article 60; ‘the permanent disappearance or destruction of an object indispensable for the execution of the treaty’ under Article 61; or ‘fundamental change of circumstances’ as per Article 62.
194 Supra note 90, p. 624.
‘precise’ situations where a State can act unilaterally and in defiance when involved in multilateral agreements.\textsuperscript{195}

Given the multilateral features of contemporary IL, it could be argued that the measures permitted can be enhanced to encompass other interrelated treaties between States. That is to say, it is conceivable that several treaties with similar obligations are entered to by many States, and as such a ‘material breach’ in one treaty can lead to the suspension of another similarly linked treaty. Even though the practice of such notion has been rare, it is important to consider the widespread applicability of reciprocity in dealing with breach of obligations. Furthermore upon termination or suspension of a treaty, following a ‘material breach’, the VCLT releases States from their treaty obligation towards each other during the period of the suspension of the treaty.\textsuperscript{196} The terms of a ‘material breach’ and suspension of a treaty as provided under Article 60 of the VCLT is often interpreted to reflect the same treaty and not to encompass other treaties. The ILC in its scrutiny of scholars’ work concerning this Article placed an emphasis on the existence and manifestation of reciprocity in relation to an unlawful act and its consequent justified reaction.\textsuperscript{197} This view of reciprocity in IL, particularly under the law of treaties, is considered as a tit-for-tat policy where the terms of a treaty allow a State to be punished if and when it has deviated from co-operation, but their punishment is not so severe as to never induce future and long-term co-operation between the parties.\textsuperscript{198} This is indeed reflective of the subtle notion in Article 72(2) where the parties to a treaty are obliged to ‘refrain from acts’ that are likely to block the continuation or resumption of the operation of the treaty.\textsuperscript{199} This in effect gives rise to reciprocity being used in both as a balance of interest as well as an incentivising tool for States to come back to the agreement and fulfil their original obligations and duties.

Osiel is of the view that States must have the ability to retaliate against a breach by other States, which in turn, should encourage them to respect and abide by the agreements.\textsuperscript{200} This view is shared by Hathaway suggesting that allowing retaliation in this form plays a vital role

\textsuperscript{195} Ibid, p. 622.
\textsuperscript{196} Supra note 128, Article 70(1A) and Article 72(1A).
\textsuperscript{198} Mark Osiel, The End of Reciprocity: Terror, Torture and the Law of War, 2009, p. 71.
\textsuperscript{199} Supra note 128, Article 72(2).
\textsuperscript{200} Supra note 198, p. 70.
in influencing the behaviours of States in adhering to international agreements.201 Similarly Greig holds the view that States should have the ability to limit their obligation in response to a breach of a similar obligation by another State, however, the scholar has concerns about the notion of proportionality towards the reaction to a breach.202 Greig introduces reciprocity as a principle for determination of obligations and proportionality as a principle for the measure of reciprocal ‘remedies’ for the breach in obligations.203

The fifth principle of treaty law, ‘denunciation or withdrawal’ from a treaty sets out the obligations where States cannot simply terminate or denounce a treaty unless termination is stipulated within the treaty.204 This outlines the principle within the Convention for maintaining rather than ending a treaty, hence the VCLT has tried to limit the possibility of withdrawal of obligations by States. Similar to the fourth principle, ‘rebus sic stantibus’, through the fifth principle, the VCLT aims to create and maintain peace and co-operation between States,205 by encouraging the continuation of agreements and to ensure one party does not gain an unfair advantage by terminating an agreement that would have been mutually beneficial to all parties. This balance of interest is preserved through the principle of reciprocity where one party is not given the right to break away from an existing agreement that would have come about through the ‘consent’ and mutual agreement of parties. By ensuring the continuation of agreements, an unfair advantage is limited and mutual benefit of the parties as set out at the beginning of the agreement is maintained. Accordingly, the issue of non-fulfilment of obligations is covered within the treaty laws collectively by asserting the necessary measures for seeking the ‘remedial’ approach in case of deviation from obligations either through ‘material breach’ or ‘denunciation or withdrawal’ from a treaty. In such circumstances there are many ‘remedial’ options available to protect the affected parties. Firstly the VCLT provides for immediate end to the provisions of the treaty where there is a ‘material breach’ by one State and the affected State is able to deem the agreement has come to an end, and is no longer bound by the obligations in the treaty.206 Secondly, the affected party is able to deem the agreement as valid if the other party is simply terminating or

202 Supra note 133, pp. 342-343.
204 Supra note 128, Articles 42-43 and 55-56.
205 Ibid, preambular.
206 Ibid, Article 60(3).
denouncing a treaty which will place the affected party at a disadvantage. Both of these options are on the basis of the principle of reciprocity which is based on maintaining the balance of interest and minimise unfair advantage by any one party.

The role of reciprocity in treaty law takes different shapes and forms as the treaty law crystallises from its outset of negotiation, consensus building and continuing in its role where it encourages States to take into consideration the reciprocal responses to their actions when inserting a reservation, their general approach to the obligations under the treaties, particularly the consequences of a potential breach of their obligations. The significance of reciprocity in treaty law is how the provisions of the treaties are able to incentivise and encourage compliance and obedience as well as allowing for reciprocal reaction to breaches in agreements, but the adopted approach is in such a way that it does not destroy possibility of returning back to the terms of the original agreements.

3.2. Customary International Law

Norms and customs, which can be defined as the standard behaviours in any society, develop over time, and are likely to be in existence for a while before they become the formal and official law of that society. Such norms range from values shared within the society and conduct deemed acceptable by the majority. These norms are often unspoken or unwritten rules, but their non-formalisation does not make them any less valuable to the society; and these customs are likely to be respected long before official laws are passed and established. Over the last few centuries, as societies have matured, so have their values, and norms which were once common are no longer seen as acceptable. This evolution of norms is evident when observing how historically acceptable practices of racism, slavery or colonisation have now become unacceptable. The study of reciprocity in general context through social and anthropological provided the platform to analyse the role of reciprocity within inter-state relations which operates within a similar context. The norms shared and

208 *Supra* note 98, pp. 72-73.
reciprocated amongst the international community have been in place as international customs, and have become formalised and documented through treaties. That is to say, treaties are not the introductions of the acceptable customs and norms of conduct, but rather are a method of formalising the pre-established and acceptable norms.\textsuperscript{212}

According to the ICJ Statute, CIL is ‘international custom, as evidence of a general practice accepted as law’. Thus the emphasis is placed on ‘evidence’, ‘custom’ and ‘general practice’. It is important to note that ‘consent’ of all States is not required to create a custom, rather the creation of CIL begins with a State engaging in a specific practice, followed by reactions to this practice by other States; the response to the practice thus formulates a rule. In CIL the reaction of States plays an important role in evidence of their ‘consent’. Equally if other States have partaken in the same conduct as another State, it can be understood that they are in agreement to the appropriateness of the original conduct. A conduct available for one State is immediately made available to other States. This is where reciprocity significantly manifests itself in CIL. A State is aware that its actions can be replicated by others and any benefits sought from such conducts are made available and shared by others. This is central to the role of reciprocity on CIL. The challenge is hence in identifying what constitute a CIL rule and what actions/conducts are to be considered as CIL.

The constituting elements of CIL were best articulated by the ICJ in the \textit{North Sea Continental Shelf} cases,\textsuperscript{213} as firstly generally accepted practices of States, and secondly \textit{opinio juris sive necessitatis} commonly referred to as \textit{opinio juris}.\textsuperscript{214} The ICJ referred to these elements in the creation of CIL, citing that firstly, ‘not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’ and this needs to be accompanied by ‘the need for such a belief, i.e., the existence of a subjective element, [which] is implicit in the very notion of the \textit{opinio juris}...’\textsuperscript{215} In essence, the presence of \textit{opinio juris} in CIL is a significant indication that States are encouraged and expected to pursue conduct that has a legally binding obligation based upon previous conduct of States. The presence of \textit{opinio juris} in CIL signifies that

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\textsuperscript{212} \textit{Supra} note 131, pp. 111-112. \\
\textsuperscript{213} \textit{Supra} note 183. \\
\textsuperscript{214} \textit{Ibid}, para. 77. \\
\textsuperscript{215} \textit{Ibid}, para. 77.
\end{flushright}
States’ conduct must be in line with their legal obligations, therefore it is to infer that States are obliged and encouraged to adopt practices that are in line with internationally accepted rules and norms. The inter-link between this notion and the presence of reciprocity in CIL is where adopting conducts based on legal obligations, brings about and maintains a sense of balance between legal rights and duties of States as well as minimising unfair advantages. This balance is achieved through encouraging compliance and obedience of States to their legal obligations and duties whilst protecting their rights against such conducts that might lead to unfair gains.

A feature of customary law which distinguishes it greatly from treaty law is its degree of flexibility. From an international legal point of view, customary law, unlike treaty law, does not have any central decision makers or specific fixed processes, hence the analysis of the two necessary elements constituting CIL rules is vitally important in order to understand the role of reciprocity within CIL.

3.2.1. State Practice

The importance of State practice in formulation of CIL suggests that any interpretation and/or act by a State can have direct implications for future conduct and interpretation of other States. Therefore, what constitutes State practice? Does every practice constitute a rule of CIL? Is the internal conduct of States also included in State practice?

The doctrine of State practice in formation of laws is not a new concept and is not exclusive to IL. As far back as ancient Greek times, common practices were deemed as customary rules in war and peace. In certain countries which follow the common law system, such as England, the formation and application of the law is based primarily on customary law according to customs and past practices. Custom in the international arena is conduct by States based on their understanding of acceptable and legal conduct and it is this custom that is shared between States. In general it is worth identifying that a State has sufficient documentations providing evidence of its international dealings, such as interviews and speeches, for example by heads of States, diplomatic communications, or statements made by

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216 Supra note 1, p. 121.
217 Supra note 100, p.36.
218 Supra note 98, p. 166.
the representatives of governments, such as the Foreign Office.219 All of these give an insight into a State’s practice. In addition, the ILC has opted to include the national Courts’ ruling as an indication and evidence of a State practice,220 indicating that State practice is not limited to the international conduct of a State relating to its foreign affairs. Ott articulated that CIL is formed through ‘gradually combining effect of the practice of a number of States with regard to a particular legal problem or situation’.221 D’Amato reflects on the flexible nature of CIL observing that:

Custom is a dynamic process of law-creation, yet it is also a restraint on illegal dynamism. The theory of custom must provide for change and adaptation in customary law, yet it must also establish enough stability so that it can exert a pressure on decision-makers to refrain from certain contemplated action that would violate customary rules.222

D’Amato’s viewpoint describes custom as a ‘dynamic’ yet flexible formation of norms which gives rise to the growth and evolution of the rules of IL, in line with the change in dynamics of the international community. This flexibility is important in IL given its nature and structure. Akehurst raises an interesting question as to how many States are required for a uniform practice to constitute CIL, and whether all States are to be deemed equal when considering a majority of State practice. The scholar asks whether a practice can fail to become a CIL, if as few as one State opposes its creation. In answering the questions, the scholar reflects on the findings of the PCIJ in the Lotus case,223 citing that, ‘the rules of law…emanates from their own free will has expressed in conventions or by usages generally accepted as expressing principles of law’.224 The importance of States’ ‘consent’ on their acceptance of legal obligations and duties is paramount in IL but ‘consent’ in CIL takes a different form than treaty law where States can formally sign and ratify treaties. The notion of

219 Supra note 121, p. 368, para. 31 states that: ‘Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to ‘documents concerning State practice’… supplies no criteria for judging the nature of such ‘documents’. Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations’.
223 Lotus Case, France v. Turkey, PCIJ Reports, Series A, No. 10, 1927, relates to the collision on 02 August 1926, between a French steamer (S.S. Lotus) and a Turkish steamer (S.S. Boz-Kourt) resulting in the death of eight Turkish nationals. The question for the Court was to ascertain the Turkish jurisdiction for the trial of the French captain since the France claimed that their steamer was flying the French flag and as such only French Courts had jurisdiction for any criminal trials of this nature.
224 Supra note 117, p. 47.
‘consent’ indicates that States are legally bound to CIL not necessarily through their own practices and customs, but more in relation to not opposing these conducts by contrasting practices.\textsuperscript{225} States are unlikely to give ‘consent’ to any CIL rule that is likely to hinder the balance of their rights and duties or provide unfair advantages to one or more States. This is where reciprocity also plays a role through ‘consent’ of States in order to maintain the balance of rights and duties for all parties.

It is important to note that the usage of a practice does not warrant it to form a custom, ultimately becoming a rule for the international community.\textsuperscript{226} The underlying issue is the ability to distinguish between the usage of a practice and a custom which can lead to an accepted international customary rule. This distinction has been widely debated theoretically and practically both by the Courts and the scholarly community.\textsuperscript{227} The Asylum case, provided a milestone in how custom can be recognised, when the ICJ indicated that custom is established when ‘it has become binding on the other Party’.\textsuperscript{228} In Brierly’s reasoning, custom is an established practice recognised by other States as ‘obligatory’ practice.\textsuperscript{229} This distinction is not easy, yet it is essential in determining CIL. The significance of the distinction lies in the primary differentiating factor between usage and custom, where usage does not carry a legal significance.\textsuperscript{230} The common factor that is deduced, illustrates that the essential distinction between usages of an act as opposed to a State practice, which can form a rule of CIL, is identifiable through consistent, uniform and regular conducts employed by many States in response to a specific situation.

The Anglo-Norwegian Fisheries case,\textsuperscript{231} provides an insight into how the existence of a custom was not accepted by the ICJ, where the Court was dismissive of a practice in relation to territorial water as general rule of IL since the practice was not considered as ‘uniform or universal’ practice.\textsuperscript{232} In other words, the ICJ ruled that there was a lack of uniformity in

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\textsuperscript{225} Ibid, pp. 47-48.
\textsuperscript{228} Asylum Case, \textit{Colombia v. Peru}, ICJ Reports, 1950, p. 276, relates to a dispute involving Colombia giving political asylum to the Peruvian opposition leader.
\textsuperscript{230} Supra note 227, p. 394.
\textsuperscript{231} Anglo-Norwegian Fisheries Case, \textit{United Kingdom v. Norway}, ICJ Reports, 1951.
\textsuperscript{232} Hersch Lauterpacht, \textit{The Development of International Law by the International Court}, 1982, pp. 369-370.
\end{flushleft}
practice; hence the mere practice by one State does not create CIL.233 The ICJ ruling in this case, and indeed its reasoning for reaching its judgement, has received criticism from the scholarly community.234 A school of thought has suggested that absolute uniformity across all nations is not a requisite for establishing custom but major uniformity is required,235 equally, a majority is sufficient even if some of them were ‘indifferent’ to the practice of these customs.236 It is not easy to comprehend how absolute universality and uniformity of a practice can exist in the international community, as large as it is. This notion of majority is understandable since not every State will have an interest in every international practice, for example a State without a sea coast is unlikely to be interested in issues surrounding coastlines or fishery rules, and the notion of majority rule of interested parties is likely to be more practical. Nonetheless, the importance of the role of ‘consent’ in IL must not be forgotten.

The Asylum case demonstrated a practical approach to the issue of custom in a dispute between Colombia and Peru relating to granting political asylum to an anti-government movement leader.237 The ICJ explicitly recognised the presence of customary norms as being ‘local or special’ in their nature.238 A similar observation is drawn from the ICJ’s ruling in the Right of Passage case,239 where a rule of customary law was claimed based on existing established practice between the two States, enabling Portuguese personnel to pass through Indian Territory and to gain access to Portuguese territory.240 The ICJ based its judgement on the existing evidence of a custom in accordance with geographical and historical specifics of the region, thus upholding Portugal’s claim with the exception of the movement of military personnel.241 Contrary to the above examples, not every action taken by a State forms a rule of CIL. For example, could actions taken by the US during the ‘war on terror’, involving long-term detentions and torturous acts relating to foreign national suspects, be considered as a custom? The reality is that these approaches demonstrated inconsistent and non-uniform

233 Supra note 98, p. 77.
235 Supra note 90, p. 7.
237 Supra note 228.
238 Ibid, p. 266.
239 Right of Passage over Indian Territory, Portugal v. India, ICJ Reports, 1960.
241 Ibid, p. 44.
practices which cannot form a CIL rule, as will be discussed in the next Chapter. The need for consistency and uniformity of a practice follows a similar theme suggested by D’Amato indicating that every State’s conduct cannot count as a rule of CIL; State conduct must be evaluated not only as the ‘material’ nature of conduct, but equally in line with the ‘characterization’ of the ‘qualitative or psychological component’ of the conduct, which is discussed later in this Chapter. The specific notion behind a practice with regards to whether a State believed itself legally bound to behave in such manner is a fundamental factor. Whether a State’s conduct stems from assumption of a legal obligation or individualistic sense of morality is a key factor in assessing the difference between usage and a legally binding obligation under the rule of CIL.

A further condition that must be present in the formation of CIL is proof of evidence for State practice. As mentioned earlier, evidence of State practice is directly attributed to States’ ‘consent’ to that practice in the sense that, through evidence of State practice, acceptance of obligations and duties by States is not subjective and their ‘consent’ is evident through their conducts and practices. Scholars have argued about the nature of State practice and factors which provide evidence of practices that led to the creation of CIL. D’Amato holds the view that a claim does not represent an act ‘although they may articulate a legal norm, cannot constitute the material component of custom’. The scholar believed that what States do outweights their claim and that their statements are likely to be contradictory to their conduct. Akehurst opposes this view claiming that statements made are in fact evidence of a State’s custom, and as such it is ‘artificial to distinguish between what a State does and what it says’.

The golden rule of CIL is that once a conduct is available for one State, it is immediately made available to others. Byers expands on this concept by suggesting that any rights

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243 Supra note 90, p. 8.
246 Ibid, pp. 51 and 88.
obtained by one State are also to be provided to all others. In the course of reasoning, Byers introduces reciprocity as one of the four principles of CIL, amongst other principles such as jurisdiction and personality as well as legitimate expectation, and he views reciprocity as:

by ensuring that any state claiming a right under general customary international law accords the same rights to all other states, the principle of reciprocity qualifies the application of power in at least three ways: first, in respect of what states claim, and, how they go about making such claims; secondly in respect to how states respond to the claims of other states; and, thirdly, in respect of how states go about persistently objecting to emerging or newly developed customary rules with which they disagree.

This is where reciprocity plays an important role in the acceptance of a conduct as a customary law based on its legal merit as well as creating a balance of interests between States. In essence, reciprocity operates as a creator of balance between the rights and duties of States in CIL, in a platform where a right claimed by one State through their actions or conduct is immediately made available to all others. Equally if there is an obligations being demanded or set upon States then similar obligations are to be carried by others too. This reiterates the role of reciprocity in maintaining the balance of interest and equality amongst States in relation to their international legal obligations and duties whilst ensuing in efforts to minimise unfair advantage sought by one State. This will have alternative effect where the presence of reciprocity limits the pursuit of every action/conduct by States because sharing benefits from such action/conduct might be detrimental to their interests. For instance, a State might be discouraged from pursuing a conduct, based on the knowledge that this conduct is available to other States and if this conduct is reciprocally carried out by others, their national or international interests may be endangered. Effectively the presence of reciprocity in CIL also plays a deterrent role for States to follow every conduct that they might deem beneficial to them with the consideration of its reciprocal effect. Given the flexible and non-central processes for CIL rule making, reciprocity operates significantly as regulator for arbitrary conduct of States as well as providing States with the opportunity of protesting or objecting to the creation of rules that are unfair or create an imbalance.

248 Supra note 4, pp. 89-90.
249 Ibid, pp. 89-90.
The very nature of the evolution of IL through customary law indicates specific attention that must be given by States in their conduct and interpretation of law. This is where the doctrine of *opinio juris* manifests itself, and the focus of the following analysis will reflect on this doctrine.

3.2.2. *Opinio Juris*

*Opinio juris* is a widely debated subject amongst the scholarly community.\(^{250}\) *Opinio juris* is opinion that constitutes an act as a necessary rule of law.\(^{251}\) Essentially, it indicates a legally binding obligation that emanates from previous conduct of States, so it is undoubtedly inter-linked with State practice and cannot be entirely separated. In other words, States follow a specific route or conduct that they believe is legally binding upon them, hence the doctrine of *opinio juris* indicates a belief that States behave in a manner in which they are legally obligated.\(^{252}\) As previously mentioned, the connection between *opinio juris* and the presence of reciprocity in CIL lies in creating and maintaining a form of balance between legal rights and duties of States whilst also minimising any unfair advantages being sought by States. This balance is achieved through encouraging compliance and obedience of States to their legal obligations and duties whilst protecting their rights against such conducts that might lead to unfair gains.

The importance of ‘consent’ and the vital role it plays in acceptance and obedience of IL has been previously discussed. It must be reiterated that the ‘consent’ of all or even majority of States cannot be achieved without compromise, and it is likely to be the result of evaluation of advantages and disadvantages of any proposal, or as previously mentioned as mutual concession of advantages. Indeed, Parisi and Ghei appropriately discuss that this compromise of ‘gains and concessions’ fits within a framework of reciprocity.\(^{253}\) Elias similarly looks at *opinio juris* where he argues that *opinio juris* is a form of ‘consent’, in the sense that when a State initiates an action the reaction of other States by permitting or agreeing with that action

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\(^{251}\) *Supra* note 2, p. 1125.

\(^{252}\) *Supra* note 131, p. 103.

\(^{253}\) *Supra* note 1, p. 120.
creates a customary rule through *opinio juris*. Watts likewise provides a view of the role of reciprocity in State practice, arguing that a custom is created through ‘consistent State practice exercised out of a sense of legal obligation’, and as such consistent practice and the sense of legal obligation must be driven from prior practice of one or more States. Therefore it can be argued that custom is created through reciprocal conduct based on reciprocating the conduct of other States, where the belief of legal obligation (*opinio juris*) is accompanied when prior conduct has created a legal norm. That is to say, a State’s conduct is the result of reciprocating previous conduct of one or more States. Interestingly, Barker and Osiel go further by suggesting that *opinio juris* can also be deducted from the silence adopted by States. Osiel, in support of his argument, uses the example where most States and the Human Rights Watch declined to condemn the targeted killings of Al-Qaeda leaders and members in Yemen in 2002.

As a matter of fact, the scholars’ arguments suggest that the ‘consent’ of States is likely to be highly affected or influenced by reciprocity, particularly in assessing their own interests. Accordingly, the formulation of CIL provides a platform for the limitation of pursuit of interest by one State because the ‘consent’ of other States for the acceptability of the conduct becomes an essential element. This limitation is based on the principle of reciprocity since the ‘consent’ of States will not be achieved if they regard a new rule to be against their reciprocal rights and interests. Furthermore, as mentioned before, States are cautious of following a path of conduct which might place them at a disadvantage due to reactions by others. Hence, it can be seen how reciprocity plays a role in shaping CIL when States are reacting to another State's actions.

A vital aspect of reciprocity, in this context, relates to how States assess their reaction to the original conduct of other States. The assessment evaluates the effect of such actions on their own interests, and the potential unfair advantage that could be gained, for example, by the conduct of other States. Once a rule is established, then the doctrine of *opinio juris* relating to

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255 *Supra* note 172, pp. 378-379.
258 *Supra* note 198, p. 55.
the legality of future similar and reciprocal conduct comes into effect. Thus, new customary rules are driven from uniform, consistent and general practice accompanied by *opinio juris*. It is therefore important to address where the belief for legality of an action which is based on reciprocating previous conduct comes from. How can *opinio juris* be proven? Is there a need for how the belief of legal obligation (*opinio juris*) is to be identified and be proven? Who has the burden of the proof, is it the Courts or States themselves? How do States decide that a practice is in line with CIL rules? Furthermore, how can States believe in the legality of actions where their own actions could be the start of the creation of CIL rule?

**3.2.2.1. How Can *Opinio Juris* be Proven and is This Proof Necessary?**

*Opinio juris* can be identified in the outlook and responsive approach of States to a situation as evident in the ICJ’s approach in the *Anglo-Norwegian Fisheries* case,\(^\text{259}\) where the Court addressed the idea of State practice relating to the government’s attitude towards *opinio juris*.\(^\text{260}\) In practical application, the International Courts’ reflection on *opinio juris* in the high profile cases, the *Nicaragua* case, the *Lotus* case, the *Anglo-Norwegian Fisheries* case, the *Asylum* case and the *Right of Passage over Indian Territory* case provide the best general application on this doctrine. On the one hand, the Courts have requested the proof of *opinio juris*, and on the other hand, occasionally they have been content with the existence of *opinio juris*.\(^\text{261}\) This resulted in disparity between whether there is an onus on parties to prove the existence of *opinio juris*, or if the burden of request for the proof is with the Court. The confusion has expanded to whether even there is a need for proof of *opinio juris* and, more often than not, the Courts have required the proof for the existence of *opinio juris*. Notwithstanding the burden of proof, it is important to understand that proof for the existence of *opinio juris* is in reflection of how States behave and take actions based upon the belief that their conduct is based upon reciprocating previous conducts as well as evidence of their ‘consent’ to these conducts.

The argument often presented against *opinio juris* is in the difficulty of proving the belief that a State was acting in line with an obligation. In arguing to prove *opinio juris*, and effectively proving how States’ conduct was in line with reciprocating previous conduct, two factors

\(^{259}\) *Supra* note 231.
\(^{260}\) *Ibid*, pp. 131-142.
\(^{261}\) *Supra* note 131, pp. 103-104.
need to be addressed; firstly dealing with the issue that States are unlike human beings and incapable of sharing states of mind or beliefs, and secondly exploring the application of *opinio juris* by the ICJ. The first issue encompasses the challenge that, since *opinio juris* requires ‘state of mind’, this notion may seem difficult to apply to States as non-human forms. Nonetheless, it must be noted that States have a legal personality and are subjected to IL in the same way as individuals are under national laws. Hence, States are presumed to have a ‘will’, and subsequently, the ‘state of mind’ and ‘belief’, in this context, is applicable to States. In reality the State officials responsible for the running of its social, political, legal and economic affairs do have a ‘state of mind’ and in their capacity take decisions and act on behalf of States. As stated by Cheng, choosing to deny the acceptance of ‘beliefs’ and ‘state of mind’ would mean entering a philosophical ‘chestnut’ in relation to ascertaining factors such as ‘intentions of parties’ relating to national law, since there is an element of presumption when applying such notions. It is too simplistic to hide behind the non-human form of States since every action taken by officials is in their responsible capacity, and equally must be based on certain motives, be it legal obligation or otherwise. An analogy could be in comparing States to corporations, where a company does not possess a ‘state of mind’, but its board of directors or responsible individuals running the company are accountable for the conduct of the company.

Moving onto the second factor relating to the application of *opinio juris*, the *Nicaragua* case provides an example of how the ICJ set out to ascertain the existence of *opinio juris*. In that case, the attitude and voting behaviour of States involved towards the UN General Assembly (GA) played an important role in leading the Court to assess the existence of *opinio juris*. The level of flexibility in the formation of CIL and the fact that absolute

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262 Ibid, p. 103.
263 Ibid, p. 103.
266 *Nicaragua Case, Nicaragua v. United States of America*, ICJ Reports, 1986, paras. 184 and 188.
267 Ibid, paras. 184 and 188, the Court paid particular attention to the voting towards the General Assembly Resolution 2625(XXV); However Virally, as quoted by Butler, has argued against the evidence of *opinio juris* in the voting behaviours of States in the GA, by suggesting that votes by States in this system only go towards recommendations and are non-binding on the international community, Grigorii Ivanovich Tunkin, *The Role of Resolutions of International Organisations in Creating Norms of International Law*, (ed.) William E. Butler, *International Law and the International System*, 1987, pp. 13-14; it is described that ‘While the Assembly is empowered to make only non-binding recommendations to States on international issues within its competence, it has, nonetheless, initiated actions - political, economic, humanitarian, social and legal - which have affected
agreement of all States is not a prerequisite in forming CIL have previously been discussed. Therefore, even though the majority vote in the GA cannot be taken as evidence of *opinio juris* for all States, the individual State’s voting attitude can be viewed as evidence of *opinio juris* as articulated by the ICJ. The Courts have adopted different approaches to the application of *opinio juris* in various cases. In the *Lotus* case, the Court agreed with France’s assertion that CIL included a rule which removed any jurisdiction by Turkey over the French ship *Lotus* on the grounds that there was no evidence available to the Court, which demonstrated the belief of such jurisdiction by States as was presented by France.

Alternatively, in the *Asylum* case, the ICJ asked for the parties to prove the existence of *opinio juris* if States were to rely on this. Even though the Court dismissed the existence of a custom in this case, the ICJ reaffirmed the acceptability of a local customary norm by highlighting international custom ‘as evidence of a general practice accepted as law’, which has played a vital role in assessing a practice as CIL. The *North Sea Continental Shelf* cases is another example where customary norms were not accepted by the Court, despite the opposing view expressed by Judge Lachs stating that ‘the general practice of States should be recognised as prima facie evidence that it is accepted as law’. In most other cases, though, the ICJ maintains the view that *opinio juris* is in existence where the practice is uniform and general, or alternatively has refrained from making a reference to *opinio juris*, namely in the *Corfu Channel* case, where the Court cites that the conduct of States is ‘generally recognized and in accordance with international custom’. Through this analysis it is demonstrated how *opinio juris* can be proved both theoretically and practically. Each case provides a unique perspective on the view of the belief for why States’ conduct was deemed to be based on reciprocating previous conduct or demonstration of their ‘consent’ to the conduct, whether rational or otherwise.

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268 Supra note 254, p. 520.
269 Supra note 223, pp. 22-23.
270 Supra note 228, pp. 276-278.
272 Supra note 183, paras. 77-81.
Although the cases brought before the Courts show different approaches towards establishing *opinio juris* when accepting CIL, as precisely emphasised by Mendelson,\textsuperscript{275} this should not be taken as devaluing the importance of *opinio juris*. In other words, it should not be presumed that non-emphasis on proof of *opinio juris* does not mean *opinio juris* is disregarded. This approach targets the opposing claims made by a school of thought such as Kelsen and Guggenheim for the denial of any necessity of *opinio juris*; according to them this is the reason why the Courts did not give too much credit to *opinio juris*.\textsuperscript{276} However, the view held by Mendelson that the approach to *opinio juris* is not uniform is a valid one. D'Amato has suggested that the Courts have never actually proven *opinio juris*,\textsuperscript{277} however this statement seems incomplete when considering cases looking at establishing practice as a rule of CIL.

### 3.2.2.2. How Important, Necessary and Helpful is *Opinio Juris*?

When discussing *opinio juris*, a pertinent question is: how do States know how to behave when CIL is created through their own conduct? Similarly, how do they know they are acting legally, if *opinio juris* indicates the belief that States behave in the manner which is believed by them to be in line with their legal obligation?\textsuperscript{278} This has led to a paradox surrounding the doctrine of *opinio juris* leading many to deem it unnecessary, unhelpful and void. The *North Sea Continental Shelf* cases demonstrate an important practical approach for *opinio juris* where the ICJ stated that, ‘Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.\textsuperscript{279} This is a strong notion for the necessity for the belief of the legality of a conduct. However, the problem is viewed as ‘How can custom create law if its psychological component requires action in conscious accordance with law pre-existing the action?’\textsuperscript{280}

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\textsuperscript{276}Hans Kelsen, *Théorie du droit international coutumier*, *Revue internationale de la théorie du droit*, Vol. 1, 1939, pp. 253 and 264-6; Paul Guggenheim, *Traité de droit international public*, 1953, pp. 46-48; and supra note 247, pp. 32-33, Akehurst regarded the scholars view as ‘radical approach’, however it is important to note that the scholars changed their reasoning later on.
\textsuperscript{277}Supra note 245, p. 52.
\textsuperscript{278}Supra note 131, p. 103.
\textsuperscript{279}Supra note 183, para. 77.
\textsuperscript{280}Supra note 245, p. 66.
\end{flushright}
To break away from the paradox surrounding *opinio juris*, it is important to understand not only what States do, but also to understand the reasons behind their conduct, or to understand the ‘psychological’ element in the formulation of CIL. Akehurst suggests that *opinio juris* is the ‘psychological’ element as the ‘conviction felt by states’ that a particular conduct is required by IL, and this view is shared by Cheng. This notion suggests that IL rules are based on outlining duties for States, but the framework and nature of IL is much more aligned to outlining the permissive rather than directive rules enabling States to act in a specific manner. Subsequently, the evaluation of the necessity of the ‘psychological element’ (referred to as *opinio juris*) further helps to clarify how State practice alone is not enough and hence the role of *opinio juris* is important. The conduct of State officials gives rise to the ‘psychological element’ or the ‘state of mind’ of a State.

It is also important to be mindful that the primary focus of IL is about how States behave towards other States, and as such, the actions and reactions of States hold equal value when assessing the ‘psychological element’ of States. Brownlie contradicts the claims made by scholars that the ‘psychological element’ surrounding *opinio juris* is an unimportant factor for the creation of new CIL. Brownlie convincingly argued for *opinio juris* as the ‘necessary ingredient’ in the formulation of CIL by stating that, ‘the sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of States recognizes a distinction between obligation and usage’. The essential problem is surely one of proof and especially the incidence of the burden of proof. Brownlie’s view is similar to Akehurst’s view who believes that the obligatory character of an act can be assessed in line with the protest or condemnation of other States whose rights have been affected by this act.

Elias draws a similar conclusion that positive reaction of States to a State’s conduct demonstrates ‘consent’, hence there is *opinio juris* in connection with the new practice, and as such *opinio juris* is ‘indistinguishable’ from the concepts of ‘will’ and ‘consent’ of

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281 Supra note 117, p. 44.
282 Supra note 264, p. 530.
283 Supra note 117, p. 44.
284 Supra note 90, p. 8.
287 Supra note 117, p. 44.
Akehurst’s differentiation is valid where he draws a distinction between obligatory rules where proof is gained from the duty imposed on a State by the view held by other States, in comparison to permissive rules that do not need others to declare illegality of another States’ conduct. The *Lotus* case provides a useful practical approach for the distinction between permissive rules and obligatory rules where the PCIJ ruled in favour of Turkey for putting on trial the French captain responsible for the accident. Despite the French claim that there was an obligatory rule not permitting Turkey to prosecute the French captain, Turkey successfully argued that even if most States in Turkey’s position had not exercised their jurisdiction, there was no reason to believe that this was due to a legal obligation. The traditional discussion on *opinio juris* is less linked to law-making features, and more aligned to providing a distinction between legally binding (obligatory rules) and norms that are driven from inter-State courtesies, otherwise referred to as comity. This outlook was developed since it was considered that practice alone does not make law. The importance of *opinio juris* for the belief that the conduct results from a defined legal obligation thus renders it a necessary
element. A widely used example is the custom of diplomatic correspondences using white paper and how, despite this common practice, there is no legal obligation for States to use white paper.\(^{294}\) This form of practice, therefore, is reciprocal but not based on a legal requirement which is a form of comity. Brownlie refers to the Oppenheim definition which describes comity as, ‘the rules of politeness, convenience and goodwill observed by states in their mutual inter-course without being legally bound by them’.\(^{295}\) As articulated by Starke, deviation from comity may result in reciprocity from other States but is unlikely to result in legal repercussions.\(^{296}\) This suggests that reciprocity in the form of comity,\(^{297}\) between States is not limited to obligatory conduct under CIL.

It is important to be mindful that custom is created through reciprocal conduct based on reciprocating the conduct of other States, where the belief of legal obligation (\textit{opinio juris}) is accompanied where prior conduct has created a legal norm. As mentioned, the presence of \textit{opinio juris} is a strong directive for States to comply and follow conduct that they are legally obligated to do so and to encourage them to abide by IL rules. State practice alone would not create encouragement for compliance of IL rules and this encouragement is needed given the nature of IL, particularly the flexible nature and non-central rule making processes of CIL. The balance of rights and duties of States is at risk where each State could follow the conduct they choose based only on State practice so long as it is consistent and uniform, but this conduct may not be in line with a legal obligation.

The argument for \textit{opinio juris} as an unnecessary factor in the formation of CIL is somehow linked to the point that the PCIJ and the ICJ have not asserted the necessity of \textit{opinio juris} in the cases presented to them. Dissenting opinion made by Judge Sørensen in the \textit{North Sea Continental Shelf} cases, indicates that, ‘the practice of States…may be taken as sufficient

\(^{294}\) Gennadiĭ Mikhaĭlovich Danilenko, \textit{Law-Making in the International Community}, 1993, p.120; and supra note 4, p. 149.
\(^{295}\) Supra note 90, p. 29.
\(^{296}\) Supra note 100, pp. 20-21.
\(^{297}\) Supra note 2, p. 284, Comity takes different meanings in legal sense. In this context it is defined as: a practice among political entities (as nations, states, or courts of different jurisdictions), involving mutual recognition of legislative, executive, and judicial acts; \textit{Hilton v. Guyot} case in the US Court states that comity ‘is neither a matter of absolute obligation… nor of mere courtesy and goodwill…. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.’, 159, US 113, 163-64, 16 S.CT. 139, 143, 1895.
evidence of the existence of any necessary *opinio juris*. On the other hand, it is argued that the Courts have also not deemed it unnecessary or asked for its abandonment. Any claim for abandonment of *opinio juris* is contradictory to practice. Conflicting evidence to this view is seen in the view adopted by the ICJ in the *Nicaragua* case, where the Court set out to ‘satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice’. Far from its abandonment, the ICJ in this case required the practice to demonstrate *opinio juris*. A similar argument is presented by Elias, referring to the ICJ judgements, claiming that the traditional view of *opinio juris*, mentioned above as separation of obligatory and comity, is not an entirely valid one and *opinio juris* ‘has a part to play in law-creation’. Taking into consideration the above discussions, the pertinent observation is that State practice alone is not enough to establish new rules of CIL, and if *opinio juris* is considered irrelevant, then the role played by *opinio juris* should be replaced. As examined above, the issue with the doctrine of *opinio juris* is with the notion that a State’s action is already part of the law before it can constitute a new law under CIL. Several suggestions have been provided for alternative options to this view of *opinio juris*, and the most plausible is where *opinio juris* intersects in the formulation of customary law. Elias suggests that involvement of *opinio juris* in the creation of CIL should be ‘postponed’ to a later stage than the view held traditionally, insofar as other States at some point during the creation of new customary law must, ‘accept, acquiesce in or recognise’ the new practice as legal. In short, *opinio juris* is the same as the notion of States’ ‘consent’ relating to the creation of CIL. The requirement of the element of ‘consent’ or the existence of it in formulation of CIL is not new and exclusive.

Having seen the arguments for and against *opinio juris*, including the arguments for its abandonment, it is clear that without *opinio juris*, the formation of CIL is incomplete. There is a great risk for the adequate safeguard necessary to ensure legality of the conducts of States or their belief of their conduct on the basis of legal obligations. This safeguard is fundamental for maintaining and encouraging States’ compliance with IL rules and the continual balance

298 *Supra* note 183, dissenting opinion of Judge Sørensen, 1969, p. 247.
299 *Supra* note 232, p. 380.
300 *Supra* note 266, para, 184.
301 *Supra* note 254, p. 506.
of rights and duties of States through the application of reciprocity. Even taking into account the suggested approaches for its potential replacement does not provide a satisfactory alternative. Furthermore opinio juris indicates the belief of the legality of an action and as such there is a strong link between opinio juris and ‘consent’ of States. The element of ‘consent’ plays a fundamental role in the formulation of IL and ‘consent’ cannot be achieved without compromise. This is where reciprocity plays an important role in the acceptance of a conduct as a customary law based on its legal merit as well as creating a balance of interests between States. It can be concluded that opinio juris fulfils an important, necessary and helpful role in the formulation and acceptance of CIL, which cannot be easily disregarded.

3.3. The General Principles of Law

The inclusion of the general principles of law in the sources of IL has created a great deal of debate amongst the scholarly community and this debate revolves around what the ‘general principle of law’ entails, since some argue that it means general principles of IL, and others suggest it means general principles of national laws. Akehurst argues for the need for this distinction and how both these national and international legal principles cannot be encompassed by ‘general principles of law’. Whilst Cassese suggests that IL principles are already included within the sources, through treaties and CIL, however, the treaty law covers either specific matters between contracting parties and CIL is gradually created and ‘cannot address all interests and concerns of States’. It has been suggested that the insertion of the general principle of law into the sources was to avoid situations where the treaties and CIL had no solution for an issue presented to the Courts, otherwise known as non liquet situation; hence without this source the Courts may be unable to address such cases. In addition a further functionality for the ‘general principles of law’ is to enable the Courts to address possible conflicting interpretations of a treaty or a customary rule.

Lord Phillimore, co-author of Article 38, indicated that the intention for the inclusion was to encompass the rules generally accepted within the national legal systems, namely ‘good

305 Supra note 117, pp. 48-49; supra note 236, p.152; supra note 90, p. 16; and supra note 221, p. 25.
306 Supra note 117, pp. 48-49.
307 Supra note 236, p.152.
310 Supra note 236, p.152.
faith’, principle of *res judicata* (‘prevention of repetitive litigation for the same parties for the same subject’), *nemo judex in causa sua* (‘no man should be judge in his own case’).\(^{311}\) This conveys a valid reasoning for the inclusion of the ‘general principles of law’ as IL sources. The general principles of national legal system encompass values and principles that are shared by the international community. These legal values and principles are regarded as the rule of law and the fundamental basis of legal systems.\(^{312}\) IL and national legal systems aim to bring about justice, equality and fairness amongst their subjects. In IL, balance of interest of States requires that equality and fairness is maintained and States should be prevented from succeeding in claiming or pursuing undue advantage. The unique nature of IL demands a framework that is not entirely based on central governing law-making or law-enforcing but there is a need to draw from the vast number of recognised principles to establish a framework for its development and evolvement.

IL relies upon key principles such as ‘consent’, equality, balance of right and duties, and good faith within its framework for the establishment of a working legal order. Effectiveness of IL is reliant on equality of rights amongst States and no State must be deemed above others. ‘Consent’ also plays a vital role in preserving the right of States on the obligations and duties accepted by them. This is where reciprocity plays a fundamental role to support and enhance the reciprocal relations between States in order to maintain the equality and fairness through protecting the balance of interests between States. In addition the principle of reciprocity is the key to creating a balance between rights and obligations since a State will have knowledge of the fact that by requesting a right, the same right will be granted to other States and non-fulfilment of an obligation will also have consequences in a form of tit-for-tat. It is clear to see how reciprocity can be the consequence of principle of equality.\(^{313}\) In IL, reciprocity plays a vital role in bringing about the acceptability and respect for international customs and principles shared by the international community by limiting unfair advantage, balancing interests and obligations and encouraging co-operation. Justice, equality and fairness are achievable through reciprocated conduct, respect and customs.\(^{314}\)

\(^{311}\) *Supra* note 90, p. 16; and *supra* note 221, p. 25.

\(^{312}\) This will be examined in the next Chapter.

\(^{313}\) *Supra* note 4, pp. 89-90.

\(^{314}\) These important points will be further discussed when analysing the rule of law and IL in the next Chapter.
From a different view, a school of thought believes that ‘general principles of law’ as a source is unnecessary and adds nothing to IL, particularly if it has not already been set as either treaty or CIL. Their reasoning is that the fundamental principles of IL, such as peaceful co-existence, are already established in treaty and customary law. Opposite views affirm ‘general principles of law’ as a separate source of IL stemming from national laws of States that relate and apply within the international arena. The practical approaches towards this source appear to support the latter arguments, albeit with limited scope, since the approach adopted by the PCIJ and the ICJ with regards to this IL source has been unclear as to whether they include national law. In the Barcelona Traction case, the ICJ stressed the need to include municipal law in its judgement, which was similar to the view of the advisory opinion expressed in the case of South-West Africa stating that:

The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of ‘the general principles of law’...the true view of the duty of international tribunals...is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.

Further support was provided on the inclusion of national legal principles within the ‘general principles of law’, suggesting that other principles will also need to be included:

To restrict the meaning to private law principles or principles of procedural law seems from the viewpoint of literal interpretation untenable. So far as the ‘general principles of law’ are not qualified, the ‘law’ must be understood to embrace all branches of law, including municipal law, public law.

317 Supra note 90, p. 16, Brownlie refers to the view held by Guggenheim and Oppenheim that the inclusion of general principle of law was based on the assertion of the principles accepted in the national law of States and as such the Courts are authorised ‘to apply the general principles of municipal jurisprudence, in particular of private law, insofar as they are applicable to relations of States’.
318 Supra note 98, p. 99.
319 Barcelona Traction Case, Belgium v. Spain, ICJ Reports, 1970, para. 50. This case was brought by the Belgians against the Spanish conduct claimed to be in violation of IL. Barcelona Traction was a company controlling utilities in Spain, incorporated in Canada, whose shares were mainly owned by Belgians. Following the restrictions placed by Spain on foreign nationals doing business there, the company suffered bankruptcy.
Having seen the theoretical and practical approach towards ‘general principles of law’, it can be observed how the inclusion of the principles of national law as a source of IL is logical and valuable. As Akehurst points out, the national law of States share similar values and principles, and its absolute exclusion may not be practical. As will be discussed in the following Chapter, laws are the tools through which legal principles are promoted. There is a link between national and international legal values and principles such as justice, equality and fairness, with the difference that the principles in national legal systems are more clearly defined and stipulated. The effectiveness and applicability of IL is reliant on acceptability and respect for international values and principles that are generally accepted by the international community. Contemporary IL is still a new subject and it would benefit from the inclusion of nationally accepted ‘general principles of law’. However, this must not be taken that these principles are to apply in an identical manner in national and international legal systems. As discussed, these two legal systems are different in nature and application so it is conceivable that applications of principles would be different. For example, the principle of estoppel in IL takes a different form than in domestic legal systems but IL benefits from using the inclusion of this principle in a modified concept.

4. Is International Law Independent from International Politics?

Examining the nature and sources of IL elaborated the pivotal role played by States in IL. The roles of ‘will’ and ‘consent’ of States have a direct impact on how IL is shaped. This has led many to question the independency of IL from IP since politics of any State is directly

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322 Supra note 117, pp. 49-50.
323 There has been many discussions amongst scholarly community whether Estoppel in international law emanates from Article 38(1b) Of the International Court of Justice Statute as a direct source of international law or does it emanate from Article 38(1c) of the Statute as a form of ‘general principles of law recognised by civilized nations’, thus stemming from general principle of domestic legal systems. Estoppel in international law takes a different form than in domestic legal system so it is easier to attribute its role in international law to emanating from Article 38(1b) as a direct source of international law given the difference in the interpretation or usage of this principle between IL and national law; supra note 4; Enrico Pattaro, Hubert Rottleuthner, Roger A. Shiner, Aleksander Peczenik, Giovanni Sartor, A Treatise of Legal Philosophy and General Jurisprudence, Volume 3; and Vladimir Đuro Degan, Sources of International Law, 1997.
driven from its ‘will’, interest and ‘state of mind’, coupled with their vision for short or long-term gains.324

Historically, IL and IP have been regarded as two entirely separate subject-matters, and this differentiation becomes clear when the detail of each discipline is explored. IL provides a collection of rules and a framework for the conduct of States, established for the international community, whether it be written or unwritten rules, treaty or custom. However, IP is the study of the behaviour of States and what motivates their behaviours.325 This separation has become, however, less clear in recent decades. In ideal democratic national systems, judiciary and politicians are kept apart, and the influence of politicians in the enforcement of law is minimal. This entire separation in IL, however, is not enforced or insisted upon.326 The uniqueness of IL indicates how States are both law-makers through their conduct, or by signing and ratifying treaties, as well the primary subject of IL. Furthermore, through the ability to place reservation on treaties or the ability to accept jurisdiction of the ICJ,327 States are able to forego the obligation intended by law. Schachter questions the concept of IL as ‘real law’ by asking, ‘Can it be ‘real law’ when those subject to it need not submit to it and may reject its obligatory requirement’?328 Therefore, the challenge for the international community is how to preserve IL from IP. Shaw refers to the ‘inextricable bond’ between these two disciplines by suggesting that ‘there can never be a complete separation’ between them.329 Similarly Schachter discusses the strong impact of the ‘will’ and ‘consent’ of States on various parts of IL,330 indirectly challenging an absolute possible separation.

The study in this section attempts to evaluate the extent to which IL and its rules have been influenced by IP. This analysis paves the way for the continuous discussion, throughout this thesis, of the role of States in the creation, interpretation and enforcement of IL. The following questions help to clarify how the two disciplines are set to function. Is IL

326 Supra note 98, pp. 11-12.
327 Please see Chapter Two and Four for further examination.
329 Supra note 98, p. 11.
330 Supra note 328, pp. 9-15.
independent from IP? To what degree are they dependent on each other? The aim is to reflect on the scholarly debates on this subject-matter to ascertain inextricable connections between the two disciplines. The importance of this exploration clarifies the nature of direct interactions that are involved in the theme of this thesis. It is clear that there cannot be a sharp dividing line, and the term ‘inextricable link’ is often used to describe the connection. Even though each of the two disciplines can be individually examined, the influence of one on another is increasingly observable. The challenge remains as to whether this connection is a positive effect or a negative influence on IL and the international community as a whole.

A legal system by its very nature must be independent from all external influences (particularly political influences), if it is to serve its community. Any influence rooted in self-gain and self-interest is ill-viewed and is likely to damage its credibility or even its legitimacy; thus political influence may not make the law totally unworkable rather it does not meet the integral parts of the rule of law which are justice, legitimacy, coherency, uniformity and legality. Given that the foundation of IL is in sovereign rights of States, any self-gaining political influence is likely to damage the right of others and will not be welcomed. Reus-Smit, in conceptualising the connection between IL and IP, has succinctly grouped the different views of IR scholars into three distinct categories as follows; the first group, referred to as realists, view politics as ‘struggle for material power’ and view IL as either ‘irrelevant’ or a ‘reflection of prevailing balance of power’; the second group, referred to as rationalists, view politics as ‘strategic game’ to maximise their interest and in turn view IL as ‘functional rules’ to promote and solve co-operation issues; the third group, referred to as constructivists, regard politics as ‘form of action’ and IL as ‘normative structure’. This grouping helps to conceptualise the scholarly outlook, but fails to fully capture the true nature of IL and the true impact of IP.

Referring back to Schachter’s question, can IL be ‘real law’; it is worth re-emphasising how the basis of IL is in ‘will’ of States driven from their ‘consent’, otherwise known as ‘voluntarism’. The notion of ‘voluntarism’ is not only a theoretical concept but also is

331 Namely, Malcolm N. Shaw, supra note 98, p. 11; and Oscar Schachter, supra note 328, pp. 9-15.
332 These integral parts of the rule of law will be explored in the next Chapter.
333 Supra note 325, p. 15.
practically applied,\(^{334}\) and is embedded in the sovereign right of every State.\(^{335}\) The notion of ‘voluntarism’ and the significance of ‘will’ and ‘consent’ are observed in every aspect of IL, which is why IL is regarded as a voluntary or consensual legal system. Contemporary IL has its roots in the framework of the UN, thus the first demonstration of ‘will’ and ‘consent’ of States is in their steps taken towards joining the UN as a member.\(^{336}\) The UN membership does not mean that States are governed by a superior authority since they have the ability to limit or withdraw from international obligations they do not ‘consent’ to. Strong evidence for this, as was examined earlier, is where States provide ‘consent’ to a treaty through their ‘ratification’, ‘acceptance’, ‘approval’ and ‘accession’ of a treaty, as well as the rights of States to place reservations on elements within treaties. Similarly new CIL rules are not achieved without the ‘consent’ of States. This was eloquently stated in the *Barcelona Traction* case, highlighting that ‘a body of rules could only have developed with the consent of those concerned’.\(^{337}\) Once again this demonstrates that in practical approaches, ‘consent’ of States continues to play a crucial role. Despite an overwhelming growth in the argument that there is a shift from ‘voluntarism’ to majority rule in IL, since there has been an overwhelming move towards formulation of CIL through the majority of States’ practices, the notion of individual State ‘consent’ has not been reduced.\(^{338}\) In fact the opposite seems to be the view in Koskenniemi’s suggestion that the success of IL rules is in pursuing ‘individual autonomy’ but within a communal environment.\(^{339}\) Equally, the approach adopted in the *Barcelona Traction* case is in affirmation of the ‘voluntarism’ concept.

Having observed the importance of ‘will’ and ‘consent’ of States, the dependency and co-existence of IL and IP must be examined. As discussed earlier, States are unlike human beings and incapable of sharing ‘state of minds’ or ‘beliefs’, however the politicians and officials of a State are responsible for the running of the social, political, legal and economic affairs of that State expressing the ‘will’ and ‘consent’ through their decisions and actions. This inter-link between IL and IP is best examined by addressing the influence of politics on

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\(^{334}\) Supra note 223, p. 18, in the *Lotus* Case the PCIJ stated ‘The rules of law binding upon a state therefore emanate from their own will expressed in conventions or by usages generally accepted as expressing principles of law’.

\(^{335}\) Supra note 110, p.530.

\(^{336}\) Supra note 7, Article 2, each State upon joining the United Nations accepts the obligations set out in the Charter.

\(^{337}\) Supra note 319, para. 89.


\(^{339}\) Supra note 14, p.28.
creation of legal rules. At the heart of the national law-making process, politicians and lawyers in the parliaments of most States have the right to vote for a bill to pass; this is where they assert their political influence on the creation of laws. Prior to voting, however, there are on-going debates, arguments and counter-arguments. Each party undoubtedly aims to argue its own case and present its own interest. Essentially, the law that is passed is the result of debates amongst politicians, but nonetheless the people of that society are bound by these laws. Alternatively, in the international arena, State’s ‘will’ stems from its interest, be it political, economic or otherwise, and the negotiation and representatives of its ‘will’ and ‘consent’ has these interests in mind. In certain cases the values being protected may stem from outside individualistic interest by attempting to protect and present international values. A pertinent example is the current austerity measures adopted across Europe which are deemed beneficial for States and not necessarily acceptable for their citizens. Obviously the conclusion is the existence of a link between IL and IP regardless of positive or negative impact.

It would be useful to view the position of lawyers or legal advisors on the law-making process and the extent to which their work is influenced by political factors. Following the establishment of the UN and subsequent tasking of the ILC with progressive development and codification of IL, this became their predominate objective. Therefore, analysing the influence of IP in their workings is important. For instance, the ILC recommendations were amended based on the influence of States during the drafting of the Article on State Responsibility by the ILC where former Article 19 regarded certain activity as criminal, and States engaging in such activities were to be identified as ‘criminal States’. Despite sound and logical reasoning for the inclusion of the recommendation for treatment of State ‘crimes’ and ‘delicts’ in the draft articles, the commission was unable to enforce this into the final draft due to lack of consensus and pressure from States.

340 Supra note 125.
341 Supra note 8, the Statute in Article 1(1) states: ‘The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification’, International Law Commission Statute proclaims their role is to promote and develop international law and they are not tasked with creating new laws, and its role is to draft treaties and recommendations which require consultations by states for their adaptations.
From another angle, Koskenniemi has argued for the dependency of IL and politics, since IL relies on its context from political principles and as such their inter-link is a necessary one.\textsuperscript{343} If this argument is to be accepted then the question would be whether IL is without objectives of its own. The scholar suggests that independence of IL from IP is based on the analysis of IL’s objective on two fronts of ‘concreteness’ and ‘normativity’.\textsuperscript{344} Koskenniemi discusses that to assess this independence both of these characteristics must be determined. The former is to evaluate the distance between IL and what is perceived ‘theories of natural justice’, and the latter is by evaluating the distance between IL and ‘will’, ‘behaviour’ and/or ‘interest’ of States. The existence of ‘concreteness’ factor is required, since that would remove the legal subjectivity by concrete elements, and the ‘normativity’ factor provides objectivity on the independency of the law from the ‘political preferences’ applicable to a State, even if that State opposes that law. Koskenniemi draws on the two common criticisms of IL which are: 1) political nature and IP dependence; and, 2) political nature based on a utopian理想istic foundation. In summary these criticisms concentrate on the parameters of ‘non-existence of legislative machineries’ and ‘compulsory adjudication’ as well as ‘enforcement procedures’.\textsuperscript{345} These criticisms are accepted by the scholar as valid and although it highlights the flexible nature of IL, it provides a ‘façade’ for political interests and power, together with emphasising the idealistic and moralistic basis of IL. This argument leads the scholar to conclude that, since the formation and application of IL is such that it is made by its subject and applied onto them, in turn, the argument for the absolute ‘concreteness’ and ‘normativity’ of IL overlaps and demonstrates the bond between IL and ‘States’ political views’.

Koskenniemi’s conclusion was not however deemed acceptable and complete by Georgiev. In his critical assessment of Koskenniemi’s observation, Georgiev argues that if IL is man-made – not deemed as natural law- then it is infused with the ‘will’ and ‘interest’ of States, however, the objectivity of IL should not be seen in its separation from IP but in its ‘validity’ which is removed from any political view or interest.\textsuperscript{347} Georgiev argues for a rightful place for IL despite its limitations, particularly, when IL is clearly preferred to subjective rule of

\textsuperscript{343} Supra note 14, pp. 7-8.
\textsuperscript{344} Ibid, p. 7.
\textsuperscript{345} Ibid, pp. 8-9.
\textsuperscript{346} Ibid.
\textsuperscript{347} Supra note 17, pp. 4-5.
law with no ‘obligation and restraint’. The scholar asserts that international rule of law can and does encompass political views and interests given the influence of ‘will’ and values of States in the formation of IL. Similar admissions to an inter-link are made by Akehurst, however, these views are coupled with the assertions that special attention must be made to the different nature of IL in comparison to national legal systems and therefore terms such as IL is a ‘primitive legal system’ are not appropriate. The fundamental factor is that, although, political positions are involved in the creation of laws, thereafter they re-form into separate existences. Even though political interest and ‘will’ of States may change, the legal rules originally set cannot change through a shift in political views.

Undoubtedly the backdrop of IL is unique and unlike national legal systems, so this renders itself in differences that make direct comparisons difficult or even impossible at times. Regardless of this, IL’s effectiveness is reliant on a certain degree of separation from IP, insofar as its execution and enforcement are concerned. It is conceivable how the formulation and obligations of IL are closely linked to States’ political interests but that link must be reduced in relation to IL enforcement, if international justice, peace and security are to be secured. Georgiev provides a useful argument that the current IL system is better preferred to a subjective rule, but the question is whether the international community only has to choose from these two alternatives.

It must be noted that the discussion above is not an exhaustive analysis of the inter-link between IP and IL. The study will return to this inter-link at later stages, and indeed this subject is reverted to throughout this thesis. It must be reiterated that the objective of this thesis is neither to support nor reject and question the complete independence of IL from IP. Admittedly though, the uniqueness of IL requires the examination of the extent to which IL is influenced by IP.

348 Ibid, p. 4.
349 Supra note 117, p. 5.
350 Supra note 17, pp. 4-5.
5. Conclusion

This Chapter examined the nature and sources of IL, as provided in the ICJ Statute. Each source and the role of reciprocity within them were addressed, highlighting the significance of reciprocity in creating a balance of right and duties for States by minimising unfair advantage. It was seen how reciprocity is embedded in every aspect of the treaty law and CIL with shapes and degrees but nonetheless playing an essential role. A particular example is in the VCLT and how reciprocity helps to shape the international agreements and States’ obligations in a reciprocal manner whereby balance between the rights and duties is maintained. Since the VCLT underpins all treaties, the strong presence of reciprocity in the VCLT illustrates how every aspect of treaty law is thus strongly influenced by reciprocity. Similar influence of reciprocity is evident in CIL where a conduct of a State gives others the similar right and other States can equally benefit from the same right. This has led Byers to convincingly regard the principle of reciprocity as one of the four key principles in CIL,\(^{351}\) essentially suggesting that an ‘element of *quit pro quo*’ in reciprocity is evidence of this principle in this source of IL.\(^{352}\) As such this provides the basis for concluding that IL operates under a reciprocal framework, in order to protect the rights, duties and obligations of States thus minimising unfair advantage and protecting their equality, without compromising their sovereignty rights and their right of ‘consent’ as embedded within its sources.

Treaties were examined in view of the underlying principles of ‘consent’, ‘good faith’, *pacta sunt servanda*, *rebus sic stantibus*, and denunciation or withdrawal. CIL was studied by exploring its constitutive elements: *opinio juris* and State practice. General principles of law were analysed applying a comparison with national legal systems. The system of IL relies upon key principles of equality, ‘consent’, balance of rights and duties, and ‘good faith’ within its framework for the establishment of a working legal order. These principles are embedded in IL and are reflected within its sources. They are its underlying factors and no IL rule can exist if it is in conflict with these principles. Direct and indirect references to these principles are evident throughout the IL system and they help shape IL rules and operation. Given the magnitude of their influence in IL, it is feasible to suggest that they indeed are the very essence of IL sources and rules where no rule is valid without them and every source,

\(^{351}\) *Supra* note 4, p. 10.
\(^{352}\) *Ibid*, p. 89.
particularly the primary sources of IL, operate under these principles. Therefore it can be concluded that these principles are the driving factor behind IL system and they are integrated parts of the sources of IL. Effectiveness of IL is reliant on equality of rights amongst States and the rights and interests of no State must be deemed above others. ‘Consent’ also plays a vital role in preserving the rights of States on the obligations and duties accepted by them. Similarly the principles of ‘good faith’ and *pacta sunt servanda* require States to uphold and fulfil their obligations encompassing all previously consented obligations. The principle of reciprocity, particularly, is important to ensure not only the balance of rights and duties but also to minimise unfair advantage by exercising ‘consent’ towards accepting IL rules, thus leading to preserving equality amongst States. Protection of this equality is essential for all States to feel universal participation that they belong to a family of nations and no State is deemed to have more rights than themselves. Indeed respecting the principle of equal rights is clearly referred to by the UN as one of the necessary factors for achieving friendly relations.\(^{353}\)

The non-fulfilment of the obligations is evidence of a breach and is likely to affect the balance of rights and duties. Remedy for this imbalance is sought through the principle of reciprocity since a State will be aware of the fact that by requesting a right, the same right will be granted to other States, and non-fulfilment of an obligation will also have consequences in a form of tit-for-tat. It is therefore clear to see how reciprocity can be the consequence of the principle of equality. Evidently, this is how reciprocity is an underlying element in relational aspects of the sources of IL operating to influence and focus on State practice and behaviours. Thus reciprocity is an essential tool in balancing the rights and duties of States by encouraging States to perform and fulfil their obligations as well as discouraging them from wrong-doings. It should not be inconceivable that when a State has given ‘consent’ to an obligation or a duty, treated as equal amongst the community of nations, it is therefore expected to fulfil that obligation and other States can have legitimate expectation and faith in the fulfilment of such obligations. Additionally it must be expected that any wrong-doing or non-fulfilment is likely to be confronted, or as a minimum, any unfair advantage sought to be restricted or shared. Significance of reciprocity was evidenced for instance, in how through placing a reservation States can limit their own obligations but equal right is given to other contracting parties since a reservation stipulated by a State brings

\(^{353}\) *Supra* note 7, Article 1(2).
similar advantages to others in their relation to dealings with the reserving State. Equally if a State wishes to gain an unfair advantage by withdrawing or terminating an agreement, this right is revoked if one party tries to break away from an existing agreement based on mutual ‘consent’ and agreement of parties. By ensuring the continuation of agreements, an unfair advantage is limited and mutual benefit of the parties as set out at the beginning of the agreement is maintained.

It could be argued that by accepting the UN Charter and IL rules, States declare themselves to be bound by the rules and principles constituting IL. That would suggest that they follow through with their agreement (pacta sunt servanda) and that they perform their international duties and obligations on the basis of ‘good faith’, in line with their agreements. This would apply equally to obligations set under treaty laws or CIL. On this basis States with similar duties and obligations can be affected when one State does not fulfil its obligations since this non-fulfilment of obligations could have adverse or at times detrimental effect on another State that was relying on the fulfilment of such obligations. Given the nature of the mutual dependency of States, it is not beyond imagination that non-fulfilment by one State may have a direct and devastating effect on another State’s economy, welfare or security. The significance of reciprocity is in the Hobbesian nature of IL where compliance is encouraged throughout its framework and non-obedience may not lead to any advantages due to reciprocal entitlement of States.

IL aims to bridge the inequality that exists in IP through a legal framework. The focus of IP is on the political power of States which is driven from their size, economic strength, technological or military advancement and so on. IL seeks to distance itself from such influences and instead relies on legality, justice and fairness in governing the inter-State relation. In reality the power and strength of States does play a role in their interactions but IL promotes and encompasses principles that aim to create a balance between the rights and duties of States where one State’s interests does not undermine the others’ interests. IL principles such as principle of equality of rights of States outline the equivalent rights attributed to each State regardless of their power. The role of reciprocity in IL is fundamental in bringing diverse group of States with varying powers and strengths into a level playing field where their legal rights and duties are equal and this legal equality is maintained in relation to their interactions. Without reciprocity, how else could IL bring States with diverse
sizes, natural resources, population, economic strength, and/or technological advancements to a similar level and grant them equal legal rights and duties. Hegemony and unilateral influence is less in IL than can be seen in IP since the international community values and norms are actively promoted through advancement of IL, with peer pressure as well as institutions established to regulate and monitor the protection of international norms. Nonetheless hegemony and unilateral power does provide IL with a challenge since IL’s infrastructure promotes and depends on equality amongst States, at least based upon their legal rights and duties.354

Through the theoretical and practical analysis, the Chapter highlighted the role played by States in the formation, application and enforcement of IL, particularly, the influence of their ‘will’ and ‘consent’. Bearing in mind the original purpose of contemporary IL in bringing international justice, peace, and security by uniting the international community,355 it is important to be reminded of the reason for the importance of ‘will’ and ‘consent’ of States in IL. Despite the good intentions, however, the direct involvement of States in IL has created a climate of ambiguity surrounding the independence of IL. The potential risk of political interests overshadowing IL has thrown doubts over the power of IL. Even though a link between these two disciplines is rooted in IL, the effectiveness of IL is reliant on a certain degree of separation from IP, insofar as its execution and enforcement is concerned. One thing that remains clear from the analysis of the present Chapter is the infusion of political interests in IL and the inextricable link between IL and IP. The analysis of the rule of law in the following Chapter will help establish the dividing line and separation that exists between IL and IP, where the rule of law as the driving factor of IL acts in capacity of a distinguishing factor between IL and IP.

355 Supra note 7, Preamble.
Chapter Three: Reciprocity, Rule of Law and International Law

1. Introduction

Having analysed IL sources, this Chapter provides an examination of the rule of law as the cornerstone of these sources. The analysis in the previous Chapter provided an insight into how IL is formulated and the role played by reciprocity in its primary sources. The effectiveness and applicability of these laws lend themselves to the legal values and principles that are generally accepted by the international community. The legitimacy and acceptability of IL is dependent on the protection and enhancement of the underlying IL principles such as the principle of equality of States and their sovereignty rights, both through the process of the creation of laws as well as the contents of the law themselves. The laws are the tools through which these legal principles are thus promoted and enhanced and it is important for the spirit and the intent of law is not lost in its interpretation and application.

The concept of the rule of law is not unique to IL, and possesses equal weight in the national legal systems of all democratic nations. Regardless of which source of IL is under discussion, the fundamental constituting factor is that all of the sources are underpinned by the application of the rule of law. Therefore, what is the rule of law? Answering this question leads the study to analyse the subject matter, to provide an examination of what constitutes the rule of law, and how it can be identified and established. Additionally it is important to gain an insight into who is able to determine the content and direction of the rule of law as well as its purpose at a national and, more importantly, at an international level. In short, this Chapter sets out to investigate how the rule of law is considered and understood as a framework that brings about a legal order for its subjects through qualities such as rights, duties and justice. This is particularly important in inter-State relations where there is a strong element of de-centralised and flexibility in acceptance of all legal obligations. It will be seen how the rule of law is not subjective or dependent on the arbitrary ‘will’ of States.

356 The significance of the rule of law is stipulated in the Universal Declaration of Human Rights preamble; for further emphasis on the importance and promotion of the rule of law for ‘the development of international law and of relations among States’ see, supra note 174; the rule of law is rooted as an underlying concept in the Charter, supra note 7, for further information on the UN rule of law programs please see United Nations rule of law programs, at: [http://www.un.org/en/ruleoflaw/](http://www.un.org/en/ruleoflaw/) and [http://www.unrol.org/article.aspx?article_id=3](http://www.unrol.org/article.aspx?article_id=3).

357 Supra note 20, pp. 253-254.
The rule of law provides a firm basis which is essential for the durability of the reciprocal inter-State relations. The rule of law creates stability so that ‘will’ of States is not short-lived and is based on deep-rooted values. This is an essential requirement for the successful operation of IL. It is worth highlighting that this analytical approach to the rule of law has received much less attention than it has deserved.

An analogy that could be used to explain the concept of the rule of law is an example of a neighbourhood, where on the outside all the houses look the same, but inside every possible detail could be completely different. So even though all parties are bound by the same parameters, such as where to obtain materials, builders and so on, still the outcome can be vastly different. Could this mean that having the principle in place is wrong? Does it suggest that those who are less capable of fully utilising it should be deemed wrong? Whatever criterion is used should not simply be dismissed because it does not achieve the same outcomes for different scenarios. This is not the fault of the principle, but rather a manifestation of the details derived. The analogy shows how even the most mundane of tasks can be made complex, simply by questioning its details. Hence, disagreements would always arise over different uses of terminology. The rule of law, on the other hand, can still be specific if we stick to the reason for its existence. Human nature would want any issue resolved as soon, simply and fairly as possible - only the guilty would want to prolong proceedings, biding their time to find a way to get what is not for them. So elaborating on what is due to the subject of the rule of law, and not simply accepting without question, will ensure a greater cohesion for all involved. However, addressing the issue of the rule of law does not apply only to parties directly involved in particular scenarios. This is to say that, third parties could also be affected by the actions of others, and addressing their concerns is just as important. Principles have been derived to try and address what needs to be done, but even if they were applied successfully, this still does not satisfy the criteria of addressing the rule of law.

Following the examination of the rule of law, the study will shift to explore why the rule of law is needed and its role in the context of IL, followed by examining the constituent factors that are necessary when defining and determining the rule of law. The general application of the rule of law is used for further clarification, specifically in the context of IL. The examination brings the focus to an exploration of the validity of the rules of IL despite the
claims of the direct influence of politics on IL. This will be achieved by arguing for the separate existence of the rules of IL, regardless of the importance and influence of States’ ‘consent’ in the formulation of the rules. This will then lead the focus of the Chapter to the fundamental question of locating the dividing line between valid and invalid interpretation of international rules and the role of reciprocity in IL guidelines for interpretation of its rules. The study seeks to explore the role of reciprocity in the contents of IL rules, how IL requires obedience and compliance to its rules and the role of reciprocity in bringing about obedience and compliance for IL. This section provides the framework for the discussion on the most important established guidelines provided by IL for interpretation and application of its rules. These are based on jus cogens rules, obligations erga omnes, the principle of pacta sunt servanda and the notion of ‘good faith’. International obligations are created under different type of relations ranging from bilateral, bilaterlisable multilateral, non-bilaterlisable multilateral and erga omnes and these are examined in the context of multilateral agreements and obligations, whilst exploring the nature and type of reciprocity within these obligations and relations. It will be examined whether reciprocity can play a role in jus cogens rules or obligations erga omnes where the aim is to protect fundamental rights. This examination leads the study to look at different areas of IL such as HR and IHL and the role of reciprocity within these areas.

Reflecting back to the analysis of the rule of law within the context of IL a question that comes to mind is whether it would be possible to formulate or define an overall notion of the term rule of law that would be flexible enough to absorb many different amendments to its attributes, and yet remain rigid enough to not lose the purpose of its intended meaning. Placing the outcome of the analysis of the rule of law in the context of IL, the study delves into examining a case study which has encompassed the most fundamental areas of IL. The case study concentrates on the recent treatment of the detainees held outside the US, namely in Abu Ghraib and Guantanamo Bay. The analysis is further enhanced by inquiring into the consequence of such approaches towards the rule of law and IL rules on other States’ conduct, as well as on the instability and insecurity which have arisen in the international arena, between States, and moreover, their effect on IL. Further to this point, the analysis of the integral parts of the rule of law is used when assessing the enforcement mechanisms of
IL, given the emphasis placed on the rule of law by the international community and IL. By exploring the rule of law in this Chapter as well as the role and significance of reciprocity in IL throughout this thesis, this work seeks to further clarify the relationship between the rule of law in the context of IL and reciprocity.

2. What Constitutes the Rule of Law?

To discuss the concept of the rule of law, it is vitally important to understand the meaning of the rule of law in general, and its constituent elements relating to reciprocity. Defining the rule of law is difficult, due to the questions of who can or should define and determine its content, and how they should do so. There is an underlying agreement as to certain attributes that define and underpin the rule of law at national and international levels, and why in some cases the overall context varies considerably.

Humans commonly adopt the learning approach of knowing something by defining it first and then not changing the original consensus, rather than exploration and personally trying to decide for themselves what it is. Could this attitude then be different for the rule of law? We have learned that a useful method for determining meaning of the language is the subject’s usage. If something is regularly used then its importance is generally considered trivial, because it is taken for granted. However, if that same thing is scrutinised then defining it would determine the outcome of something as important as a Court case; therefore the mundane becomes essential. Equally, parties in a Court case may rely on alternative or ambiguous definitions, to attain the verdict in their favour. Hence without an existing definition in the context of the rule of law, how can there be a consensus or common ground? When trying to ascertain the definition of the rule of law, it is thus reasonable to assume the approach would determine how its implications are used. There are different ways in which communities would define their perception towards the application of the rule of law, but limiting the rule of law to a narrow group would still be a futile approach, since they would

358 According to the United Nations World Summit Outcome, it was recognised by Member States that there is a need for ‘universal adherence to and implementation of the rule of law at both the national and international levels’ and they reaffirmed their commitment to ‘an international order based on the rule of law and international law’; General Assembly Resolution, World Summit Outcome, 24 October 2005, A/RES/60/1, para. 134.
still have disagreements amongst themselves. Surely ‘One man’s terrorist is another man’s freedom fighter’.

An issue surfaces when a need arises or a concern is brought to attention, which is usually a result of a dispute or concern between two or more parties. For this reason, there can never be a simple scenario of having the definition clarified, because of the very nature that the question has stemmed from. In this case, trying to obtain an ideal or utopian definition of the rule of law is futile, because there will always be a party that would never agree with it. People by their very nature have always managed to categorise others by using various, and often complex, features they have witnessed. If their views on certain issues are considered new and adaptable to situations, then they are regarded as liberals, whereas if they refer to traditional ideas they are conservative. What is strange then is how these same people cannot agree to a universal concept of the rule of law - especially as the parameters required are considerably fewer, and only one category is already known. Despite the building blocks being readily available, the problem concerns their application.

Even once the definitions are agreed upon, it then becomes a matter of witnessing who is incorporating them and then adding the label to them. Like a jigsaw puzzle, we know what the overall picture (label) is; we just need to find the right people who will fit into it. If a person was at a particular place, and adopted a route to arrive at their destination, they could tell others of it. But others might know different routes for the same journey. Does this mean the person is wrong? Or that the others are? How could they all be right when there is only one starting and ending point? It is often the method of analysing and interpreting specific issues which creates the problems. What could reduce the problem at this stage is acknowledging that there are many different ways to answer the same question, but deciding upon universally accepted principles which any further investigation would conform to in general.

Everyone has a general picture of what the rule of law is, since we are all faced with rules in our daily lives, and this has become embedded as an instinct; its effect on our daily lives is almost unnoticed. Abiding by speed limits when driving, purchasing a ticket before using public transport and respect for others’ rights are common examples of how rules are abided by within society. Up to this point, it could be argued that every ordinary
person has an innate view of what the notion of the rule of law entails. Once again, the ambiguity begins when the analysis and interpretation of it is questioned. Attempts to define it may vary from one context to another, and arguments for one definition or another are often attempted. One famous explanation on this subject is provided by Dicey who classified the rule of law into three categories: 1) people’s personal interests were not invaded without due cause and only where law had been violated and this violation had been established by a Court of law; 2) everyone was to be equal in the eye of the law and no one is deemed above the law; 3) fundamental rights of people are inherent within the ordinary law. This outlook provides a general perception of the rule of law, applicable almost in every community, both nationally and internationally.

Dicey’s views have been criticised by Jennings on the basis of impracticality, since Jennings believes in a degree of inequality that must exist between officials of a State such as politicians, ministers or the police and the ordinary people, and a certain degree of power needs to be bestowed upon such authorities to perform their roles. The fundamental point to iterate is that the rule of law is most effective in its non-differentiating between different categories of people, that is, a more educated person is not differentiated from a less educated person, or the rich are not favoured over the poor. As for Jennings’ reasoning, it is comprehensible that an official would have higher authority than the average person, but the conduct of the official in executing their duties cannot go beyond the set parameters by the rule of law. For example officials cannot be seen to act unjustly or apply inequality amongst different people when performing their job and they cannot be seen to be above the law.

To better understand what constitutes the rule of law, it is relevant to consider the inextricable connection between its interrelated sets of code. These include legality and/or reason, consistency or uniformity, legitimacy, and justice based on common values or legal validity driven from the motives behind the creation of the rule of law within any community. Collectively, as integral parts of the rule of law, these codes are interdependent, and must work with each other. An analogy is provided by a car, where each part is needed for the overall to work, but if any of the parts were to be replaced with something completely different, then the overall functionality is lost.

361 This point will be further clarified when discussing the integral parts of the rule of law.
The constitutive elements of the rule of law will now be analysed individually below.

2.1. Legality

Legality within the context of the rule of law plays a pivotal part in the acceptability of the rules. For this condition to be fulfilled, a school of thought has set out to establish the characteristics that the rules must possess for them to be regarded as acceptable within the context. Fuller enumerated eight parameters for legality that must be honoured and fulfilled by certain rules to be considered law, as opposed to mere force: ‘general, public, prospective, comprehensible, consistent, possible to obey, relatively stable and corresponding between the rules and their governance.’ Clearly this gives the rule of law a theoretical nature which is more in line with ‘aspiration’ rather than a set of duties. This view is contradictory to Dworkin’s view that regards legality more as reasoning and interpretation. Dworkin considers rationalisation of legality to be justified through legal interpretation aimed at ensuring each individual’s right and respect, through former adopted rules deemed to be accepted and coherent. In his analysis of legal rules, Dworkin argues that rules are ‘all or nothing’ standards which provide a conclusive reason for an action. In this regard, valid rules cannot come into conflict and when there is a conflict between two rules, one of them cannot be valid.

On a different level, despite the overall acceptance by Raz of the parameters suggested by Fuller, there seems to be a disagreement between these two scholars on the degrees to which deviation from these parameters can be deemed acceptable. Fuller believes in the closeness of law and morality, thus for this connection to continue, there can be little deviation from these parameters if the link between morality and law is to be preserved. The general acceptability by Fuller that his eight parameters of legality naturally achieve morality, has been criticised by Summers who draws from the argument that Fuller’s legality parameters

362 Supra note 40, pp. 39-44.
363 Ibid, pp. 39 and 44.
364 Ibid, pp. 41-44.
are closer to achieving ‘merely ‘oughts’ of efficiency not of morality’. As such the parameters are valid in achieving what ought to take place, to give everyone the chance to abide by the law but does not automatically achieve the morality. Raz alternatively believes that conformity with the rule of law is open to variation, since although the ideal of absolute conformity might be welcomed, it is not an achievable notion. The scholar suggests that the rule of law should not be accepted ‘blindly’ and ‘radical’ deviations from the parameters can occur, since the rule of law is an ideal set of standards and does not necessary enforce a sense of morality; hence the fundamental issue, as assessed by the scholar, is in the values promoted by the rule of law which enables accurate assessment of potential deviation from rule of law. The root of this argument stems from the values underlying any legality, which is aimed at conformity with fundamental values such as fairness and protecting individuals’ dignity which is the essential concern, and the rule of law is the tool to provide such protections through legal rules.

Walters provides another viewpoint, by reflecting on Allan’s work, indicating that legality within the rule of law is demonstrated when it is in pursuit of ‘common good’, in line with ensuring respect for the rights of individuals. Therefore, in his articulation, the rule of law is not to be taken as unquestioning obedience of the legislation, but rather as a reason for abiding by law. The basis of this reason is due to the commitment by the rule of law to ensure pursuit of government strategies without compromising respect for the rights of individuals. Walters compares the above concept of the rule of law to the approach adopted in the common law system, where there is continuous judicial reliance on precedents set by the application of accepted general principles, aiming to achieve harmony, consistency, unity and coherent reasoning. This leads Walters to categorise the concept in two general forms of ‘legality as order’ and ‘legality as reason’. The former represents the method by which the rules for governance are set, through identifying what the rules are. It also establishes the legal terms for a rule to be considered and accepted within the system of the rule of law. This could be described as a normative approach. The latter reflects on how the rule of law is affirmed through interpretation which is based on consistent, unified and coherent reasoning.

368 Robert S. Summers, Lon L. Fuller, 1984, pp. 36-38.
369 Supra note 367, pp. 222-225.
370 Ibid, pp. 222-225.
372 Ibid, p. 571.
which Dicey appropriately titles as ‘legal turn of mind’, and Rand similarly classifies as ‘standard of reason’ or ‘artificial reason’.  

The ‘legality as order’ concept suggested that the rule of law should be established as descriptive codes dictating how the law must be set out in clear, public, general and eventual format, but it must be understood that the legality of these collections of rules carries equal importance to the expressive legality of each of the individual codes. In addition to the aforementioned aspect, there is an alternative purpose for the rule of law which is to provide a sense of normative reasoning. This aspect is somewhat subtle, and rather more implied than descriptive, and is not implicit. However, such normative features are not easy to capture in written documentation or in a textual format, yet simultaneously, carry an important weight in providing the rule of law with the necessary consistency and coherence, and their significance must not be overlooked. These subtle, implied and significant features of legality, which due to their characteristics might not necessarily appear in the written constitutional law, form part of the rule of law and, therefore, guide the administrative, executive and legislative systems. Thus, as such they must display a sense of legality through reason.

There are three common features in almost all legal rules that can be observed. Firstly every law is created for a purpose with reason behind its formulation; secondly the law is to serve the community and must not be conceptual in nature; thirdly ‘adjudication’, which enables decisions to be made through interpretation of the law, it is open to intuitive analysis rather than following specific rules. These common features highlight how the legal basis for any community is not to set a series of rigid rules, but rather, to provide rules based on shared values. These rules in turn have features that are common in nature. They must guide the actions of the community towards one direction instead of other paths, such as, referring back to the driving example, in guiding drivers towards the legal standard of driving. Secondly, the rules are deemed binding on the community and this obligation is felt by the community and failure to uphold obligation will have future repercussions. Thirdly, the acceptance of the obligation brings with it a change in attitude

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373 Ibid, pp. 571 and 584.
and behaviour, such as stopping at red traffic lights. Fourthly, the standard provides the benchmark against which all actions can be compared for judging the actions of people, and the importance of this notion is that the rule was created to guide action, and should be regarded as the benchmark for claiming action of others as right or wrong. The additional feature that should not be disregarded is that the rule of law everywhere must emanate from similar values.\textsuperscript{377} Equally the rules bring power and obligations; for example the statutory rights of each person gives them legal entitlements at the same time as imposing obligations, and without this balance it will be difficult to convey the sense of obligation.\textsuperscript{378} This in effect brings about reciprocal balance between rights, duties and obligations.

Referring back to the constituent elements of the rule of law, a rule of law is based on reason, rather than erroneous assumptions and its aims should be to enhance and promote the values of the community. The subjects of a rule of law will, therefore, act in a certain manner or be guided in a direction only if there is a reason for that rule. For the rule of law to be valid for applicability it must be consistent and be rooted in similar values, and cannot be self-contradictory in its purpose or in the obligation it set for the community.

\section*{2.2. Consistency, Coherency and Uniformity}

To achieve consistency within the framework of the rule of law, the requirement is for its rules to be in harmony with the overall common values and principles of its subjects. In other words, the rules must not be deemed contradictory with other laws. The definition of consistency is better achieved by understanding what inconsistency means and how best to avoid this. Consistency in the rule of law is fulfilled by eliminating the potential for inconsistent treatment under one rule as well as ensuring that a rule does not permit inconsistent treatments relating to any one issue.\textsuperscript{379} The notion of uniformity and consistency in law, mainly in relation to consistent State practice, was discussed in the previous Chapter.


\textsuperscript{378} Ibid, pp. 51-52.

when analysing the sources of IL. It was acknowledged how practice that is not consistent or uniform amongst States cannot be declared as State practice.

Inconsistency in legal rules can arise in three possible cases: 1) ‘Total-total inconsistency’ – where rules cannot be applied without absolutely contradicting one another and resulting in total incompatibility; 2) ‘Total-partial inconsistency’ – where one of the rules cannot be applied due to conflict with another, but one of the rules is able to be applied in all circumstances; 3) ‘Partial-partial inconsistency’ – where partial conflicts between the rules exist, but there are aspects of the rule where no contradiction is evident.\(^{380}\) When there is a conflict between two rules, it is important to assess whether the inconsistency lies between older or newer rules. Moreover, the nature and the root of each rule must be identified. In other words, it must be established whether the inconsistency is between general rules, or is a case of a conflict between general rules and a specific rule. Each of these types of differences make it possible to classify the inconsistencies into the correct category as identified above. In case of inconsistency or conflict between older and newer rules, the established principle of *lex posterior derogat legi priori* is applicable since this maxim dictates that the newer rules supersede older established rules.\(^{381}\) This maxim is embedded both in national and international jurisprudence.\(^{382}\) Within IL, the most important reference to this maxim can be observed in the VCLT affirming that: ‘When all the parties to the earlier treaty are parties also to the later treaty…the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty’.\(^{383}\) Moving onto the second identifying feature of a rule, the nature of it depends on the specific or general aspect of the rule. In other words, what becomes important is to assess whether the specific (specialist) rule is to override the more general rules – a principle known as *lex specialis derogat legi generali*.\(^{384}\)

In ‘total-total inconsistency’ situations, particularly when the inconsistency is due to rules within the same level, it would be inconceivable to move away from adopting *lex*

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\(^{383}\) *Supra* note 128, Article 30(3).

\(^{384}\) *Supra* note 381, pp. 34-35. 
In cases of ‘total-partial inconsistency’, \textit{lex posterior} is still the superior convention to use, but the specific nature and the generality of the rules must be assessed, and thus resolving the inconsistency needs to be in conjunction with \textit{lex specialis}. Finally, in situations of ‘partial-partial inconsistency’, \textit{lex posterior} is still applicable but its use cannot be unconditionally applied and the intention behind the later rule must be considered since it might have been intended that the later rule to work in harmony with the laws already in existence.

The rule of law would always be open to interpretation, so using our analogy of the car, the person who has created the design would allow for later updates because they know that a number of factors in the future, like new knowledge, could be incorporated to allow new [appropriate] modifications. Therefore it is argued here that the engine, for example, could always be improved to reach optimum performance, even if it means the original form is completely lost. The consistency and uniformity in the rule of law does not eliminate the need for judgement since the application of any general rules in specific cases will, undoubtedly, require the application of ‘discretion’ by the judicial system. The rule of law in this situation creates the parameters for the decision makers, but at the same time allowing them the discretionary freedom needed to review specific cases. The application of discretion and judgement in itself will require consistency to ensure similar specific cases are treated consistently and uniformly.

The inconsistencies in the rules may raise the question of the possible achievement and existence of the rule of law, since how can the rule of law exist and provide the necessary legal standard if it is not coherent, consistent and determinate? This is a pitfall for many since the role of the rule of law is not to provide a set of dos and don’ts but rather to provide a legal framework and standard, based on respected declaratory values shared within the community. Establishing the existence of law, therefore, suggests the possibility of the rule

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\textsuperscript{385} \textit{Supra} note 380, pp. 131-132, in situations of general inconsistency, the principles used to move away from the conflict are regarded as \textit{lex posterior} or \textit{lex superior}. The former principle means when both rules are of equal value, the rule set later prevails over a former set rule. The latter principle means that in conflicts between rules of different value, the rule of the higher level will prevail.

\textsuperscript{386} \textit{Ibid}, pp. 131-132.

\textsuperscript{387} \textit{Ibid}, pp. 131-132.

\textsuperscript{388} \textit{Supra} note 379, p. 72.

\textsuperscript{389} \textit{Ibid}, pp. 59-60.
of law, but that is not to say that there are no contradictions existing within law that are indeterminate or incoherent. 390

2.3. Legitimacy

Another integral factor of the rule of law lies in the notion of legitimacy. This is a multidimensional word that could be used in conjunction with the legitimacy of the government, the Courts, or even the legitimacy of any law. It is generally accepted that a government gains its legitimacy from respecting and promoting the rights of individuals, particularly in the process of creation and legislation and upholding the law. 391 Similarly the Courts follow these laws to promote and maintain the rule of law and its underpinning values which ultimately give rise to the enhancement and promotion of rights of individuals. 392 This concept is not unique to national law and is equally applicable internationally. In fact, the UN regards the promotion and adherence to the rule of law as one of the most fundamental factors that brings about peace and stability, together with the protection of HR, at international level. 393

Georgiev explores the concept of legitimacy as the bridge between the existence of the rule of law and the contradictions that exist in the rules; where legitimacy, when compared to the concept of legality, is seen to be more flexible in acceptance of the principle of law as opposed to specific law. 394 Legality is a fixed singular view of declaring an act as either legal or illegal, and thus cannot accept contradictions. Legitimacy, in contrast, having the implication of contestability, suggests the notion of something legal which may not yet be recognised as fully legal on the grounds of rules and principles. 395 Legitimacy, unlike legality, addresses what ought to be legal, in a broad sense, as opposed to being merely concerned with what is legal or otherwise. This is not to suggest that legitimacy is an alternative to legality in the legal arena, since even if an action is legitimate, the decisions on its legality are still based on the law.

390 Supra note 17, p. 11.
393 Supra note 29.
394 Supra note 17, p. 12.
Law-makers or politicians, though, are concerned with legitimacy as part of the legislative process for formulation of the law, since legitimacy is the underlying factor for the legality and acceptability test of any law. Legitimacy, in this sense, provides an understanding for the general principles of the rule of law which is commonly associated with the *jus cogens* rules. In addition, legitimacy is concerned with consistency with the general principle of law, and unlike legality has a secondary interest with the general principle of law, and its interest is raised, for instance, when specific rules do not provide the necessary answer in *lex specialis* situations. In this context of legitimacy, the connection between *jus cogens* rules and other rules of IL provide a valuable insight. Hence the point that must be iterated is how conformity with the legal rules is reliant on the existence of legality with a strong presence of legitimacy.

2.4. Justice

The significance of the role of justice, in the context of rule of law, has not only been emphasised by the UN Charter, but it has also been subject to a debate amongst the scholarly community and is a wide subject. Justice is a multifaceted concept and encompasses broad perspectives. The primary questions that arise are: what does justice in the context of the rule of law mean? Is justice the same as equality? Does justice mean that everyone is to be deemed equal irrespective of their circumstances, or should circumstances be taken into consideration when considering the notion of justice?

A school of thought following Rawls’ views on justice regards the rule of law as the

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396 *Ibid*, p. 13; and further discussion on *jus cogens* rules will be provided later in this Chapter.

397 Supra note 17, p. 13.


399 The Charter of the United Nations, states that one of the aims and objectives of the United Nations is “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. The Charter regards it as the principle of justice by stating that: a principal purpose of the United Nations is “to maintain international peace and security… and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”, the Charter of the United Nations, Preamble, and Article 1, Purposes and Principles; the rule of law is rooted as an underlying concept in the Charter, supra note 7, for further information on the UN rule of law programs please see United Nations rule of law programs, at: [http://www.unrol.org/article.aspx?article_id=3](http://www.unrol.org/article.aspx?article_id=3), and [http://www.un.org/en/ruleoflaw/](http://www.un.org/en/ruleoflaw/).

400 John Rawls’ book, *The Theory of Justice*, has paved the way for the scholarly debate on justice and the rule of law, subsequently scholars namely Joseph Raz and Michael Neumann have continued to build on the Rawls’ theory.
conceptualisation and formulisation of justice in the framework of a legal system.\textsuperscript{401} In fact, Rawls suggests formal justice ‘addresses to rational persons for the purpose of regulating their conduct and providing the framework for their cooperation’.\textsuperscript{402} The rule of law, in Rawls’ reasoning, is a set of principles that ‘rational persons’ need to formulate their conduct to avoid unnecessary conflicts and contradictions.\textsuperscript{403} This view is broadly shared by Raz where he iterates the aspect of the rule of law which required, ‘that the law should be such that people will be able to be guided by it’; therefore for the law to be obeyed, ‘it must be capable of guiding the behaviour of its subjects’.\textsuperscript{404}

Despite the natural inclination that justice must mean equality to everyone, the principle of justice cannot ignore the circumstances of the individuals, in their obedience to the law. In the quest for equality in justice, these circumstances should not and cannot be ignored; however, the fundamental aim must be to eliminate the arbitrary nature of assessment of these circumstances and to replace this with a more concrete set of rules.\textsuperscript{405} In broader terms, equality is to be identified as treating like with like. To achieve like for like treatment consistently, as underpinned by the definition of equality, clearly the conceptual rules of evaluation for categorising different circumstances are required.\textsuperscript{406} The accurate application of these rules, which form part of the rule of law, should enable the achievement of justice through equality, since their application is binding under the rule of law. The primary aim of justice is to suggest a concept upon which the basic structure of society should be based. Rawls presents justice as a ‘deontological theory’ relating to the priority of the right over the good.\textsuperscript{407} He suggests that, ‘in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interest’.\textsuperscript{408}

As an example, imagine there are two people working in a vineyard but one is old and the other is young. The younger is able to pick more grapes so should he be paid more? Alternatively, should the older man work fewer hours for the same wage because of his

\begin{thebibliography}{9}
\bibitem{404} Supra note 367, pp. 212-214.
\bibitem{405} Supra note 380, pp. 269 and 273.
\bibitem{406} \textit{Ibid}, p. 273.
\bibitem{408} \textit{Ibid}, pp. 24-25.
\end{thebibliography}
condition? The basic concept of justice clearly does not address this without the introduction of the notion of equality of like for like comparison. If the working performance for both is documented, a very different outcome can be reached from what was initially desired, than by simply asking what is ‘due’ or ‘just’ for each of them. To provide yet another perspective, suppose both men were treated equally in every respect. Imagine now that the ownership is in a shared partnership with another, and so the younger man now works for them. For whatever reason, the new employer increases the wage of the young man while the older remains unemployed. Is this unjust? If the previous employer had done this then it would be viewed as unjust, but because there is another person in charge that is no longer considered. Why is this? Although everyone would like the same underlying conditions for living, when going into detail for each person, this could vary considerably based on circumstances.

In his attempt at defining his theory of justice, Rawls employs two principles: firstly ‘justice as fairness’ driven from the priority of the right over the good, and secondly the relationship between the self and its ends. The scholar further introduces his approach as the two elements of ‘each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’; subsequently that ‘social and economic inequalities are to be arranged so that are to the greatest benefit of the least advantaged and attached to offices and positions open to all under conditions of fair equality’. These principles are set out in order of priority, which means that the first principle must be satisfied before consideration of the second can begin. According to Rawls, under ‘lexicographical prioritising: a principle does not come into play until those previous to it are either fully met or do not apply’. Consequently, according to these principles of justice, the equality of rights to basic liberties must be predominantly fulfilled and satisfied. Rawls believes in the value of a ‘thought-experiment’, in which individuals are deemed equal and, through a logical process, evaluate which principles are acceptable as the basis for a just society.

From another perspective, Ross provides an appropriate definition of ‘just’ and ‘unjust’ by suggesting that ‘just’ would have been achieved if decisions made by applying ‘a given set of rules’; this is to say a just decision would have been made by adopting and applying the

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409 Ibid, pp. 93-97 and 265-266.
410 Ibid, p. 38.
411 Ibid, p. 11.
parameters provided by the set of rules in force. In legal terms this set of rules is provided by the rule of law, following parameters within the rule of law must enhance and uphold justice in a just society.

The core of Rawls’ argument focuses on ‘original position’ and ‘the veil of ignorance’; where the former’s importance is how the ‘original position’ is defined as the position when fairness and justice is achieved, and the latter, ‘the veil of ignorance’, is described as bringing about acceptability of the elected principles in the ‘original position’ by excluding contingent or subjective elements such as cultural, economic or geographical bias. In other words, Rawls progresses his analysis by defining the principles of justice as universal principles, which can apply to any just society at any given time. The scholar’s reasoning is counter-argued by Sandel who challenges the basis of Rawls’ notion of ‘original position’ by claiming that this immediately classifies people incorrectly without due attention to their specific knowledge or awareness of their race, intelligence, age, or position in a society. Their ‘ignorance’ does not seem to end here, and according to the scholar, people are also unaware of good, their values and aims in life; in short, assumed to be under complete ‘ignorance’. The scholar’s further criticism is that Rawls’ theory leaves little room for motivation of good in achieving justice and fairness as opposed to achieving this only in the condition of ‘the veil of ignorance’.

One principle of justice suggested by Rawls is the ‘circumstances of justice’, which is characteristically both objective and subjective. Rawls suggests that ‘a human society is characterised by the circumstances of justice’, opposing the involvement of a notion of motivation but rather emphasis is on the importance of ‘original position’. The objective circumstances consist, for example, of the moderate scarcity of ‘primary goods’ which are ‘things it is supposed a rational man wants whatever else he wants’. On the other hand, subjective circumstances include the idea that the parties possess differing aims and conceptions of good, and each wishes to advance his own interests above those of others.
These circumstances would engage the concept of justice. Their existence leads the principles of justice to be chosen to regulate the distribution of such goods. In this situation, ‘circumstances of justice’ brings about the requirement for justice.

Despite agreeing that ‘circumstances of justice’ ‘prevail in human societies and make human co-operation both possible and necessary’, Sandel opposes Rawls’ reasoning since, if it is to be assumed that ‘original position’ has a practical basis, then it cannot represent the foundation of ‘deontological theory’. The reason for this counter-argument stems from the description offered for ‘deontological theory’ as the priority of the right over the good, which suggests a dependency of good and right. Therefore taking this view into consideration practically, one has to accept the existence of certain parameters or conditions in societies at specific times, and whenever these conditions are not applicable, the priority of the right is open to challenge. Sandel’s criticism of Rawls seems to focus on the assumption that Rawls’ reasoning does not allow for people’s commitments or attachments, where in reality this is not necessarily a conclusive deduction of Rawls’ approach. Sandel’s analysis of Rawls’ theory of the ‘person’ does not seem to represent a comprehensive view of the scholar’s outlook. A selective view by Sandel of Rawls’ view has been presented as a whole view of Rawls. Furthermore, an additional limitation of Sandel’s view is on the important point that Rawls’ approach to the principles of justice is universal principles which suggests applicability in any just society. As such, one of the most important features of these principles is to ring-fence the available options for the structures of interactions in that society.

When the constituent elements of rule of law were discussed earlier, the inextricable connection between its interrelated set of codes was mentioned. The inter-link between justice and other constituent elements such as consistency, uniformity, reason and legality can be observed when analysing the characteristics of justice in the context of the rule of law. For justice to be achieved there must be consistency in approach, uniformity in the application of circumstance, and sound wisdom and reasoning in evaluation of the characteristics for categorisation of circumstances. Justice in this context is an essential ingredient in any legal

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420 Supra note 415, p. 28.
system, since legality alone will not give the desired outcome, as decisions made based on legality alone without inclusion of justice may yield an overall unjust result.

The importance of the role of justice in this respect can also be seen in Banakar’s discussion of justice as an ethical form of judgement, where unjust outcome of legal rules cannot be deemed valid and a form of morality in the application of judgment on the basis of justice is necessary, and as such ‘positive law which produces grossly unjust results is not valid’, therefore unjust law is not legitimate law.422 This inter-link between the rule of law and a valid law is also observed by Raz where he articulates how validity of law is encompassed in the rule of law within any legal system; and how the mere belonging to a legal system does not make the rule a valid one. In other words, a legally valid rule is one that brings or imposes an obligation which carries normative characteristics.423 Therefore, a legal system that produces legitimate, legal, and consistent rules will still fall short of its full requirement if its rules lack a consideration of the element of justice. Equally, justice can only be served in a system which is based on the rule of law where due respect and importance is placed on different elements of the rule of law. Effectively, a mutual and reciprocal relationship between justice and rule of law must always exist, since the rule of law without justice loses its essence, and retrospectively, in a legal system justice cannot be established without the rule of law. For example in an authoritarian environment, where law is dictated by the rule of the ruler, justice in its true sense is never achievable, and will forever remain an ideal concept.

In short, the constituent elements of the rule of law are individually significant and their absolute importance is in the collective functionality and its outcome. Each of these elements could be compared to links in a chain where their effective functionality is much stronger when they come together. However it must be reiterated that the rule of law is not achievable where it does not serve justice in its framework. This analysis has provided an insight into the factors that must simultaneously exist within the framework of the rule of law. Therefore, if a rule fails to meet one of these integral components of the rule of law, then it will fail to be deemed law and falls outside the scope of the rule of law.

423 Supra note 367, pp. 148-150.
Placing the outcome of the analysis of the doctrine of the rule of law into international legal system, the study now proceeds to examine the role played by the rule of law in IL.

3. The Rule of Law and International Law

Throughout the above analysis, it was suggested how through logic, reasoning and subsequent legal institutions, societies have moved towards ensuring their rulers are bound by legal frameworks under the rule of law. Chapter Two discussed the role of IL in establishing the legal principles and guidelines for States’ conduct, which they are obliged to follow, obey and adhere to. It was demonstrated how the establishment of IL rules either through treaties or CIL brings about a reciprocal legal system. The treaties provide clear guidelines for the conduct of States within the framework of the treaty provisions, the rules that must be followed and consequences of a breach in agreements. Moreover, CIL demonstrates the extent to which the conduct of one State becomes immediately available to others to follow, minimising unfair advantage but more importantly that each State acknowledges the advantages of operating in certain manner since others will also behave similarly.

The sphere of IL is broad; regulating States and individuals, together with the obligations on States for the respect of HR. IL functions to promote a sense of order based on stable and uniform rules which are considered to benefit the international community. The reciprocal nature of IL requires a reciprocal sense of responsibility and commitment amongst States to ensure fairness and justice for others. The importance of this is how reciprocity, tied with the rule of law in the context of IL, regulates and deters States from regularly applying their every interest and ‘will’. Indeed the UN has declared that ‘the principle of the rule of law embedded in the Charter of the United Nations encompasses elements relevant to the conduct of State to State relations’. There is a general enthusiasm and respect for the rule of law in most States where head of States publicly support the rule of law, but the practice and application of it is somewhat varied from one to another. In general, Western States are perceived as more democratic and conscious of their international standing, and therefore more obedient to the rule of law. For instance, George W. Bush stated: ‘America will

424 Supra note 29.
always stand firm for the non-negotiable demands of human dignity: the rule of law…equal justice; and religious tolerance’. 425 Each government has a structure which is not due to a legal system but more underpinned by its political framework. 426 There are many reasons for the respect for the rule of law ranging from the respect for democracy and liberalism to public or world opinion. Equally the element of peer pressure, how a State wishes to be perceived within the international community, and internal factors must not be ignored.

The rule of law discussed so far is a general perspective, but the principles play a similar role in IL. It is argued that since at national level the discussion is about the ‘rule of law, not men’, therefore at international level discussion must focus on the ‘rule of law, not States’. 427 This might be a reasonable statement but it seems to be in contrast to the realistic framework of IL. At a national level the rule of law has an additional aim of protecting people from the rulers which is equally echoed at an international level, however IL is additionally concerned with protecting people not only from their own rulers but also from rulers of other States. The fundamental difference is that national constitutions clearly set out the powers entrusted in government, but this is more vaguely articulated internationally. Given the nature of how IL rules are formulated and the inextricable link that exists between the law and politics, the question is: can IL rules exist and be accepted as independent and valid rules?

The above question stresses the challenge that IL rules lack the necessary independence from IP. However, even though the rule of law by its very nature suggests objectivity in law, free from subjective or arbitrary rules, it is less certain why and how this objectivity should be reached. In fact, it is less clear why this objectivity is necessary on the basis of dependency from politics. This definition of the rule of law suggests that it is to be driven from natural law, unlike the ‘social’ formation of law which is man-made, and undoubtedly will have an inter-link with politics. A more convincing definition of the rule of law could be that it is

426 Supra note 376, p. 11.
427 Supra note 16, p.227.
setting the parameters for ‘arbitrary power’, as opposed to dictating absolute independence or
distance from State practice or interest.428

Voyiakis and Georgiev,429 in their examination of Koskennini’s work, suggest that less
restricted and explicit definitions of ‘concreteness’ and ‘normativity’ would equally remove
the clashes between these two factors, thus allowing for the objectivity of IL as required
within the definition of the rule of law. A revised definition of ‘concreteness’ would suggest
that formation of law should be within recognised and set parameters which enable the
existence of the law to be acknowledged. Similarly, ‘normativity’ would suggest that once
the law has come into effect, it is not changed through such measures like State ‘will’ or
practice but instead through set procedures.430 Objectivity of IL is not in its independency
from IP, but more created by its distinctive features from politics.431 In other words, this
objectivity could be achieved in the notion of the separate existence of IL from a set of laws
that is purely driven from State conduct and its politics. Hence the two disciplines can co-
exist when the rules and basis of one discipline do not change upon the changes of the other,
that is to say, IL as a discipline has its own distinctive features that are not entirely dependent
upon IP.

Despite the limitations observable in any legal system, it can still be believed that law is a
necessary and helpful tool in bringing a sense of order within a community, however large or
small. Its usefulness lies in its distinction to ‘arbitrary’ control and power, as well as the
parameters defined within law that guide the community. Similarly, the usefulness of the rule
of law is in creating and establishing the necessary rules. This form of creation of rule of law
helps in establishing rules, but more importantly in outlining the obligations of future conduct
with the aim of avoiding unnecessary conflicts.432 The same values and ideals are within IL
for the wider international community, and even though it cannot, by itself, bring
international harmony or order, it does act as a powerful force.

428 Supra note 17, pp. 2-3.
429 Ibid, pp. 2-3; and Emmanuel Voyiakis, International Law and the Objectivity of Value, Leiden Journal of
430 Supra note 17, pp. 2-3.
431 Ibid, pp. 3-4.
432 John Rawls in A Theory of Justice suggests for the rule of law to be set of principles ‘rational persons’ need
to formulate their conducts to avoid unnecessary conflicts; and supra note 17, p. 4.
The above discussion demonstrates the validity, objectivity and the existence of IL, differentiated from political values and driven from the conduct and ‘will’ of States. The rules of IL are influenced by political views and the conduct of States, but this is not to be taken as the only form of law-making within the realm of IL. Once an IL rule is created, it exists and stands on its own right, and is no longer just a political view. Although the rule may change through State practice or political views, it is nonetheless changed in line with the legal parameters set, and not through arbitrary political change. In this sense, IL exists and is followed through the binding obligations set for States’ conduct when such obligations are accepted and embarked upon.\textsuperscript{433} Georgiev discusses another argument for the validity of IL, which can be observed in how States’ conduct is influenced by IL. The rules cannot be deemed unreal if States’ behaviour or conduct is governed by the observation of these rules. An important point to note is that governments representing States do change regularly; however, the ideals of IL remain unchanged despite changes in political views.\textsuperscript{434} Governments change but IL or the rule of law does not. Each State consents to IL rules, although some States may want to change, reject or modify certain obligations; this needs a prerequisite notion of the acceptance of the existence and validity of IL. Additionally the endurance and the continuation of IL rules, despite the changes in the political arena, are testament to its stability and independency from arbitrary views; one State’s view cannot change the direction of the rules of IL.\textsuperscript{435}

The establishment of the validity and existence of IL rules is not to be taken as assertion for its ‘completeness’ or an existence of a set of rules applicable to every circumstance; it is more to suggest that there are rules to govern State conduct. In cases where a rule does not exist to deal with the issue at hand, then new rules need to be created, and the rule of law provides the framework for its creation by regulating political views. Likewise the rule of law is again relied upon where there is a need for changes to existing laws, or where contradictions are observed.\textsuperscript{436} There could be a suggestion that the element of ‘consent’ raises the question of the nature of IL as a basis of suitable rules. However, all of the rules of IL have come through

\textsuperscript{433} Supra note 17, pp. 4-6.
\textsuperscript{434} Ibid, p. 6.
\textsuperscript{435} Ibid, pp. 6-7.
\textsuperscript{436} Ibid, p. 7.
a legal process to be recognised as sources of IL, and as such satisfy both ‘normative’ and ‘concreteness’ rules of objectivity.\textsuperscript{437}

There exists a dilemma in the rule of law, where on the one hand there is the requirement to provide general rules for a society as applicable to different situations, and on the other hand, the more general the rules, the more incoherent they are, and thus open to various interpretations.\textsuperscript{438} This battle of establishing the ‘determinate’ elements within the rules of IL is suggested by Franck to be achievable through prohibiting certain conducts as unacceptable, thus providing the necessary clarity for unacceptable acts and allowing interpretation of other conducts.\textsuperscript{439} One manner in which IL can evolve is through the adoption and conceptualisation of new principles that demonstrate the international community’s evolving values. The adoption of newer principles will undoubtedly create a conflict with the existing specific laws, and the continuous tension will lead the international community towards an evolving view of the rule of law driven from its principles. It is useful to be reminded of the well-known Dworkin definition of a principle stressing that principles, unlike rules, do not provide ‘all-or-nothing’ actions whereas they carry dimension of weight and importance which in case of intersection of principles, these dimensions are used to help resolve issues.\textsuperscript{440} As such principles provide a general framework rather than providing concrete sets of actions. IL principles help establish the norms and a legal framework but their application can vary dependent on the situation. These principles establish obligations and duties for States not in the form of rules but rather as guiding principles for inter-State interactions.

Having established the importance of the rule of law in the context of IL, the next questions are: how is it interpreted and applied in light of different circumstances? Where is the dividing line between valid and invalid interpretation of the rules in IL? What is the role of reciprocity in ensuring valid interpretation of IL? Answering these questions requires an examination of how any interpretation of the rules of IL must be based on the recognised international norms and obligations referred to below.

\textsuperscript{437} Ibid, pp. 8-9.
\textsuperscript{438} Ibid, p. 9.
\textsuperscript{439} Ibid, pp. 9-10.
3.1. Interpretation of Rules in the Context of International Law

The study has examined that it is a requirement for the constituent elements to be collectively present and function in the context of the rule of law. Furthermore, it was discussed how the rule of law provides the broad principles without distilling into specific laws. The international legal system, like any other system, encompasses a set of rules and principles that work in conjunction with one another and require interpretation, yet this interpretation must take consideration of other rules and norms.\textsuperscript{441} This means that achieving valid interpretation requires determination of which rules and principles are applicable to the situation in hand and thus be taken into consideration when reaching a valid interpretation. Valid and consistent interpretation is fundamental in ensuring uniformity in the application of IL rules and that States’ rights and obligations are not subject to unfairness or contradiction. An established framework and principles have been provided for the interpretation of international rules. The principles are primarily \textit{pacta sunt servanda}, the notion of ‘good faith’, \textit{jus cogens} rules, and obligations \textit{erga omnes}. These principles ensure the context and the essence of IL is not lost through obscure interpretation. The first two principles together with the role and significance of reciprocity within these principles were explored in previous Chapter. In the section below the summary of the first two principles is briefly touched upon, however the latter two principles constitute the focus of this section.

The interpretation of IL rules is tasked to the specific international legal bodies.\textsuperscript{442} In a practical sense, varying interpretations are possible, as evident in the \textit{Tadic} and the \textit{Nicaragua} cases, but the fundamental principles were not lost as part of the interpretation. Although different approaches were adopted towards a similar concept, the interpretation remained within the established framework. In the \textit{Nicaragua} case, the ICJ decided that the US could not be assumed to have ‘effective control’ of the actions of the Nicaraguan contras, even though the US had provided them with weapons, finance and training; the ICTY in the \textit{Tadic} case, however, chose a different interpretative approach, citing that ‘effective control’ was too broad a view to be applied when assessing the influence of an external State in the


\textsuperscript{442} The following examples set out the authority bestowed upon the international legal bodies: Statute of the International Law Commission, \textit{supra} note 125; and The Statute of the International Court of Justice, \textit{supra} note 8, Article 36(2a) sets out the Courts’ jurisdiction for ‘the interpretation of a treaty’.

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domestic violence of another country.\textsuperscript{443} Thus, the International Tribunal for the Former Yugoslavia (ICTY) concluded that organising and planning the military actions of another State gave the external country the ‘overall control’ which is sufficient to be regarded as an armed conflict.\textsuperscript{444} Such different approaches should not give rise to States taking it upon themselves to apply fundamentally different interpretations that are not aligned to the overall international interpretation on the subject. This only leads to a distorted picture of the rule of law in IL. In this respect and following the theme of ‘good faith’, there is CIL that directs a principle that States should not gain from their wrongdoing.\textsuperscript{445} This statement was clearly iterated in the \textit{Factory at Chorzow} case where the judgement concluded that:

\begin{quote}
It is… a principle generally accepted…that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.\textsuperscript{446}
\end{quote}

The ICJ further relied upon this judgement in the case of \textit{Gabcikovo-Nagymaros Project}, when analysing the wrongdoings of States and their potential consequences.\textsuperscript{447} For these reasons, the interpretation of IL rules must not be limited to providing erroneous reasons or ill-founded justifications provided by some officials or lawyers.

When exploring the role and manifestation of reciprocity in connection with \textit{jus cogens} rules, and obligations \textit{erga omnes}, it is important to address the nature and level of reciprocity in different relations such as bilateral, multilateral and \textit{erga omnes} relations in line with the examining the different obligations set under each type of these relationships. Hence the section below examines the bilateral, multilateral and \textit{erga omnes} relations and the role of reciprocity within each type of these relations. Additionally the role and manifestation of reciprocity is explored relating to rules that have been created in order to protect \textit{fundamental values} that are universal and commonly shared by the international community.

\textsuperscript{444} \textit{Ibid}, paras. 120-121 and 145.
\textsuperscript{445} \textit{Interpretation of Peace Treaties with Bulgaria, Hungary and Romania}, (Second Phase), ICJ Report, Judge Read dissenting opinion, Advisory Opinion, 1950, p. 244.
\textsuperscript{446} \textit{Factory at Chorzow Case, Germany v. Poland}, PCIJ Reports, Series A, No. 9, 1927, p. 31.
\textsuperscript{447} \textit{Supra} note 186, para. 110.
3.2. *Pacta Sunt Servanda* and Good Faith

In the application of IL, it is a requirement for the international community to interpret IL rules effectively, consistently and correctly. On the other hand, the more general the rule of law is, the more interpretation is needed for its specific application.448 The application of the rule of law requires interpretation, and IL has established guidelines for how this interpretation must be carried out. However, one difficulty is the role of States’ ‘consent’ in the creation and application of IL. The interpretation guidelines through the principles of ‘good faith’ and *pacta sunt servanda* provide the necessary tools to ensure States do not interpret the rules exclusively to their own benefit and interest. The clearest reference to valid interpretation of treaty laws is in the VCLT stipulating that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’,449 additionally stating the importance of maintaining the intended purpose of the treaty when interpreting by citing that a ‘treaty shall be interpreted in ‘good faith’ in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.450

It is useful to be reminded of the PCIJ statement in the *Polish Postal Service in Danzig* case that, ‘words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd’.451 The notion of avoiding absurdity in interpretation was first introduced by Vattel, as far back as 1758. The scholar provided clarity on interpretation that is the foundation for the contemporary guidelines, stating that ‘any interpretation that leads to an absurdity should be rejected: or, in other words, we cannot give a deed a sense that leads to absurdity, but we must interpret it so as to avoid the absurdity’.452 He continues: ‘…we are not in any case to presume that it was their intention to establish an absurdity:….therefore, when their expressions taken in their proper and ordinary meaning, would lead to absurd consequences, it becomes necessary to deviate from that meaning,…to avoid absurdity…’.453 The VCLT has

448 Supra note 17, p. 9.
449 Supra note 128, Article 26.
450 Ibid, Article 31(1).
451 Supra note 181, p. 39.
also expressly asserted the importance of relying on ‘supplementary means’ to ensure unreasonable or absurd conclusions are not drawn. This highlights and reiterates the importance of ensuring the essence and intent of the law is not altered in its interpretation and application.

### 3.3. Jus Cogens Rules and Obligations Erga Omnes

No interpretation of IL rules could be considered valid if it is in conflict with *jus cogens* rules and obligations *erga omnes*. *Jus cogens* rules and obligations *erga omnes* are regarded as universal norms and/or rights and are internationally recognized and accepted by the international community as a whole.

There has been much debate on the nature and type of States obligations, particularly focusing reciprocal obligations and those ‘absolute’ non-reciprocal obligations. In simple terms, these range from obligations created from bilateral and multilateral relations as well as those obligations that are owed to the international community as a whole. Obligations *erga omnes* are considered as obligations owed to the international community. Obligations *erga omnes* concern all of the international community since States have a vested interest in protecting these obligations.

The ILC has made a distinction between the different responsibilities bestowed upon States by treaties and has classified them as:

1) Those that produce ‘reciprocal relationships’; and
2) ‘More absolute type of obligation’ like humanitarian law or disarmament conventions.

The significance of this distinction is to highlight the nature of ‘more absolute type of obligation’ in the sense that such treaties are less derogable and newer treaties cannot diminish their absolute obligatory

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454 *Supra* note 128, Article 32(b).
456 *Supra* note 382, para. 380.
This distinction is paramount to the analysis of reciprocity since the nature of relations and obligations determines whether reciprocity takes a role and creates reciprocal obligations. The UNHRC has emphasised that obligations *erga omnes* has its roots in ‘rules concerning the basic rights of the human person’ and by referring to the ICCPR expands this to state that: ‘there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms’. On another point, the UN Secretary General has declared that these universal rights and values, protected by HR laws, are not time-bound or restricted and are ‘intended to apply always and everywhere, in time of peace as well as in time of war’. Moreover, the UNHRC highlights a treaty signatory State’s legal obligation to every other party to fulfil its agreements. The protection of ‘individual human beings, peoples or even humanity as a whole’ has been given similar weight by the ILC where such interests have been regarded as ‘extra-state’ interests that cannot be subjected to breach. The ILC refers to the ICJ’s viewpoint in the *Namibia* case, where the Court draws from the provision in the VCLT Article 60(5) by expressing that the exception to the treaty termination right of provisions for ‘protection of the human person contained in treaties of a humanitarian character’.

The obligations *erga omnes* was strongly supported in the *Barcelona Traction* case, where the ICJ declared that a State has responsibilities towards non-nationals entering its territory and has a duty to provide them with legal protection. The ICJ noted that where the obligations are owed to the international community as a whole, all States have a ‘legal interest’ in their protection, given values and rights that are subject to protection, thus to be

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461 Human Rights Committee General Comment No. 31 (80), Nature of the General Legal Obligation Imposed on States Parties to the *International Covenant on Civil and Political Rights*, 2187th meeting, CCPR/C/21/Rev.1/Add.13, para. 2, 26 May 2004; the Committee was formed according to the *International Covenant on Civil and Political Rights*, Article 28.
464 *Supra* note 319, paras. 33-34.
regarded as ‘obligations *erga omnes*’.

The Court regarded rights and obligations falling under this category as namely aggression, genocide, slavery, and racial discrimination. The ICJ examples have heavily been relied upon as ‘useful guidance’ for the current list of obligations *erga omnes*, and this list was expanded by the ICJ to include self-determination of people in the *East Timor* case.

These rights are regarded as universal norms and/or rights that are not based on bilateral or multilateral relations and instead are universally recognized and accepted by the international community as a whole. Essentially these are obligations owed by all States to the international community as a whole and create a universal obligation rather than just involving two or selected States only. The *Barcelona Traction* case has played a pivotal role in leading the discussion on obligations *erga omnes* and is to date a significant base for the list of such obligations as well as distinguishing between obligations of States to the international community as a whole and those obligations created from bilateral relations.

Unlike the common obligations where reaction to a breach in obligations is restricted to the injured party, breaches of *erga omnes* obligations are not only restricted to affected States, and non-affected States are equally entitled to react to such violations. The endorsement for reaction by non-affected States is iterated in Article 48(1b) of the State Responsibility, where the ILC, in their commentary, provides for reaction to breach of certain obligations impacting the international community as a whole by non-affected States. Even though the ILC did not refer to the obligations *erga omnes* directly in the Article, they did however indicate that obligations *erga omnes* are within the essence of the Article.

*Jus cogens* rules and obligations *erga omnes* exist to give clarity to international obligations, expectations and protection. The clarity is provided by creating a hierarchal order and distinction between peremptory rules and other rules, thus providing a decisive tool for the ranking of IL rules to establish the significance of these rules and the obligations imposed by

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466 *Ibid*, para. 34.
468 *East Timor* Case, Portugal v. Australia, ICJ Reports, 1995, para. 29.
469 Supra note 319, para. 33.
470 Supra note 382, para. 380.
471 Supra note 467, para. 2, p. 126.
472 *Ibid*, para. 9, p. 127.
them. As such some rules become peremptory in establishing their adherence as obligatory in nature and type. These rules and obligations are not subject to derogation. In addition, *jus cogens* rules and obligations *erga omnes* further affirm the paramount focus by IL to uphold and incorporate the values of the international community and their resolve to protect and promote the basic human rights. Examples of rights and obligations falling under *erga omnes* obligations and *jus cogens* rules, as previously mentioned, include the prohibition of aggression, genocide, slavery, and racial discrimination.\(^{473}\) The ILC has drawn a distinction between *jus cogens* rules and obligations *erga omnes* by affirming that the former has the power to override any conflicting rules whereas the latter does not impose an overriding character, but each ‘designate the *scope of application* of the relevant law’.\(^{474}\)

The significance of the power of *jus cogens* rules is referred to in the VCLT stipulating that: ‘a treaty is void if…it conflicts with peremptory norm of general international law…a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted…‘.\(^{475}\) Therefore, the peremptory rules are important for two reasons: firstly, for playing a pivotal role in international treaty law and customary law; and secondly, for their absolute power which cannot be subjected to derogation under any circumstances.\(^{476}\) Moreover, as indicated previously, according to the VCLT *jus cogens* rules cannot be superseded through the maxim of *lex posterior derogat legi priori*. Additionally the VCLT adds that: ‘if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates’.\(^{477}\) In essence, the VCLT affirms the role of *jus cogens* rules as superseding above treaties and this nature renders *jus cogens* to be considered as a rule of customary law too. *Jus cogens* rules and obligations *erga omnes* were further reinforced and enhanced by the rulings of the ICTY in

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\(^{473}\) The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46, 39th Session, 10 December 1984, A/RES/39/46, entered into force in 26 June 1987, Article 4; and *supra* note 319, paras. 33-34.

\(^{474}\) *Supra* note 382, para. 380.

\(^{475}\) *Supra* note 128, Article 53.

\(^{476}\) *The Prosecutor v. Anto Furundžija, (Trial Judgement)*, IT-95-17/1-T10, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para. 153; the International Criminal Tribunal for the former Yugoslavia was established by the Security Council with jurisdiction to deal with war crimes taking place in the conflicts in the Balkans (Croatia and Bosnia and Herzegovina) in the 1990s, Resolution 808, S/RES/808, 3175th meeting, 22 February 1993, and Resolution 827, 3217th meeting, 25 May 1993, S/RES/827.

\(^{477}\) *Supra* note 128, Article 64.
the case of *Prosecutor v. Anto Furundzija*. The ICTY, having established that the crimes committed in this case were torture, further reflected on why the act of torture should not have taken place by referring to *erga omnes* obligations as well as *jus cogens* rules. The ICTY in *Prosecutor v. Kupreskic et al.* further emphasised that the absolute and non-derogable character of obligations does not allow reciprocity to play a role. This establishes the significance of *jus cogens* rules being based on a non-reciprocal manner and fundamental values.

Introduction of obligations *erga omnes* and *jus cogens* rules arguably demonstrate a shift for IL away from the more traditional bilateral inter-State relations and instead towards contemporary IL by instilling a sense of respect and adherence to universal and common shared values. This indicates the shift from the more traditional bilateral one on one State relations and obligations or even multilateral obligations to a more normative viewpoint for universal values and obligations that are owed to the international community as a whole. In this respect, the international community in collective form, have a legal interest in the fulfillment of these universal obligations (*obligations erga omnes*) and/or expect compliance with preemptory rules (*jus cogens* rules). This sets a reciprocal overarching responsibility for all States to ensure that universal values and obligations are upheld and are not compromised.

In a de-centralised IL system the rules and obligations are fundamentally set through bilateral, multilateral agreements and/or CIL. The bilateral agreements almost take a form of a contract between two parties encompassing their specific agreements and create a direct reciprocal relationship based on equal rights and obligations. Byers makes an interesting reference to bilateral relationships and how they are not ‘unidirectional’ but instead include an element of ‘*quid pro quo*’, subject to the principle of reciprocity. Multilateral agreements, on the other hand, include multiple parties but at times, the true content of some multilateral agreements are an aggregation of bilateral agreements which create bilateral and reciprocal obligations within a multilateral framework. The Vienna Convention on Diplomatic Relations is an example of this. In this context, the agreement is multilateral by nature and includes multiple parties but within it, simultaneously bilateral obligations and

478 *Supra* note 476, paras. 151-156.
480 *Ibid*, para. 518.
481 *Supra* note 4, p. 89.
responsibilities are created amongst States. This is what Sicilianos refers to as relations that are ‘bilateralizable’ and dominated by reciprocity.\textsuperscript{482} However, there are multilateral agreements that are not ‘bilateralizable’ since the obligations set within them are to benefit the international community as a whole which the Genocide Convention is an example,\textsuperscript{483} thus such multilateral agreements carry obligations and responsibilities that cannot be limited to bilateral obligations. Essentially, parties to the Genocide Convention do not enter this agreement in order to stop genocide relating to one another’s citizens but rather these conventions aim to instil a code of conduct and obligations and are ‘norm-creating conventions’, setting the norms for the international community regardless of protecting the citizens of just the parties to the conventions.\textsuperscript{484} Most commonly, these relate to situations where the rights of individuals or common universal rights are under threat,\textsuperscript{485} for instance in the 1949 Fourth Geneva Convention Article 31 or the 1949 Third Geneva Convention Article 17 where coercion is prohibited as a means of extracting information.\textsuperscript{486} Therefore, the international community has a right to expect compliance with these obligations on humanitarian grounds irrespective of the principle of reciprocity. This however does not take away the universal responsibility of States and reciprocal commitment, responsibility and respect for upholding the rights of individuals and universal rights.

The non-bilateralisable concept of multilateral agreements and obligations \textit{erga omnes} are linked, insofar as, ‘all obligations \textit{erga omnes} are non-bilateralisable, while the reverse is not necessarily true’.\textsuperscript{487} This is to say that for sure obligations \textit{erga omnes} cannot be bilateral but not every multilateral agreement which is non-bilateralisable necessarily brings about obligations \textit{erga omnes}. This is an important point to note since IL in general is a collection of bilateral agreements and inter-relations within a multilateral context and IL operates predominantly as a reciprocal legal system. The suggestion above indicates clearly that

\begin{footnotesize}
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\item \textsuperscript{484} Gerald Fitzmaurice, Judicial Innovation: Its Uses and Its Perils, as Exemplified in some of the Works of the International Court of Justice during Lord McNair’s Period in the Office, \textit{Cambridge Essays in International Law: Essays in Honour of Lord McNair}, 1956, pp. 33-34.
\item \textsuperscript{485} Supra note 236, pp. 6 and 26.
\item \textsuperscript{486} International Committee of the Red Cross, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Article 17; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 31.
\end{itemize}
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obligations *erga omnes* go beyond bilateral relations and imposes obligations on all States that are not based on a beyond one-to-one relationship. That is to say obligations *erga omnes* are not restricted to only reciprocal and mutual exchanges of benefits or how one party is directly affected but rather expanded to include areas where the international community as a whole is owed an obligation even if a State is not directly affected by violations of these obligations. HR and IHL are clear examples of such obligations, namely in the 1949 Geneva Conventions where High Contracting Parties are not entitled to ‘absolve’ each other of the grave breaches of their responsibilities in these conventions.\(^{488}\) As rightly observed by Provost, this affirms IHL outlook towards certain obligations as *erga omnes* and refuting the bilateral characteristic of the agreement in this specific area.\(^{489}\)

At first glance, it might be concluded that since *jus cogens* rules and obligations *erga omnes* are aimed to protect the *fundamental rights*, thus reciprocity cannot play a role in relation to such principles and obligations that are protecting HR and Humanitarian aspects of IL. Indeed in HR laws there is almost no basis for reciprocity since its aim is to protect the rights of those individuals who are not able to, or cannot, reciprocate.\(^{490}\) HR are universal and egalitarian legal rights of individuals which encompass moral guarantees for individuals and their protection in this context cannot be subject to reciprocity. Certain factors must be taken into consideration, firstly that HR laws ultimately aim to protect individuals and do not fundamentally relate to inter-State relations but States have an obligation to protect and uphold HR of individuals; secondly these rights are applicable to everyone equally and in every circumstance.\(^{491}\) This is to say HR laws transcend States’ boundaries and are there to protect all individuals including those individuals from States that are not party to the treaty or stateless individuals.\(^{492}\) Also HR rules tend to possess unilateral characteristics based on


\(^{489}\) Supra note 487, p. 139.

\(^{490}\) Supra note 382, p. 111.

\(^{491}\) Universal Declaration of Human Rights proclaimed by General Assembly through resolution A/RES/217(III) on 10 December 1948, this theme encompasses the whole of this declaration and more prominently in the Preamble, Articles 1, 2 and 7.

\(^{492}\) Supra note 487, pp. 131-132.
HR universal norms.\textsuperscript{493} As such, HR laws aim to protect and uphold \textit{fundamental rights} under several types of obligations, including \textit{jus cogens} rules applicable in any circumstances so it is understandable how reciprocal reactions may not be a basis within HR laws. Therefore, States cannot revert to the principle of reciprocity to breach \textit{fundamental rights} on this basis.\textsuperscript{494} Such legal obligations are non-derogable under any circumstances and cannot be avoided on the premise of reciprocal action. For example a State cannot resort to torture or genocide acts on reciprocal grounds. Another pertinent evidence of this is in the 1949 Geneva Conventions where High Contracting Parties are not entitled to ‘absolve’ each other of the grave breaches of their responsibilities in these conventions.\textsuperscript{495}

Additionally the complex nature of how IL rules are created must not be ignored and should be taken into consideration before entirely dismissing the role of reciprocity in HR and Humanitarian law. The fundamental basis of IL is on ‘will’ and ‘consent’ of States so, one could argue that regardless of the rules, an element of reciprocity exists since for any rule to be set an element of concessions or give and take in the form of reciprocity must have taken place amongst the international community as part of the formulations of the new rule.\textsuperscript{496} Indeed, Thirlway suggests that rules under \textit{jus cogens} or obligations categorised as \textit{erga omnes} should be regarded \textit{opinio juris} since the creation of such rules or obligations would have resulted from overwhelming State practices.\textsuperscript{497} Therefore reciprocity takes a role in the initial formulation of the rules, but the rules themselves are set in such a manner that do not allow a great deal of reciprocity in application, interpretation or in their compliance given their aim of protecting \textit{fundamental rights}. The teleology behind such rules are the moral aspect of universal human values which requires the protection of the \textit{fundamental rights} where resorting to reciprocity would endanger achievement of the moral need for upholding universal norms.

\textsuperscript{493} \textit{Ibid}, p. 133.
\textsuperscript{494} This can be seen in recent work of International Law Commission where the possibility of placing a reservation on treaties is removed serving to protect obligations and rights that are non-derogable or where reciprocity would defeat the purpose of the treaty, \textit{supra} note 123, p. 36, para. 3.1.5.4, and p. 41, para. 4.2.5.
\textsuperscript{495} International Committee of the Red Cross, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Article 51; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Article 52; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Article 131; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 148.
\textsuperscript{496} \textit{Supra} note 487, pp. 127 and 133.
\textsuperscript{497} \textit{Supra} note 131, p. 119.
As mentioned previously, there is almost no basis for reciprocity in HR laws, but on the other hand, reciprocity does play a role in IHL although this appears in varying degree and is not always clearly observable. The study of reciprocity in IL requires a careful and delicate analysis of identifying how reciprocity manifests itself in IHL and this is the focus of the following section.

3.3.1. Reciprocity in International Humanitarian Law

There are many contradictions evident in IHL relating to reciprocity which demonstrates the acceptance or rejection of this concept. IHL, otherwise referred to as the law of war or law of armed conflict, aims to govern and regulate the conduct of States at war times and it encompasses the use of weapons, treatment of prisoners of war (POW) and protection of civilians caught up in armed conflict. IHL is founded on the principle of reducing suffering in war, and this agenda is the foundation for The Hague Conventions, and the 1949 Geneva Conventions. The former Conventions are laws which primarily set about establishing rules of war, efforts for disarmament and the rights of neutral parties in a conflict. The rules set out under The Hague Conventions were heavily breached during two World Wars which led to the innovative work resulting in the adoption of the latter Conventions.

The 1949 Geneva Conventions predominantly concentrate on codification of humanitarian aspects of war, broadening the historical law of war beyond international armed conflict to

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499 International Conferences (The Hague), Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899; and International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

include non-international armed conflicts too. This shift towards enhancement of humanitarian aspects of war post World War Two is a direct shift towards further emphasis on the humanitarian impact of war and its impact on individuals which has resulted in the dimming of the role of reciprocity in IHL.

The reliance or reference to reciprocity can only be applicable in certain areas of IHL but reciprocity does not manifest itself in the entire framework of IHL. To understand the reason for this, it is important to understand the purpose of IHL and certain rights it aims to protect. The International Committee of the Red Cross (ICRC) claims that obligations under IHL on all States are not dependent on the notion of reciprocity.

Common Article 1 of the 1949 Geneva Conventions requires that the provisions are to be respected ‘in all circumstances’. This view is further reiterated in Common Article 3 of the 1949 Geneva Conventions which sets out the ‘minimum’ requirement of protection for other conflicts that are not of international nature. This is to say, the provisions dictate a set of obligations on the member States which are not dependent on reciprocal conduct and deviation of other States and cannot be used as justification for breaking the terms of the conventions; similar to what was discussed in relation to the protection of jus cogens rules or obligations erga omnes.

Reciprocity is more clearly evident in the Hague-type weapons-restriction treaties since it requires States involved to play by the same rules. Clausula si omnes which was embedded

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502 Supra note 479, para. 518.

503 For further information see International Committee of the Red Cross, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rule140.


506 Clausula si omnes which was embedded...
in the 1906 Hague Convention suggested that obligations are binding on a belligerent only if all of the opposing sides are likewise bound by the same obligations.\textsuperscript{507} This provided States with the assurance that their own obligation would be retrospectively in line with the opposing party’s obligation and no unfair advantage would be gained by States party to the obligations under the Hague Conventions. In the aftermath of World War II and the inability of reciprocal obligations to prevent the devastating damages, this clause was abandoned at the time of drafting the 1949 Geneva Conventions; yet it is important to note that the 1949 Geneva Conventions specifically stipulate that entry in a conflict of a non-party to these Conventions does not reduce the obligations of the existing parties.\textsuperscript{508} The main reason for this was that all parties were to be bound by the obligations under the new 1949 Geneva Conventions and the ability of States to avoid this would have gone against the humanitarian nature of these Conventions. The 1949 Geneva Conventions, as the newer Law of War treaties, thus have led many to suggest that reciprocity is gradually being discarded due to the more humanitarian nature of the conventions.\textsuperscript{509} This argument stems from the shift perceived in the Law of War from reciprocal treatment of an enemy to a more humanitarian approach and values enshrined by the international community. Moreover, there are further limitations in IL with regards to limiting the use of reprisal or the general use of force through disallowing retaliation.\textsuperscript{510}

A distinct feature of the 1949 Geneva Conventions is in their enforcement, where States are given the predominant responsibility for enforcing the obligations under the said Conventions.\textsuperscript{511} The conventions distinguish between the different form of breaches by classifying acts such as wilful killing, torture or inhuman treatment, intentionally causing great suffering or injury, or wilfully depriving POW of their rights to a fair and regular trial as ‘grave breaches’.\textsuperscript{512} This view of the disregard for reciprocity is further seen when reflecting on the provisions in IHL particularly when enemy POW are expected to be released

\textsuperscript{507} International Committee of the Red Cross, Geneva Convention (III) relative to the Treatment of Prisoners of War, Commentary on the General Provisions Common Article 2, 1949.

\textsuperscript{508} International Committee of the Red Cross, Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135, Article 2.

\textsuperscript{509} Supra note 172, p. 367; and supra note 198, p. 51.

\textsuperscript{510} Supra note 198, pp. 49-50.

\textsuperscript{511} The enforcement of the provisions of the 1949 Geneva Convention by States is cited in all four Conventions, for instance International Committee of the Red Cross, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Article 49.

\textsuperscript{512} Grave Breaches have been identified in all four of the 1949 Geneva Conventions, as an example, supra note 508, Article 130.
at the end of the conflict even if the enemy has not yet released its POW.\textsuperscript{513} In practical examples, though, the release of POW is usually on reciprocal exchange such as POW exchange post the Iran-Iraq war.\textsuperscript{514}

At the backdrop of the above apparent disregard for reciprocity in IHL, it is important to draw attention to subtle and pertinent examples of reciprocity rooted in the 1949 Geneva Conventions and its 1977 Additional Protocols. There is strong yet discrete evidence of reciprocity in the classification of individuals protected by the 1949 Geneva Conventions or indeed the category of conflict that the Conventions are applicable to.\textsuperscript{515} Contradictions of application of reciprocity start to rise when examining the different provisions under the 1949 Geneva Conventions and the 1977 Additional Protocols. For instance, the 1977 Additional Protocol I states that violation of the rights prohibited by one party does not release the other party from their legal obligations.\textsuperscript{516} However, certain areas of IHL place a great importance on reciprocity such as the right to resume ‘hostilities’ in case of a violation of an ‘armistice’.\textsuperscript{517} In other areas however, the 1977 Additional Protocol I does not provide protection to those classified as ‘unlawful combatant’,\textsuperscript{518} as an example those who have been classified as ‘mercenaries’,\textsuperscript{519} or have taken up fighting under a white flag.\textsuperscript{520} Similarly the 1949 Geneva Conventions do not provide protection to nationals of a State which is not bound by the Convention.\textsuperscript{521} All of these examples suggest a sense of protection based on the principle of reciprocity by which non-party nationals or those operating against the decorum of correct warfare cannot be seen to benefit from the protection provided by IHL.

Even by evaluating Common Article 3 which leaves little regard for reciprocity or reciprocal obligations, it is important to be mindful of what Watts suggests as ‘obligational reciprocity’ with regards to the enforcement of this article.\textsuperscript{522} As convincingly argued by the scholar,

\begin{footnotes}
\item[513] Supra note 508, Article 118; and supra note 198, p. 62.
\item[515] Supra note 172, pp. 407-408.
\item[516] International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 51(8).
\item[517] Supra note 506, Article 40.
\item[518] Supra note 516.
\item[519] Ibid, Article 47.
\item[520] Ibid, Article 37.
\item[521] Supra note 504, Article 4.
\item[522] Supra note 172, pp. 410-411.
\end{footnotes}
Common Article 3 requires international commitment and international enforcement through legal channels and international bodies including the international Courts, and as such, would the claim of breach in obligation under Common Article 3 by a non-contracting party be acceptable in its enforcement?\textsuperscript{523} Notwithstanding the CIL obligations, analysing the recent example of non-international conflicts in Libya or Syria under the terms of the Geneva Conventions, would the UK, France and the US’s claim for a breach in the humanitarian rights of individuals in those States have easily been refuted by Libya or Syria if those States were not party to the Conventions. Further to this point, even though the term ‘armed conflict’ has not been clearly defined in IHL, the commentary on the Common Article 3 provided ‘means of distinguishing a genuine armed conflict from a mere act of banditry’\textsuperscript{524} Within this commentary, a provision for protection of insurgents is dependent on their agreement to be bound by the provisions of the Conventions,\textsuperscript{525} indicating that protection of insurgents is dependent on their actions being bound by the provisions of the Convention. Therefore once again this point is reflective of the contradictory approach of IHL to reciprocity where ‘observational reciprocity’ plays a role in the level of protections that can be deemed under IHL.

Additionally, Common Article 2 suggests a strong reference to reciprocity by stipulating that the provisions in this Article ‘shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’.\textsuperscript{526} This provision resembles reciprocal obligation which is evident in other treaties where binding obligations are limited to States party to an agreement.\textsuperscript{527} There is however a conflict in this Article that is contradictory to the nature of treaties such as the VCLT where the agreement can come to an end in the case of a breach, whereas in Common Article 2, obligations between contracting parties are not affected upon entry of a non-contracting party. Reciprocity in this case surfaces in a different capacity to the discussion on reciprocity in the VCLT but nonetheless, the principle of reciprocity in shaping international duties and obligation of States remain solid. Hence although on the surface principle of reciprocity is not

\textsuperscript{523} Ibid, pp. 410-411.
\textsuperscript{524} International Committee of the Red Cross, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Commentaries to Common Article 3, 1949.
\textsuperscript{525} Ibid, in the commentary it clearly stipulates that the application of the Convention would depend on ‘the insurgent civil authority agrees to be bound by the provisions of the Convention’; and supra note 172, p. 411.
\textsuperscript{526} Supra note 508, Common Article 2.
\textsuperscript{527} Supra note 172, pp. 413-414.
evident in IHL, deeper analysis of this subject matter indicates the influence of reciprocity on its rules and obligations.

It can be argued that there is an incentive for States to accept the provisions since States protect their own armed forces and civilians by accepting to reciprocally provide the same protection to the enemy. Obedience and acceptance of the 1949 Geneva Conventions establishes the duties upon States to protect those captured by them, and in return provides them with the rights of expecting and ensuring that armed forces of their own are thus protected. Despite the inclination of not wanting to provide protection to enemies, the fear of reciprocal ill-treatment of one’s own armed forces is more likely to persuade each State to follow and abide by the rules as set out in IHL such as the Geneva Conventions. The encouragement in this context is similar to what has induced States to provide political and legal immunity to foreign diplomats, which led to the adoption of the Law of Diplomatic Relations.\(^{528}\) By doing so, States had the benefit that by providing immunity to foreign diplomats, their own diplomats abroad would be reciprocally protected. Even though, as an example, in the US Embassy hostages case in Iran, it was seen how the Law of Diplomatic Relations was not adhered to; generally this law is abided by the international community. Higgins regards strong compliance with international diplomatic immunity to be the result of open and transparent reciprocity.\(^{529}\) Franck, in turn, considers that States are willing to comply with the diplomatic immunity for long-term advantages of ensuring protection for their diplomats, even if immediate advantages are to be foregone.\(^{530}\) Barnhoorn places reciprocity as the basis for the arguments presented by the two scholars for the balance of interest when States choose to comply with protecting the foreign diplomats in reciprocal return of protection for their own diplomats abroad.\(^{531}\)

The thesis suggests that there are subtle but concrete examples of reciprocal obligations within IHL even if they are more discrete than in other areas of IL. The fundamental point is that the issue at hand relates to interests of individuals as it is the case in HR laws or elements

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\(^{528}\) Supra note 114.


of IHL, then reciprocal obligations do not have a place but reciprocity comes into play when
the interests of States and the treatment of their armed forces are more in focus. In contrast to
this a challenge in IHL is to establish the role of reciprocity relating to conflicts involving
belligerents openly targeting civilians or killing their POWs or when the rules governing the
laws of international armed conflict have been breached during hostilities. This is an
extensive subject in its own right however, in a nutshell, reciprocating under the umbrella of
reprisal is not permissible in IHL. This is the view at first glance but further detailed
observations indicate that belligerent reprisal, as an enforcement measure and in justification
towards directing the unlawful party to end their actions, is deemed lawful and permissible as
long as certain established rules and conditions are observed. The specific conditions,
established as part of Laws of War, relate to the protection of categories of people who must
not be subjected and targeted by reciprocal reprisal. These conditions were narrowed already
by the 1949 Geneva Conventions which included a category of people and objects against
whom reprisal was not permissible but it was also further narrowed by the expansion and
addition of protected people or objects by the introduction of Additional Protocol I, so that
indiscriminate attack and engaging in a war that does not distinguish and discriminate
between civilian and military targets are considered unlawful. Specifically any kind of
reciprocal reprisal must not target or give rise to the abuse of all civilians [Article 51(6)],
sick, wounded or shipwrecked (Article 20). The fundamental point is to understand that
reciprocity in the form of belligerent reprisal is permissible but under specific conditions
whereby consideration is given to ensure that the humanitarian values and protection of the
rights of victims of the international conflict are preserved and are not abused.

This subject was also tackled by the ICTY in the Kupreskic case when rejecting the claim by
Croats that their attacks on the Muslim populations were reciprocal since their populations
was under attack by the Muslims; the ICTY was adamant that such conduct which would
have resulted in ‘large numbers of civilian casualties’ is against the obligations set by the IHL
and affirmed the ‘irrelevance of reciprocity’ in relation to obligations that ‘have an absolute
and non-derogable character’. The thesis has also alluded to this line of thought that jus
cogens rule and obligations erga omnes do not have a reciprocal nature and are not subject to

532 Supra note 516, Article 51, Article 52 (General Protection of Civilian Objects), Article 54, Article 55
(Protection of the Natural Environment) and Article 56 (Protection of Works and Installations Containing
Dangerous Forces); for further information please see Shane Darcy, The Evolution of the Law of Belligerent
533 Supra note 479, paras. 511-513.
reciprocal obligations. In effect, such rules and obligations are not able to be reduced to a bilateral basis since they are to serve the international community as a whole and to protect the rights of individuals. However as the analysis of this section has demonstrated, there are subtle examples in targeting the States’ interests and treatment of their armed forces that have reciprocal obligations within IHL.

Reflecting back on the above discussions examining pacta sunt servanda, ‘good faith’, jus cogens rules, and obligations erga omnes, the study has provided an analysis of the principles and elements available within IL for valid interpretation of its rules. These operate as guidelines within a framework to ensure the object and purpose of IL is not lost. Valid interpretation of IL rules is extremely important in order for the true intention of the rules to be adhered to. Invalid interpretation of IL rules can have a significant impact on the balance of rights and duties of States. The analysis of valid and invalid interpretation of IL and its repercussions is examined in the following section as a case study reviewing the actions of the Bush Administration in the ‘war on terror’. The case study encompasses many areas of IL and demonstrates the struggle of the Bush Administration with valid interpretation of relevant IL rules. The case study highlights the practical devastating effects of invalid interpretations.

4. Case Study on Interpretation of the Rules of International Law

In a legal ‘system that is reciprocally generated, issues of interpretation occupy a sensitive, central position’. 534 In the study of IL, particularly when the legal system is used at inter-State level, the aim and importance of the role of reciprocity in the interpretation and application of IL rules are primarily to ensure the balance between rights and duties of States is maintained through a consistent approach. Once this aim is achieved unfair advantage is minimised. A recent example of an interpretation of IL rules, causing major uproar, was the US treatment of the detainees held outside the US, namely in Abu Ghraib and Guantanamo Bay. This treatment required routine violation of habeas corpus and engagement in the extraordinary rendition of these detainees followed by

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534 Supra note 40, p. 91; and Jutta Brunnée, Stephen J. Toope, Legitimacy and Legality in International Law: An Interactional Account, 2010, p. 25.
application of extensive interrogation methods. George W. Bush was given legal advice on the ‘war on terror’ on ‘how that war was to be fought: its extent, its limits, and its rules’. The aim of this section is to critically examine the interpretations provided by the Administration’s legal advisors. For this to be systematically conducted, the study begins by exploring the international legal instruments surrounding torture and cruel, inhuman or degrading treatment or punishment (unjust treatment). This is followed by emphasising the significance placed in IL for banning such acts particularly relating to the objective of protecting human dignity whilst upholding fundamental and universal values. The focus will then shift to the interpretation of IL rules by the US on such issues before critically assessing the validity of their interpretation within the framework of IL.

4.1. Torture in International Law

The signatories of the UN Charter ‘reaffirm faith in fundamental human rights, in the dignity and worth of the human person…’. Subsequently these fundamental rights and dignity were recognised as the ‘foundation of freedom, justice and peace in the world’, the Universal Declaration of Human Rights (UNDHR) states that, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Overall it could be observed that the international community not only rejected but also banned torture. However, the debates surrounding the definition of acts constituting torture and unjust treatment continued. The international legal instruments banning torture are the ICCPR, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (DAT); and the United Nations

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535 *Habeas corpus* writ is defined as ‘a writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal’. A petition for habeas corpus is filed for prisoners claiming illegal imprisonment as a result of being held without being charged or when due process has not been followed, *supra* note 2, pp. 728-729; Peter Cane, and Joanne Conaghan (eds.), *The New Oxford Companion To Law*, 2008, pp. 515-516; for further information on *habeas corpus* and its applicability in connection with the detainees held in the US prisons namely Guantanamo bay as a result of extraordinary rendition please see the following the Cases brought by the detainees against the Bush administration: *Rasul v. Bush*; *Hamdan v. Rumsfeld; Boumediene v. Bush; Khaled A. F. Al Odah et al. v. the United States;* and *Hamdi v. Rumsfeld.*


537 *Supra* note 7, Preamble.

538 *Supra* note 96, Preamble.


541 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by General Assembly Resolution 3452 (XXX), 30th Session,
Convention against Torture (UNCAT).\textsuperscript{542} The ICCPR states: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…’.\textsuperscript{543} The UNHRC,\textsuperscript{544} set up to interpret the Article and definition of torture, did not deem it essential to compose a long list of forbidden acts or to ‘establish a sharp distinctions’ between torture and unjust treatments.\textsuperscript{545} In practical terms the UNHRC has simply indicated that both types of acts are in violation of Article 7, without stating whether these violations fall within the scope of torture or unjust treatment. However, it stated that the following factors need to be considered for determining whether acts or treatments fall within the categories of torture or unjust treatment, and whether acts or treatments breach Article 7:

- Purpose and severity together with the nature of the acts or treatments;\textsuperscript{546}
- Surrounding conditions for the treatments with regards to the manner and the length of time that the mental or physical pain lasts or continues, as well as the consequences of the treatments on the victim and other factors like the victim’s health, age and sex.\textsuperscript{547}

The DAT defines torture as intentional actions causing severe mental or physical pain or suffering, upon an individual by or at the instigation of a person acting in a position of public official for the intention or purpose of extracting confession and/or elicitation of information from him/her or third party, as a form of punishment of an individual for any action they have perpetrated or there is a suspicion that they have perpetrated, or intimidation.\textsuperscript{548} This definition by the DAT provided the basis for the UNCAT’s definition of torture; an intentional infliction of mental or physical severe pain or suffering upon an individual, caused ‘by or at the instigation of or with the consent or acquiescence of a public official or other

\textsuperscript{9} December 1975, A/RES/3452(XXX). Through this adoption, it is evident that no objection could have been raised by any of the member states to the contents in the Declaration and it has been deduced that all the United Nations’ member states were in agreement with this definition of torture and unjust treatment.
\textsuperscript{543} Supra note 540, Article 7.
\textsuperscript{544} Supra note 461, para. 2, 26 May 2004; the Committee was formed according to the International Covenant on Civil and Political Rights, Article 28.
\textsuperscript{545} Human Rights Committee, General Comment No. 20 replaces General Comment No. 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), ICCPR, 44th Session, 10 March 1992, para. 4. \textsuperscript{546} Ibid, para. 4.
\textsuperscript{547} Human Rights Committee’s analysis of Article 7 interpretation; for further information see joint publication by Association for the Prevention of Torture and Centre for Justice and International Law, \textit{Torture in International Law, A guide to Jurisprudence}, 2008, pp. 7-8.
\textsuperscript{548} Supra note 541, in Article 1(1) definition of torture excludes actions causing pain or suffering resulting from ‘inherent in or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners’.
person acting in an official capacity'. Although similar to the definition of torture in the DAT, the UNCAT version excludes actions causing pain or suffering that are ‘inherent in or incidental to lawful sanctions’. The element of purpose or intention that is required for an act to be regarded as torture is specified by this Article as: extraction of confession and/or elicitation of information from the individual or a third party; as a form of punishment for them for any action perpetrated, or even for which the suspicion exists of having been perpetrated; for exposing them to coercion and/or intimidation, or for any discriminatory grounds. However, Article 1(1) does not provide a specific definition of unjust treatment or of what acts would be included at this level. As clearly referred to in Article 16 of the UNCAT, there are distinctions made between acts that are to be constituted as torture or unjust treatment. Lesser conditions need to be fulfilled for an act to qualify as an unjust treatment in comparison to torture. Elements constituting torture can be enumerated and reviewed individually as follows:

- Intention for torture
- Infliction of severe mental and physical pain
- Reason or purpose for inflicting such pain (prohibited purpose)
- Consent and agreement as well as being connected to an individual in a public official position or an individual/s who act/s in an official capacity.

As is evident in the UNCAT, the preliminary element for an act to constitute torture is the role of intention of the torturer. The UNCAT states that a purpose or intention to cause severe pain or harm must be evident for an act to be regarded as a torturous act. The second element discusses that the severity and the distinction in a traumatic action that causes pain or suffering has to reach the level of severe mental or physical pain. The third element is the existence of a reason, purpose or aim for inflicting pain and how to clearly measure this in defining the acts which fall within the UNCAT’s definition. Similar to other elements, a reason, purpose or aim must exist for an act to be defined as torture. This is to say that, as precisely discussed by Harper, the specific aim or purpose of a torturer has to be extracting information, confession and/or as a form of punishment, or can be based on any discriminatory ground. The purposes embedded in the UNCAT are often referred to as

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549 Ibid, Article 1.
prohibited purposes. To look at this from another angle, a distinction was drawn by Wauters between the element of motivation and the purpose or aim of the torturer, indicating that motivation for torturous act need not be an important factor in relation to understanding the final outcome that was being sought as a result of inflicting severe pain. 552

In reflecting on the infliction of pain for discriminatory purposes, Wauters discusses that this might be deemed more of a motivation than a purpose, since discrimination might create the motivation as opposed to giving the torturer a purpose. 553 This view is in contrast to the International Tribunals’ judgment, as will be analysed when scrutinising the relevant case-laws. The fourth element addresses the following two factors: 1) consent and agreement; 2) being connected to an individual in the public official position or other individual/s who act/s in an official capacity. Even though the factor of ‘public official’ has no specific definition within the UNCAT or the other international legal instruments, it can be substantiated to refer to any individual whose role is not linked to private bodies; alternatively a person who is tasked by governmental bodies must evidently be acting in a public and official role.

There is further obligation on the UN members banning torture and unjust treatment based on CIL given *jus cogens* rules and their non-derogable character as a result of the value of the *fundamental rights* they serve to protect and safeguard; hence absolute obligation is binding on all States. In the previously discussed case, *Prosecutor v. Anto Furundzija*, 554 where the ICTY emphasises non-derogable obligations, the Court identified three main features relating to banning torture in common with protection of HR: 1) The international community’s attempt to ban torture has placed an emphasis for States to put in place not only rules to ban torture but also to foresee situations that might lead to possible acts of torture whilst withdrawing laws that are contrary to banning torture; 2) The international community’s attempt towards an absolute ban of torture results in the principle of *erga omnes* which thus constitutes a legal obligation on all States, where every State has a right to demand full compliance and taking necessary steps to ban torture; 3) The third feature is how banning torture has been elevated and has obtained a *jus cogens* status. The significance of this

554 *Supra* note 476, paras. 153-156.
elevation is that banning torture has become a peremptory or mandatory rule, and is not justifiable under any legal circumstances.

4.2. The US Interpretation of International Rules relating to Torture and Unjust Treatment

In the aftermath of 9/11 attacks, some key interpretative approaches were adopted by the Bush Administration and the legal advisors. George W. Bush asked for legal advice on ‘war on terror’. The fundamental questions were the rights of these detainees together with the length of their interrogation for extracting information. The responses came in the form of memos, later titled ‘Torture Memos’, comprising the advice offered on the interpretation of torture, ultimately adopted by the Department of Justice. Bybee offered a definition of torture by reflecting on standards of conduct for interrogation under both the UNCAT and 18 U.S.C. sections 2340-2340A. He interpreted that for an act to be classified as torture, the act must be of an extreme nature causing, ‘serious physical injury, such as organ failure, impairment of bodily function, or even death’, and that any mental injury must be an injury that lasts a period of ‘months or even years’.

Given the reservation placed by the US on the UNCAT, limiting its obligation towards banning unjust treatments to what constitutes an illegal act within the US constitution, Bybee reflected on acts deemed illegal under the US Statute. His first deduction was that ‘cruel, inhuman, or degrading’ treatment is not torture according to the Statute, and besides

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555 The fundamental figures in the discussions around the treatment and the status of the suspected detainees were Dick Cheney (Vice President to President Bush), John Ashcroft (Attorney General), Jay Scott Bybee (Assistant Attorney General), Alberto Gonzales (Chief Counsel to President Bush) and John Yoo (Deputy Assistant Attorney General).
556 Supra note 536, pp. 115-126.
557 Jay Bybee Memorandum to Alberto Gonzales, US Department of Justice: Office of Counsel to the president, Washington, D.C. 20530, 07 February 2002; supra note 536, pp. 96-103; for further information on the definition of torture in the United States’ Statute refer to United States Code, Title 18, Chapter 113C, Sections 2340-2340A.
559 The reservation on the Convention states that: ‘[T]he United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as these terms mean the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the United States Constitution; additionally the United States believed that its existing national laws were adequate to cover torture within its own territory and predominantly focused on the torture outside their territory, CRS Report for Congress, U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, 25 January 2008.
interpreted ‘possible defenses that would negate any claim that certain interrogation methods violate the Statute’.\textsuperscript{560} Gonzales built on this by suggesting that the unique kind of war facing the US created a necessity of self-defense which could justify interrogation techniques violating Section 2340 A.\textsuperscript{561} Yoo’s memo to Gonzales also endorsed Bybee’s interpretation of torture.\textsuperscript{562} Yoo emphasised the intention of those involved to inflict long-term harm (severe physical pain or suffering) by reiterating Bybee’s reasoning that ‘the infliction of such pain must be the defendant's precise objective’ and this harm must be the result of ‘predicate acts, such as threatening imminent death, and intend to cause ‘prolonged mental harm’.\textsuperscript{563} Yoo additionally suggested that, ‘international law clearly could not hold the United States to an obligation different than that expressed in § 2340’ on the grounds of the reservations placed on the UNCAT, as well as the interpretive understanding submitted by the US on the UNCAT.\textsuperscript{564}

Since the US considered itself at war, the Administration were aware of a need for safeguards to ensure the US would not be in violation of the Geneva Convention relating to the treatment of the detainees, irrespective of the interrogation methods applied. Hence, legal advisors additionally addressed the pertinent issue of the detainees’ rights relating to the applicability of the Geneva Convention as well as the \textit{habeas corpus} and their extraordinary rendition. The predominant interpretation for this was provided by Gonzales and Ashcroft memos where they provided two options for how the detainees should be classified as well as the extent to which both options best fulfilled US interests.\textsuperscript{565} Ashcroft’s two options suggested declaring Afghanistan as a failed State, with the interpretation that the Geneva Convention protections would not apply to the detainees from Afghanistan, or alternatively, the Taliban combatants were to be regarded as ‘unlawful combatants’ which meant the 1949 Geneva Convention III would not apply.\textsuperscript{566} The theme of the memos addressed the position of the US, considering advantages and disadvantages of both options with regard to the legal position of the US forces. The memos additionally considered the

\textsuperscript{560} Supra note 558; and supra note 536, pp. 96-103.

\textsuperscript{561} Supra note 536, pp. 149-155.

\textsuperscript{562} John Yoo Memorandum to Alberto Gonzales Counsel to the president, US Department of Justice: Office of Counsel to the president, Washington, D.C. 20530, 01 August 2002, pp. 108 – 113.

\textsuperscript{563} Ibid.

\textsuperscript{564} Status of the United States of America on Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations - Treaty Series, Vol. 1465.

\textsuperscript{565} Supra note 536, pp. 83-87 and 92-93.

\textsuperscript{566} Ibid, pp. 92-93.
likelihood of action against the US in the federal Courts in the event of cases that might be brought against them, particularly the liability which might be faced by the US.

5. Critical Examination of the US approach in relation to Interpretation of the Rules of International Law, Torture and Unjust Treatment

The focus in this section is to critically examine the interpretation of the legal advisors and the role of reciprocity in their interpretation. The main focus of the interpretations concentrates on: 1) Whether the treatment of the detainees constituted torture? 2) Should the detainees be protected by the rules of Geneva Convention? The rights and duties of the detainees under the latter, and the status assigned to them could determine the parameters for their treatment and protection. Given that the treatment of the detainees was the prime concern of the Administration, the study predominantly focuses on the manner of the treatment, to assess and question the validity and the subjectivity of their approach based on IL rules with particular attention to the principles of valid interpretation, in accordance with the notion of ‘good faith’.

5.1. Reservations

The basis for the US’ interpretation has its roots in their reservations on the UNCAT and the ICCPR. The nature of their reservations is open to criticism given the fundamental purpose of these legal instruments is to prevent torture and unjust treatment. Hence, placing a reservation contradictory to this purpose defeats the object and is inconsistent with the spirit of the treaty. This view is iterated in the VCLT, which took a similar approach adopted by the ICJ on the principle of how inserting a reservation on the Genocide Convention jeopardises the key purpose of the treaty. There are similarities in approaches between reservation on the Genocide Convention applicable when assessing the US reservations placed on the UNCAT and the ICCPR. This is particularly relevant given the same weight placed by the international community on banning acts of aggression and genocide, together

567 Supra note 128, Article 19(C).
568 Supra note 148, pp. 23-24.
with the international efforts to prevent such acts, by classifying them as acts infringing upon the fundamental rights.\textsuperscript{569}

The ICJ’s approach to reservation on the Genocide Convention highlights that ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’.\textsuperscript{570} The ICJ was of the opinion that such obligations are binding on all States, even without this convention, since the principles at stake are recognised by the international community to be undignified, and there is an obligation to eradicate such acts. The notion of ‘civilized nation’ and their accepted ‘general principles’ as sources of IL was discussed previously, and as such the principles accepted by the international community, should be disseminated as binding obligations, without any specific treaty or convention. In the Bush advisors’ interpretation, there is no reference to entitlement of individuals’ fundamental rights, irrespective of their crimes and misgivings, despite the stress placed on those rights in the international legal instruments, namely, the UN Charter, the ICCPR and the UNCAT. The judgment in \textit{Prosecutor v. Kupreskic} case further emphasised the importance of fundamental rights by proclaiming that, ‘the defining characteristic of modern international humanitarian law is…the obligation to uphold key…body of law regardless of the conduct of enemy combatant’.\textsuperscript{571} Additionally, the legal advisors disregarded the emphasis placed by the UNCAT that: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war…may be invoked as a justification of torture’.\textsuperscript{572} This brings to light the previous assertion that change in circumstances does not always alter the obligations owed by States particularly on obligations that are aimed to protect values of the international community.

\textbf{5.2. Jus Cogens Rules and the Interpretation of the Bush Administration}

In the legal team’s reasoning, there is a disregard of peremptory jus cogens rules where no reference is made to the legal obligation on the US to respect and abide by these rules encompassing an absolute ban on torture. It needs to be stressed that the US is banned from torture and unjust treatment on the basis of CIL with its binding values of peremptory rules

\textsuperscript{569} \textit{Supra} note 540, Article 4; and \textit{supra} note 319, para. 34.

\textsuperscript{570} \textit{Supra} note 148, p. 23.

\textsuperscript{571} \textit{Supra} note 479, para 511.

\textsuperscript{572} \textit{Supra} note 542.
and their non-derogability characteristics, as was articulated in the ICTY cases of *Prosecutor v. Anto Furundzija* and *Kupreskic* as discussed earlier.

On a related matter, Osiel supports the US justifications for steps taken in the ‘war on terror’, arguing that the peremptory rules of *jus cogens* do not apply to the US, since they have ‘never officially endorsed’ these rules. Osiel has not considered that *jus cogens* rules are neither optional, nor do they require the ‘consent’ of States for their applicability. Although the scholar’s argument could be driven from the strong reservations, understandings, and declarations placed by the US, his argument could be challenged in two ways. Firstly, the adoption of the ICCPR’s fundamental provisions and their intent and purpose are the basis of CIL that has subsequently become treaty law; insofar as their provisions are to protect the *fundamental rights*, no State can deem itself removed from these obligations. Despite the US reservations, it cannot escape CIL nature of the granted protection. Secondly, as was discussed in Chapter Two, the formulation of CIL based on custom and *opinio juris* does not require unanimous agreement, and a majority is sufficient for a practice to form CIL.

*Jus cogens* rules are identified in the category of rules that bring certain legal obligations, irrespective of States’ specific ‘consent’, and are deemed superior to *jus dispositivum* rules. Shifting back to the ICCPR, supporting the *fundamental rights* particularly their non-derogatory nature as has been awarded to these rights, cannot be undermined. Therefore, as far as IL is concerned, neither Osiel’s reasoning nor the disregard by the Bush Administration can be deemed valid.

### 5.3. Interpretations of the Definition of Torture and Unjust Treatments

The interpretation of advisors, namely Bybee, for specific intent and definition of acts constituting torture and/or unjust treatment in the UNCAT has been subject to much

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573 *Supra* note 198, p. 51.
574 The United States ratified the International Covenant on Civil and Political Rights but placed five reservations, five understandings, and four declarations, limiting the scope of applicability of the provisions and articles of the Covenant into its domestic legal system. The Senate ratification declared that the Covenant Articles are ‘not self-executing’ and as a result no domestic law has been changed, and the United States has effectively not accepted any of the Covenant obligations. For detailed information on the reservations, understanding and declarations placed see the International Covenant on Civil and Political Rights, 16 December 1966, United Nations - Treaty Series, Vol. 999, p. 171 and Vol. 1057, p. 407.
576 *Supra* note 540, Article 4 cites that the *fundamental rights* cannot be subject to derogation.
criticism.\textsuperscript{577} The legal advisors have referred to torture and unjust treatment, or to coercive interrogation, as two distinctive acts, but have failed to explore detailed analysis of which acts constitute torture and which acts constitute unjust treatment. This technical approach is flawed so far as limiting the interpretation to suggest that an act is torture when it results in death or organ failure with long term effect. The timing and theme that emerges from these memos suggest that the interpretations were directed and focused on the detainees already in US possession and relating to interrogation practices that were already in place, but with the view of exonerating the US of any wrong-doing under IL.

In Yoo’s interpretation, for an act to constitute torture, the severe pain caused must be due to prior intention and not as a consequence of factors such as negligence. Clearly not every severe pain caused is to be assumed as intention for torture. For instance, as suggested by Wauters, a line must be drawn between the elements of negligence and intent to cause harm; in other words, if suffering or harm has been inflicted as a result of negligence with no specific intention of causing pain, it does not qualify as torture.\textsuperscript{578} However in the situations of the treatment of detainees, where pain was inflicted in interrogation procedure, it is difficult to imagine that pain would have been inflicted as a by-product of negligence as opposed to intended or planned. The interpretation of the Administration regarding the intention of torture is in sharp contrast to the UNCAT definition, and moreover, the US military acts were presented by the Administration as unintentional infliction of pain rather than application of interrogation methods.

Considering the distinction provided in the UNCAT for torture and other acts, Harper critically argues that the UNCAT fails to supply a specific level or an amount in defining the level of pain determining ‘severe pain’.\textsuperscript{579} Continually there is a need for Courts’ interpretations of the term ‘severe’,\textsuperscript{580} thus a vivid account of what constitutes torture and unjust treatment is supported by the International Criminal Tribunals’ judgments. The


\textsuperscript{578} \textit{Ibid} note 552, pp. 158-159.

\textsuperscript{579} \textit{Ibid} note 551, p. 898

\textsuperscript{580} \textit{Ibid}, p. 898.
International Criminal Tribunal for Rwanda,581 (ICTR) in the *Prosecutor v. Jean-Paul Akayesu* case,582 acknowledged the UNCAT in its own judgment since there is a lack of definition of torture in the context of IHL. The ICTR reached the consideration that rape is regarded as torture when it is ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’, and interprets rape as an aggressive act aimed at breaching human dignity.583 The ICTR further cited that the rape was employed for ‘such purpose as intimidation, degradation, humiliation, punishment, control or destruction of a person’.584 The interpretation of the Administration’s advisors shows a disregard to the ICTR’s definition of torture. In other words, the ICTR considers an act such as rape as torture, but the Administration’s interpretation only regards torture as an act so severe as to result in organ failure or death. Gonzales goes as far as suggesting that ‘sensory deprivation techniques’ ‘may amount to cruel, inhuman or degrading treatment…do not produce pain or suffering of the necessary intensity to meet the definition of torture’.585

On a related matter, the UNCAT Article 16, looks at the conditions for an act to be regarded as unjust treatment as opposed to torture defined in Article 1. The main differences lie in: 1) the presence or absence of aim, purpose or intention; and 2) the severity of the level of pain inflicted. Similar to issues with Article 1, Article 16 does not provide clear guidance in determining the level or amount of ‘severe pain’. A relevant example of unjust treatment is evident in the ICTY’s ruling in *Prosecutor v. Zejnil Delalic* case,586 where father and son, Danilo and Miso Kuljanin ‘were forced to slap each other repeatedly’.587 The ICTY ruled that this would have caused humiliation when being subjected to ‘serious pain and indignity’. This clearly highlights again a major divide between the interpretation of torture and unjust treatment by the Administration and by the international Courts. For instance, a lesser act of

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581 The International Criminal Tribunal for Rwanda was established by the Security Council to prosecute the individuals responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda during 1 January 1994 and 31 December 1994, Resolution 955, 3453rd meeting, 8 November 1994, S/RES/955.


father and son being forced to slap each other is regarded as unjust treatment by the ICTY, but the advisors claimed that only extreme severe acts resulting in death or organ failure are worthy of consideration as torture.

5.4. Interpretations of the Rights of Detainees under the 1949 Geneva Conventions

There are complexities involved when assessing the legal status, rights and duties of Al Qaeda and Taliban members. The Administration classified the detainees as ‘unlawful enemy combatant’ with no protection granted to them on the basis of the 1949 Geneva Conventions. Osiel provides a detailed analysis of justifications in favour of the approach adopted by the Administration which were: 1) Common Article 2 of the 1949 Geneva Conventions does not apply since the conflict is not between States; 2) most detainees were nationals of States not involved as party to the conflict so they were not covered on the ground of their nationality under the Fourth 1949 Geneva Convention; 3) Al Qaeda members are ‘unprivileged belligerents’ since they use arms without being members of the armed force or military of a sovereign State, thus they cannot be considered as POW and claim the rights granted under Article 4 of the Third 1949 Geneva Convention; 4) Al Qaeda never accepted and/or applied the 1949 Geneva Conventions; 5) similarly Taliban fighters were not POW, having ignored the requirements of the provisions in the 1949 Geneva Conventions; 6) the conflict with Al Qaeda is not a civil war and is across many nations thus Common Article 3 of the 1949 Geneva Conventions does not apply to the conflict since it could not be considered as ‘not of an international character’. Despite the arguments presented, the US Supreme Court in Hamdan case held the view that the detainees were protected by Common Article 3 of the 1949 Geneva Conventions, by referring to Article 75 of the 1977 Additional Protocol II. Osiel himself, though, is of the view that the US is not bound by this since they have not ratified the 1977 Additional Protocols.

A counter-argument for the US interpretation can be observed in Sands’ analysis where the scholar claims that, under the US Presidential order decrees, all Guantanamo detainees are

588 Supra note 198, p. 52.
589 Ibid, p. 53.
590 Ibid, p. 53.
591 Ibid, p. 53.
considered to be ‘unlawful combatants’ given that ‘Al Qaeda detainees are…part of a foreign terrorist organization which is not a state and cannot be a party to the Geneva Conventions; hence its personnel are not entitled to proper prisoner of war status’; and as to the ‘Taliban detainees, they do not qualify for prisoner of war status because they do not meet the requirements for lawful combatant status’.  Consequently, according to the order, the detainees have been disqualified from having any rights under IHL. Sands provides a different viewpoint arguing that if the terrorist suspect is linked to the ‘Taliban’s regular armed forces…then he is a combatant, and must be treated as such. Once caught, he is entitled to protection under IHL….Even if it is suspected that he has information which may assist in the ‘war on terrorism’ there are strict constraints on his interrogation’. In any case, Sands argues that under any circumstances the suspect can never be subjected to torture or ‘treated inhumanely’. Alternatively if a suspect is a ‘member of Al-Qaeda who is thought to have planned a suicide attack’ should he be considered a ‘combatant or criminal?’ Sands’ response is that generally, the suspect is regarded as criminal according to IL, but even in this case the ordinary protection of law is applicable, therefore, the suspect cannot be subjected to torture or treated inhumanely.

The focus revolves around whether these detainees are ‘lawful’ or ‘unlawful combatants’, but in the meantime there are other fundamental challenges that need to be addressed. Firstly a collective mass pre-labelling has taken place for all detainees, encompassing anyone caught suspected of involvement in the ‘war on terror’, irrespective of whether they were caught in or out of the battlefields. Can this collective labelling apply to everyone captured, including those captured in neutral countries such as Indonesia, Germany, Canada and so on? In fact, is it not arbitrary what title is given to the detainees, since even if we assume all of these detainees were captured as part of the ‘war on terror’, is it correct to pre-determine their status without any trial? From a legal standpoint, is the judicial system not the authority to examine the case of each detainee on individual merit before declaring their rightful status? Only a tribunal can be the judge of their rightful status and their subsequent rights, and until that time they are merely to be regarded as being in protective custody. The 1949 Geneva Convention III is very clear on this point: ‘Should any doubt arise as to whether persons,

593 Ibid, p. 145.
having committed a belligerent act and having fallen into the hands of the enemy…such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal’. The US has not held any such tribunals for the detainees, and the president made the call on assigning status onto the detainees even before their capture. Interestingly, Sands expands his previous criticism by claiming that not only is their interpretation in contradiction with IL, it also contradicts the US’s own relevant rules which makes it explicit that a doubt arises whenever a captive who has partaken of hostilities asserts a right to be a POW.

Despite every interpretation given for denial of any rights to the detainees, the Nuremberg Tribunal judgement relating to ‘captivity’ of prisoners at war times cannot be forgotten or ignored. The Judgement made it clear that ‘captivity’ of prisoners must be ‘neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent prisoners of war from further participation in war’. Therefore until these detainees were brought before a tribunal, they should have the protection under the 1949 Geneva Conventions and any other interpretation as was made by the US is in breach of IHL. It is worth reiterating that until the present time, no tribunal has been set up to assess the rights and duties of the detainees regarding their charge or release.

The interpretation of IL by the Bush Administration took a more reciprocal turn when the advisors suggested that the US was acting in self-defence following the 9/11 attacks, thus allowing them to react reciprocally. Self-defence is a reciprocal right in IL as discussed in the following Chapter. The view was based on the argument that the survival of the US was at stake, following increased terrorism threats by such groups as Al-Qaeda. This survival risk is not to be assumed to be the same as a State’s inherent right to self-defence, which is a legal right of every State. The conduct of the US, in the wake of 9/11 attacks, was not in self-

596 Supra note 508.
598 The United States Army’s Field Manual provides ‘interim protection’ where there is a doubt on the status of the prisoner whilst their status is being reviewed by a ‘competent tribunal’, The United States Army’s Field Manual No. 27-10, The Law of Land Warfare, Chapter 3 – Prisoners of War, Section I, para. 71, 18 July 1956; supra note 592, p. 149.
600 The right to self-defence was discussed previously and will be further discussed in Chapter Four.
defence against a nation but was more a case of pushing the parameters for a State’s interest in relation to any given issue.

In this critical analysis, the study has examined the different interpretations applied to different areas of IL by the Bush Administration. Two important factors are the contradictions between the Administration’s interpretations and those of the International Courts, as well as the contradictions between those interpretations and the view of the US Supreme Court. In relation to the interpretation of treaties, the Supreme Court states: ‘[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties’. 601 The Administration has contrived a new code of law relating to interrogation rules and custody arrangements. The result is to deprive the detainees of their legal rights, so keeping them out of Courts, including foreign or American, and circumventing IL, and the Administration and all people who are involved in the ‘war on terror’ will be exempt from all kinds of responsibility, prosecution and legal obligation. It is highly questionable and regrettable that the Bush Administration could stand firm behind their interpretation and claim that their approach was consistent with applying IL rules and interpreting them in accordance with ‘good faith’. If in their interpretation severe interrogation methods are legal what then constitutes illegality?

6. Conclusion

This Chapter provided an interdisciplinary research aiming to bridge IP and IL through the rule of law. The study discussed the rule of law as the driving factor of IL establishing a dividing line between IL and IP elaborating how IL’s validity, objectivity and existence is separated from political views and interests. The important relevance of the discussion on the rule of law revolves around the constituting factors of the legal system, and hence it is based upon the values and principles of the international community. These principles by their very nature are broad and generic, yet concise and clear, as they provide the principal guidelines in formulating, interpreting and executing the law. For these principles to carry the required merit and legitimacy, they are required to be consistent, coherent, uniform, legal and just which were introduced in this study as the constituent elements of the rule of law which

include legality, consistency, coherency, uniformity, legitimacy, and justice. The constituent elements of the rule of law are individually significant and their absolute importance is in their collective functionality and its outcome. Each of these elements can be compared to links in a chain where their effective functionality is much stronger when inter-linked. If a rule fails to meet one of these integral components of the rule of law, then it will fail to be deemed law and falls outside the scope of the rule of law. The terminology of the rule of law, consequently, suggests the existence of its legally justified rules, based on reasons, and is formulated according to valid, fixed and firm norms. These valid rules are not only driven from constructive purposes, but also aim to protect rights in different forms. Hence, the rules would neither contradict each other, nor be tendentious by their nature. These constitutive elements embrace and promote the notion of equality and fairness which become particularly important in the study of IL and the role of reciprocity within it. The operation of IL requires a reciprocal sense of responsibility and commitment amongst States to ensure equality of rights and duties under the umbrella of fairness and justice for all States. Given the fundamental role played by States in every aspect of IL, the rule of law together with reciprocity, regulate and deters States from frequently applying their every interest and ‘will’ and encourage and incentivise them to move within the set parameters.

The rule of law is broad and general since on the one hand it is required to provide general rules for a society applicable to different situations, on the other hand, the more general the rules, the more incoherent they are, and thus open to various interpretations. The essence of the rule of law in the context of IL primarily lies in its interpretation. One of IL’s achievements is its flexibility, while limiting the deviation from the specific intent of each rule by providing rigid and specific interpretation guidelines. These tools ensure the context and the essence of IL is not lost through obscure interpretation. This objective is achieved if interpretation is based on reason and true to the original object and purpose of the rules. The guidelines are based on jus cogens rules, obligations erga omnes, the principle of pacta sunt servanda, and ‘good faith’.

In IL system the rules and obligations are fundamentally set through bilateral, multilateral agreements and/or CIL. The study examined the distinctions between the international obligations created under different type of relations ranging from bilateral, bilaterlisable multilateral, non-bilaterlisable multilateral and erga omnes within multilateral agreements
particularly exploring the nature and type of reciprocity within these obligations and relations. It was seen how the bilateral agreements almost take a form of a contract between two parties encompassing their specific agreements and create a direct reciprocal relationship based on equal rights and obligations. Multilateral agreements were examined in light of their true nature where at times, content of some multilateral agreements are aggregation of bilateral agreements which create bilateral and reciprocal obligations that are not ‘bilateralizable’ since the obligations set within them are to benefit the international community as a whole. Reciprocity is embedded within bilateralisable multilateral agreements but where the obligations are absolute and non-derogable, the obligations are non-reciprocal. The latter agreements are based upon *jus cogens* rules and are obligations *erga omnes* which are non-reciprocal since their aim is to protect the fundamental values of the international community. HR laws as pertinent examples of non-reciprocal rules were looked at, IHL however imposes absolute and non-derogable obligations where they related to the protection of individuals but the study demonstrated the subtle yet concrete examples of reciprocity within IHL such as the right to resume ‘hostilities’ in case of a violation of an ‘armistice’ or when violation of the rights prohibited by one party does not release the other party from their legal obligations.

The international community has demonstrated its resolve to protect and uphold human rights, in particular the *fundamental rights* which captures the moral aspect of human rights and fundamental values which led to the creation of relevant legal rules. The promotion and respect for *fundamental rights* cannot be undermined in pursuit of States’ interests. *Jus cogens* rules and obligations *erga omnes* stand to give clarity to international obligations, expectations and protection, including the prohibition of aggression, genocide, slavery, and racial discrimination. States cannot revert to reciprocal reaction to breach *fundamental rights* on this basis. For this purpose, reciprocity takes a step back when looking at the legal instruments created for the protection of human rights and human dignity. The principle of reciprocity’s attributes is more relevant to balancing equality and interests of States. The significance of reciprocity is in its influence and focus on State practice and behaviours illustrating how reciprocity is an essential tool in balancing the rights and duties of States by encouraging them to perform and fulfil obligations whilst discouraging them from wrong-doings.
The analysis of valid and invalid interpretation of IL and its impacts was examined using a case study focusing on the actions and interpretations of the Bush Administration in the ‘war on terror’ demonstrating how they struggled with reaching the objective and purpose of the relevant IL rules. The reservations placed, and their interpretation, paved the way to fulfil their intended purposes. Their approach, disregarding IL rules in the spirit of the guidelines, conveys a message that they not only lost all sense and guidance of the required direction by the rule of law, but also adopted an opposite commitment to the underlying trend set for integral parts of the rule of law. The interpretive approach addressed a pre-arranged and/or pre-determined approach which raises the question of whether or not this is a different and hegemonic and unilateral approach to the applicability of the certain rules of IL.

This Chapter examined and focused on the rule of law and its relationship with IL to discuss that in reciprocal inter-state interactions, the objective of the rule of law is to act as a bridge between IP and IL to establish the required stability for the international legal system. The study discussed how the rule of law as the driving factor of IL establishes a dividing line between IL and IP elaborating how IL’s validity, objectivity and existence is separated from political views and interests of States. It was discussed how, despite the direct involvement of States in formulation of IL, the parameters of the rule of law may not be changed by States based upon their arbitrary ‘will’. IL system allows States to choose their rights and obligations, which means an obligation or duty is in force after States have given their ‘consent’ to accepting such obligation or duty. However if States choose to limit their obligations under IL then reciprocity plays a role for the rule of law to protect others with the aim of having the same level of obligation in their dealings with that State. Additionally reciprocity is the key for creating a balance between rights and obligations since a State will have knowledge in the fact that by requesting a right, the same right will be granted to other States whilst non-fulfilment of an obligation will also have consequences in a tit-for-tat form.

It is clear to see how reciprocity can therefore create, protect and maintain equality of rights. For example when a State places a reservation, the principle of reciprocity limits the obligation of other States in relation to the reserving State. Similarly in CIL when a right is claimed by one State this right must be made available to all States and others must be able to share in the benefit of this right. Therefore in this context the rule of law is preserved when

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602 Supra note 4, pp. 89-90.
all States have the same level of obligations in their interactions and no unfair advantage can be gained by the reserving State.
Chapter Four: Reciprocity and Enforcement Mechanisms of International Law

1. Introduction

Having scrutinised the sources of IL and the rule of law underlining these sources, it is important to shift the focus to how these laws are to be enforced and how commitment and adherence to these rules could be secured. IL like any other legal system is in need of enforcement mechanisms, since these mechanisms play an important role in encouraging compliance and commitment of its subjects to their duties and obligations to protect the rights of its subjects, whilst acting as a deterrence of any non-obedience. Collectively, the enforcement mechanisms must be able to deal with issues of non-compliance and serving justice to the injured parties effectively and decidedly. The nature and framework of IL is such that its enforcement is unlike any national system, which is likely to have a uniform judicial system, policing, adherence to law, and finally executors aiming to enforce and punish any breach in legal duties. The enforcement of IL in this context includes coercive response towards States in breach of international legal rules and obligations. IL does not possess such distinct organs in enforcing law at the international arena and, as such, the aim of this Chapter is to explore the enforcement mechanisms available under IL, their effectiveness and accessibility, together with the consequences of the actions taken under the enforcement systems.

The enforcement of international rules is a wide-reaching and fascinating subject and its uniqueness has resulted in a challenge to its effectiveness. Due to its non-conventional system, IL enforcement has been subject of much criticism and pessimism. The enforcement mechanisms of IL could be categorised as centralised and non-centralised, where the former includes specific international organs tasked with enforcing IL rules and obligations whereas the latter encompasses the options available to States to negate disobedience and encourage compliance. One of the aims of IL is to promote non-aggressive and non-confrontational actions in response to breach of agreements and obligations. This is based on the IL principle of peaceful settlement of disputes as adopted by the international community through ‘Declaration on Principles of IL concerning Friendly Relation and Co-operation among
States…’ 603 This resolution together with the UN Charter set the basis for the internationally accepted IL principles. The emphasis of this resolution is to ensure disputes are settled peacefully by States themselves through processes such as negotiation, mediation, arbitration before resorting to the centralised enforcement channels given the horizontal and de-centralised IL system.

States are encouraged not to lose sight of the ultimate goals of IL for maintaining international peace, security and justice; subsequently, efforts must be made to avoid escalation of disputes likely to endanger peace and security. For that effect, there are several stipulations evident throughout IL which allows a remedial response by the affected party without the need to resort to enforcement organs. Reciprocity plays a vital role in bringing disputes towards peaceful ends by establishing, creating and maintaining the balance of rights and duties between States. The principle of reciprocity and the principle of equality of States are powerful principles that help create and maintain the peaceful balance within the international community. States have equal rights and duties under IL irrespective of their size or power and disputes are minimised if States do not feel a threat to their equality rights. Under the principle of reciprocity wrong-doers will be fearful of reciprocal response to their efforts at gaining an undue and unfair advantage since injured States will be given the right to retaliate reciprocally or respond back to a wrong-doing act. Moreover, disputes are peacefully settled if States are able to resort to reciprocal measures to bring about a balance through gaining same advantages. More importantly reciprocity plays an important role in encouraging a wrong-doing State back to obedience and compliance with IL. As mentioned before, reciprocity in this respect operates essentially to influence and impact on State practice and behaviours by creating a balance of rights and duties of States by encouraging States to perform and fulfil their obligations whilst discouraging them from wrong-doings. The absence of a powerful legal authority to enforce IL has placed reciprocity in a pivotal position. Hence, the objective of this analysis is to investigate how, and to what extent, IL is affected by the intricacies of the enforcement mechanisms which result in the weaknesses and limitations of its own system. Using the analysis, this Chapter explores the challenges and consequences of this situation, and how the international community has responded and continues to respond. This will help explore how these challenges have affected different

603 Supra note 174.
areas of IL, examining the reasons and circumstances for this whilst exploring the role of reciprocity within the enforcement of IL.

One of these stipulations was examined in Chapter Two when discussing the option in the VCLT in response to material breach in the agreements. Other strong stipulations are evident in the Charter providing the right to self-defence as well as the right to remedial response of counter-measure. These two stipulations are discussed in detail in the following section before discussing the existing main IL enforcement organs. The enforcement organs mainly comprise the power granted to the UNSC, the ICJ, the WTO’s DSB, the International Court of Arbitration, the International Tribunal for the Law of Sea, and the International Criminal Court (ICC). The focus of the enforcement bodies in this thesis is only on the first three enforcement mechanisms since the ICC has a limited jurisdiction, and is a controversial institution, for instance, over forty States have not yet ratified the ICC Statute, the International Court of Arbitration deals with disputes on international commerce and business only, the International Tribunal for the Law of Sea is more limited in its scope than the general purpose of this Chapter.

This study explores various dimensions of the three enforcing organs, particularly the significant role played by them in enforcing IL rules, as well as exploring the enforcement power bestowed upon each of these organs. The analysis is accompanied by examining the UNSC and the ICJ’s relationships and approaches to issues they are tasked to deal with. This

604 The International Criminal Court Statute, Articles 5-21, stipulates its jurisdiction over genocide, crimes against humanity and war crimes, limiting the jurisdiction of the Court and only authorising it to examine crimes occurring since 1 July 2002; specifically under Article 17(1) of the Statute, the principle of 'complementarity' indicates that certain Cases will be 'inadmissible' even when the Court has jurisdiction over the Cases. Under Article 17(1b) a Case will be inadmissible if 'The Case has been investigated by a State which has jurisdiction over it...'; the Statute adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, came into force 1 July 2002, United Nations - Treaty Series, Vol. 2187, No. 38544.

605 Even though the Rome Statute came into force in 2002, a large number of States as yet have not ratified it. Despite a growing number of ratifications/accessions from initial 66 to 122, effectiveness of the operation of the International Criminal Court co-operation of more States are needed. For further information please see, http://www.iccnow.org/?mod=romesignatures; and http://www.iccnow.org/?mod=romeratification.

606 The International Court of Arbitration, created in 1923, is an international leading system to resolve international commercial and business disputes, the Court supervises arbitration and assists to overcome obstacles. ‘It does not itself resolve disputes, a task that is carried out by independent arbitrators. The Court makes every effort to ensure that the award is enforceable in national courts if need be, although in practice the parties usually comply’.

607 The International Tribunal for the Law of Sea was established to deal with disputes arising from interpretation and application of the Convention on the Law of the Sea which came into force on 16 November 1994 and was officially inaugurated on 18 October 1996.
is followed by examining the relationship between the UNSC’s acts or resolutions and their relationship with the rule of law. Placing the analysis of the pillars of the rule of law examined in the preceding Chapter, this study proceeds to explore the pillars upon which effective legal enforcement mechanisms and organs must work. This study explores the legality and inconsistency of the UNSC’s approaches, namely relating to the ‘war on terror’ and Arab Spring. By doing so, the study seeks to ascertain the extent to which the enforcement mechanisms must act in compliance with the rule of law. Placing the outcome of the analysis on the rule of law and its role in negating subjective and arbitrary will of States on IL, the study examines the need for conformity with the rule of law and commitment to its integral parts as a requirement within the enforcement mechanisms of IL. Given the nature of IL system, weaknesses in its enforcement mechanisms places reciprocity in a pivotal position where the rights and interests of States can be protected and unfair advantages are to be minimised, yet adherence to the rule of law within the context of IL is not compromised. The study further poses the question of whether or not there is a unifying enforcing mechanism in IL to deter a State from complying. If not, to what extent must and could the UNSC transcend the boundaries set by IL?

The sections below begin with some strong examples of non-centralised enforcement measures in the form of reciprocal remedial responses available in IL before assessing the centralised enforcement mechanisms.

2. Non-centralised Enforcement Measures

2.1. Self-Defence as Remedial Response

IL’s non-centralised enforcement measures aim to encourage States to co-exist by resolving conflicts without resorting to violence and escalation of disputes. One of the aims of IL is to promote non-aggressive actions in response to breach of agreements and obligations, and there is a specific stipulation in the UN Charter that prohibits States from using or threatening to use force against another State. An exception to this, however, lies in States’ ‘inherent right of individual or collective self-defence if an armed attack occurs…’ as permitted by the

608 Supra note 7, Article 2(4).
UN Charter.\textsuperscript{609} The Persian Gulf War in 1990 is a clear case showing the application of this right,\textsuperscript{610} where self-defence in collective form was used when Kuwait’s sovereignty was violated and intervention of the coalition forces was carried out.\textsuperscript{611} The sovereignty right of each State is protected by IL and it is strongly stipulated that the UN should not intervene in internal or national matters.\textsuperscript{612} States have been given protection against aggressors through their ‘inherent right’ to self-defence, whilst aggressors lose their claim to sovereignty rights in cases of self-defence reactions. An issue however exists with the ambiguity in IL where self-defence, non-interference in internal affairs of a State and sovereignty rights of a State should take priority.

Self-defence is a strong form of reciprocity which can help maintain peace and co-operation as well as ensuring that existing agreements and treaties are adhered to. If a State is attacked then its rights are under threat and an imbalance of equality between States’ rights is thus created. The ‘inherent right’ to self-defence is a major reciprocal right that allows the restoration of the equality of rights and it is particularly important in order to minimise unfair advantages sought by the aggressor. Nonetheless there are restrictive measures stipulated in IL for self-defence by the injured State. Considering the UN Charter prohibits the use of force by States, under what situations can States resort to armed force in the name of self-defence? In this case, a State resorting to use of force is required to notify the UNSC that it has been the victim of an armed attack.\textsuperscript{613} However, there is ambiguity about what constitutes an armed attack as well as the level of force which can be used to act in self-defence. This is where the obligation on States to interpret treaties in ‘good faith’, and to avoid possible abuses, is essential when interpreting Article 51 of the UN Charter.\textsuperscript{614}

The interference into a State’s sovereignty under the doctrine of self-defence is justifiable on the basis of the sovereignty right of the attacked State. Sovereignty of a State is not only

\begin{thebibliography}{9}
\bibitem{609} Ibid, Article 51.
\bibitem{611} Ibid.
\bibitem{612} Supra note 7, Article 2(7) refers to non-intervention into a State’s internal affair but Article 51 stipulates the ‘inherent right’ of States to self-defence.
\bibitem{613} Supra note 7, Article 51.
\bibitem{614} Supra note 128, Article 31(1).
\end{thebibliography}
about the territorial legitimate ruling but also about the rightful autonomy of a State to feel protected from external interferences into its internal affairs together with its territories and borders. Upon taking action to attack another State, in effect a State can be considered as giving up its sovereignty right of absolute protection from other States since the injured State is authorised under IL to act reciprocally in self-defence. Although Article 51 clearly affirms the inherent right to self-defence when an armed attack has occurred, the legality of self-defence is not limited to reciprocal self-defence following an armed attack, and in some cases is broadened in scope to include anticipatory, pre-emptive, interceptive, preventive, or collective self-defence and the parameters for legality of such actions is the subject of much scholarly debates. Each of these forms of self-defence will be discussed later on in this section.

The Nicaragua case ruling helped clarify somewhat the uncertainty that existed around the use of force and the right to self-defence by identifying the limitations of what constitutes an armed attack, as well as the rights existing in customary and treaty law for self-defence. The ICJ emphasised that the use of force is prohibited in CIL since States are required to cooperate according to the Resolution concerning Friendly Relation. However, the ICJ’s ruling maintained that the general rule of the prohibition of the use of force is subject to certain exceptions such as the right granted by the UN Charter for self-defence. This is to say that, under Article 51 of the UN Charter, when an armed attack takes place, under the right to self-defence an injured State has a right to retaliate but must report to the UNSC immediately. The ICJ in the Nicaragua case deemed it necessary to identify the conditions necessary for the deployment of force in self-defence, citing that the ‘criteria of necessity and proportionality’ must be met in any military reaction. The required conditions of proportionality and necessity in the legitimate right to self-defence were already established

617 Supra note 266, paras. 176 and 187-201.
618 Supra note 174.
619 Supra note 266, para 200.
620 Ibid, paras. 176 and 194.
as CIL rule. This view was shared by the ILC which considered that restraint must be applied in international armed conflicts as well as fulfilment of ‘the requirements of the proportionality and of necessity inherent in the notion of self-defence’. This is to ensure that the rights of States are not impacted through arbitrary reliance on self-defence where the balance between action of one State and the reaction of the other are excessive, disproportionate and/or unnecessary. The ILC reiterated the right to self-defence in an armed attack as an exception to Article 2(4) of the UN Charter, concluding that self-defence is not wrongful as long as it is conducted within the limitations provided by IL. Thus legality of self-defence is reliant on the existence of a proportionate response to the initial act and certain key answers need to be obtained in order to assess the proportionality, namely whether the initial act was lawful and whether the response is proportional to the initial act.

The aim of the conditions for necessity and proportionality is to disallow States to use unnecessary force in the name of self-defence or military counter-measure against other States. By reflecting on both the ICJ and the ILC conclusions, Franck examines how neither of these organs specified the manner in which an injured State can retaliate; additionally he suggests that an attack to be in a similar manner (such as choice of weapon or exact number of casualties) is not essential but the context should be paramount in assessing the legality of any reaction. To advance his argument, the scholar refers to Professor Ago who affirmed that when ‘a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale to put an end to this escalating succession of attacks’.

In Chapter One, it was discussed how the value of the return gift should be in line with the original that has been received, and introduced two types of equivalence, ‘tit for tat’ and ‘tat for tat’, where the former is about an identical exchange in value but not in type whereas the

621 Ibid, para 176; and Legality of the Threat or Use of Nuclear Weapons, ICJ Report, Advisory Opinion, 1996, para 41.
622 Supra note 467, p. 75, para. 6.
623 Ibid, p. 74, para. 1.
626 Ibid, pp. 727-728.
627 Ibid, p. 728.
latter is an identical exchange in both type and value. Applying this concept to self-defence, similarities in approach can be observed, as to why the notions of proportionality and even necessity play a role when assessing the use of armed force in self-defence. Ago’s statement is plausible but the main issue facing the international community is the difficulty in assessing the right measure and response in equal reciprocal manner to fulfil the requirement of necessity and proportionality in practice. The balance between State’s rights and obligations in relation to the use of self-defence requires that a like for like response is provided in order not to violate the right of any party as in the context of self-defence actions. Given the nature of IL and in the absence of an authority to determine an appropriate level of self-defence actions by States, the notion of proportionality and necessity in an armed attack against a State is evidence of the principle of reciprocity guiding States towards appropriate actions, as opposed to excessive responses.

A report of the UN Secretary General’s panel emphasised that the language adopted in Article 51 of the UN Charter is restricted, however, the interpretation of the statement in this Article must not limit self-defence to an actual attack and it should not go as far as allowing preventative self-defence for non-imminent attacks. The concept of self-defence excludes the other potential forms of self-defence which are based on punitive or disciplinary intentions which are generally considered as a form of unlawful armed reprisal. Anticipatory self-defence can be argued as permissible and its legality is rooted in the CIL rules, long existing before the introduction of the UN Charter, based on expected, anticipated and imminent armed attack but caution must be used to assess the imminent attack and the response must be responsibly measured. Pre-emptive self-defence is the use of force to diffuse situations where, if they were to be left un-responded, it would result in a grave cost to the victim State. The Caroline case provides some useful tests for the assessment of legality of pre-emptive self-defence by referring to the necessity of self-defence in situations where instant and overwhelming action is necessary and there is no time for deliberation or

seeking alternatives measures. Therefore, the issue of timing and overwhelming need for action are necessary for this form of self-defence to be considered legal. Interceptive self-defence is an armed response where actions taken are in response to unavoidable attack, meaning that an attack is on its way and the victim State is aiming to intercept the attack. Preventative self-defence is described as where a State chooses to engage in armed attack in order to prevent a future attack on itself, and the difference between preventative and anticipatory self-defence lies in where self-defence in former cases will take place prior to an attack whereas in the latter case, anticipatory self-defence will take place when an armed attack is imminent and seeking alternative actions are detrimental for the victim State. These forms of responses require appropriate consideration under IL guidelines where the specific aim is to use the principle of reciprocity in order to minimise an imbalance on the rights and duties of States and that interests of States are not at risk. This is particularly significant given the current level of technology and availability of weapons of mass destruction. Self-defence in all of the categories are at first glance similar, however, there are subtle differences that require closer inspection to assess the legality of such actions. The most important challenge for legality, in this concept, arises from the perceived threat, the imminent possibility of an attack or the intention of the attacking State. That is to say, in anticipatory self-defence, there is a clear claim of the imminent foreseeable threat as opposed to pre-emptive self-defence where armed attack could be one of the available options to be considered. Preventative self-defence is controversial and it is difficult to accept any legal status for the right to preventative self-defence.

Interceptive self-defence can further be distinguished from anticipatory in situations where the threat is unavoidable, and as such the imminent danger cannot be ignored. It is suggested that this form of self-defence is deemed legal both under CIL as well as governed by the UN Charter when there is sufficient evidence of an imminent attack. Once again since there is little guideline as to the acceptable and appropriate evidence for what constitutes an imminent

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632 The Caroline Case was a series of events involving United Kingdom and United States around 1837. This landmine case has provided the necessary test and conditions for the legality of preemptive self-defence. For further information please refer to: http://avalon.law.yale.edu/19th_century/br-1842d.asp.
633 Supra note 98, p. 1139.
635 Supra note 631, p. 526.
636 Supra note 98, p. 1139.
and/or unavoidable threat, there is a degree of flexibility for States to apply their own interpretation of the facts. The assessment must be based on reason and within the parameters discussed above which are aimed at protecting the right of States as opposed to gaining any unfair advantage through an attack. Anticipatory, pre-emptive and interceptive forms of self-defence are legal as long as there is an appropriate assessment of the belief and the factors that make use of force necessary and there are careful considerations and evaluations before engaging in the employment of force. In assessing the legality of self-defence, it is important to make a distinction between different motives for self-defence, in the sense that whether self-defence takes place whilst the victim State is still under attack, if the State is acting to prevent an attack, or the victim is acting in response to a recent attack which has ceased, and finally whether the self-defence is taking place in order to punish and/or deter any future attacks.

Collective self-defence was already discussed above in relation to the Persian Gulf War. The legality of this type of self-defence is less of a debate given that it is directly referred to in Article 51 of the UN Charter, however in practical terms, it is less certain whether actions could be interpreted as collective self-defence. The right of collective self-defence comes into effect where at least one State is ‘entitled to take action by way of individual self-defence’. Additionally the ICJ in the Nicaragua case provided further clarity by indicating that two conditions must be fulfilled for satisfying the legality of collective self-defence, firstly the victim State must declare itself as a victim and request assistance, and secondly that the attack requiring self-defence must be an armed attack.

When assessing the role of proportionality and necessity in self-defence, it is useful to understand what these elements mean in this context. Whilst necessity refers to the need for the use and level of force in the response to an armed attack, proportionality is concerned with the degree of the response in self-defence with regards to the threat being posed by the armed attack. That is to say proportionality cannot be limited to the proportional level of use of force as was applied in the initial armed attack since this might not allow the recovery of the sovereignty and territorial rights of the victim States. A good example is provided by Greenwood that a part of a victim State’s territory might easily and without major force be

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637 Christopher Greenwood, Self-Defence, Max Planck Encyclopedia of Public International Law, 2011.
638 Supra note 266.
seized by an enemy but its recovery might require a much greater force by the victim State in order to recover back its territory and to ‘reverse the effects of the armed attack’. 639

A distinction must be made between the notion of proportionality when assessing the need and the form of response prior to the response to an attack (jus ad bellum) as opposed to the notion of proportionality once an armed attack has occurred (jus in bello). It may be argued that the element of necessity plays a greater role in self-defence since it is used to assess the need to respond by use of force, however the element of proportionality is also important when assessing the form and extent of the response. Laws of War provide the parameters for how a war must be conducted and what proportional measures are to be taken. The proportionality of force, prohibition of specific weapons and protection of people or targets stipulated in the Laws of War are still in force and apply to all parties equally, hence the party acting in self-defence is not exempt from these rules. On the other hand, it is less clear what level of proportionality in response must be applied when assessing how to engage in self-defence irrespective of the form of self-defence in question.

When assessing proportionality in self-defence the main questions are: What is the right level of proportionality in response to an armed attack? What level of force must be used? Can additional steps, besides a responsive attack, be taken to prevent future attacks from the same aggressor? The effectiveness and legitimacy of proportionality is justifiable in the legitimate ends being sought as well as in the relative force and measure of the response to the initial attack. Kretzmer engages in an interesting debate regarding proportionality in relation to self-defence by highlighting that the first issue to assess is to ‘define’ the legitimate ends when engaging in use of force relating to self-defence and it is essential to assess whether the level of force used in self-defence was necessary to meet the legitimate ends. 640 Therefore, the ends being sought in self-defence are important factors in the assessment of the proportionality in the use of force. The conditions of proportionality cannot be considered as fulfilled if the result, after the use of force, is disproportionate when compared to the initial suffering of the victim State. For example, the victim State had lost part of its territory but after acting in self-defence it captures its own land back and also occupy part of the aggressor’s territory.

639 Christopher Greenwood, Self-Defence, Max Planck Encyclopedia of Public International Law, 2011.
640 Supra note 629, p. 239.
Clearly the use of relative and equal force as a direct response to an attack can leave little to challenge in terms of proportionality but the testing and measurement of proportionality in the use of force when motives are more linked to reducing the strength of an aggressor, or when the attack has ceased, or is anticipatory, can be much more difficult. Essentially proportionality and necessity play a vital role in assessing the legality of a pre-emptive, interceptive or anticipatory self-defence. However, the challenge is to apply proportionality to the level of force being used since there is no direct relative measurement of the appropriate force given prior to an attack taking place.641

The element of intent or aim in the use of force in self-defence is also an extremely important factor since there is direct link between the appropriate level of force used and testing for proportionate use of force. The legitimacy of the aim is likely to directly indicate the lawful necessity and proportionality of the force used. One needs to take into consideration the intentions, reasons, necessity, the proportionality and the timing of the use of force, which is to say whether the attack has been initiated before the response, armed self-defence takes place during an attack or soon after an attack, or in effect as a preventative measure in case of an attack not in the imminent future. Greenwood convincingly argues for the importance of establishing the timing of the original attack for which self-defence actions are being taken by arguing that the timing of an attack could be deemed to start with the intended attack by the aggressor, challenging the correct timing of the attack by the Japanese on Pearl Harbour to when the Japanese Fleet left Japan or when the aircrafts launched the attack.642 It should be noted that this is just an example to be used on evaluating the timing of an attack, rather than taking into considerations the reasons for the attack. It is not correct to apply a one rule fits all judgement on the legal status for all different forms of self-defence since all these factors play a vital role in assessing and evaluating the necessary testing for the legality and legitimacy of the use of force in self-defence, particularly prior to having been subjected to an attack.

The recent example of the West’s approach towards the uranium enrichment of the Islamic Republic of Iran (IRI), suggests that an armed attack against IRI might be an option. This stems from the view that if IRI were to achieve nuclear power this could be a threat to

641 Supra note 629, pp. 247-250.
642 Supra note 637.
international peace and as such could give rise to anticipatory or pre-emptive self-defence. The legal justification of such an attack, if it were to take place, would need to be carefully examined in the view that the intention of the West is to prevent IRI from becoming a nuclear threat, then careful assessment must be made with regards to how close is IRI to produce nuclear weapon. Is this threat imminent? Can other forms of non-forceful measures be taken before resorting to use of force? What is the mode and type of attack likely to be? Will the West apply a bigger force than necessary to deter IRI from becoming a threat or to defuse the tension? It could be argued that the West is taking the necessary non-forceful actions to deter IRI from becoming a nuclear threat and is considering the option of an armed attack very carefully. The absence of any of these factors would have a bearing on the legal status of the self-defence actions. The attack on Afghanistan is a less controversial example even if neither Afghan forces nor Afghan civilians were involved in the US 9/11 attacks, yet the attack on Afghanistan was presumed legal by the US since those responsible for the US attacks were assumed to have received training or to be operating from Afghanistan, involving the international responsibility of the State.643 This was further supported by the fact that the US has always regarded pre-emptive self-defence as justifiable and legal. George W. Bush’s post 9/11 declarations and attacks, which are known as ‘the Bush Doctrine’, may create some concern about what is legal self-defence as opposed to a State’s unilateral or hegemonic approach to this notion. Other controversial examples of actions taken under the claim of pre-emptive self-defence were the attack on civilian Iranian Airbus by the US naval ship USS Vincennes in 1988,644 or the action by Israel in 1967 on its Arab neighbours.645

In the study of reciprocity in the context of the right to self-defence, it is not relevant whether self-defence is in the individual, collective, pre-emptive or anticipatory forms since reciprocity operates to create and maintain the balance between States’ rights and interests. Reciprocal response in the form of self-defence is permissive in IL either in an individual or collective form, however appropriate assessment must be made prior to reciprocal response to

ensure that the collective form of self-defence meets with the ICJ’s consideration. This is to say that when a State is faced with an act of aggression, it considers itself as a victim, thus requiring support from the rest of the international community in response to aggression in the form of armed attack.

IL seeks to promote non-violence and peaceful co-existence but there is also a need to protect sovereign States, their rights to non-intervention and from attack by other States. As such the ‘inherent right’ to self-defence as a form of reciprocity, provides a sense of balance and protection to States, whilst acting as a deterrent for States choosing to attack others with the fear of reciprocal reaction in response to their aggressive actions.

2.2. Counter-Measures as Remedial Response

The ‘remedial’ approach to non-compliance has provided States with certain rights to counter-measure towards breaching or non-complying States. Traditionally States resorted to war as a first step in dispute settlement but contemporary IL aims to promote non-violence and peaceful dispute as embedded in the UN Charter. IL allows the right to different methods of reciprocal counter-measure which should lead States to regard war as the last resort once other methods of dispute settlements have been exhausted. The international community’s resolve is particularly evident in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation, where it clearly stipulates that ‘States have a duty to refrain from acts of reprisal involving the use of force’ as well as that every State “shall settle their international disputes by peaceful means”. This is not to say that wars have been eliminated, rather it can be observed that the international community is employing peaceful reciprocal counter-measure and delaying or avoiding war when possible.

Counter-measure is defined as ‘non-forcible measures taken by an injured State in response to a breach of international law in order to secure the end of the breach and, if necessary, reparation’. In simple terms, it is a tool to bring to an end the breach and secure

646 Supra note 7, Article 2(4).
647 Supra note 174, pp. 122-123.
compliance. This is part of the work undertaken by the ILC as part of their work on the Articles on State Responsibility. Reading Professor Crawford’s observations, it is obvious the sensitivity and the challenged facing them in finalising the Articles on counter-measure. Counter-measure is a replacement for the previous term ‘reprisal’, no longer in use, as it is associated with the term used describing belligerent reprisals involving the use of force. In the Air Service Agreement case, the Court discusses that ‘counter-measures involves the great risk of giving rise...to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other party. They should be used with a spirit of great moderation’. Since the time of that case, the term counter-measure has come to refer to reciprocal response to wrong-doers without the use of force.

The ILC has defined counter-measure as ‘a reaction to...a specific kind of internationally wrongful act’, continuing to cite that this reaction is a form of ‘self-help’ or ‘self-protection’. The ILC recognised the need for counter-measures in IL given its ‘decentralized system’ ‘by which injured states may seek to vindicate their rights and to restore the legal relationship with the responsible state which has been ruptured by the internationally wrongful act’. It is important to note that such actions on their own without prior wrongdoing by another State would be deemed illegal but could only be considered legal if and when they are in reciprocal response to a previous breach of existing obligations. It must also be noted that as emphasised by the ICJ in the Nicaragua case a victim State is entitled to proportionate counter-measure response but those options are not made available to other States, on the basis of collective counter-measure, who may feel their interests are indirectly at risk. Even though controls must be applied in accordance with the

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649 Supra note 467.
650 Professor Crawford was the special rapporteur of the International Law Commission for the final stages of these Articles, James Crawford, The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries, 2002, pp. 48-49.
651 Supra note 467, para. 3, p. 75.
652 Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, decision of 9 December 1978, UNRRIA, vol. XVIII.
654 Supra note 197, para. 10.
655 Supra note 467, p. 128.
656 Ibid, p. 75.
657 Supra note 266, para, 249.
principle of non-intervention when assessing a wrongful action, there are available reciprocal measures within permissible IL rules to regain the imbalance created by the wrongful act.

There are many aspects regarding legal counter-measures discussed in this section, but one point to note is that IL aims to provide the opportunity for States to regain their balance of rights and interests through the principle of reciprocity which is a useful tool for this balance. This is a clear emphasis on the role of reciprocity in stabilising a balance of rights between States in cases of wrongful acts, given the absence of a centralised powerful legal enforcement of IL. It is worth noting that counter-measures are different from the termination of treaties permissible in the VCLT in response to a breach of treaty obligation, discussed before. However, resorting to counter-measure by States must be within the fundamental legal parameters as set out by IL. For instance the UK saw a self-help claim rejected by the ICJ in the Corfu case since their responsive action was in direct violation of the sovereignty right of Albania.658

Counter-measure has broadened the level of judgment that States can apply towards responding a wrongful action without resorting to the use of force. This has in effect increased the number of potential enforcers of IL. States are able to assess and apply their own judgement as to whether there has been a breach in IL and resort to non-forcible remedial options in response to a wrong-doer. The significance of the permissibility of counter-measure is to lower the escalation of disputes which can harm the international peace and security. A similar line of thought can be seen in the separate opinion of Judge Simma in the Oil Platforms case where permissible counter-measures are described as ‘designed to eliminate...the threat or harm’.659

The ICJ made a direct reference to the legality of counter-measures in the landmark Gabčikovo-Nagymaros Project case whilst referencing to previous ICJ cases.660 The judgment cited that counter-measures are indeed a justifiable response once set conditions are met, where firstly ‘it must be taken in response to a previous international wrongful act…and must be directed against that state’, secondly ‘the injured state’ must ask the wrongful State

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658 Supra note 274, p.35
660 Supra note 186, para. 83.
to ‘discontinue or to make reparation for it’; and also that the purpose of the counter-measure ‘must be to induce the wrongdoing state to comply with its obligations…and that the measure must therefore be reversible’.661 The Court then continued to exert its view that ‘effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question’,662 thus bringing about the fundamental notion of proportionality in the assessment of the legality of counter-measure. The Court held the view that actions taken by Slovakia in response to Hungary not fulfilling their agreement and discontinuing the work on the project was not proportional and thus rendered the counter-measure response as unlawful.663 This was in spite of the Court’s view that Hungary’s initial action was unlawful; however, it did also reach the conclusion that Slovakia’s response fell short of the proportionality measures necessary to qualify their response as legal counter-measure.664

The ICJ judgment addressing the legality of counter-measure has a direct impact on the work of the ILC in their final draft of Articles on State Responsibility. This is particularly evident in Articles 51 and 52 of State Responsibility which reiterates the Court’s view by stating that ‘Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’, as well as setting the conditions that must exist prior to resorting to counter-measure.665 An important point to note is the way the ILC explores the objective and the limitations of counter-measure in Article 49. Following the path of the ICJ ruling once again, the ILC sets three objectives for counter-measure, firstly that counter-measure must be taken against the responsible State ‘to induce that State to comply with its obligations’, secondly it places a time-frame limitation for counter-measure only so long as non-performance persists, and thirdly counter-measure must be such that it allows ‘resumption of performance of the obligations’.666 This codification of counter-measure by the ILC strongly demonstrates that counter-measure is reciprocal response to a wrong-doing but instead of only acting as the balance of interests; it must also go towards encouraging compliance with IL obligations and duties.667 The focus is very much

662 Ibid, para. 85.
663 Ibid.
664 Ibid, para. 48 and 78.
665 Supra note 467, pp. 134-135.
666 Ibid, p. 129.
on counter-measure as an incentivising tool for compliance rather than punishment for wrong-doings, and as such if it is to be effective placing a timeline becomes essential.

It is suggested that the ICJ’s comments on appropriate legal countermeasure, later adopted by the ILC, was made in order to place limitation on the States taking actions in counter-measure in response to acts deemed by them as unlawful.668 This potentially stemmed from fear of abuse which seems to have also been echoed in the ILC and Sixth Committee debate on counter-measure as part of the work in drafting Articles on State Responsibility.669 In this respect, some ILC members felt the need that ‘a compulsory dispute settlement mechanism was necessary’ since there was the possibility of abuse relating to counter-measure.670 Although this group’s view did not make it into the final draft, it shows how many people and groups were uneasy and fearful of the abuse of the conditions required for counter-measure in response to a deemed wrongful act. The ILC, however, made attempts at negating the possible abuse of counter-measure in Article 51 of the Articles on State Responsibility by turning the language surrounding on the requirement of the proportionality of counter-measure to a positive form in order to minimise the ‘latitude’ available for abuse.671 The Article uses the language that ‘Countermeasures must be commensurate with the injury suffered’ which is more in line with the ICJ ruling in the Gabčíkovo-Nagymaros Project case, rather different to the negative form that was expressed in Air Service Agreement Case where the tribunal’s ruling was judged on the basis of whether the actions were not disproportionate.672

The ILC has provided different forms of responses under the umbrella of legal counter-measure to a wrongful act which include sanctions, retorsions, and reprisals. Sanction is not a term used in the UN Charter but is taken to be what is described within it as a non-forcible ‘measures’ available to the UNSC,673 and as such can be defined as ‘consequences of an [internationally] wrongful act, unfavourable to the offender…’.674 In this respect, sanctions

670 Supra note 467, p. 23.
672 Supra note 652, para. 83; and supra note 668, p. 821.
673 Supra note 7, Chapter VII.
674 Supra note 197, para. 14.
are not unilateral actions of a State against another in response to a wrongful act, but actions of an international body in response to potential breaches in peace and security. By their very nature they are not an exact tit-for-tat reciprocal measure but they are nonetheless reciprocal in nature since they are aimed at bringing the wrong-doing State back towards abiding and complying with their obligations. This suggests that sanctions are a form of enforcement for international obligations in a precise top-down authoritative and coercive manner and are considered illegal if applied by a State against another State in a unilateral manner.\(^{675}\) Examples of the UNSC sanctions are discussed later in this Chapter, namely sanctions against IRI, Libya and Iraq.

Retorsion, otherwise referred to as retaliation, has been described as hostile, yet lawful, reaction to a previous international wrongful act.\(^{676}\) It is negative reciprocal response to a wrong-doing within IL. The ILC suggests that responsive acts under retorsion aim to deprive the wrong-doing State from an advantage,\(^ {677}\) in which acts such as breaks in diplomatic relationships, reductions in economic support or stricter immigration or visa restrictions are seen as examples of such responses.\(^ {678}\) Cassese highlights that the response can only be deemed legal if it is in response to a breach of an international obligation or to a previously unfriendly act by another State, bearing in mind also that the response must not violate IL, must be proportionate and the unfriendly response must be stopped once the wrong-doing State has stopped its unfriendly actions.\(^ {679}\) Cassese’s explanation of retorsion is seen by other scholars to include such punishing and damaging responses that are above what the ILC would have intended as lawful counter-measure to induce States to abide by their legal obligation.\(^ {680}\) Practical application of such actions is the expulsion of Iranian diplomats, in 2011, by the UK in response to the attack on the British Embassy in IRI.

Reprisal is referred to as a ‘reaction to an internationally wrongful act by an injured party against the offending State’ and it is often associated to reactions involving the use of force.\(^ {681}\) The major distinction between reprisal and retorsion is that reprisals are illegal.

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676 Supra note 197, paras. 16-17.
677 Ibid, para. 17.
678 Supra note 236, p. 244; and supra note 98, p. 1128.
679 Supra note 236, p. 244.
680 Supra note 675, p. 538.
681 Supra note 197, paras. 24-25.
actions used in response to an unlawful act whereas retorsion is legal responsive actions.\textsuperscript{682} Reprisal will only be deemed legal as counter-measure if it excludes the use of force.

Despite the disagreement relating to the legality of different permissible forms of counter-measure,\textsuperscript{683} by a State toward a wrongful act, for instance retorsion or suspension of treaty obligations, a common factor in all of these reactions is nonetheless a measured reciprocal response to a wrongful act in proportional measures. This follows the principle of peaceful dispute settlement discussed earlier, where the non-centralised enforcement system of IL provides for reciprocal responsive measures not only to encourage fulfilment of obligations but also bringing back wrong-doers to compliance.

It must be noted that features of any coercive counter-measure either as a reprisal or termination of obligations are in violation of the rules of IL, and they only become legal once strict criterion, discussed above, are fulfilled. In this respect, what becomes an important factor when examining counter-measure and the ILC’s work is that reciprocity of some responsive form is identified as an ‘action consisting of non-performance by the injured State of obligations under the same rule as that breached by the internationally wrongful act, or a rule directly connected there with’.\textsuperscript{684} This is essentially irrespective of the form of reaction to an international wrongful act or the terminology assigned to it.

For the purpose of providing an analysis of the subject, and to avoid jumping into specialised exploration, the present work begins by providing a concise general insight before proceeding to explore the centralised enforcement of IL, limited to the workings of ICJ, UNSC and the WTO’s DSB, starting with the ICJ.

\textsuperscript{682} Supra note 98, pp. 1129-1130.
\textsuperscript{683} Supra note 675, pp. 537-538; supra note 98, pp. 1128-1146; supra note 236, pp. 239-244.
\textsuperscript{684} Supra note 197, paras. 28-29.
3. Centralised Enforcement Measures

3.1. The International Court of Justice

The ICJ is considered as the principal judicial institution of IL,\textsuperscript{685} authorised to oversee and review cases of dispute arising between States.\textsuperscript{686} The jurisdiction of the ICJ is twofold: firstly it decides on cases submitted by States known as ‘jurisdiction in contentious cases’, and secondly, it provides legal advice to the various organs of the UN known as ‘advisory jurisdiction’.\textsuperscript{687} The ICJ Statute refers to the notion of jurisdiction in ‘contentious cases’ by outlining the basis for the jurisdiction of the ICJ relating to the cases in question.\textsuperscript{688} The ICJ has jurisdiction over the parties who have accepted its jurisdiction, but also provides States the ability to withdraw from accepting jurisdiction on a voluntary rather than a compulsory basis,\textsuperscript{689} or on the basis of reciprocity in return for other States’ acceptance of the ICJ jurisdiction, or for a finite period of time.\textsuperscript{690} Nigeria is an example which uses reciprocity in accepting the Court’s jurisdiction.\textsuperscript{691} This means that Nigeria has accepted the ICJ’s jurisdiction as long as another State party to a dispute has accepted the Court’s jurisdiction.

Therefore, the principle of reciprocity can limit the Court’s jurisdiction. In reciprocal acceptance cases of the ICJ jurisdiction, this notion of reciprocity in the ICJ’s function indicates that States are able to bring a dispute to the ICJ as long as they themselves have given consent to the jurisdiction of the ICJ. The ICJ’s jurisdiction upholds the consensual nature of IL and compulsory jurisdiction of the Court could violate the importance of consent in IL framework.

\textsuperscript{685} Supra note 7, Introductory Notes and Article 92; and supra note 8, Article 1.
\textsuperscript{686} Supra note 8, Article 1; and supra note 7, Chapter XIV.
\textsuperscript{687} Supra note 8, Articles 36 and 65; and supra note 7, Articles 96. The authority bestowed upon the International Court of Justice allows the General Assembly or the Security Council to request the Court to give an advisory opinion on any legal question. However, other organs of the United Nations and specialized agencies may also request advisory opinions of the Court on legal questions within the scope of their activities as authorized by the General Assembly.
\textsuperscript{688} Supra note 8, Article 36.
\textsuperscript{689} Ibid, Article 36 (2).
\textsuperscript{690} Ibid, Article 36 (3).
\textsuperscript{691} Nigeria accepted the jurisdiction of the International Court of Justice ‘as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity’, and this became evident in \textit{Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v. Nigeria}, ICJ Reports, 1998, para. 41.
The ICJ, however, has the authority to decide on any challenge upon its jurisdiction in any case. The ICJ has resorted to many options when evaluating the ‘consent’ of a State with regards to evidence of its jurisdiction, namely in the Corfu case, the Court decided on its jurisdiction by referring to communication between the plaintiff and the defendant, and particularly the response from the defendant suggesting the acceptance of the ICJ’s jurisdiction.\textsuperscript{692} Similarly, in Qatar v. Bahrain case, the ICJ relied on the minutes of a meeting between the States to ascertain its jurisdiction.\textsuperscript{693} Although there are different routes available for the ICJ to establish its jurisdiction, the ability of States to choose optional acceptance of the jurisdiction places limitations on the effectiveness of the ICJ as a powerful authority in international disputes.

Some States have chosen to accept compulsory jurisdiction, namely the US from 1945 to 1986, when it used Article 36(2) of the Statute to withdraw its agreement to the ICJ’s compulsory jurisdiction, moving towards acceptance only on a case by case basis.\textsuperscript{694} The US move was made after the Nicaragua case, where the ICJ ruled against the US by stating that the US secret operation in Nicaragua was against IL.\textsuperscript{695} The US’s original compulsory acceptance could be presumed as an attempt to encourage others to accept the ICJ’s jurisdiction; however, the US Connally reservation, limiting the Court’s jurisdiction to review matters involving the US domestic jurisdiction, brought a sense of distrust to the acceptance of the ICJ’s compulsory jurisdiction.\textsuperscript{696} The controversy surrounding this reservation stems from the words suggested by Senator Connally, as amendment to the reservation, stating that limitation of the ICJ jurisdiction involving the US domestic jurisdiction would be ‘as determined by the United States of America’.\textsuperscript{697} This reservation effectively gave the US control over the matters it would deem to be within the authority of the ICJ involving the US. In other words, the US acceptance of compulsory jurisdiction can be perceived more on the surface than a candid submission to the ICJ’s authority.

\textsuperscript{692} Supra note 274, 1949, p.25.
\textsuperscript{693} Case Concerning Maritime delimitation and Territorial Questions, Qatar v. Bahrain, ICJ Reports, 1994.
\textsuperscript{694} Supra note 266.
\textsuperscript{695} Ibid.
\textsuperscript{696} Franck & Lehrman, Messianism and Chauvinism in America's Commitment to Peace through Law referred to in Anthony D’Amato, The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court, The American Journal of International Law, Vol. 80, No. 2, 1986, p. 331.
Even when States have accepted the jurisdiction in general, there have been cases to date where States have disputed the jurisdiction in addressing the specific contention, for instance, the US challenged the ICJ’s jurisdiction in the *Nicaragua* case on several basis, initially questioning the jurisdiction of the Court on the basis of reciprocal acceptance of the declarations made by Nicaragua and the US respectively with regards to the Court’s jurisdiction; and also on the basis that Nicaragua had not pursued the ‘regional arrangement’ exhaustively prior to bringing the case, and as such the ICJ should not deal with this case prior to complete follow through established regional processes. The Court rejected the US argument for pursuit of the ‘regional arrangement’ since there is no suggestion in the UN Charter that any regional processes must be followed prior to a case being brought to the ICJ.\textsuperscript{698} The challenge made by the US on rejecting the jurisdiction of the Court in relation to the relevant case based on reciprocity was an interesting point. The Court firstly rejected the US claim that Nicaragua had not accepted the Court’s jurisdiction based on estoppel and then moved to assess the relevance of the 1984 notification to the Secretary General.\textsuperscript{699} Nicaragua challenged the applicability of this notification given a clause in the original 1946 declaration by the US on accepting the ICJ’s jurisdiction which included a six months’ notice for any modification. The US claimed that, on the basis of reciprocity, since Nicaragua had not included such provisions in its own declaration when accepting the jurisdiction of the Court, then Nicaragua had not accepted ‘the same obligation’ as the US, and therefore the six months’ notice was not applicable in the case between Nicaragua and the US. The Court rejected this argument by citing that the US, of its own will, had stipulated the six months’ notice, thus entering into a commitment and so reciprocity could not be used to ‘excuse departure’ from the US’ own limitations included in its declaration irrespective of what was included in other States’ declarations.\textsuperscript{700}

The ICJ referred to its reasoning in *Interhandel* case that a State can use reciprocity to limit its own obligation based on the limitations provided by the other party but it cannot rely upon a restriction that has not been included by the other party.\textsuperscript{701} The US additionally contested the ICJ’s ability to rule on the applicability of self-defence in the *Nicaragua* case on the

\textsuperscript{698} Supra note 266, paras. 102-108.
\textsuperscript{699} Supra note 266, paras. 48-52.
\textsuperscript{700} Ibid, paras. 52-63.
grounds that this task must be undertaken by the UNSC.\textsuperscript{702} These examples are reflective of the limitations and obstacles placed upon the ICJ in executing its judiciary responsibility and delivering its remit more effectively.

On a related point, further limitation of the ICJ’s authority can be seen in States’ refusal to appear before the Court. The ICJ Statute has provided provisions for the likelihood of this situation in its Article 53 and although it states that non-appearance can lead to the other party asking for the ruling in their favour, before doing so some conditions must be fulfilled, least of all for the Court to be satisfied that the claim is ‘well founded in fact and law’.\textsuperscript{703} In this regard, the Statute has included provisions that should help limit the blockage faced by the Court in relation to non-appearing parties. In a practical sense, faced with non-appearance, the ICJ has iterated its need to satisfy itself of the validity of the claim and all related legal issues as per its Statute, whilst taking ‘special care’ to include the viewpoint of the absent party in its judgement.\textsuperscript{704} Instances of these are: Iceland in the Fisheries case,\textsuperscript{705} France in the Nuclear Test case,\textsuperscript{706} IRI in the Tehran Hostages case,\textsuperscript{707} Turkey in the Aegean Sea Continental Shelf case.\textsuperscript{708} Even though none of these refusals were on the grounds of the question of jurisdiction, they have nonetheless highlighted a weakness in the ICJ’s overruling authority to demand the presence of States. Ability of States not to attend the formal ICJ procedure despite the prior acceptance of its jurisdiction brings a sense of a weakened authority and the formality that an international judicial body must possess. In this respect, an interesting observation concerns the benefits to be gained by the refusing States from this non-obedience.

Schachter provides an adequate view on possible advantages for the ‘non-appearing State’ where the gain could be summarised as firstly moving the burden of proof more stringently onto the State bringing the case. Secondly, by their non-participation, they would not be

\textsuperscript{702} Supra note 266, paras. 102-108.
\textsuperscript{703} Supra note 8, Article 53
\textsuperscript{704} Supra note 8, Article 53; and United Kingdom of Great Britain and Northern Ireland v. Iceland, Fisheries Jurisdiction Case, ICJ Reports, 1974, pp. 3-4 and para. 17.
\textsuperscript{705} United Kingdom of Great Britain and Northern Ireland v. Iceland, Fisheries Jurisdiction Case, ICJ Reports, 1974, pp. 3-4 and para. 17.
\textsuperscript{706} Supra note 182, para. 15.
\textsuperscript{707} The United States Diplomatic and Consular Staff in Tehran Case, The United States of America v. Iran, ICJ Reports, 1980, p. 3, and para. 33.
\textsuperscript{708} Aegean Sea Continental Shelf Case, Greece v. Turkey, ICJ Reports, 1978, para. 15.
bound by the ICJ’s judgement. In essence, if the Court has to fulfil the conditions as stated in the ICJ Statute and satisfy itself of the lawful and factual basis of the claim then the non-appearing party is not present to provide any information or evidence to further incriminate itself. Effectively Schachter indicates that the advantage of not participating in the proceedings reduces the non-appearing party’s accountability and the need to abide by the ICJ’s authority as a judicial organ. This is in contrast with the domestic legal systems where a defendant could not simply refuse to participate in a legal proceeding; and also in an extreme case if they were to refuse to participate, there is nothing that indicates towards the other party asking for the judgement to be ruled in its favour as in the case in Article 53 of the ICJ Statute. Practically, in the Fisheries case where Iceland did not participate in the Court, the ICJ stated that the view of the absent party must be taken into consideration in their judgment, so non-participation not only saved the State from the burden of answering the Court but also provided protection by the ICJ where its circumstances were taken into consideration throughout the proceedings.

In cases of non-compliance with the ICJ’s decisions, there are enforcement measures available to the Court but these options depend on each situation. In cases when the parties involved do not provide the necessary evidence, it is in the power of the Court to presume that the evidence would result in disadvantage for the party withholding the evidence. Even though Reisman and Sandifer suggest that adverse advantage must be felt by the withholding party, practically the Court declared that no adverse effect should be drawn from non-disclosure of materials. Similarly, the ICJ is authorised to ‘require previous compliance with the terms of the judgment before it admits proceedings in revision’. This is effectively a form of sanction, where the ICJ can encourage non-complying States towards abiding by its judgements rather than choosing non-abiding paths. Additionally, the ICJ has resorted to

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709 Supra note 328, p. 231.
711 Supra note 705, paras. 17-18.
712 Supra note 328, p. 231.
713 Supra note 8, according to Article 49 of the International Court of Justice’s Statute, the Court must formally note the refusal of presenting any specific document or information requested. For further discussion see Sandifer’s argument suggesting that the Court can presume adverse impact of the evidence for the refusing party, Durward V. Sandifer, Evidence Before International Tribunals, 1975, p. 460.
715 Supra note 274, p. 32.
716 Supra note 8, Article 61(3).
717 Supra note 328, p. 230.
the use of non-compliance of its interim measures as merit for its adverse judgment, as was observed in the *Tehran Hostages* case, where IRI’s defiance of carrying out the ICJ’s interim measures was used as merit in the judgment against IRI.\(^{718}\) These are valid tools available to the ICJ but arguably they are relatively weak to be effective for the ICJ as the principal judicial organ of IL.

The ICJ’s judgment is final and not open to appeal, however in cases of non-compliance the injured party can take their case to the UNSC where recommendations can be made or decisions taken upon actions to enforce the ICJ’s judgement.\(^{719}\) This is not to be taken as the ability of the UNSC to hear appeals for the Court’s decisions, but rather as additional enforcement of the original judgment. Non-compliance with the ICJ’s judgement can be observed in Iceland in the *Fisheries* case,\(^{720}\) Albania in the *Corfu* case,\(^{721}\) and IRI in the *Tehran Hostages* case,\(^{722}\) where the decisions of the Court was not followed through. Using the *Corfu* case specifically, the ICJ calculated adequate compensation payable to the UK for damages to a Royal Navy vessel.\(^{723}\) The ICJ was not able to enforce its own judgement by ensuring Albania’s payment for the set damages, and indeed the compensation was not paid until the 1990s.\(^{724}\) Yet again, these examples demonstrate the Court’s inability to enforce its judgement as effectively as possible and/or be able to limit States from applying loopholes for escaping their duties and obligations. Considering the weakness explored where the disputing parties comply with the ICJ decisions in a non-uniform and inconsistent basis, the question is: If States are able to apply selective choice to upholding international legal obligations and duties, what are the other tools available to encourage compliance and commitment to these obligations?

In addition to dealing with contentious cases, the ICJ has additional responsibility to provide advisory opinions.\(^{725}\) The ICJ’s advisory opinions are a useful form of providing insight into

\(^{718}\) *Supra* note 707, paras. 75 and 92.

\(^{719}\) *Supra* note 7, Article 94.

\(^{720}\) *Supra* note 705, para. 3.


\(^{722}\) *Supra* note 707, p. 3 and para. 75.

\(^{723}\) *Supra* note 274, pp. 24-26.


\(^{725}\) *Supra* note 8, Article 65; and *supra* note 7, Articles 96; The International Court of Justice is tasked to provide an advisory opinion to the United Nations Security Council or the United Nations General Assembly or other
valid and appropriate interpretation of IL indicating the importance of the relationship between interpretation and reciprocity in IL. This is another area where the UNSC and the ICJ come into contact. The advisory opinion is important for the UNSC since it is a political body enforcing IL. The ICJ’s advisory opinion can be valuable for such a non-legal yet political body seeking legal advice, thus the opinion provided can act as an independent legal viewpoint not diluted by political interests. It is worth noting that, in contrast to the contentious cases, the ICJ’s advisory opinion is not binding, and is a form of legal advice or counsel. Examples of the advisory opinions provided by the ICJ can be observed in the Interpretation of Peace Treaties case, where the ICJ provided interpretation for the peace agreement between the States of Bulgaria, Hungary and Romania, or the Reservation to the Genocide Convention case. More recent cases have been, for example, the Wall Opinion, discussed later in this Chapter.

The ICJ judgements whether in contentious cases or advisory opinions, such as Nicaragua case, North Sea Continental Shelf cases, the Genocide case, or the Reparation case have had significant influences on IL and its development. The rulings have also at times led to a specific treaty or CIL. The most pertinent example of this is the establishment of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone which followed the prominent case of Anglo-Norwegian Fisheries. As such the legal interpretation applied by the judges, as experts in their field, is of immense value to IL’s progressive development, and evidence shows their significance in application of international rules. Although the ICJ is a legal organ and it can play a fundamental role in interpretation and application of IL, its advisory opinion is not requested frequently on all relevant matters. This is a debateable weakness since the decisions taken by non-legal organs such as the UNSC are not consistently reviewed by the ICJ for legal reasoning. The relationship between the UNSC and the ICJ constitutes the basis of discussion in following sections where issues surrounding the

organization authorised by the United Nations General Assembly upon request, an analysis of the advisory opinion will be provided in the following section.

726 Supra note 117, p. 289.
727 Supra note 445.
728 Supra note 148.
729 Supra note 90, p. 20; supra note 117, p. 51; and supra note 98, pp. 109-110.
730 Supra note 231, p. 143, The International Court of Justice declared ‘that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree…is not contrary to international law’; and supra note 98, p. 110.
legality of the UNSC resolutions. However, prior to this, it is important to gain a full understanding of the UNSC’s workings and powers.

3.2. The UN Security Council

3.2.1. The Power of the UN Security Council

The UNSC has been granted a special role and responsibility for achieving the UN key objective of maintaining peace and security,\(^{731}\) as well as the authority to ascertain what constitute as the threats to such objectives.\(^{732}\) From the outset it was decided that the UNSC should be a relatively small group to facilitate and enable more rapid decision making or actions especially when an urgent matter arise.\(^{733}\) For any decision at least nine votes must be secured and must include ‘the concurring votes of the permanent members’.\(^{734}\) The members, however, have the right to abstain from voting, but the strict interpretation of Article 27 of the UN Charter suggests that on important matters requiring a decision, votes of the P-5 must be secured, and other non-permanent members can choose to abstain. This effectively gives a veto power to each permanent member where their acceptance plays a key role in passing resolutions.\(^{735}\) However, in some cases, as the UNSC records shows, in practice the P-5 have abstained from voting which is different to their veto right.\(^{736}\) For instance, Russia and China chose to abstain from the voting on resolution 1973 for the ‘no fly zone’ in Libya preferring not to veto which would obstruct the passing of the resolution.\(^{737}\) Similarly, in the issue of the independent State of Palestine, the UK and France have indicated that they are likely to abstain when the case is brought before the UNSC.\(^{738}\) The purpose of veto power and the issues surrounding this are explored later in this Chapter.

\(^{731}\) Supra note 7, Article 24.
\(^{732}\) Ibid, Article 39 states that ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken…to maintain or restore international peace and security’.
\(^{733}\) Security Council comprises of ten revolving members with two years tenure, and five permanent members who are China, France, the United Kingdom of Britain and Northern Ireland, the United States of America, Russia.
\(^{734}\) Supra note 7, Article 27(3).
\(^{735}\) Ibid, Article 27(3).
\(^{737}\) Security Council Resolution 1973, 6498th meeting, 17 March 2011, S/RES/1973; Under the resolution the Security Council has authorised ‘Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to protect civilians under threat of attack in the country’.
The powers granted to the UN Security Council (UNSC) by the UN Charter are:

- maintain international peace and security,
- to address any issues which could result in an international conflict,
- to provide recommendation for conflict resolution,
- to identify any threat to peace and recommend actions,
- to pass resolutions for sanctions by the UN members,
- to resort to use of force against ‘an aggressor’,
- to make recommendations on the appointment of UN Secretary-General by General Assembly, and
- to appoint the judges of the International Court of Justice (ICJ) in conjunction with the Assembly.

The responsibility bestowed obliges the UNSC to ‘act in accordance with the Purposes and Principles of the United Nations’.\(^{739}\) In assisting the UNSC, their decisions have been outlined as binding upon all member States.\(^{740}\) This essentially gives the UNSC legislative rights where the decisions reached by them create legally binding obligations. The binding nature of the UNSC resolutions is different to the nature of the General Assembly (GA) resolutions that are considered ‘soft law’ and as such have a non-binding nature.\(^{741}\) Moreover, there exists a contrast between the UNSC binding decisions and the nature of International Law (IL) in general where ‘will’ and ‘consent’ of States play an important role in the creation and acceptance of obligations. This emanates from the fact that a prerequisite condition for becoming a UN member is to accept the UN Charter, and as such indirectly accepting the special role of the UNSC.\(^{742}\) In this context, the initial acceptance of the UN Charter is also the acceptance of the ‘judgment’ by the UN and its trust on the UNSC and their empowerment. Observing this from a different angle, no objection or negotiations of the ‘consent’ of States is permissible in relation to the UNSC, and the organ’s ‘judgment’ is binding and not open to challenge or appeal.

The UNSC is empowered to examine and establish whether the State’s practice constitutes a...
‘threat to the peace, breach of the peace, or act of aggression’, which carries no limitations or restrictions, authorising the UNSC to decide upon the actions necessary. The UN Charter has outlined several choices for the UNSC, namely their authority to impose sanctions as a method of exerting pressure on a targeted State. The UN Charter indicates that the UNSC will strive to resolve issues without the use of force but stipulating how in some situations, the use of force may be unavoidable. The nature of such sanctions varies, but the most effective and common ones adopted are characteristically economic and political. An example of economic sanctions are those declared against IRI firstly in 2006, and later extended by imposing further sanctions. The UNSC approach towards the IRI’s Uranium enrichment programme and its potential effect on international peace has been to impose economic sanctions in response to the regime’s refusal to halt their enrichment programmes.

Similarly, an example of a military resolution was the UNSC authorising the use of force for the protection of civilians in Libya. The UNSC reacted to a State’s non-compliance with IL rules and obligations for the violation of HR and IHL. Another example of military sanctions is evidenced in those imposed against Iraq in 1990s following their invasion of Kuwait. These examples illustrate how the scope and sphere of the UNSC has been broadened over the years from international disputes concerning States to include national civil wars; effectively the threat to international peace and security has been expanded to encompass national concerns. Further to this point, the UNSC has exercised power in setting up ad hoc tribunals to prosecute those responsible for war crimes, of which ICTR and ICTY are two prominent examples. Initial issues were more focused on international threats impacting upon the international community, but cases relating to civil wars in Rwanda, Kosovo, former Yugoslavia and more recently the uprising in Libya demonstrate an expansion in the UNSC’s sphere.

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744 Ibid, Article 39.
745 Ibid, Article 41.
746 Ibid, Articles 40-42.
748 Supra note 737.
749 Supra note 610.
750 Supra note 98, p. 1267.
752 Instances of how the International Tribunals addressed war crimes concerning issues such as torture and unjust treatments in former Yugoslavia and Rwanda were examined in Chapter Two; for further information please see supra note 476.
When analysing the different options adopted by the UNSC, their main approach is either sanctions or the use of force; aimed to incentivise States to choose co-operation and continue their commitment to international rules and obligations. The UNSC’s approach is based on a response to wrongdoers, for example where North Korea conducted nuclear testing,\(^\text{753}\) and the UNSC imposed sanctions aimed at encouraging North Korea to terminate its nuclear weapons program and any further testing.\(^\text{754}\) Another example is the UNSC’s reaction in 1990 to Iraq’s invasion of Kuwait, resulting in the Persian Gulf War and liberating Kuwait. The UNSC continued to exert economic, military and diplomatic constraints and pressures through sanctions that had a crippling effect.\(^\text{755}\) The widespread concern of the international community on the impact of the sanctions on the civilians resulted in resolutions creating the ‘Oil-for-Food Programme’ which meant that Iraq’s oil was sold for food rations or tokens.\(^\text{756}\)

There is a debate as to how successful these sanctions have been at resolving issues as well as bringing the non-compliant States towards compliance. Equally, have these actions been able to provide a remedy and act as future deterrence? What are the consequences of such actions? The continued sanctions and constraints placed on Iraq had a devastating effect on civilians and less impact on the government. The UNSC approach soon turned into actions such as regime change and facilitating the possession of Iraq’s natural assets without absolute consent of the nation, and needless to say the vast humanitarian suffering that came with the slow drainage of Iraq and its people.\(^\text{757}\) These issues need detailed analysis, addressed later in this Chapter when examining the legality and the risks associated with the UNSC’s actions and decisions. Further power of the UNSC lies in the appointment of the ICJ judges when these

\(^{753}\) Executive director of the Centre for Korean-American Peace in Tokyo, Kim Myong-chol, stated that the test is considered to be a reminder that North Korea ‘is going it alone as a nuclear power’; North Korea further claimed that ‘we are not going to worry about sanctions. If they sanction us, we will become more powerful. Sanctions never help America; they are counter-productive…we don’t care about America and what they say’, the Guardian News, World News, 25 May 2009.


are based upon the recommendations of the UNSC. This is reflective of a strong inter-link between the UNSC and the ICJ. Interestingly, given that the UNSC is an important organ of the UN, its further power is in its influence in the appointment of the UN Secretary-General. The influence of the UNSC in the appointment of such high ranking members of key international bodies/institutions brings about a sense of control and management for such important organs. Independence of organs such as the ICJ is of great importance when the UNSC has absolute power, not only as a law-making body but also as an executive body of the UN.

3.2.2. The Role and Power of the Permanent Members of the Security Council

One of the issues with the UNSC is in its formation and particularly with respect to power bestowed on its P-5, as victorious powers of the World War II. Even though every State is deemed to have equal rights in IL, the UN Charter has however, created an element of inequality by granting more rights to the P-5. In addition to their permanent seat, there is a greater distinction which lies in their veto right. The use of veto does not need an explanation and all it needs is to exercise the veto. Although, there have been attempts to curtail the use of veto rights and, as a minimum, requiring the P-5 to provide a written reason for their veto.

The teleology of the veto rights lies in establishing a balance of power amongst major States and to create ‘equilibrium’ in inter-State relations. The importance of this is in ensuring a

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758 Security Council appoints the International Court of Justice’s judges as specified in the International Court of Justice Statute, a responsibility shared with General Assembly based on the list provided by the Secretary-General; supra note 8, Article 4-19, particularly Article 4 and 7.

759 The inter-link between the two main enforcing bodies will be discussed later in this Chapter.

760 Supra note 7, Articles 97; The United Nation Secretary-General is regarded as the representative of the international community.


762 Supra note 7, Article 2(1) explicitly declares that ‘The Organization is based on the principle of the sovereign equality of all its Members’.


balance of interests in a political organ, since the pursuit of self-gain and supremacy was a major issue. The veto right was established for the major powers to provide each with the ability to decide what assignments they would participate in; and more importantly to safeguard their interests by ensuring that the decisions of others would not automatically affect or result in their disadvantage.\textsuperscript{766} Their veto right was also a way of ensuring that there were no negative repercussions on each of the major powers resulting from decisions taken by other P-5 members.\textsuperscript{767} It is important to recall that circumstances leading to the establishment of the UN and the UNSC in the aftermath of the two World Wars, particularly soon after World War II.\textsuperscript{768} Thus, the veto was introduced to ensure that no action would be taken which did not have the absolute co-operation of the P-5, effectively bringing about the co-operation of the powers towards maintaining peace and security.\textsuperscript{769} This is a way of creating a sense of collective security, discussed in Chapter Five when examining co-operation.

There have been continuous debates on the P-5 veto right and its accompanying power.\textsuperscript{770} How have these rights affected international legal and/or political relations? Scholars have raised concerns on the role of politics in use of veto, for instance Shaw maintains that the interpretation of a threat to international peace and the consequential actions by the UNSC, in practice, is dependent on the ‘circumstances of the case’ as well as the relationships of the P-5 with the State in question.\textsuperscript{771} Essentially, practical review of the UNSC actions and decisions corroborates this view as well, in light of the vote/action on each permanent member’s interests. This issue will become more apparent when examining inconsistency of the P-5’s conduct later in this Chapter.

\textsuperscript{766} Ibid, pp. 11 and 13.
\textsuperscript{767} Supra note 757, p. 98.
\textsuperscript{768} Supra note 7, The Charter’s preamble refers to the scourge of the two world wars and their devastating consequences. It was very important to ensure the international community would not find itself at the grip of another devastating war.
\textsuperscript{769} Supra note 765, p. 13 and 458; Bailey and Daws, provide a slightly different angle on the exercise of veto by essentially suggesting that veto is ‘the failure of the Council to adopt a resolution due to the negative vote of one or more permanent members’ even though the other non-permanent members have voted in favour of the resolution, supra note 763, pp. 227-228.
\textsuperscript{771} Supra note 98, pp. 1236-1237.
The important factor to consider is whether it was ever originally intended by the international community to assign such authority and power, so that the P-5 would decide the direction of the international community? Has the UNSC always been successful in achieving its goals as embedded in the UN Charter? Can reciprocity play a role in the application of the veto rights amongst the P-5? Reisman reflects on the latter point by referring to the Cold War period where the reciprocal use of veto rights by States had effectively limited the operation of the UNSC.\textsuperscript{772} The use of veto during that period had reached such a scale as to threaten the UNSC’s ability to deliver its task.\textsuperscript{773} This led to concern in the GA given the constant state of SC’s deadlock resulting from reciprocal Russia (former USSR) and the US veto use. Thus the UNSC rendered itself ineffective to take control of threats to international peace and security. As a result, GA’s ‘Uniting for Peace’ resolution was adopted on the grounds that if the UNSC is the primary body of maintaining peace, then the GA is the secondary body for addressing threat to international peace.\textsuperscript{774} Even though this was hailed as a breakthrough at that time for increasing GA’s power, in practice there were obstacles that would not allow the use of this resolution. Firstly the UN Charter indicates that any issue concerning international peace and security must be brought to the UNSC’s attention,\textsuperscript{775} and the possibility of any action impacting peace and security without the UNSC deliberation is debatable. Secondly, the GA’s resolution called for collective security with the use of force but there was dispute as to the authority of GA to call for use of force since this authority lies with the UNSC.\textsuperscript{776} In short, as Shaw convincingly argues, the optimism surrounding the ‘Uniting for Peace’ resolution has been fruitless, given the significant impractical ability to use this resolution by the GA in resolving conflicts or maintaining international peace or security, and this power continues to remain firmly in the UNSC’s domain.\textsuperscript{777}

Although there has been on-going use of veto since the end of Cold War, the use of veto has been comparatively less on a tit-for-tat policy, as opposed to the protection of the P-5’s

\textsuperscript{772} Supra note 757, pp. 83-84.
\textsuperscript{773} Ibid, p. 84.
\textsuperscript{774} The resolution was in the event of the Security Council’s inability to execute its responsibility in maintaining international peace and security in light of the use of veto rights, General Assembly Resolution 377(V), Uniting for Peace, 5th Session, 3 November 1950, A/RES/377(V)AA.
\textsuperscript{775} Supra note 7, Article 11.
\textsuperscript{776} Supra note 98, p. 1272.
\textsuperscript{777} Supra note 757, p. 1273.
rights. For example the US has exercised the most number of vetoes since the end of the Cold War, as opposed to Russia exercising the higher number during the Cold War. It is naive to comprehend this statistic as a pure coincidence, but rather a demonstration of the shift in world power. Furthermore appropriateness of the veto use must be aimed at global interest rather than calculated actions based on the evaluation of self-interest which is not always the case as can be seen in the recent UNSC debates on Syria. The emphasis on why the international community’s interests must take priority over self-interest is rooted in the tasks and responsibility bestowed to function as enforcing body of IL. It is also important to recall that the great powers in the UNSC are to act in representation for international peace and security and that the basis of their elevation to the permanent membership status was primarily to enhance mainly international co-operation of the great powers.

There has been some argument in favour of the veto right, namely Patil argues that the veto right has helped protect smaller nations that might otherwise be subject to conflicts by aggressors. Even though Patil’s argument can be theoretically reasonable at times, in practice, the UNSC efforts do not always reach the desired objective and conclusion of maintaining peace. The current Syrian case is an instance of this where the approach adopted by China and Russia was to veto the United Nations resolution against Syria resulting in the loss of over a hundred thousand civilian lives. Although more of the P-5 co-operations can

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778 Instances of veto exercises is seen in the US veto on the re-appointment of Boutros Boutros-Ghali as Secretary-General of the United Nations, 1996, on the ground of his failure to implement necessary reforms to the United Nations, Security Council Report, Special Research Report: Appointment of a new Secretary-General, 16 February 2006, available at: http://www.securitycouncilreport.org; and the United States veto on Israel expropriation of land in east Jerusalem and also further forty two vetoes by the United States in support of Israel. In the latter example, it is seen how the veto use is rooted in political interest rather than taking a cooperative approach to establish international peace and security, the American Association for Palestine Equal Rights, available at: http://www.aaper.org/site/c.quIXL8MPJpE/b.3813077/k.9D93/UN_Security_Council_Resolutions_supporting_Palestinian_human_rights.htm.

779 There has been a dramatic shift in the numbers of the US vetoes since the end of the Cold War. Prior to this the USSR had been the main user of the veto power, for further information please see Global Policy Forum, Changing Patterns in the Use of the Veto in the Security Council, available at: http://www.globalpolicy.org/component/content/article/102/32810.html.

780 There has been a dramatic shift in the numbers of the US vetoes since the end of the Cold War. Prior to this the USSR had been the main user of the veto power, for further information please see Global Policy Forum, Changing Patterns in the Use of the Veto in the Security Council, available at: http://www.globalpolicy.org/component/content/article/102/32810.html.

781 Supra note 765, p. 458.

782 The uprising in Syria is reported to have resulted in over hundred thousand loss of civilian lives, a large number which is adequate to warrant a Security Council condemnation through resolutions, BBC News, Syria death toll now above 100,000, say UN chief Ban, 25 July 2013, at: http://www.bbc.co.uk/news/world-middle-east-23455760; The approach adopted by China and Russia was to veto the United Nations resolution against Syria claiming that the ‘threat of sanctions will not bring peace’, UN News Centre, Syria: Ban voices deep
be observed compared to the Cold War era, this new era raises concern for the UNSC, particularly the P-5, decision-making processes and the scope of their authority that could not be fathomed at the inception of the UNSC. A change in the UNSC approach is in the Persian Gulf War where the P-5 provided declarations and interpretations of IL – inconsistent and contrary to the existing requirements regarding the limited guidelines for interpretation of the UN Charter provisions. For example, under resolution 687, the UNSC declared Iraq ‘is liable under international law for any direct loss, damage’. The legality of this resolution was questioned by other UN members, particularly Iraq as the suffering party, but also other States, namely Yemen, had reservations on how the resolution contradictorily exceeded the UNSC’s mandate. The concerns predominantly related to reparations of the damages and the losses suffered by Kuwait, as well as the demarcation of the boundaries of both Kuwait and Iraq. The Yemen’s concerns followed this, since in the past the UNSC would not be involved in such matters which were more in the ICJ’s domain. Upon the passing of the resolution, the US who voted favourably on the resolution, claimed:

The circumstances that are before us are unique in the history of the United Nations, and this resolution is tailored exclusively to these circumstances…Certainly, the United States does not seek, nor will it support a new role for the Security Council as the body that determines international boundaries.

The actions and decisions around the Gulf War indicate that ‘circumstances’ resulted in the provisions of Chapter VII to be ‘reaffirmed, neglected and then, on the contrary, surpassed’

regret after Security Council fails to agree on resolution, 4 February 2012, available at: http://www.un.org/apps/news/story.asp?NewsID=41144&Cr=Syria&Cr1=; Similar uprising in Libya was inconsistently and more aggressively dealt with by the Security Council, where UK and France lobbied for international support for ‘no fly zone’ in Libya and the eventual downfall of Gaddafi regime. Similarly the uprising in Iran back in 2009 did neither result in any actions by the Security Council nor did it receive adequate international attention.


Supra note 757, p. 85.


by the UNSC.\footnote{Pierre-Marie Dupuy, \textit{Droit International Public}, 1993, pp. 424-425} Prior to the Gulf War, resolutions were targeting Iraq to evacuate Kuwait on the provisions and authority bestowed upon the UNSC.\footnote{\textit{Supra} note 7, Article 41 states that ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures’; an example of a resolution reflecting on Article 41 is seen in resolution 678 in Security Council Resolution 678, \textit{supra} note 610.} Similarly Judge Bedjaoui, expanding Dupuy’s examination of the Persian Gulf War, believes that resolution 678, authorising the use of every necessary means to ensure enactment of resolution 660, is inconsistent with the provisions of the UN Charter, particularly Article 42, thus suggesting that the essence of this resolution neglects the provisions of the UN Charter.\footnote{Mohammed Bedjaoui, \textit{The New World Order and the Security Council: Testing the Legality of its Acts}, 1994, p. 43.} Finally, following the end of the Persian Gulf War, resolution 687 provided the conditions for peace which once again were surpassing the UN Charter provisions raising again questions on the legality of the resolution.

Back in 1993, Reisman had predicted the uneasiness that would follow the Persian Gulf War and the precedence that would be set for the UNSC’s future conduct, particularly by the P-5.\footnote{\textit{Supra} note 75, p. 85.} Since then, there have been many conflicts and decisions taken, claiming to be for the greater good; enhancement of international peace and security. However in recent decades there have been obvious inconsistencies in the UNSC approach towards the urgency and necessity of action. The most obvious controversial examples are failure to act in time for the genocide in Rwanda (1994),\footnote{Security Council Resolution 872, Rwanda, 3288th meeting, 5 October 1993, S/RES/872.} the Kosovo war (Conflict that started in 1998),\footnote{Security Council Resolution 1244, on the situation relating Kosovo, 4011th meeting, 10 June 1999, S/RES/1244; The United Nations has been trying to resolve the conflict for two years, however, the news indicates the NATO countries’ reluctance to put an immediate end to the war for which the news was criticised for its inaccuracy. It is important to be mindful of the controversy surrounding Kosovo war due to the objection raised by China and Russia throughout the process of dealing with this Case. In other words, the Forces intervened without the Security Council resolution and as a result it was considered an illegal intervention, the New York Times, Kosovo Conflict, 2007, available at: \url{http://www.nytimes.com/packages/html/world/20071209_KOSOVO_FEATURE/}; for further information see the Economist Divided rule: The European Union runs into roadblocks in its plans for Kosovo, 29 May 2008, available at: \url{http://www.economist.com/node/11460102}; also BBC World Service, \url{http://www.bbc.co.uk/iplayer/console/p007z15k}.} Iraq war (2003), and the Syrian uprising (started in 2011).\footnote{Although the United Nation Security Council passed a resolution on destruction of Syria of chemical weapons, this approach does not provide an immediate solution to stop the atrocities taking place in the State. Security Council Resolution 2118, Requires Scheduled Destruction of Syria’s Chemical weapons, 7038th meeting, 27 September 2013, S/RES/2118. The uprising in Syria is reported to have resulted in the loss of over a hundred thousand civilian lives, a huge number which is adequate to warrant a Security Council condemnation through resolutions, BBC News, Syria death toll now above 100,000, says UN chief Ban, 25 July 2013,} In these cases the inconsistency and
lack of uniformity in the UNSC’s approaches and responses became evident. In Rwanda the response was too late, meaning that the UNSC did not intervene in time to stop the genocide and its consequent effect has been that the international community is left with a sense of regret.\footnote{797} As mentioned above, after the end of the Cold War, there was a shift in the number of the US vetoes attributed to the increase in their power. This has resulted in an increasing concern about their hegemonic approach, where the US’s unilateral acts are threatening long-term stability and international peace and security. The most pertinent example is the Iraq War in 2003, where the US and the UK engaged in use of force against Iraq amidst international controversy. A similar hegemonic approach was in the Afghanistan War, without UNSC authorisation, and its threat to go to war with Iraq, in case of non-cooperation by the UN, which not only endangers international peace but also goes towards discrediting IL and its counterparts in the UNSC.\footnote{798} George W. Bush’s comment: ‘We will work with the UN Security Council for the necessary resolutions’,\footnote{799} warning that the US would act unilaterally if the UN failed to co-operate, or the words of a senior US official claiming that ‘we don't need the Security Council’ are further examples.\footnote{800} This view that the US will ‘go it alone’ was correctly anticipated by Reisman, when assessing the increase in the US global power and the UNSC after the end of the Cold War.\footnote{801}

The UNSC was thrown into turmoil in response to the US pressure that Iraq was in ‘material breach’ of the previous resolutions, resulting in resolution 1441, in 2002, warning Iraq of a

Similar uprising in Libya was inconsistently and more aggressively dealt with by the Security Council, where UK and France lobbied for international support for ‘no fly zone’ in Libya and the eventual downfall of Gaddafi regime. Similarly the uprising in Iran back in 2009 did neither result in any actions by the Security Council nor did it receive adequate international attention.
797 This regret is seen in the Kofi Annan’s statement indicating that Rwanda Genocide ‘must leave us always with a sense of bitter regret and abiding sorrow’, Secretary-General Kofi Annan’s remarks at the Memorial Conference on the Rwanda Genocide, organized by the Governments of Canada and Rwanda in New York, 26 March 2004, Press Release SG/SM/9223/AFR/870HQ/631, Similarly US former President Clinton has repeatedly spoken about his personal regret of delay in actions in Rwanda, the Boston Globe News, 10 December, 2007.
798 Michael J. Glennon, Why the Security Council Failed, 
799 Further to this point, the President stated that ‘We created the United Nations Security Council, so that, unlike the League of Nations, our deliberations would be more than talk, our resolutions would be more than wishes’, The White House, US President George W. Bush at General Assembly, 12 September 2002, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html
800 For further information see the Telegraph News, Julian Coman and David Wastel, ‘We don't need permission’, 10 November 2002.
801 Supra note 757, p. 97.}
‘series of consequences’ if failing to disarm.\textsuperscript{802} The subsequent events following this resolution resulted in the war in Iraq and divided the P-5 as they were no longer able to co-operate in their response to the disarmament of Iraq.\textsuperscript{803} Disagreements and non-cooperation was observed, with France and Russia refusing to permit the use of force against Iraq, with China following their reluctance soon after, and the UK’s efforts in bringing about a compromise was failing rapidly.\textsuperscript{804} The US was concerned at this deadlock with reference to the view that the UNSC would be seen as unable to deal with Iraq and its alleged weapons of mass destruction (WMD) and George W. Bush claimed that the UNSC was likely to ‘fade into history as an ineffective, irrelevant debating society’.\textsuperscript{805} The legality of this war stemmed from a combination of deemed non-compliance of the previous UNSC resolutions, together with the alleged threat of Iraq’s pursuit of WMD.\textsuperscript{806} The Iraq War took place with the US citing that disarmament was no longer the only objective for them and they were now also pursuing regime change.\textsuperscript{807} As time has shown, no WMD were found and the legality of the US and the UK attack in Iraq remains the most controversial issue to date.\textsuperscript{808} The absence of clear collective UNSC backing has jeopardised not only the reputation of the US and the UK, but also has gone towards weakening the UNSC and the UN as a whole. This has been a long time coming, since the US became a unipolar force in the international arena, and particularly the threat by the US to unilaterally involve itself in issues needing to be addressed under the umbrella of IL and the UN, as the organization representing the international community. The initial approach adopted by the US in relation to Syria and their alleged chemical weapon attack is a prominent and most recent example of this unilateral responsiveness. Given the role of the US and the other four


\textsuperscript{803} Supra note 798, pp. 17-18.

\textsuperscript{804} Ibid, p. 18.


\textsuperscript{806} Supra note 98, pp. 1255-1256.

\textsuperscript{807} The National Security Archive, Declassified Documents Show Bush Administration Diverting Attention and Resources to Iraq Less than Two Months after Launch of Afghanistan War, 22 September 2010, available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB326/index.htm; also for further information please see Mail Online News, Simon Walters, Iraq Inquiry bombshell: Secret letter to reveal new Blair war lies, 29 November 2009.

permanent members in enforcing IL in the realm of the UNSC, when any member openly defies the basis of international peace and security, it can only result in international instability and insecurity, as evident through various examples, most obviously the ever increasing insurgencies in Afghanistan, and Iraq Wars and the increase in radical Islamic fundamentalism.

It is important for the US to consider its role as a decision-maker and determinant member of international legal enforcement mechanism, hence it must commit to its rules rather than permitting itself to circumvent IL, and utilise the loopholes existing in its enforcement in pursuit of individualistic objectives. Therefore, the validity of the enforcement mechanism of IL has come under scrutiny and placed IL at great disadvantage by having to justify its place. One consequence of this can be seen in escalating crises and instability in the world. Therefore when looking at the P-5 approaches to these cases, what comes to the picture is how the UNSC’s credibility has been damaged through their inconsistent actions and decisions.

3.3. The connection between the ICJ and the UNSC

There are numerous inter-connections between the ICJ and the UNSC in their enforcement efforts. In the above sections, the distinct forms and features of these two organs were discussed but as a reiteration, it is useful to emphasise that the ICJ is predominantly a legal organ whereas the UNSC is a more political organ, empowered to maintain peace and security. Examination of the connection between these two organs highlights further weaknesses in the enforcement of IL which has placed reciprocity in the pivotal position as an alternative enforcement mechanism.

As was discussed previously, the ICJ faces limitations in enforcing its own decisions since its Statute does not make any reference to enforcement of the ICJ judgment. In cases of non-compliance, States look to the UNSC to enforce the Court’s judgment.809 The prominent example of this is in the Nicaragua case, where the US was accused of breaching IL by not

809 The Security Council’s empowerment for enforcing the Court’s judgments emanates from the Charter stating that ‘If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may… make recommendations or decide upon measures to be taken to give effect to the judgment’, supra note 7, Articles 94(2).
following through with the ICJ ruling and the case was accordingly taken to the UNSC. The resolution put forward for the US non-compliance went through several rounds of voting, finally vetoed by the US, resulting in the resolution not being adopted. Following Nicaragua’s failing attempt, it resorted to taking the case to the GA. Despite a general agreement amongst the international community for the US to accept the ICJ’s judgment, the GA was powerless to do any more than request the US’s full compliance. This example is reflective of instances rendering the ICJ less powerful than would be ordinarily expected, where one of the P-5 can go against its judgment and absolutely disregard its international obligations. The difference in this situation was how the UNSC was able to reduce the effectiveness of the ICJ ruling despite wide claim for recognition of the judgment by the international community.

As mentioned, the ICJ can be asked to provide advisory opinion on legal matters particularly the consistent legal interpretation of the provisions in the UN Charter, but its interpretations are not restricted to just advisory opinions. An example of this interpretation is in the ICJ ruling in the *Nicaragua* case where the provisions for the right to self-defence were interpreted. The ICJ’s advisory role was further cemented by the GA resolution 171(II)(A). The recommendations of this resolution were derived from the need for correct and valid interpretation for the UN Charter in line with ‘recognized principles of international law’, and the expert legal knowledge that resides in the ICJ as principal judicial organ of the UN. However, as discussed, the ICJ’s role for providing advisory opinion has not been sufficiently sought for numerous reasons.

The demonstrative example is the case of *Indonesian Question*, where Belgium proposed a draft resolution for seeking the ICJ’s advisory opinion on the competence of the

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812 Supra note 266, para, 200.
814 Ibid.
815 In the dispute between the Netherland and Indonesia during the colonization era, 1947, the Netherland had challenged the Security Council’s involvement in their dispute on the grounds of the nature of the issue which was claimed by the Dutch to be a domestic issue hence according to the Article 2(7) of the Charter of the United Nations was outside the scope of international intervention.
UNSC in the dispute between the Netherlands and Indonesia. The responses and debate on the Belgium proposal provide a dim view of the working relationship between the UNSC and the ICJ, or the respect the UNSC has or portrays for their advisory opinion. Similarly the UNSC pays less attention to the ICJ’s legal expertise than it deserved. The first disheartening response came from the Polish representative who declared that, ‘the question of competence in the case of the Indonesian question was not a legal one. It was a political question which could be decided only by the Council’. Similarly, the Australian representative dismissed the need to seek the ICJ’s opinion, by suggesting that:

If we decide on every occasion to refer a question to the International Court before we decide to take any action whatever, the result would be that we would never take any action.

This line of thinking was followed by the Chinese representative who was equally reluctant to ask the ICJ’s opinion, arguing that:

A legal opinion rendered to the Council might turn out to be a very tight strait-jacket…If we put on this strait-jacket, we may find it very inconvenient when we attempt to face the problems of a world which is changing very rapidly.

As can be convincingly argued, the idea behind the recommendation of seeking the ICJ’s advice was not to refer every case but to bring about a sense of uniformity in the application of IL. It is concerning that the Chinese representative suggested that the UNSC should be left unguarded and free to pursue its own course. The view that ICJ recommendations are to limit the UNSC sphere of movement or its discretionary powers is alarming, especially from a P-5 member. This view disregards the usefulness, or at times necessity, for uniformity and legality in interpretation and applicability of IL. Another perspective is the UNSC representatives opposing the Belgian proposal were loath to submit themselves and/or the UNSC’s authority to an external organ, preferring to maintain their own autonomy and autonomy.

820 Supra note 792, pp. 16-17, Bedjaoui argues that it was accepted originally that each international organ can interpret the Charter themselves in their daily activities; however, the important questions that require legal assessment and expertise are to be referred to the Court. The Security Council by now has had adequate experience to identify the strengths of its expertise as well as its weaknesses that require the legal-based analytical advisory opinion.
power in their decision making.  

It is useful to look at a similar issue that arose when Yugoslavia, in the Anglo-Iranian Oil Company case, was not satisfied with France’s suggestion of delaying the UNSC decision till after the ICJ ruling on the same subject; fearing that such proposal reduces the UNSC’s competency indicating a dependency on another organ. This argument is baseless since the UN Charter itself offers the UNSC the grounds for referring to the ICJ, where this is an available option, not a requirement, and it will have no impact on UNSC’s competency. It is incorrect to assume that upon exercising this option, the UNSC becomes a subordinate body. Contrarily, it is the UNSC asking for an advisory opinion rather than being challenged or imposed upon. As a matter of law the importance of seeking advice is that a political body needs to confer with a legal body when reaching legal decisions, least of all to ensure the decisions are complying with the requirements of IL as embedded in the integral parts of the rule of law.

The discussion above on the power and influence of the UNSC particularly the P-5 setting out the binding obligations and duties upon States demonstrates the extent to which the enforcement of IL can be influenced by a political organ such as the UNSC. This influence is alarming when it can be observed that a political organ is more influential in affecting international legal obligations and its enforcement to a higher degree than the ICJ as a judiciary organ. In fact the decisions reached by the ICJ and the UNSC are both legally obligatory, however, looking at these comparatively, the ICJ decisions create only legally binding obligations on the disputants, while the UNSC decisions encompass a wider legally binding scope, including all UN members. The ICJ has maintained a limited sphere by assessing only the legal aspects of any dispute; however, the same cannot be said of the UNSC, when the UNSC has intervened in wide-ranging legal aspects of disputes. Cases such as the Aegean Sea Continental Shelf and the Nicaragua are examples of such intervention. In the former case, the ICJ identified the political nature of the dispute but on closer

822 Anglo-Iranian Oil Company Case, The United Kingdom of Great Britain v. Iran, ICJ Reports, 1952, the Government of Iran raised its objection on the basis of lack of jurisdiction; for further information please see supra note 792, pp. 19-20.  
823 Ibid note 792, p. 20.  
824 Ibid, p. 20.  
825 Supra note 708; and supra note 266.
investigation, the ICJ rejected Turkey’s claim that the case was purely political, and the Court assessed the case purely on the legal matters surrounding the dispute.\textsuperscript{826} In the latter case, however, the US as one of the P-5 disregarded the legal position of the case as judged by the ICJ, and used its veto right ignoring the legal obligation set by the ICJ.\textsuperscript{827} Furthermore, the international community’s overwhelming view on this case as was demonstrated by their GA votes was also disregarded. The international community reiterated and requested the US to uphold its regard for IL which includes absolute compliance with the binding decision of the ICJ, but this has been of no effect.

The UNSC actions, in the above cases, have had intended and unintended consequences in IR and IL, at times relating to the enforcement of judicial decisions. It also casts a shadow of doubt on the true representation of the international community in the UNSC and the correct use of veto for maintaining and promoting international peace and security. This is to say, the regard for equality of States and their equal representative and quest for justice as the core basis of IL has been undermined. Hence, the strength and the power of the enforcement mechanisms have been affected and continue to be affected. It is worth reiterating that the US, as an example, has continued its approach to the present time where it is confirmed that the US will use its veto right in following the Palestine request for admission to the UN as a member State. The Palestinian request has received the international community’s backing where there was a standing ovation in the GA following the formal request.

3.4. Issues with International Law Enforcement through the Security Council and the International Court of Justice

The enforcement mechanisms discussed so far highlight the weaknesses and limitations faced by IL for the enforcement of its rules. The power and strength bestowed upon the UNSC were observed, and the following analysis assesses the concerns surrounding this power and its impact on enforcement of IL. The issues are multifaceted and encompass issues with 1) Equality and democratic representation in international disputes settlements; 2) Compliance and commitment of States to IL or the obligations set for them; 3) Risks to international peace and security. The issues with the centralised enforcement mechanisms further highlight

\textsuperscript{826} Supra note 708, pp. 12-13.
\textsuperscript{827} Supra note 810, p. 40.
the necessity of the non-centralised enforcement mechanism of IL and the role of reciprocity within this form of enforcement.

3.4.1. Equality and Democratic Representation in International Disputes Settlements

Compared to the UNSC, the GA power is minimal although it includes a greater representation of member States. The UNSC resolutions are legally binding whereas the GA resolutions are considered as ‘soft law’. More than half a century after the UN’s creation, it is difficult to fully digest how the power granted to its political organ, the UNSC, can be a democratic distribution of power. The UN has had to admit that the world does not regard the UNSC as a truly democratic representation of the international community, and reform must take place.\textsuperscript{828} This non-democratic representation is further skewed by inequality within the UNSC, where the P-5 holds veto rights, and their buy-in is necessary for any issue brought to them.\textsuperscript{829} In theory, veto rights can be useful in bringing about co-operation and uniformity in the decisions taken by the P-5. However, has this been achieved in practical cases? Given the political nature of the UNSC, can the decisions and actions taken by the UNSC disregard potential individualistic decisions and exclude the personal interest of the UNSC members, particularly the P-5, for the benefit of the international community as a whole? The significance of this is in the role of the UNSC as an enforcement mechanism of IL and it is reasonable for the international community to have a level of expectation for neutrality in evaluation of the overall benefit in the UNSC decision making process. Although, steps have been taken to address this problem through the necessary reform for a better representation,\textsuperscript{830} this effort has not so far been successful.

The following sections examines why the urgency in this reform is needed as a short-term solution, and how the UNSC decisions and its impacts can create negative consequences on international peace and security, notwithstanding the damage to the UN’s credibility. There exists a fundamental discrepancy in the UN Charter indicating the ‘equal rights’ of States and later outlining the limited composition of the UNSC, particularly empowerment of the P-5.\textsuperscript{831}

\textsuperscript{830} \textit{Supra} note 828, para. 20.
\textsuperscript{831} \textit{Supra} note 828, para. 20.
The contrast between the aim for inclusiveness and equality in theory, and the exclusivity of the UNSC decisions has a paramount impact on IL. The biggest damage is where a permanent member can veto a resolution and go against the will of others. This issue was highlighted in two recent cases, firstly surrounding the US threatening to use its veto right against the establishment of an independent State of Palestine, and secondly China and Russia using their veto right against the UNSC resolution against Syria. In both cases the majority of the international community was in support of the resolutions, but the threat of a veto meant that the final outcome may not have been based on the general consensus of the international community.

A similar approach can be seen in the extent to which the US political will on the issue of Israel and Palestine has influenced the course of IL through vetoing a case between these two States forty two times. The US systematically fails to consider its role in the UNSC to act in capacity of an enforcing body of IL and to maintain international peace. There would be immense rewards if the US would play a more constructive role and adopt a more problem-solving approach. The issue of Israel/Palestine is considered to be of vital importance by the ICJ, the UNSC and the GA since it is a major contributor to international peace and security. On the one hand, Palestinians have support from the Arab World and Islamic countries; and on the other hand, Israel has the support of most Western countries. Additionally, the Islamist groups, such as Hamas or Hezbollah, believe that in the conflict, Palestinian rights are being abused, as well as relying on this persecution as a way of increasing expansion of their belief system. Therefore, this important approach, for instance, towards the recognition of Palestine could be pivotal in building co-operation in the future which will go towards prolonging international peace and security. Chapter Five addresses what the necessary steps are in

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832 Middle East Monitor, Dana Halawa, A Palestinian-American view of the US veto, 30 September 2011; and Voice of America News, André de Nesnera, Possible US Veto Against Palestinian Statehood Bid at UN Debated, 21 September 2011.
834 Syria has received a condemnation for the treatment of protestors for reform, and similarly Mahmood Abbas received standing ovation following his speech requesting the consideration for independent State of Palestine.
835 When looking at Israel and Palestine case, it is disappointing to observe that 42 Security Council resolutions on the same subject have been vetoed unilaterally by the United States since 10 Sept 1972; more importantly, in July 2004, illegality of the construction of the Wall in the occupied Palestinian Territory was approved by advisory opinion of the International Court of Justice, for further information on this subject see: the United Nations Resolutions Concerning Israel/Palestine, American Association for Palestine Equal Rights, available at: http://www.aaper.org/site/c.quiXL8MPJpE/b.3813077/k.9D93/UN_Security_Council_Resolutions_supporting_Palestinian_human_rights.htm; and Wall Opinion Case, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports, Advisory Opinion, 2004.
achieving international co-operation as a prerequisite for international peace and security. These steps will help determine how the loss viewed by Israel in the short-term is overpowered by the future long-term gains in this mutually beneficial deal when viewing the value of establishing a long lasting peace, and minimising escalating threats to international security.

3.4.2. Compliance and Commitment of States to International Law or the Obligations Set for States

IL is based on the ground of compliance by States and their commitment for upholding their duties and obligations. As iterated in this study, the formulation, the compliance and enforcement of IL relied heavily on the ‘will’ and ‘consent’ of States. As such it has been presumed that by taking States into consideration in every aspect of the legal system, the commitment of the main players can be relied upon. A previous example used was comparing the domestic and IL, where in a national legal system, the jurisdiction of a Court cannot be undermined or questioned without repercussions, whereas in IL, the jurisdiction of the ICJ is not compulsory, but determinable and open to challenge by States. It is therefore plausible to expect commitment from States in the legal system where they have a self-determining right to their obligations and duties, together with such authority as to challenge the jurisdiction of its judiciary organ. This is to say that, treaty formulation, ability to place reservations, the role of States in formulations of CIL, and the unequivocal acceptance of the UN Charter duties and obligations, together with the absolute necessity of ‘consent’ at every turn places a responsibility upon States to give due respect and consideration to the importance of their commitment to the agreed duties and obligations under the IL.

The limitations of IL enforcement have impacted the extent to which States are willing to abide by their obligations. This is coupled with inequality perceived between the stronger States, the P-5, and others, which provides an escape route for non-compliance. The imbalance has fuelled a dimmer view of IL than it deserves, as well as a stronger tendency for States to follow their political agenda rather than their commitment. Hence, if the UNSC approaches are influenced by political motivations, where does that leave the international community and IL enforcement mechanism?
Disregard for IL is not exclusive to undemocratic and authoritarian States. There is convincing evidence of disregard by some of the P-5 in cases referred to the UNSC such as China’s support in ‘fuelling war in Darfur’,836 France arming Libyan rebels,837 the US willingness to go to Iraq in 2003 without the UNSC backing or absolute clarity on the legality of the war,838 or the case analysed in Chapter Three regarding the US treatment of detainees. This level of disregard or unilateral approach towards IL by its guardians and enforcers leaves little room for expecting others to have a high regard for the rule of law and IL. Hence, despite the anticipation of commitment of States to IL, the political elements intervene in the level of commitment that would otherwise be expected.

3.4.3. Risks to International Peace and Security

On reflecting back to the main role of the UNSC, it is important to consider the stipulation that the UNSC ‘in discharging these duties…shall act in accordance with the Purposes and Principles of the United Nations’.839 This suggests that the UNSC must hold the UN purpose and principle forefront in their approach. A feature of the UNSC resolutions, discussed before, is in their binding obligations that are created following a law-making process. At the next stage, the resolutions create the basis of an enforcing instrument for IL. Hence, the UNSC’s acts and resolutions must be based on the integral parts of the rule of law, justice, consistency, uniformity, and legality, which are reflective of the UN purposes and principles. This stance helps clarify how, for justice to be achieved, there must be consistency in approach, uniformity in the application of circumstance, and sound wisdom and reasoning in evaluation of the characteristics for categorisation of circumstances. That is to say, the decisions of the UNSC are internationally accepted and

836 Despite the international embargo for the United Nations members taking measures to ensure they do not provide militarily assistance in the conflict in Darfur, BBC found evidence that China has been in breach of this embargo by assisting Sudan military, BBC News, World News, Hilary Andersson, China ‘is fuelling war in Darfur’, 13 July 2008.

837 African Union criticised and condemned France for arming Libyan rebel groups on the ground that it put the region at risk. John Laughland, the director of studies at the Institute of Democracy and Cooperation was also critical of France’s actions, available at: http://www.idc-europe.org/en/The-Institute-of-Democracy-and-Cooperation; also see RT Russian News, 30 June 2011; and BBC News, World News, Libya: AU condemns French arms drop to rebels, 30 June 2011.

838 Further information on this subject see supra note 798; illegality of the war in Iraq on the basis of international law was stressed by Scholars Ulf Bernitz, Nicolas Espéjo-Yaksic, Agnes Hurwitz, Vaughan Lowe, Ben Saul, Katja Ziegler, James Crawford, Susan Marks, Roger O’Keefe, Christine Chinkin, Gerry Simpson, Deborah Cass, Matthew Craven, Philippe Sands, Ralph Wilde, Pierre-Marie Dupuy in an article, the Guardian, War Would be Illegal, 7 March 2003.

839 Supra note 7, Articles 24(2).
valid, if and when the UNSC has fulfilled its tasks and responsibilities in line with the requirements of the rule of law. If not, to what extent must and could the UNSC transcend its set boundaries?

Kelsen suggested that the UNSC’s conducts under Article 39, in assessing the measures in response to potential threat to peace, are taken in response to ‘maintain or restore peace’ as opposed to restoring or enforcing the law.840 He believed that although the UNSC’s empowerment must be based on the UN purpose and principles of which justice and IL are paramount, the UNSC however is not limited to IL. That is to say, the UNSC is empowered to take steps for maintaining peace and security through justice even if it is not ‘in conformity’ with IL.841 This viewpoint is startling as it suggests that the UNSC is granted an empowerment to establish peace and security at any cost, even if it transcends the rules of IL. Judge Bedjaoui provides a coherent and strong counter-argument when stressing how the UNSC is not excused from the boundaries of IL which includes, within it, the provisions of the UN Charter.842 This counter-argument revolves around important primary factors of IL. Firstly, IL, particularly the provisions of the UN Charter, must be respected and not be breached by any UN organ; secondly, the UNSC cannot disregard the rules of IL formulated and consented to by States for any reason; thirdly, in cases of the UNSC facing a gap in IL, the legality of the UNSC actions creates an obligation on them not to act against the rules of IL.843 Additionally, in developing his argument, Bedjaoui refers to Dupuy’s observation on how States create international organizations that in turn provide legal rules for the operations of the organizations; however all international organizations’ rules must be subject to IL.844 It is difficult to see how the UNSC can deem itself above the rules of IL but simultaneously be its main enforcer. In this line of thought, surely it is more plausible to accept Bedjaoui’s reasoning that the sphere of the UNSC operation is limited to the framework of IL.

The above discussion makes the assessment of legality of the UNSC decisions paramount when discussing their duties for upholding and enforcing IL. One of the most important assessments of legality is in the correct interpretation of the UN Charter provisions, essentially, the factors that must be present when the UNSC decides on potential risks to

841 Ibid, p. 295.
842 Supra note 792, pp. 32-36.
843 Ibid, pp. 32-36.
844 Pierre-Marie Dupuy, Droit International Public, 1992, p. 127; and supra note 792, p. 33.
international peace and security. The UN Charter has authorised international organs to interpret its provisions in the sphere of their control and parameters. Even though there is no requirement for one body to adopt the interpretation of others, however, the ability of any organ’s ability has an effect on IL. This might be an unintended effect, but as Schachter has convincingly argued:

When an organ applies a Charter principle or any other rule of law to a particular set of facts, it is asserting, as a matter of logic, a new rule of a more specific character. This is a law-creative act, even though the members of the organ maintain (as they often do) that their decision is confined to the specific facts and they do not intend to establish a precedent.845

As discussed earlier in this work, this raises a concern when legal interpretation of a political body, the UNSC, can set legal principles and precedents for other UN organs, particularly the ICJ, the principal judicial organ. Such concerns lead the study to argue for a need for the establishment of an overarching judicial review body that could overview the legality of the decisions and actions of all UN bodies in line with IL and the rule of law.

Judge Lachs refers to the ICJ as a ‘guardian of legality’ for the international community,846 however the ICJ is limited in its advisory opinion so long as there is no request placed upon it to provide any interpretation, and also its advice is non-binding. However, suggested overarching judicial body must be enabled to perform regular legal reviews. Additionally, the parameters for this body must only not be limited to maintaining peace and security, but must expand to encompass all areas of IL, if it is to be able to take a complete view of the implication of the decisions of one body upon the others. In other words this organ must not contradict other rules of IL when interpreting and dealing with a point at hand. This also helps towards serving global justice from an overall viewpoint without limitations to peace and security. One of the main issues with the UNSC decisions is the perception that there are inconsistencies in their approach towards subjects endangering international peace or with non-complying States. It has often been concluded that political and domestic pressures play a vital role in the P-5 decisions.

Over the years, since the establishment of the UN and its organs, there have been indications that politics play a more prominent role in UNSC decisions than a purely legal ground. Amongst a large number of politically driven resolutions, the Libya case, following the Lockerbie incident, provides a prominent example, where resolution 731 obliged States to assist with efforts for the extradition of two accused Libyan nationals. The validity and legality of such mandate was brought under question, particularly since the extradition was deemed a legal matter and must be dealt with through legal channels. This approach was generally perceived by Libya as a purely political decision sponsored by the US and the UK. As a result, Libya took the case to the ICJ, claiming that Libya had fully complied with its obligations under the applicable 1971 Montreal Convention and hence requested provisional measures for its interim protection. Even though the US and the UK counter-claimed on the grounds of jurisdiction of the Court, the ICJ finally refuted this and set about to examine the case. Subsequently, soon after the close of the hearing, the UNSC passed resolution 748 requesting the ICJ not to provide any ‘provisional measures’, so as not to be in conflict with the UNSC. This action by the UNSC has been described by many to change the natural course of the ICJ decision-making, placing a great conflict between these two organs.

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847 Namely, the United States use of veto against Israel and Palestine Case for 42 times and the US invasion in Iraq and Kosovo.
849 The challenge was made by the representative of Sudan, Iran, the League of Arab States and Libya, Security Council Provisional Verbatim Record, 3033th meeting, 21 January 1992, S/PV.3033.
850 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United States of America, ICJ Reports, 1998, paras. 33-35; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United States of America, Request for the Indication of Provisional Measures, ICJ Reports, paras. 7-8, Montreal Convention Article 14(1) states ‘Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall…be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court’, International Civil Aviation Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, adopted on 23 September 1971, 974 UNTS 177.
Franck convincingly argues how these forced the ICJ to comply with a political organ’s decision on a situation that required a legal opinion. The ICJ was placed under great restriction by the UNSC when deciding upon a legal matter which was in its domain and expertise; and had to conclude that even though Libya may have had legal rights under the 1971 Montreal Convention, but its legal obligation under the UN Charter meant that the UNSC resolutions override other obligations and must be adhered to. Judge Lachs articulated that the ICJ is duty bound by IL to respect the UNSC, and as such the Court could not disregard the UNSC resolutions. Although the Judge was also quick to disclaim suggestions that the ICJ judgement is to be taken as ‘abdication of its powers’, but this situation undoubtedly caused discomfort. It is hard to see how a political organ’s ability to override a situation by silencing a judiciary organ will not have an impact on its ability to protect and enforce IL. Also equally important is the issue of both organs’ ability to review and assess a case simultaneously.

Comparing this to national legal systems, enforcement bodies are not empowered to deal with the same case that is being examined in another Court prior to the cessation of that case, known as res judicata as well as Estoppel; however, the same restrictions do not seem to apply to the ICJ and the UNSC, as this case demonstrates. This issue had risen before in the case of United States v. Iran, where IRI contested the case on the grounds that this matter was already before the UNSC, but the ICJ rejected this claim as viable and continued to assess the case. Judge Alvarez in the Anglo-Iranian Oil case viewed that the UNSC has the right to intervene and overtake a case that it deems a threat to international

855 Supra note 7, Article 25 and 103.
857 Supra note 757, pp. 87-88.
858 Supra note 856.
859 This is known as res judicata as well as Estoppel. The former is recognised in both civil law and common law referring to situations where a dispute cannot be claimed again either in the same Court or in any other Court. In effect the doctrine of res judicata will be used to preclude the dispute being put forward for reconsideration. The latter refers to situations being barred from re-litigation, supra note 2, pp. 589-590 and 1336-1137.
860 The ground for this claim was that the Court should not decline to resolve legal issues comprising aspects of political disputes because ‘it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes’, supra note 707, paras. 39-40; and Krzysztof Skubiszewski, the International Court of Justice and the Security Council, (eds.) Vaughan Lowe and Małgosia Fitzmaurice, Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings, 2007, p. 610.
peace, indicating that the UNSC can directly intervene and limit the Court’s jurisdiction in a case under the ICJ’s review. Judge Alvarez’s view was challenged by Judge Weeramantry, in the *Libya* case, on the grounds that even though the UNSC ‘has primary responsibility for the maintenance of international peace and security … is not sufficient to give it exclusive competence over these matters’, referring to Rosenne’s argument for non-exclusivity of UNSC’s competence. In practice, however, the ICJ found itself closer to Judge Alvarez’s view in the *Libya* case, when it was not able to address the case on the grounds of obligations set by the UNSC. Upon closer inspection, Judge Alvarez’s view is questionable and does not seem correct that the UNSC as enforcing body is able to contradict the judiciary organ of IL.

Based on evidence, it must be noted that there do not seem to be any jurisdictional issues between the ICJ and the UNSC prior to the end of Cold War, where any restrictions were shown to be placed on the ICJ for the Court to follow its legal course and to deliver its judgment. To sharpen the conflict between the two international enforcing bodies let us assess a similar situation which arose a few years later where the ICJ contradicted the legal interpretation of right to self-defence by the UNSC. Soon after the 9/11 attack, the UNSC interpreted that the ‘war on terror’ was effectively self-defence and therefore permissible under the UN Charter. In this respect, an important point to note is that the ‘war on terror’ was not against a particular State or its armed force, rather it was targeting non-State actors, otherwise referred to as belligerents. The legality of the UNSC resolutions, 1368 and 1373, and the subsequent attack on Afghanistan following these resolutions have been the subject of contradictory debates. The questions revolved around the issue of whether self-defence

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865 Security Council Resolution 1373, Threats to international peace and security caused by terrorist acts, 4385th meeting, 28 September 2001, S/RES/1373, the Security Council reaffirmed ‘the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368’.

in the UN Charter is permissible in response to non-State actors, as of the Taliban and Al-Qaeda example. The interpretation adopted by the UNSC was that ‘inherent right’ to self-defence is permissible, but this interpretation was indirectly challenged by the ICJ a few years later.

The ICJ’s advisory opinion sought in the Wall Opinion in 2004 brought the issue to the surface relating to the legal interpretations of the UN Charter, where Israel relied on the UNSC interpretation of self-defence to defend the legality of building a wall to protect itself in its self-defence from Palestinian attacks. The ICJ concluded against the applicability of self-defence and hence Israel could not rely upon this notion.\textsuperscript{867} Furthermore, the ICJ reiterated the rights of the Palestinians and Israel’s obligation to uphold its international legal obligation.\textsuperscript{868} The ICJ opinion dismissed the earlier UNSC interpretation of permissibility of self-defence for non-State actors, concluding that the right of self-defence is applicable only when a State finds itself attacked by another State.\textsuperscript{869} The ICJ’s view was contradicted by Judge Buergenthal declaring that the UN Charter, ‘in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State’,\textsuperscript{870} and the Judge refers to Franck’s reasoning that this inherent right ‘is expressly accorded in response to ‘an armed attack’ and not to any particular kind of attacker’\textsuperscript{871} Franck claims that the UNSC resolutions cannot ‘legally’ give the right to exercise of self-defence since this is an inherent right for the injured party already established in the UN Charter.\textsuperscript{872} The ICJ did not reach the same conclusion as either the UNSC or the one proposed by Franck, and has subsequently stirred its relationship with the UNSC. Since the UNSC resolution is binding in this case and the ICJ’s advisory opinion is non-binding, in this situation, the UNSC’s interpretation is the overruling one, even though this is arguably a legal matter and the ICJ’s view should hold a higher authority.
On a related subject, when the evidence of US torture-related issues came to light, no condemnation or action were taken by the UNSC, and let us recall the interpretation provided in the US torture memos indicating that as non-State actors there would be no protection for these individuals under IL. However, the UNSC was comfortable to reaffirm that self-defence under the UN Charter would provide protection from the same non-State actors. Could this be taken as selective interpretation of IL by a political organ whose area of expertise is not in legal interpretation? Are these not indicative of why and how the interpretation of all, if not, most important legal issues must be referred to an international judiciary body, able to interpret legal issues coherently, consistently and uniformly under the umbrella of justice as embedded in IL.

3.5. International Trade Dispute Settlement

As previously mentioned, the working of IL is such that it encourages co-operation and compliance with its rules and obligations but in case of non-compliance, it aims to provide the reciprocal opportunity for States to regain their balance of rights and interests. This is strongly evident in international trade system which is governed by the WTO. The WTO is an international organization which deals with the rules and regulations of international trade based on the WTO agreements, aimed primarily to help producers of goods and services, exporters, and importers conduct their business. In other words, its primary objective is to ensure that international trade ‘flows as smoothly, predictably and freely as possible’. The WTO rules and agreements are a branch of IL and as such are under the umbrella of the VCLT. The notion of ‘good faith’, discussed earlier, plays a vital role in the agreements and rules of the WTO specifically in relation to the dispute settlement processes and procedures which are discussed later in this study. In particular, ‘good faith’ is specified in Article 3(10) of dispute settlement rules stating that ‘all Members will engage in these procedures in ‘good faith’ in an effort to resolve the dispute’, as well as under Article 4(3) of dispute settlement rules stating that ‘members…shall enter into consultations in good faith’. As will become

873 World Trade Organisation, established in 01 January 1995 as the successor to the General Agreement on Tariffs and Trade, and created by: Uruguay Round negotiations (1986-94).
874 Ibid.
876 Ibid, Article 4; for more information see Andrew D. Mitchell, Legal Disputes in WTO Disputes, 2008, pp.121-123.
evident, ‘good faith’ plays a fundamental role in ensuring the obligations of the WTO are abided by, since the principle of reciprocity in the framework of the WTO allows for States to claim the same advantage as the breaching State.

The negotiation as well as decision-making process in the WTO is unlike most other organizations in the fact that consensus and unanimity of all member States play a vital role in its operation, demonstrating how important these are in international trading.\(^\text{877}\) The success in achieving unanimity is directly linked to reciprocity and the benefit deemed by each State since trade liberalisation which leads to the lowering of barriers for foreign products is likely to have political damage, and States need to achieve a reciprocal advantage in their negotiations.\(^\text{878}\) This creates the uniqueness of the negotiation process where in fact every member must be in agreement unlike other organizations or institutions where either the majority or a selected board are the decision-makers. The focal point to note is that the need for unanimity and consensus discussed above create reciprocal duties and obligations amongst the WTO member States. As appropriately stated by Herrmann-Pillath, in an ever-changing structure like the WTO, reciprocity is comparable and/or equivalent to unanimity given the concept of an individual State's ‘consent’ in accepting the rules at the point of joining the WTO, or in the ongoing negotiations on world trade agreements.\(^\text{879}\)

The WTO membership emphasises the general notion of reciprocity by stating that ‘membership means a balance of rights and obligations’ and that with the privileges of membership a commitment is required by each member to abide by the membership rules and to allow others to access their markets. New countries wanting to join the WTO must be mindful of their reciprocal obligations and duties, since membership is granted only when all entry requirements for their admission are fulfilled and of which reciprocity is an important factor.\(^\text{880}\) Reciprocity is believed to be one of the most important underlying principles of


\(^{879}\) Carsten Herrmann-Pillath, Reciprocity and the Hidden Constitution of World Trade, Constitutional Political Economy, 2006, p. 144.

\(^{880}\) For further information please see World Trade Organization, Membership, Alliances and Bureaucracy, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.
international trade,\textsuperscript{881} and the reason for trade liberalisation.\textsuperscript{882} More precisely, the principle of reciprocity is viewed by many scholars to be the underlying driver and the motivational force behind the creation of the General Agreement on Tariffs and Trade (GATT) and the WTO as the international trade organizations.\textsuperscript{883} In fact, a clear statement referring to reciprocity is in the GATT’s preamble itself, addressing an objective for countries to be ‘entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to eliminations of discriminatory treatment in international trade relations’.\textsuperscript{884}

Before embarking on understanding the dispute settlement process in the international trade system, it is important to examine the role of reciprocity in the workings of the WTO which is the underlying factor for the WTO dispute settlement. The most prominent features of reciprocity in multilateral world trade are in the Most Favoured Nation (MFN) status awarded to each member as well as the National Treatment protection (NT) covering intellectual property rights discussed below.

3.5.1. Most Favoured Nation

The MFN clause is embedded in the rules of the WTO which require member States to treat all members equally irrespective of their wealth or power with no discrimination between them.\textsuperscript{885} The idea is that any time a market is opened up or a trade barrier is lifted all member States, unconditionally and without discrimination or prejudice, can benefit from this. The importance of the MFN is very clearly stipulated in the WTO and indeed in Article 1 of the GATT which refers to the non-discriminatory nature of trade between member States by declaring that ‘…any advantage, favour, privilege or immunity granted by any contracting

\begin{thebibliography}{8}
  \bibitem{882} Thomas Alexander Zimmermann, \textit{Negotiating the Review of the WTO Dispute Settlement Understanding}, 2006, p. 35.
  \bibitem{885} World Trade Organization, Understanding The WTO: BASICS: Principles of the Trading System, Most-Favoured-Nation.
\end{thebibliography}
party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties’.

Scholars, namely Parisi, Ghei, and Herman-Pillath, have accredited the existence of reciprocity in international trade to the assertion of the MFN and the non-discrimination feature in the structure of the WTO. Parisi and Ghei have persuasively articulated this when assessing the effect of the MFN on trade liberalisation by suggesting that prisoner’s dilemma situations in international trade are limited and the dominant strategy of States which stands in the way of lowering trade barriers are removed by the assertion of the MFN and non-discrimination in the WTO/GATT. This argument demonstrates how reciprocity has been put to use to lower the imbalance that might be created between the parties. Also the assertion of such clauses places the future negotiations at a higher level without the need for repetitive discussion for trade negotiations. That is to say, certain balancing of rights is already pertained through the membership and thus negotiations will always start from a higher stance. A WTO member is secure in the knowledge that by bestowing the MFN status on their fellow trade partners, equivalent advantages are reciprocated in relation to the trading partners’ markets, trade barriers, etc. The value of the MFN is different for specific countries; for example, smaller countries benefit from the MFN by avoiding entering negotiation with larger countries and suffering as result of high tariffs bestowed on them by larger countries.

3.5.2. National Treatment

The second feature of reciprocity within the WTO is in the protection granted to foreign products, services, copyrights, patents, and trademarks, where member States are required to treat foreign products and services and so on in an equal manner to domestic products and services, once the product, service or items covered by intellectual property have entered into

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886 World Trade Organization, General Agreement on Tariffs and Trade, signed April 1947, entered into force 01 January 1948, Article I.
887 Supra note 879, p. 145; supra note 1, pp. 112-113.
888 Supra note 1, p. 112.
their market.\footnote{For further information please see World Trade Organization, Principles of Trading System: National Treatment, available at: \url{http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm}} The NT rules are covered in Article 3 of the GATT stating that, ‘…internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale…should not be applied to imported or domestic products so as to afford protection to domestic production’.\footnote{Supra note 886, Article 3(I).}

As with the MFN status, the NT rules provide each member with the assurance that their products and services are protected and not subjected to unequal national tax or additional charges; each member agrees to protect the products, services or items covered by intellectual property rights. In Article 3(1) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) which specifically deals with intellectual property, it states that ‘Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property’.\footnote{Trade Related Aspects of Intellectual Property Rights, Article 3(1), The TRIPS Agreement is Annex 1C of the Marrakesh Agreement.} Furthermore, reciprocity of this nature is observed in the Berne Convention where all member States are obliged to recognise the copyright of the works by other nationals to the same level as would be provided to national works.\footnote{World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, accepted 09 September 1886, Article 1 and 2; according to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), the principles of national treatment, automatic protection and independence of protection also bind those World Trade Organization Members which are not party to the Berne Convention. In addition, the TRIPS Agreement imposes an obligation of ‘most-favored-nation treatment’, under which advantages accorded by a World Trade Organisation Member to the nationals of any other country must also be accorded to the nationals of all Members. It must also be noted that the possibility of delayed application of the TRIPS Agreement does not apply to national treatment and most-favoured obligations, for further information please see \url{http://www.wipo.int/treaties/en/ip/berne/summary_berne.html}.} The significance of reciprocity in the protection of intellectual property rights has come a long way to its contemporary form. A requirement has been for States relations to move away from the viewpoint of sovereignty and territory to a more collective view of protection of rights at a global level.\footnote{Catherine Seville and Joe McMahon, Intellectual Property, \textit{The International and Comparative Law Quarterly}, 2001, Vol. 50, Issue. 3, p. 714.} Hence, this could have only been achieved by shifting towards a non-discriminatory basis instead of silo of each territorial or national law.

Parisi and Ghei convincingly argue that the conditions eliminating discrimination in trade within the WTO diminish the prisoner’s dilemma situation that States might find themselves
in, where a State has reduced its price barriers but other trading partners have not.895 This view is shared by Staiger who argues that reciprocity in international trade, as set out in the WTO, helps eliminate 'terms-of-trade manipulation' issues by States and reciprocity constraints within the rules of the WTO which create a ‘fixed-terms-of-trade rule to which mutual tariff changes must conform’.896

The WTO aims to eliminate trade barriers and to promote non-discriminatory protection of products and services of members, but only to the extent in which foreign suppliers are not treated unfavourably in comparison to national suppliers. These conditions only impose obligations on States to treat foreign products and services in line with how national suppliers are treated. The form of reciprocity granted by the NT eliminates discrimination amongst national and foreign supplies and to ensure fair trading competition. The role of reciprocity in this context should not be confused with providing the goods and services, etc., with exactly the same treatment as their originating country. That is to say, the taxes levied in the France on French products and services, for instance, are to be replicated when entering the UK market. This form of reciprocity would make the administration of importing virtually impossible especially for States such as the UK which are major importers. Instead the role of reciprocity with the NT rule is to eliminate discrimination and reciprocity, ensuring that goods entering a foreign market would not be treated differently and can fairly compete with one another.

3.5.3. Trade Dispute Settlement Process

In instances of international trade disputes where breaches of the WTO conditions or agreements have occurred, the WTO is empowered to deal with and settle such disputes. The WTO has a unique dispute settlement system which is aimed at enforcing the WTO rules and to bring about stability, predictability and security in world trade.897 Similarly the consultation process for the dispute settlement system helps protect reciprocity between the WTO members.898 Reciprocity is evident in the dispute settlement process where an injured

895 Supra note 1, p. 112.
898 Supra note 882, p. 42.
State is able to make a claim and receive compensation for the losses suffered as a result of another member's non-obedience to the agreement. A dispute between members occurs when a State is considered by others to adopt strategies or actions which are in breach of the WTO agreements or obligations,999 effectively leading it to gain an unfair advantage over other member States.

The WTO dispute settlement system constitutes detailed rules and procedures clearly outlined in annex 2 of the WTO agreement,900 and these rules are believed to be ‘vital for enforcing the rules’.901 The DSB is set up and empowered to deal with the WTO disputes.902 The DSB has been given authority for many responsibilities but the most important one relating to the focus of this research is how it is able to authorise ‘suspension of concessions and other obligations’ as well as authorising retaliation in cases of non-obedience.903 When a dispute arises, the first step is for the involved States to enter consultation and dialogue to settle their dispute themselves.904 This is resulting from the ‘horizontal’ system of IL without the hierarchal enforcement authority. Failing the consultation process, the following stage is for the victim to request establishment of a panel to address and assess the complaint.905 The final report of the panel constitutes the ruling of DSB, unless there is a consensus rejection or if a party decides to appeal against the panel findings.906

There are some underlying factors in the WTO dispute settlement process that are comparable to the ILC workings on counter-measures and the ICJ ruling in *Gabcikovo-Nagymaros Project* Case relating to resolution of the disputes or the validity and legality of the response to breach in agreements. For instance, both the ICJ and the ILC have given three necessary rules for legal counter-measure which are that the response must be against the responsible State, that the responsible State must be given the opportunity to correct the non-compliance by discontinuing or making reparations, and that the response must have a time-frame to have the ability to be reversible so that the response can cease in case of the

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999 Ibid, p. 42.
900 Supra note 875.
901 For further information please see supra note 897.
902 Supra note 875, Article 2.
903 Ibid, Article 2.
904 Ibid, Article 4.
905 Ibid, Article 6.
906 Ibid, Article 16.
continuation of agreements and compliance. As discussed before all of these conditions are to allow reciprocal response to the injured State whilst inducing the responsible State to return and comply with the original agreement. Similar trend in WTO dispute settlement is visible when evaluating the rules and procedures governing the settlement of disputes. Similarly the WTO dispute settlement calls for States to work together constructively to resolve their issues as part of the consultation process prior to reverting to panels set up by the DSB. States are obligated to ‘enter into consultations in good faith’ and similarly this was also iterated in the ICJ ruling that the two States must engage in negotiations in ‘good faith’ in dispute resolution in the Gabcikovo-Nagymaros Project Case. The relevance and importance of this observation is that, as previously discussed, the prerequisite of ‘good faith’ in treaty laws provides the basis for the application of reciprocity, particularly, where the terms of treaties provide the withholding or retraction of the obligation upon the breach of the other party. This notion enhances respect and fairness whilst instilling the obligation on States to abide by the spirit intended by the treaty or their agreements and avoid gaining unfair advantage.

Additionally the dispute settlement process calls for ‘the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed’, suggesting similar trend as the issues addressed by the ILC and the ICJ relating to the counter-measure response is applicable so far as the duration of the non-fulfilment of obligation or the unlawful act. This is once again illustrative of the point raised earlier that IL, through the use of reciprocity, attempts to minimise unfair advantage and bring about the balance of rights and obligations whilst promoting and encouraging compliance. However despite a need for punishment of disobedience, this punishment should not be so severe as to disallow the reversibility or cessation of the punishable response.

The principle of reciprocity manifests itself in the WTO dispute settlement system by allowing different forms of retaliation in case of a breach of agreements. If the panel finds that there is a breach in the WTO rules and agreements, the DSB then grants the victim

907 Supra note 186, paras. 83-87; and supra note 467, p. 129.
908 Supra note 875, Article 4; Also for further information please see supra note 897.
909 Supra note 133, p. 320.
910 Supra note 875, Article 22(8).
compensation or suspension of concessions. The dispute settlement process described in this Chapter is an overview of the complex process involved in resolving disputes between members; however a more detailed review of the dispute settlement process is outside the scope and aim of this Chapter. It is important to reiterate how the WTO envisaged the essential requirement for reciprocal retaliation to ensure that rules and obligations would be honoured and fulfilled, particularly, authorising retaliation by the victimised State through the empowerment of the DSB in cases of breaches in trade agreements.

Demonstrating the aforementioned analysis of the reciprocal retaliation can be better understood through examining the following high profile cases where retaliation has been warranted for a breach of agreements. In the beef hormone dispute, the US and Canada took the European Communities to the DSB for the ban imposed on meat and meat products treated with hormones. The DSB reached the conclusion that the annual losses suffered by the US and Canada were US$ 116.8 million and CAD$ 11.3 million respectively and thus, the victims were authorised in retaliation to ‘the suspension of concessions’ to the European Communities for their losses. In the Banana War case, where a complaint was filed by the US against the European Communities for the breach in the GATT agreements relating to the ‘regime’ adopted by them for the import, sale and distribution of bananas. The European Communities was found to be in violation of agreements and the US was granted the suspension of concessions to the value of $191.4 million. The role of reciprocity in the right to retaliate against a breach in international trade agreements can be observed and the significance it brings to compensate the victim for any unfair advantage other States may have attempted to gain.

As previously mentioned this dispute settlement system is set to bring about co-operation and ensuring members adhere to the WTO rules and agreements through reciprocal retaliation.

912 Ibid, Article 22.
914 Ibid.
915 Ibid.
916 EC-Banana III Case, Ecuador, Guatemala, Honduras, Mexico, United States of America v. European Communities, WTO Dispute Settlement, DS27, 1999.
917 Ibid.
918 Ibid.
This point is well demonstrated in the case of US-Upland Cotton,\(^9\) where Brazil took a claim against the US for their ‘domestic support’ of the upland cotton industry.\(^2\) Following the lengthy dispute settlement process, the DSB authorised Brazil to suspend ‘concessions or other obligations’ to the US.\(^3\) Although Brazil was awarded compensation against the US, it however chose to engage in a discussion with the US to reach ‘a mutually satisfactory solution’ resulting in an agreement with the US in August 2010 and until this ‘Framework for Mutually Agreed Solution’ is in place Brazil will not exercise their authorized retaliation.\(^4\)

4. Conclusion

In this Chapter the enforcement mechanisms of IL in the forms of centralised and non-centralised were discussed. The centralised forms of enforcement comprise of many institutions and organs but this Chapter predominantly focused and analysed the workings of the ICJ, the UNSC and the WTO dispute settlement body. Non-centralised forms of enforcement operate predominantly as remedial actions in the form of self-defence and counter measure. The absence of an overarching enforcement body in IL, the weaknesses of the centralised forms of enforcement, as well as attempts to promote responses to breaches of agreements and obligations in non-aggressive and non-confrontational forms have given non-centralised form of enforcement a prominent role in IL. Fundamentally, these options have been made available to States in order to negate disobedience and encourage compliance without the need to resort to the UN organs for dispute settlements.

Therefore, the absence of an overarching legislator or enforcing mechanism in IL places reciprocity as an important alternative enforcement mechanism where non-compliance or disobedience can be met by direct or indirect remedial legal reactions through available options in IL to injured States in the form of self-defence or counter-measure. These options have a twofold effect, where firstly they protect the injured State against any loss that may be suffered from non-compliance of other States by restoring the balance of rights and duties; as well as encouraging and maximising the commitment of States to fulfil their individual and collective responsibilities. The tit-for-tat policy view of reciprocity in IL allows for a wrong-

\(^{2}\) Ibid.
\(^{3}\) Ibid.
\(^{4}\) Ibid.
doing State to be punished but the punishment is not so severe as to never induce long-term co-operation.\textsuperscript{\textdegree} Even in cases of self-defence, where its legality is dependent on necessity and proportionate reciprocal response, then it is arguable that the use of force is only a ‘remedial’ approach and reciprocal reaction to a violation of IL, and the other State was aware of the consequences of its initial actions. The important point to note is that these remedial reactions, particularly available options under counter-measure, discourage the use of force as much as possible and the aim is to resolve dispute through peaceful means. In the cases where there is a need for the use of force in self-defence, IL encourages the two elements of proportionality and necessity to be strongly considered and satisfied. Taking into consideration the issue that in IL States are not just its subjects, but they are also the formulatrices of its rules as well as to a great extent its enforcers, particularly where they can act in self-defence or adopt counter-measure responses without resorting to a legal process.

This study challenges the validity and appropriateness of the use of reciprocity in this context as an alternative enforcement mechanism where States can self-judge and self-determine their response or reaction to other States without the need to follow specific legal or judicial channels for resolving disputes. Obviously the need for reciprocity as an alternative enforcement of IL is rooted in the nature of IL but interestingly, this does not seem to be the case with the European Union, as an example of a smaller group of States, where any response to a dispute needs to go through legal channels and be referred to the European Courts. The importance of this approach by the European Union is to restrict self-judgement, self-determination and inconsistent interpretations of rules, and by doing so the fundamentals of the rule of law and IL such as legality, legitimacy and justice will be fulfilled and applied uniformly.

The examination of centralised enforcements makes evident the lack of uniformity and consistency in the collective approach towards enforcing IL and the rule of law, particularly relating to the legal interpretations. The decisions reached by the ICJ and the UNSC are both legally obligatory but the decisions taken by the UNSC carry legally binding obligations on everyone, whereas ICJ judgements create legally binding obligations only on the disputants, moreover the ICJ advisory opinions have non-binding effects at all. This inequality of power between the principal judicial organ (the ICJ) and a political organ (the UNSC) has not only

\textsuperscript{\textdegree} Supra note 198, p. 71.
Weakened the ICJ, but has also placed the UNSC with excessive powers to rule on both legal and political issues. This has placed IL at significant disadvantages, and has not been entirely helpful in maintaining international peace and security.

The most common penalising UNSC approach is to impose sanctions whilst providing no detailed reasoning for their objectives and the intended results of such sanctions. It is not simply enough for the UNSC to say that they are imposing sanctions, without any additional detail behind the intentions and objectives of such approaches. This is contrary to the workings and rulings of the ICJ where detailed reports are produced upon the reasoning behind their actions and decisions, for example even when they have no jurisdiction over the case at hand. Taking the Iraq and IRI cases as examples, the UNSC must have provided reasoning as to what are the aims of sanctions; is the aim to secure further compliance, to reduce the threat to peace and security, or is there a political agenda such as regime change behind their efforts? Reflecting back on the course of the UNSC actions towards Iraq post-Kuwait invasion, it was seen how the approach moved from collective self-defence to the exertion of crippling economic, military and diplomatic sanctions with the ultimate aim of regime change, resulting in the death of many ordinary Iraqi civilians.

It is difficult to assume that peace and security can be achieved through violence, aggression and war. The aggressive attitude guides the decision-makers to follow coercive approaches to achieve their goals. Irrespective of reasons surrounding a coercive action, it directs the international community towards aggressive projects that were initiated for securing peace; let alone when political agenda is the driving factor behind these decisions. A reason for this could be in the P-5’s engagement in the arms industry/trade, and why the international community witnesses the significant market share of the arms industry belonging to the P-5. It is also important to consider that the international community is aware that,

924 Supra note 785; and supra note 757, p. 85.
925 A reason why neither democracy nor peace and security can be established through violence is in the fact that democracy is a process more like a learning progress requiring education and other factors to have the highest respect for its democratic values such as justice, for this reason a community must be ready to have democracy.
‘Hezbollah has more weapons than many European armies’.\textsuperscript{927} The same applies to the Taliban and Al-Qaeda where they have been able to gain access to weapons to fight against the NATO-led security forces in Afghanistan for over ten years.\textsuperscript{928} By also reviewing the recent Libyan and Syrian uprising, it is worrying for the international community to witness how the rebel groups were empowered and supported in response to resolving violations of HR, which is a legal matter. How can the arming of rebels be perceived as being in line with IL, the purpose of the UN, and the promotion of international peace? The risk in this case is how other rebel groups are likely to be encouraged across the globe, to seek more power and support.

The other concern discussed in this work is on the question of legality of the UNSC’s conduct and their approach towards IL. It is established how any issue requiring the attention of the UNSC must be in line with IL. This is a point from which no deviation or circumvention must be permissible. The steps provided for achieving this are set out in the UN Charter, where compliance of the UNSC with the rule of law is a requirement.\textsuperscript{929} Commitment of the UNSC to the rule of law must therefore be in line with consistency, legality, justice, legitimacy. This work has provided many examples where the UNSC’s decisions have arguably fallen short of these requirements. The effect of this on the international community is felt through the increase in conflicts, continuing violations of HR, the international community’s exhaustion with loss of lives, as well as the imbalance created in the world. It is, hence, reasonable for the international community to be concerned about the ill-founded approach towards restoring and maintaining international peace. This is because:

A) A political body decides legal decisions as the enforcing body of IL, as well as the power attributed to the P-5 and their privileged veto rights. This has illustrated an inequality in representation of the international community and the role and strength of five States above all other UN members. This stems mainly from their veto power and attempts to reform this

\textsuperscript{927} BBC News, Hezbollah: Terrorist organisation or liberation movement?, Owen Bennett-Jones, 11 October 2011.
\textsuperscript{929} Supra note 29, the United Nations states that ‘Promoting the rule of law at the national and international levels is at the heart of the United Nations’ mission… The principle of the rule of law embedded in the Charter of the United Nations encompasses elements relevant to the conduct of State to State relations. The main United Nations organs, including the General Assembly and the Security Council, have essential roles in this regard’.
have so far been unsuccessful. Additionally, the P-5 has demonstrated reluctance to seek legal advice and work with the ICJ to resolve legal matters on a regular basis.

B) IL is open to interpretation but this must be applied within the set parameters previously discussed. For instance, when reviewing the UNSC’s decisions in the recent Syrian and Libyan cases relating to the violation of HR, extensive inconsistency or injustice can be observed. In both cases, there is a similarity on the violation of HR but the question remains why a different approach has been adopted by the UNSC for similar grounds and similar timeframe? Was this inconsistency due to any differentiation in the nature of the violation? What is the measure for assessing HR violations? Moreover, what are the criteria for judgement in these cases? What considerations need to be provided for a reasoned decision? Applying inconsistency in their decisions inevitably leads to a loss of credibility and trust and challenges its underlying motives.

It is arguable that challenging the legality of the decisions and actions of the UNSC might damage its credibility and provide a non-complying State with an escape route away from its obligations, additionally reducing the ability of the UNSC to maintain peace and security.930 Even though this might be reasonable, in the legal domain, one cannot accord unquestionable power to one organ in fear of the minority that might use this as an excuse for non-compliance and non-cooperation.

C) Following the examples of Syria and Libya, and taking into consideration the human rights record of Russia and China nationally,931 as well as the recent US engagement in torture-related conduct, is it appropriate for them to judge HR violation? It seems inappropriate for them to use their veto rights in passing adequate punishment and/or determining how the international community must react to violations of HR. The use of veto

930 Supra note 757.
by Russia and China in support of Syria brings about, once again, the question of the appropriateness of the veto right. Russia and China chose not to veto the Libya ‘no fly zone’ and instead they chose to abstain which means they applied different approaches to these two situations. Even though these situations had some similarities in nature, the relation of these two P-5 members with Libya or Syria were different to begin with which undoubtedly would have influenced the decision to support, abstain or veto against other P-5 decisions. It was seen how swiftly actions were taken in relation to Libya but response to Syria was much slower and did not include an international action to stop human rights violations. The UNSC’s approaches in the Libyan and Syrian cases could be attributed to the reciprocal relations of the P-5 members with other States and among themselves in the application of their veto rights. Lobbying behind the scenes plays a role in the decision-making process and the reciprocal give and take between P-5 members is a significant influence towards the final decision taken by each member. Recent use of veto rights was questionable when no veto was used against Libya ‘no fly zone’, yet veto rights were exercised in the Syrian case; this demonstrates an inconsistent approach to very similar situations and brings into question the legality and uniformity of actions.

These examples show how the use of veto rights failed to meet the constitutive elements of the rule of law. Additionally a P-5 member will take into consideration its position and standing in the international community and with its counterparts prior to applying a veto right. For example review of the history of the use of veto rights shows that on the one hand, Britain and France have refrained from applying their veto power in general, but on the other, the use of veto by Russia and the US have been high. This suggests that Britain and France may not wish to be perceived by the international community as blocking collective UNSC action whereas the US and Russia have a more individualistic approach towards their interests. All in all, non-uniform and inconsistent approaches are evident in the use of Veto by the P-5 members. It could be deducted that even if the international community could one day reform the veto power of the P-5, for IL to have a uniform and effective enforcement mechanism, there must be an overriding legal (judicial) authority to deal with all international legal related cases.

Although this is a difficult shift in approach that the UNSC should be accountable to an international legal body in performing its tasks, however, it is a requirement for IL
enforcement to have a legal organ to monitor the UNSC’s decisions. This is not to be taken as diminishing the authority of the UNSC but more as a hierarchical necessity for reducing injustice and minimising the influence of politics and interest of the States in legal situations. This hierarchy has additional benefit in the sense that it provides greater transparency and opportunity for review of a case from multiple legal aspects as it stands in national legal systems. The current structure lacking an overriding authority or monitoring for the UNSC undermines IL. Therefore, without a significant change in the system, the cycle repeats itself. Any reform in the current format could be helpful but it would not provide a remedy to the issues in question. Of course, considering the important role played by ‘will’ and ‘consent’ of States in the formulation of international rules which has an inextricable link to politics, this has a long way to go.

The above example of an overarching judiciary review body in the international arena is a far-reaching objective in the current climate. The reasons for this have become evident throughout the thesis which are: 1) the importance of ‘will’ and ‘consent’ of States in formulation and interpretation of obligations set upon them, 2) the inextricable link between the political and legal issues dealt with by the UN bodies, least of all the ICJ and the UNSC, 3) the time-line surrounding the legal review - for example where an organ such as the UNSC may need to take urgent actions and post-action deliberation of the legality of the action would render itself redundant, 4) many scholars have argued that maintenance of peace is the main key for the UN, so the UNSC’s decisions take priority over other organs. 932

IL should not be based on idealist approaches and views, acting obliviousy to any reality of IR. The reality dictates that there is an unbalanced distribution of power and control in the world,933 thus IL must operate within the existing framework if it is to maintain its legitimacy and applicability. As it is, the international community and IL face an unequal distribution of power, not only in the UNSC members’ veto rights, but also in their economic, military and political strength. Faced with all these constraints, one would expect international agreements to be disregarded as a higher level than is being witnessed, however IL and the international

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932 Eugene V. Rostow, Disputes Involving the Inherent Right of Self-Defense, (ed.) Lori Fisler Damrosch, The International Court of Justice at a Crossroads, 1987, p. 270; supra note 861, p. 134; also see supra note 840, p. 295 where Kelsen’s comment that the Security Council is empowered to take steps for the maintaining peace and security through justice even if it is not ‘in conformity’ with international law thus granting the Security Council with special powers.
933 Supra note 757, p. 97.
community are reliant on other factors outside the mainstream enforcement to bring about obedience to international obligations. Encountering these constraints as well as the absence of an overpowering enforcing body, the international community and IL have found themselves reliant most importantly on the principle of reciprocity, as a creator of balance between the interests and actions of States. The remainder of the thesis, particularly the following Chapter demonstrates how the conduct of States has been reduced away from pursuit of self-interest as a result of the reliance on the principle of reciprocity.
Chapter Five: Reciprocity and Co-operation between States in the Context of International Law and International Relations

1. Introduction

Having examined the role of reciprocity in IL, this Chapter examines co-operation and non-co-operation as forms of reciprocity. The emphasis is firstly on the necessary factors that States must satisfy in complying with IL; secondly, on those factors that facilitate co-operation between States and the reasons that States choose to co-operate. For instance, what is the role of co-operation in achieving and maintaining international peace and security as a fundamental goal of IL? This leads the study to seek the answers to the following questions: 1) what is the role of IL in bringing about co-operation among States? 2) how does reciprocity take a role in inducing States to co-operate? 3) what are the advantages and disadvantages of co-operation? 4) why do States choose to deviate from co-operative objectives? To answer these questions, important factors in bringing about a co-operative environment, and obstacles facing the international community are scrutinised.

The Chapter begins by reviewing the definition of co-operation, and continues to analyse the evolution of co-operation through changes in IR and closer dependency of States on one another. Given the inextricable link between IL and politics in IR, the Chapter continues to assess the role of co-operation in each of these disciplines. Further to this point, the study focuses on the different schools of thought in exploring the study of IL and IR together with their consequences on co-operation. This analysis enables this work to tackle the above questions relating to the reasons for States’ co-operation, and their benefits and drawbacks for States leading to specific barriers for co-operation. These analyses lead the study to explore the importance of co-operation for States involved in bringing about long-term advantages in politics, economic gains, peace, security and stability, based on the lessons learnt throughout the evolution of international co-operation. The important factors for achieving and maintaining long-term co-operation are examined. How can non-co-operation be minimised? Will long-term co-operation be achieved through the threat of negative reciprocity?

This Chapter identifies the measures required for ‘*increased co-operation*’ as a strategy in
reducing negative reciprocity in IR. In doing so, it is suggested that through the advancement of technology and the ability to easily access up-to-date information, the nature of interactions between States have changed and therefore the strategy of battle and confrontation need to change. It is observed how the incentive for co-operation between States can help develop a multilateral benefit for all parties involved as well as those who are not directly involved. It is in the collective interest for such strategies to develop in a framework and action through relationship-building between States. Hence the source-control dominant mechanism is a co-operative strategy which is beneficial for parties involved even when a State does not wish to co-operate. This is to say, lack of co-operation is characteristically powerless to assist or support the development of source-led solutions or solutions geared to manage the huge costs of such strategies even for stronger States in the long run.

2. What is International Co-operation?

Similar to reciprocity, co-operation carries many meanings and is open to various interpretations in the international arena. Co-operation in simple terms is defined as ‘an association of individuals who join together for a common benefit’; more specifically, in IL it is defined as ‘the voluntary coordinated action of two or more countries occurring under a legal regime and serving a specific objective’. The messages that could be deducted from these definitions are that 1) a group of entities have come together by choice, 2) with representation from different interests and/or viewpoints, but 3) have chosen to unite in pursuit of a common goal.

The important point to consider in international co-operation is the difference in State interests and needs, but despite the differences between immediate needs States are compelled to co-operate with one another because it is in their long-term interest to do so. For instance, Keohane suggests that co-operation is achieved when actions of different States or institutions come together in unity through negotiation, which Lindblom has defined as ‘policy coordination’, for which he provides the following framework:

934 Supra note 2, p.359.
935 Supra note 24, p. 51.
A set of decisions is coordinated if adjustments have been made in them, such that the adverse consequences of any one decision for other decisions are to a degree and in some frequency avoided, reduced, or counter balanced or overweighed.936

In this context, each State or organization moves away from its original position through negotiation or bargaining to reach a common and coordinated policy; or as eloquently phrased by Keohane ‘intergovernmental cooperation takes place when the policies actually followed by one government are regarded by its partners as facilitating realization of their own objectives, as the result of a process of policy coordination’.937 The principle of reciprocity will undoubtedly play a role in the negotiation and bargaining between States to gain ‘policy coordination’ since inter-State negotiations will include a degree of equalising gains and advantages in the light of the various interests of each State.

Co-operation should not be confused with harmony since harmony is only achievable when policies of each party are flexible in allowing the fulfillment of other parties’ interests without the need for co-operation or negotiation.938 Taking into consideration that each State is driven in pursuit of self-interest, particularly in the absence of centrally governing authority in IL or IR, harmony is not achievable, or as recognised by Waltz ‘in anarchy there is no automatic harmony’.939 Hence, what further distinguishes harmony from co-operation is the ‘automatic’ fulfillment of other parties’ interest without a need for shift in policy either by co-operative attempt or through bargaining and negotiation. In attempts at negotiation, if States are not willing to change their policies then ‘discord’, as identified by Keohane, and referred to in this thesis as non-cooperation, will arise.940 Furthermore, co-operation does not mean a state of unconditional agreements. Keohane concludes that, the mere existence of conflict between States brings them into a sphere of international attempts at breaking away from conflict into a state of co-operation and without the existence of conflict and differences there would not be a need to shift or to coordinate policies.941 The important factor therefore, is in the negotiation and bargaining of these conflicts, to coordinate the policies (co-operation) or inability to coordinate the policies.

937 Supra note 24, pp. 18 and 51-52.
938 Ibid, pp. 18 and 51-52.
939 Kenneth Neal Waltz, Man, the State, and War: a Theoretical Analysis, 2001, pp. 159-160 and 182.
940 Supra note 24, pp. 18 and 51-52.
941 Ibid, pp. 18 and 51-52, pp. 53-54.
In Chapter Four, it was observed how the principle of reciprocity acts as an enforcement mechanism for obedience to international legal obligations due to available reciprocal responses, and thus abiding by international legal obligation is an incentive for States in order to avoid negative reciprocal action. Similarly, States might choose to co-operate not in pursuit of common interests but instead in avoidance of negative impact through non-co-operation. Stein refers to this form of co-operation as arising ‘to avoid losses’, and identifies it as an option when facing difficult or limited choices. In such situations, rational States are likely to choose the least costly option, as discussed later in this Chapter.

3. Evolution of Co-operation

In Chapter One, it was discussed briefly how the international community has gone through a historical process of achieving peace through adopting a more collective view towards security and co-operation on commonly shared values among States. In this Chapter, this evolution is discussed in depth with a particular view of the lessons learnt during the last few centuries that have been instrumental to the creation of IL in its contemporary form. The main reason for gaining a deeper understanding of the origins and evolution of co-operation lies in the fact that, by studying the nature and the consequences of co-operation, the Chapter distils the role of co-operation in the structure of world order.

It is important to reiterate that co-operation is in effect a form of positive reciprocity. Throughout this thesis, it is seen how reciprocity can take positive and negative forms. Co-operation within the international community is certainly one of the strongest forms of reciprocity, where States with different self-interests aim to come together and achieve a balance of interests. Achieving this, in turn, is gained by negotiation, bargaining and inducing other States to come towards common goals by negative or positive means where reciprocity plays an important role.

Peace and security of every State is paramount to them and they will adopt certain strategies to maximise and ensure its short-term and long-term security. Following the growth in inter-State relations and dependency as well as technological advancement, particularly over the

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last century, States have had better access to each other but simultaneously the threat of attack using more advanced technology has been raised. States’ former concerns were about marking their borders, but gradually they moved towards the notion that peace can only be achieved collectively. Obvious examples of such cases in history are the ambitions of rulers such as Napoleon and Hitler or instances of the Cold War. Each of these instances brought about a gradual structural change for the international community towards acting more as a collective co-operative force.

The existence of co-operation at international level is due to collective and significant efforts that have been made throughout the long process of the change in inter-State relations. There have been many attempts and examples in the history of the world where States have endeavoured to build international co-operation having recognised the importance of a shift from narrow self-interest to a more co-operative approach. These include the attempts to achieve co-operation through Collective Security as in the Concert of Europe (1815), League of Nations (1919), and the current form of the United Nations (1945) and contemporary IL. Before analysing these international attempts individually, it is important to firstly gain an understanding of the doctrine of Collective Security since this helps to gain a better insight into the steps taken towards the Concert of Europe.

3.1. Collective Security

The idea of a collective decision-making method as a co-operative approach manifested itself in the form of ‘Collective Security’. This is best described as a concept which ‘purports to provide security for all states, by the actions of all states, against all states that might challenge the existing order by the arbitrary unleashing of their power’.

Prior to the theory of Collective Security, States relied only on military strength as a deterrent measure against wars, rather than collective co-operation. This shows that the proponents of the theory set about a fundamental change in a co-operative framework in inter-State relations.

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944 Ibid, p. 245.
There are prerequisites in ensuring Collective Security can be achieved and maintained. The key elements that must be fulfilled consist of certainty, utility, and universality.\textsuperscript{945} The element of certainty is that the collective force of all States involved must meet the potential aggressive State. Thus, States that are members of such groups are required to unite against any potential aggressions. Needless to say the unification of States under this doctrine should not be conditional if it is to provide the necessary features for Collective Security. The second element, utility, relies on collective reciprocity, which requires that any act by any potential aggressor must be reciprocated by all other member States, using ‘as many of the tools of international politics as are available to them’.\textsuperscript{946} This requires States to use any means available, ranging from diplomatic efforts, economic sanctions and even resorting to military force, if needed, in order to mitigate any act of aggression. This could also be in the form of options such as counter-measure or sanctions to respond collectively to an aggressor. The last element, universality, indicates that a Collective Security organization would, to ensure deterrence against aggression, start by eliminating aggression by its own member States. Therefore, any such organization would attempt to increase the membership for the shared vision of Collective Security to become the norm in the world. This certainly was behind the creation of the League of Nations and its attempts at bringing about peace and cooperation.\textsuperscript{947} Scholars have suggested a need for certain conditions to be fulfilled for Collective Security to be functional.\textsuperscript{948} Firstly, the power must be distributed amongst many States rather than a select few, so that no State is too strong as to be able to or willing to resist collective punishment;\textsuperscript{949} secondly, it is important for States to share a common view and interests to be able to protect the ‘status quo’ as opposed to fighting for individualist goals.\textsuperscript{950} In other words, the aim must be to protect multilateral goals and to avoid taking only unilateral benefits into consideration. Bouchard is critical of the notion of ‘Collective Security’, particularly as is established within the UN and involving a collective approach by States in cases of a breach of peace, since collective response can build a limited conflict into a general

\textsuperscript{945} Justin Morris and Hilaire McCoubrey, \textit{Regional Peacekeeping in the Post-Cold War Era}, 2000, p. 4.
\textsuperscript{946} Ibid, pp. 3-5.
\textsuperscript{948} Inis L. Claude Jr., \textit{Power and International Relations}, 1962, p. 195; and supra note 943, p. 256.
\textsuperscript{949} Inis L. Claude Jr., \textit{Power and International Relations}, 1962, p. 195; and supra note 943, p. 256.
\textsuperscript{950} Inis L. Claude Jr., \textit{Power and International Relations}, 1962, p. 195; and supra note 943, p. 256; and supra note 947, p. 217.
war that involves many States. The scholar’s view might hold true in relation to certain situations like the neutral positions held by Sweden and Switzerland in both World Wars; however, in case that their neutrality had been compromised, the international community would not have risen to their support given that they chose to remain neutral whilst the rest of the world was in the grip of fierce destruction.

3.2. Concert of Europe

The Concert of Europe (Concert) brought about a strong belief that peace across Europe could only be achieved through Collective Security and co-operation between States. The Concert was formed in the aftermath of the Napoleonic wars leading up to Napoleon’s final defeat at the battle of Waterloo in 1815. Once Napoleon was defeated by the major European powers, including Britain, Russia, Prussia, Austria, and eventually France, they sought to ensure that such hegemonic adventures would not be repeated. Other States apart from Britain also wanted to ensure that the revolutionary visions which were contrary to monarchist views would not gather momentum. This effort is seen as the most successful and long lasting attempt at Collective Security.

The format of the Concert was not based on a formal structure and instead upon regular communication on subject-matters related to all parties involved. The Concert provided a novel process of engaging with international partners whereby the previous bilateral approach moved towards a newer format of multilateral IR. The formation of the Concert stemmed from the notion of Collective Security but States soon recognised additional benefits from their multilateral relations. The Concert provided national leaders with the belief that the best available strategy to maximise their gains was through co-operation. This led to the thinking that was behind the creation of the UN and the emphasis for the co-operation in securing peace through a collective approach. Small variation from co-operation could be

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954 Supra note 947, p. 214.
955 Supra note 953, p. 108.
956 Supra note 943, p. 25.
957 Supra note 952, p. 59.
tolerated by the Concert members given the ‘margin of safety’ but major defections could be costly and likely to result in a conflict which would once again destabilise Europe.\footnote{958 Supra note 953, p. 108.}

As iterated by Jervis, repeated plays bring each State towards co-operation in the expectation that the others do the same.\footnote{959 Supra note 952, p. 171.} Booth and Wheeler developed this argument by addressing the importance of reciprocity in the Concert, which created co-operation between them. The promise of long-term co-operation incentivised States to relinquish their short-term advantage as a result of the expected reciprocal co-operation.\footnote{960 Supra note 953, pp. 109-110.} Jervis articulated that this should not be taken as a change of identity or interest by States but rather a change in a longer-term view of gains and advantages.\footnote{961 Ibid, pp. 108-110.} Collective decision-making practices resulting from these efforts could therefore be regarded as a form of co-operation between European States to maximise their advantages. In light of this argument, Hinsley argued that the acknowledgement by the European major powers of belonging to a wider community provided the advantages and responsibilities that would follow from such ‘rights and duties’.\footnote{962 Francis Harry Hinsley, Power and Pursuit of Peace, Theory and Practice in the History of Relations between States, 1963, pp. 213-237.}

The co-operative nature of relations between the great powers of Europe eventually came to an end with the Crimean War. The Russians’ decision to intervene in Ottoman territory and Britain’s actions to oppose such interventions led to a conflict and reduction in restraint in defection from the Concert norms.\footnote{963 Supra note 953, p. 112.} Mearsheimer argued that historical co-operation between great powers of Europe was more related to the need to re-establish their strength following the wars during Napoleon’s reign, and the period of restraint demonstrated by the great powers through the Concert’s norms provided them with the opportunity to do so.\footnote{964 Ibid, p. 111.} In other words, the restraints demonstrated during the Concert were more related to their self-interest at that time and as soon as it was no longer to their best advantage, the status of co-operation between them disappeared.

The Concert ended by departing from the idea of Collective Security when taking into account the necessary elements embedded in the notion of Collective Security. The element
of universality was always absent since only the major powers in Europe were involved in its creation and in its continuing conferences or congresses such as that of 1832 in London. Clearly from a practical perspective as well as the vision that any threat to security would have been driven by these major powers, it can be seen why only a few countries in Europe were part of the Concert; however this is inconsistent with the theory of Collective Security. Inclusion of a wider group would have eliminated any threat from a new rising power. A present day example of this is in the emergence of China and India as rising powers and how the West’s acknowledgement of this and the West’s approach towards them has been one of inclusion in decision-making and negotiations rather than exclusion, for instance having a seat in the UNSC.

The differences between the visions held by Britain as opposed to other States, particularly Russia, as to what was the main objective of the Concert brought about the absence of certainty as another element. Russia’s vision was partly to ensure that revolutionary visions, which were contrary to monarchist views, would not gather momentum. This had never received support from other members and was never the aim of the Concert as seen by Britain. This difference in vision was therefore undoubtedly inconsistent with the element of certainty that was necessary for the concept of Collective Security.

Even though all elements necessary in Collective Security are not observed in the Concert, the existence of the Concert acted as a collective discouragement of any acts of aggression for a long period. It changed the dynamics of inter-State relations where individual States did not purely pursue individualistic self-interests and applied restraint with the view of longer term advantages. Given the nature of the Concert, involving only the great powers of Europe, co-operation and Collective Security were always going to be short-term achievements since they were missing, in an absolute sense, the certainty, utility, and universality conditions necessary for long-term stability. Once the restraints were abandoned with the Crimean War, self-interest rather than a collective outlook can be observed in relation to the decline of Austria, as Russia further expanded into Balkan territory. Under a Collective Security regime, the actions of Russia would have been severely opposed by other members. However since this movement resulted in the decline of Austria, which was to the advantages of other States such as France and Prussia, no strong opposition was shown against Russia by these States.
The Treaty of Paris in 1856 saw the end of the Crimean War where the victorious allies set out the terms for peace that dealt a big blow to Russia and its power and territories.  

However the world saw itself not long after in the deadly conflict of World War I with casualties of more than eight and a half million. Despite the efforts towards maintaining peace and co-operation between States, World War I broke out amongst the world great powers and finally ended with the Paris Peace Conference in 1919. The terms of the peace were outlined in several treaties, with the Treaty of Versailles as the most important one, outlining the aim ‘to promote international cooperation and to achieve peace and security’. These steps, hence, paved the way for the establishment of the League of Nations.

3.3. League of Nations

The origins and evolution of co-operation in an international legal framework owe their existence to the League of Nations which was set up in 1919, at the end of World War I. The League of Nations as an international organization played a significant role in the advancement of IL. Its aim was to promote co-operation at international level with the advantage of gaining international peace and security between States. Gaining this objective through co-operation was primarily deemed an important achievement to put an end to wars. Thus, the Covenant of the League of Nations was created with binding obligations on its members. The membership of the League of Nations required that a nation ‘guarantees

966 Supra note 83.
968 Supra note 83.
969 Treaty of Versailles, signed on 28 June 1919, is one of the peace treaties after the World War I which ended the war between Germany and the allied powers, available at: http://www.un.org/aboutun/history.htm.
971 League of Nations, Covenant of the League of Nations, 28 April 1919, Preamble; Article 10 states: The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In the case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled, League of Nations, Covenant of the League of Nations, 28 April 1919.
972 Ibid.
of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments’. 973

Despite its success in creating a legal framework at international level and important steps taken, the weakness of the League is made very clear by its failure to live up to its aim of putting an end to war, considering Europe and the world turning to the conflict of World War II which in turn led to the creation of the UN. 974 What is important to emphasise when comparing the concept of Collective Security in the League of Nations and the UN is that the League did not provide for States to have to take part or contribute to a ‘joint force’ commanded and under the responsibility of the League.

4. Co-operation in International Law

The world found itself in the grip of World War II, another devastating war which lasted till 1945. Following this, the urgency of structured IR emerged with the aim of regulating and developing States’ relations. The creation of the UN was the pivotal step taken towards this goal. The UN was established to ‘save succeeding generations from scourge of war’, ‘to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person’ and ‘to promote social progress and better standards of life’. 975 Contemporary IL has taken its existing shape following the creation of the UN.

The concept of co-operation is one of the most important factors for States in complying with IL and acting in a co-operative manner towards peace and security. Undoubtedly IL has played an important role in leading the interaction of States through relationship-building and co-operation. An underlying point is that the doctrine of co-operation in a legal framework owes its existence to the UN Charter and the UNDHR as cornerstones of IL, in creating a uniform systematic approach towards the concept of co-operation. 976 In other words, IL is a central legal framework for promoting this concept by highlighting it as one of the purposes and pillars of the organization. The UN Charter provides the UN purpose as ‘to maintain

973 Ibid, Article 1.
974 Supra note 87.
975 Supra note 7, Preamble.
976 Supra note 491, Preamble; and supra note 7, Articles 1, 11, 13, 55 and 56.
international peace and security’, ‘to develop friendly relations among nations’ and ‘to achieve international co-operation in solving international problems’. These principles are inter-related and connected since peace and security cannot be attained without creating and maintaining friendly relations which are achievable through co-operation between States.

In IL, equal weight is also given to the potential consequences of non-co-operation by States, as seen in the recognition of the ‘inherent’ right to self-defence against an aggressor. Thus the focus of this study is to reflect on the reasons why co-operation is emphasised in the legal framework. Article 13 of the UN Charter states: ‘the General Assembly shall initiate studies and make recommendations for the purpose of: ... encouraging the progressive development of international law and its codification...’ Subsequently, the GA passed a resolution to establish a committee consisting of a group of legal experts. This group, the ILC, prepares recommendations for the purpose of advancing IL through co-operation. Under the UN Charter rules, States are obliged to co-operate with each other and the UN, as emphasised by the Charter: ‘All members pledge themselves to take joint and separate action in co-operation with the Organisation...’

It is important to note that, simultaneous to the substantial steps taken by the UN towards establishment of organizations such as the WTO, the idea of creating regional organizations has strengthened the UN approach to the concept of co-operation, as exemplified by the Organization of Petroleum Exporting Countries (OPEC). The price and level of output of each petroleum exporting country is set as per the joint agreement of OPEC, and so each member stands to gain from co-operating and abiding by the OPEC agreement.

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977 Supra note 7, Articles 1(1, 2 and 3); and supra note 174.
978 Supra note 7, Article 51.
981 As a subsidiary organ of General Assembly, the International Law Commission is tasked to the promotion of the progressive development of international law and its codification. The Commission is ruled by a Statute annexed to General Assembly Resolution 174 (II), supra note 125.
982 Supra note 7, Article 56.
983 Organization of Petroleum Exporting Countries is a permanent intergovernmental organisation created in 14 September 1960, with the objective of co-ordinating and unifying petroleum policies amongst members. The
This section identified the role and importance of co-operation in IL. The focus of the Chapter shifts to provide a deeper analysis of the concept of co-operation in IR and its relationship with IL.

5. **Co-operation in International Relations and its Relationship with International Law**

The factors creating an inextricable connection between IL and IP have been previously explored in this thesis. The field of IR provides connections between these two disciplines. States, through lawyers, policy-makers, law-makers, judicial bodies and politicians seek to set out, implement, interpret, study and apply international rules, therefore, the study of IL would inevitably be incomplete without taking into consideration the influence of these disciplines on each other.

This Chapter discussed the most important condition required for States to co-operate which is the existence of a peaceful environment rather than war. For this reason, it is important for the analysis of co-operation to examine peaceful conditions from multiple angles. Further to this point, it was seen in the analysis of the evolution of co-operation how there has been a change in inter-State relations with a fundamental transformation in their interdependence. States’ dependency on one another has paved the way for greater need to seek co-operation since significant matters such as their security, environmental and trade growth can no longer be achieved without international co-operation. In this section, the different viewpoints in IR are introduced, to gain a better understanding of the positive or negative consequences of the various forms of inter-State relations. Particularly the study seeks to assess the role and influence of IL and international institutions on inter-State relations and international co-operation. Additionally, the study analyses the effect and impact of reciprocity in maintaining and incentivising States towards co-operation.

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984 These subjects were explored in Chapters Two and Three.
There are numerous schools of thought in the study of IR but in this section the study focuses on the following approaches which are more related to the aim of this Chapter primarily focusing on the behaviour of States towards co-operation.

**5.1. Liberalism v. Realism**

These two schools of thought are extremely different in their perspective and do not share many common factors. The foundations of each of their belief systems are entirely divergent. Doyle defines liberalism as:

> A distinct ideology and set of institutions that has shaped the perceptions of and capacities for foreign relations of political societies that range from social welfare or social democratic to laissez faire.\(^{986}\)

Liberalists regard the primary actors to be the individuals whereas the realists regard States to be the dominant players in IR, furthermore, realists believe that States are in pursuit of maximisation of their gains and this belief is identically shared amongst the players.\(^{987}\) Liberalists, on the other hand, regard that States act differently in line with their national policies, government systems or trade structures. The liberalist’s argument stems from the notion of States’ ‘will’ and ‘consent’ in IL, expecting States to hold different views and act according to their domestic preferences guided by organizations and individuals.\(^{988}\) The differences between the views held by realist and liberalist does not end here. The realists regard States as the only decision-makers, but the liberals hold that ‘State-society relations’ are significant, in the sense that the main players in the international arena are such individuals, organizations, institutions and groups that exert pressure on States’ governments.\(^{989}\)

Thus, this contrast in view regarding the primary players in IR leads to another fundamental distinction between these two schools of thought, where realists view State power as the most

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\(^{987}\) *Supra* note 985, p. 507

\(^{988}\) *Ibid*, p. 504

important objective of States,\textsuperscript{990} as opposed to the liberalist view that governments are representative of individuals or groups within States. Simultaneously, this difference of vision lends itself to the general view that, according to realism, States are unlikely to act in co-operation if it is not in pursuit of greater power or in their interest but under liberalism State policies are more in line with the societies’ common values,\textsuperscript{991} which are more driven towards compliance and co-ordination.

Hobbes, a traditional realist, suggested that the root of conflict lies in three principles: ‘competition’, ‘diffidence’ and/or ‘glory’, retrospectively driven from pursuit of gains, protection due to insecurity for their safety, and expansion of glorious status or reputation.\textsuperscript{992} By contrast Kant, renowned liberal scholar, introduced liberalism as an approach by which to withdraw from the Hobbesian view of international system, and to work towards ‘perpetual peace’ which the scholar suggests is attainable through a liberal international system both domestically and internationally.\textsuperscript{993} Kant viewed three ‘Definitive Articles’ as the prerequisite for lasting peace: firstly, ‘The civil constitution of every state should be republican’, secondly, the ‘law of nations shall be founded on a federation of free states’, and thirdly, ‘The law of world citizenship shall be limited to conditions of universal hospitality’.\textsuperscript{994} It follows from these three points that a national legal system based upon democratic values, and universal respect for the right of foreigners not to be treated as enemies, are essential. Liberal States are those who engage in promoting and applying democratic values. Western States are examples of such States.\textsuperscript{995} Non-democratic States such as Egypt, Syria or Libya involved in the Arab Spring of recent times did not promote or live by liberal values and are likely to be drawn into conflict.

The world has developed and changed since Kant’s time, but his vision for the conditions necessary for achieving and maintaining peace is still valid. The six Preliminary Articles introduced by Kant in \textit{Perpetual Peace}, are regarded as the prerequisite conditions for

\begin{itemize}
\item \textsuperscript{990}For further information please see supra note 24, pp. 31-48.
\item \textsuperscript{991}William C. Bradford, In the Minds of Men: A Theory of Compliance with the Laws of War, \textit{Bepress Legal Series}, paper 290, 2004, pp. 8-9; and supra note 985, pp. 508-510.
\item \textsuperscript{993}Immanuel Kant, The Eternal Peace, (ed.) Carl J. Friedrich, \textit{The Philosophy of Kant: Immanuel Kant’s Moral and Political Writings}, 1949, pp. 430-476.
\item \textsuperscript{994}Ibid, pp. 436-441.
\end{itemize}
engagement of States in co-operative relationships in pursuit of peace before the international system can be established on the basis of the Definitive Articles discussed earlier. Kant’s work has been subjected to analysis and interpretation amongst scholars including Hinsley, Doyle, Rummel, Meyers, Tesón and Burley. One of the most visionary aspects of Kant’s approach was his suggestion of the interconnection between domestic law of a nation and its arbitrary government and aggressive action internationally. This liberalist view suggests that, for international peace to be created and preserved, first and foremost the domestic law must be amended to protect and support freedom of individuals. The reason for this is deeply rooted in liberalism’s view of the importance of individuals and institutions above a State and as such the rights of individuals must overrule the national interest. Liberalists, including Kant, believe that by instigating institutions and processes of ensuring freedom for individuals, co-operation, peace and stability will be ensured. Realists, in contrast, argue that in the absence of an overarching ultimate power in the international legal system that can reasonably control the rights of individuals, IL and IR should focus predominantly on States’ interests rather than individuals.

Tesón challenges the realist view by asking ‘Why is it that national interest persists over and above changes in the actual interests of the citizens’? Why indeed? If a State is to serve and protect the nation then why and how would their interests be contrary to the interest of States? In answering the question, Tesón has reiterated Kant’s reasoning for securing international peace through domestic freedom by emphasising that citizens of States are not likely to encourage war, since they have to live with the consequences and scourges of war. As such a liberal State’s government, which is democratically elected and a true representation of its citizens, is likely to follow the interests of its individuals; thus working towards resolving conflicts through co-operation and peaceful means. In addition, Kant’s

996 Supra note 993; and supra note 953, p.69.
1000 Ibid, p. 73.
1001 Supra note 999, pp. 73-74
vision is that a stronger possibility exists for an increase in the level of understanding of right and wrong in liberal States, giving rise to stronger leaning towards accepting co-operation and peace as opposed to engaging in war. A more pertinent point, however, is that the separation of different authorities and institutions in decision-making processes gives rise to more debates and dialogues before States engage in war.

According to liberal IR theory, the nature of each State’s national policies and its decision-makers determines their stance towards the rule of law and particularly IL. Followers of this school of thought, thus, believe that more democratic and liberal States are likely to co-exist peacefully and abide by IL. Likewise, liberal States are believed to promote a sense of respect nationally and internationally, paving the way for co-operation and mutual gains through the trust and respect created. The realists’ viewpoint, on the other hand, regarding the anarchic international system, brings about a sense of volatility which requires States to always be prepared for conflict, as well as an environment that is outside the realm of mutual trust and respect. Even realists have been unable to deny the existence of peace amongst liberal States, irrespective of their explanation for peace amongst liberals being less to do with similarity of regimes and more related to motivational factors for States to co-operate and diffuse war. Realists’ beliefs stem from the Hobbesian view of the anarchy and insecure state of IL and IR, as discussed before, where States are independent, sovereign authorities in pursuit of their interests. Under such outlook, combined with the absence of a central, overseeing and unified authority, war and conflict is a plausible outcome that can bring States closer to their goals.

The linkage between internal freedom and external peace has been resonated not only by Kant’s work, but also in more recent work on liberalism, peace and co-operation amongst

1005 Ibid, p. 9; and supra note 985, p. 504.
1006 Supra note 986, p. 213.
1007 Supra note 985, p. 508.
1008 Supra note 986, p. 218.
States. There are similarities in the scholars’ views that liberal States do not engage in war, but there are variations in their reasoning on why that has been the case. Meyers is not absolutely convinced by the assertion of the inter-link between internal freedoms and external peace; his concern is that liberal States do not in ‘straightforward’ manner place the actions of the government into the hands of the majority of citizens, and what is more, individuals are not fully informed and may be deceived in the actions that best represents their interests. Meyers’ viewpoint is vigorously objected to by Tesón who finds the argument far reaching, sceptical and more importantly missing the concept introduced by Kant that world peace will only be achieved through like-minded democratic and liberal States.

One important point to note is that liberalism plays a pivotal role in contemporary IL and the international rule of law, particularly in the UN Charter where liberalism is promoted through international equality, non-intervention, non-discriminatory rights and acceptance/tolerance of diversity amongst nations. The international community has established institutions such as the UN to help promote co-operation. This is based on the neo-liberal institutionalism which is a strand of liberalism discussed earlier. Institutions such as the UN or the WTO have facilitated States to reciprocate in cases of defection or for dispute settlements, and undoubtedly, as an incentive for States to co-operate and abide by their obligations. Keohane has established that, in non-hegemonic inter-State relations, the international institutions play a fundamental role in bringing about an atmosphere of co-operation. Stein further supports the role of institutions in promoting co-operation since they are able to reduce uncertainties, thus minimising the costs associated with obtaining knowledge on the intentions of other States. The scholar also claims that international institutions increase durability of strategies given that each government is usually more short-lived than institutions such as the UN or the WTO. Keohane equally credits the institutions with providing a basis for co-operation on

1009 Supra note 953; supra note 986; Rudolph. J. Rummel, Libertarianism and International Violence, The Journal of Conflict Resolution, Vol. 27, No. 1, 1983; supra note 999; and supra note 985.
1011 Supra note 999, p. 79.
1012 Supra note 7, the Charter expresses this notions in various sections predominantly in Article 1(2), 2(4), 2(7) and 4
1013 Supra note 24, pp. 18 and 51-52, p. 244.
1014 Supra note 942, p. 7.
similar grounds, but with the emphasis on their role in bringing about agreements that would otherwise be more difficult to achieve.\textsuperscript{1015}

Any international organization is likely to be founded on principle or a Statute outlining its own parameters but equally is likely to set out standards of conduct for States.\textsuperscript{1016} Similarly the mode of monitoring obedience to the set standards and possible remedial actions in cases of defection, based on reciprocity, is able to provide long term co-operation and compliance with these standards, whilst respecting the ‘consent’ of States and allowing States to pursue their ‘will’ and interest.\textsuperscript{1017} This is particularly relevant given the nature of anarchy that exists in the international system. Blum asserts that multilateralism can lead States towards co-operation by providing a ground for incentives for co-operation and obedience, together with reducing the threat of deviation which should be ‘overcoming collective action problem’\textsuperscript{1018}. The scholar has credited this to a ‘looser’ and ‘decentralized’ form of enforcement mechanism through principles such as reciprocity.\textsuperscript{1019} It is easy to concur with this view, particularly when reflecting back on the analysis of reciprocity in the UN Charter and the VCLT. In fact, the principle of reciprocity has been accredited with achieving co-operation and being an integral component in the neo-liberal institutionalism approach.\textsuperscript{1020} Reciprocity does not require common interests and goals in all cases and it is functional in cases of limited common interest.

\section*{5.2. Unilateralism v. Multilateralism}

Up to this point, it has been observed that the evolution of IL and IR, together with the need for stronger co-operation between States, has shifted the approach of the international community towards working in conjunction with one another rather than preserving their narrow self-interest. Thus, there has been a general shift from unilateralism to multilateralism. Under unilateralism, States did not have the need to engage with one another; however, reasons such as technological advances and environmental concern as well as

\begin{thebibliography}{9}
\bibitem{1015} Supra note 24, pp. 18 and 51-52, pp. 244-245.
\bibitem{1016} Supra note 7, the Charter is an example of such statute outlining the standard of conduct for member States.
\bibitem{1017} Supra note 24, pp. 18 and 51-52, pp. 245-246.
\bibitem{1019} Ibid, p. 356.
\end{thebibliography}
collective peace, for instance, have led the international community towards multilateralism. This shift has been a significant move for States, since it indicates a move from individualism, independence and flexibility towards a more rigid and inter-connected system. Interestingly, the opponents of multilateralism are not restricted to authoritarian States who wish to maintain autonomy and control, but amongst liberal States there are those, such as the US, which oppose an absolute move towards multilateralism. The opponents in the US believe that multilateralism is only partially useful, when it addresses unification of issues such as military or economic, and they maintain that further advances towards multilateralism must be curtailed, to avoid restrictions on the US conduct or limitations on the power of decision-making to a more international organization. In effect, they wish to benefit from gains on issues where multilateralism can be beneficial but not to wholly submit to multilateralism in issues where there is no specific or obvious gain.

Nevertheless the doctrine of multilateralism is a goal in contemporary IL which encourages States to come together and protect the fundamental values of the international community with a collective approach. The international rule of law is indeed viewed as the collection of such beliefs and values of the international community and is the pillar upon which other aspirations such as peace, harmony, growth and co-operation can be built. The UN has in fact outlined enhancement of multilateralism as an underlying condition for reinforcing international rule of law. It can clearly be argued that the vision for contemporary IL from the outset stems from multilateralism with the protection of States’ sovereignty and ‘consent’. Contemporary IL has seen a rise in multilateral treaties and a move away from bilateral treaty format, namely the establishment of the WTO which brings international trade to a multinational level rather than trade agreements between a small number of States. However, the unilateralists would choose to restrict their obligations by inserting reservations, to maintain more individualistic autonomy. The benefits of multilateralism have been unequivocally argued by Blum who indicates that for IL to gain universality, it must pose a sense of multilateralism. Multilateral treaties bring a sense of collective

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1021 Supra note 1018, pp. 324-325.
1022 The creation of institutions such as the United Nations and the World Trade Organisation are pertinent example of actions towards greater multilateralism.
1023 Supra note 1018, pp. 331-332
1025 Supra note 1018, p. 325.
internationalism by encompassing a wider range of States within a treaty and thus the rights, obligations and duties set out within the treaty include a larger group.

The advantages and disadvantages of multilateralism and unilateralism have been debated amongst the scholarly community. Multilateralism has been championed amongst the legal scholars as the future of an international system supported by the international organizations and institutes that are assigned to resolve conflicts and disputes. International legal scholars have been divided in their views on this subject since the unified international response to a problem under multilateralism might be legal, but it can have devastating long-term effects on the international community and/or individuals. In contrast the unilateral action of one State towards an issue by imposing its ‘will’ or belief is equally flawed. The example provided by Alvarez is appropriate where he refers to international sanctions against Libya following the Lockerbie terrorist act and the implication of the UNSC actions in the aftermath of the Persian Gulf War. Regardless of one’s view on sanctions against Libya or Iraq, there is no question about the devastation caused to the civilians in those countries that were the ultimate sufferers of the international community’s multilateral actions. Another example as was discussed previously relates to the US involvement in torture-related issues in the name of law, which has a profound consequence for the international community.

The debates on appropriateness of unilateralism or multilateralism have taken many forms, encompassing debates concerning the US withholding of the UN funding, the US non-ratification of the Ottawa Treaty, and the appropriateness and legality of unilateral action in the form of humanitarian interventions. Analysing the issue of the US withholding of

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1029 The issue of the ability for a State to withhold funding of the United Nations constituted a debate amongst scholars namely Gerson, Cardenas and Alvarez, see Allan Gerson, Multilateralism a la carte: the Consequences of Unilateral ‘pick and pay’ Approaches, European Journal of International Law, Vol. 11, No.1, 2000; Emilio J. Cárdenas, UN Financing: Some Reflections, European Journal of International Law, Vol. 11, No. 1, 2000; supra note 1028.
the UN funding, Cardenas regards such actions by the US to be a direct suggestion of its unilateral approach and a break away from multilateralism,¹⁰³² let alone a breach of the US treaty obligations under the UN Charter.¹⁰³³ Gerson, on the other hand, considers the US to honour its multilateral obligations but further suggests that as the world power, the US is faced with the dilemma of being forced towards ‘cavalier’ acts of unilaterialism.¹⁰³⁴ This concept of delimiting international obligations and allowing unilaterialism by the US is what Hathaway has correctly termed as ‘American Exceptionalism’.¹⁰³⁵ Gerson leads us to believe that the US unilateral approach has been for the pursuit of good; yet Alvarez, despite agreeing with certain portions of Gerson’s argument, is of the view that not all unilateral approaches by the US have been positive and does not regard the US as seeing itself bound by multilateral obligations as set out in the UN Charter.¹⁰³⁶

The formulation of contemporary IL is rooted in multilateralism and the promotion of cooperation. The principles such as balancing of rights, duties and obligations are aimed at bringing about a sense of harmony between States, where one is not deemed above the other. This is visible when the rules of the WTO membership as the MFN and the NT principles were discussed in Chapter Four. In recent decades, this inclination towards multilateralism in IL has resulted in escalating concerns around weakening of the notion of State sovereignty and the power of States. The emergence of McDougal’s policy-oriented approach to IL,¹⁰³⁷ as well as the end of the Cold War, has led Hathaway to be suspicious of the move by world powers, particularly the US to rid themselves of multilateral obligations and to move towards a more unilateral approach.¹⁰³⁸

Moving to another aspect of the debates on unilaterialism and multilateralism, which is the appropriateness of approach in humanitarian issues, Reisman argues that certain unilateral humanitarian interventions are legal in situations where the multilateral international

¹⁰³³ Supra note 7, Article 17(2) states that ‘The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly’.
¹⁰³⁶ Supra note 7, Article 17(2); and supra note 1028, pp. 403-404.
¹⁰³⁸ Supra note 1035, pp. 128-129.
institutions are not able to respond ‘collectively’. This view, as deduced by Hathaway, is driven from a policy-oriented approach to IL, which suggests that more modern factors outside its traditionalist sources are to be considered in formulation of IL, namely inter-governmental organizations, non-governmental organizations (NGOs) and even the media. Reisman views that ‘all actors, who assess, retrospectively or prospectively, the lawfulness of international actions and whose consequent reactions shape the flow of events, now constitute, in sum, the international legal decision process’. Essentially Reisman’s reasoning suggests that unilateral acts which would result in States, such as the US, using force on the grounds of humanitarian interventions are legal, despite those actions being in direct contrast with the UN Charter Article 2(4). This view of the legality of such unilateral action is ardently counter-argued by many scholars namely Alvarez, Hathaway, Chesterman, Boutros-Ghali, and Mandel. Chestman regards such unilateral actions to be deviations from multilateral institutions and warns us of the effect on the ability to bring IR, particularly the conduct of international super-powers, under the rule of law. Equally Boutros-Ghali, former UN Security General, and Mandel, by referring to the US unilateral intervention in Kosovo in 1990s, discuss the role and impact of such illegal unilateral approach, without the UN authorisation, and in violation of the UN Charter, and its consequent effect in undermining multilateralism efforts by the UN. As cited by the former UN Security General ‘my responsibility was to promote multilateralism; the emerging U.S. policy was unilateralism with multilateralism providing a fig leaf as needed’.

Similarly Reisman’s claim does not seem to take into consideration the principle of reciprocity where the unilateral actions by the US can result in a reciprocal response, authorised as legal self-defence, by the attacked party. Furthermore, Reisman’s suggestion jeopardises the fundamental notion of State sovereignty if the power of legality is to be

1039 Supra note 1031, p. 17.  
1040 Supra note 1035, p. 126; and supra note 1031, p. 13.  
1041 Supra note 1031, p. 13.  
1043 Simón Chesterman, Just War or Just Peace?: Humanitarian Intervention and International Law, 2003, p.236.  
determined by NGOs and/or media. It raises the question that if the ‘will’ of such new actors is to be included in the formulation of IL, then where does this leave the notion of ‘will’ and ‘consent’ of States in the formulation, application and enforcement of IL? Throughout, this thesis has examined the role played by States in IL, particularly how IL is founded on their ‘will’ and ‘consent’. Their ‘consent’ brings about a sense of accountability and obligation upon States, and as referred to by Hathaway, the policy-oriented approach to IL and encompassing other non-State actors in the legitimacy of unilateral action will undoubtedly affect the duties and obligation recognised by States.¹⁰⁴⁶

The sources of IL were looked at in Chapter Two, and as D’Amato suggests there are no ‘mysterious’ other sources; as discussed before, IL is guided from the practice adopted by States.¹⁰⁴⁷ Hathaway relies on D’Amato’s view and appropriately argues that adoption of a policy-oriented approach to IL creates a trend towards a ‘non-democratic’ approach.¹⁰⁴⁸ Indeed, the ‘will’ of the democratically elected governments can be deemed as representation of the ‘will’ of the nation, but if the ‘will’ of such actors such as NGOs and the media, which are not democratically elected, are to be taken into consideration then this trend cannot be taken as a move towards the aim of the international community and the goals of the international legal system. In fact, Hathaway develops this argument further by suggesting that adopting a different interpretation of the policy-oriented approach to IL will enable States to break away from the norms and rules of contemporary IL since the final justification of legality of an action can be the ‘will’ of the media or NGOs.¹⁰⁴⁹ This opens the door for States to act unilaterally towards an international issue that would otherwise require multilateral action. Taking a situation such as the use of force into consideration, the media calling upon the world to attack a totalitarian State could be considered legal but under the strict interpretation of contemporary IL, strict guidelines must be followed in order to attack and take up arms against another State legally.¹⁰⁵⁰

The fundamental questions that come to mind are: where would the unilateral actions of a State lead the international community? How would such unilateral actions promote cooperation, democracy and democratic values in the international arena? Hathaway suggests

¹⁰⁴⁶ Supra note 1035, pp. 128-129.
¹⁰⁴⁷ Ibid, p. 129.
¹⁰⁴⁸ Ibid, p. 129.
¹⁰⁴⁹ Ibid, p. 130.
¹⁰⁵⁰ Ibid, pp. 128-130.
that Reisman’s reasoning above provides a justification for unilateral actions by world powers, most dominantly the US since the end of the Cold War.\textsuperscript{1051} On a similar perspective, Scheffer holds the view that the US has an obligation and is called upon to maintain world peace and security and ‘this is a reality in the international system’.\textsuperscript{1052} This might be a situation in which the international system might find itself but surely it was not the intention or the vision of the international community when such liberal and multilateral organizations as the UN were formed.

Unfortunately regardless of all the efforts and the good intention of the international community, and despite claims made by Alvarez that international lawyers ‘worship at the shrine of global institutions like the UN’,\textsuperscript{1053} there have been inadequacies and disappointments with the UN.\textsuperscript{1054} Hence, under this view, the US unilateral actions have at times been justified as necessary since multilateral organizations such as the UN are not adequate to deal with the issues concerned in specific cases.\textsuperscript{1055} Examples of this were unilateral action in Kosovo without the UNSC backing, and the invasion of Iraq without the full agreement of other UNSC members. This unilateralist action by powerful States, namely the US, has damaged the efforts of the international community towards multilateralism, and as argued by Ramphal, the US’s ‘recent behaviour has served actually to weaken the structure of multilateralism, including the United Nations itself’.\textsuperscript{1056} This poses the dilemma of chicken and egg where the question is: did the weakness of the position of the institutions such as the UN result from the unilateral actions of the US or was the US attracted towards deviation from multilateralism as a result of inadequacies within internationalism. Alternative views exist, such as that the US ‘is known as the foremost bearer of the ideology of human rights’,\textsuperscript{1057} or as claimed by Anderson that the unilateral actions by the US are never ‘merely

\textsuperscript{1051} Ibid., p. 127.


\textsuperscript{1053} Supra note 1028, p. 394.


\textsuperscript{1055} Supra note 1031, p. 17.

\textsuperscript{1056} Jeffrey Harrod and Nico Schrijver (eds.), \textit{The UN Under Attack}, 1988, p. xi.

one of power’ but more related to ‘moral and political legitimacy.\textsuperscript{1058} However, the phrase used by Malanczuk is very appropriate that ‘what is good for the goose must be also good for the gander’ in relation to the US unilateral actions.\textsuperscript{1059} Therefore, can the US assume an exceptionalist and/or unilateral approach to the rule of law and IL, though at the same time expect all other States to be law-abiding?

5.3. Functionalism and Neo-functionalism

One important element that needs to be considered in the study of co-operation is that there has been a movement towards the growth of multilateralism by establishment of institutions and organizations that promote and maintain co-operation. Integration between States became the new pathway to stability and peace, through functionalism, which led to the creation of such international organizations as the UN and the WTO. Following the discussion above on realism and liberalism, functionalism is another school of thought in which States and non-State actors focus on multilateralism based on common interests and goals. This approach is more akin to liberalism and differs from realism insofar as the interests of more than just States are taken into consideration. It recognises that there are other groups concerned and has greater focus on peace than on control by power.\textsuperscript{1060} International integration under functionalism is formulated and based on Mitrany’s work seeking the origins of world integration in ‘low’ politics areas such as economic and trade concerns.\textsuperscript{1061} This emanates from the fact that States value their sovereignty and are more likely to begin co-operation in common areas rather than give up full control over all matters. In this regards, a group of States take a collective identity whilst maintaining their individual sovereignty and control. Functionalism thus became the foundation upon which the UN based international organizations were set up and operated.\textsuperscript{1062}

\textsuperscript{1059} Supra note 1057, p. 89.
However, functionalism did not provide the framework for establishment of a global authorisation on one side, but also provided limited scope for institutions to govern and manage functional relations between States. This is where neo-functionalism was able to assist by regenerating and reintroducing the notion of co-operation but at a more regional level rather than on a global basis. One of the most important features of neo-functionalism lies in the concept of ‘spillover’, where the concept suggests that once co-operation and integration have been introduced in one area, there is a domino effect and there will be an increased momentum towards more integration.\textsuperscript{1063} This is a strong notion which suggests that, co-ordinated and common approach in one area can have a strong influence in the international policies, for example the concept of common market requires common, co-ordinated and unified policies which can then strongly influence the economic and trade relations between States.

This framework has been attributed to the notion that integration is more favoured when problems are minimised through a more collective approach rather than singular efforts, and even those that once opposed integration feel the pressure for co-operation and shift their views when realising the gains that could be obtained from more integration.\textsuperscript{1064} This could particularly be effective through pressures exerted (whether political or peer-pressure) from an established central organisation. This could lead towards a sense of co-operation and alliance between member States and through integration in one area further integration can be created or enhanced. An obvious example of this is the European Union with the vision that regional integration would enhance co-operation and bring a better sense of synergy in States’ relations. This new allegiance to the European Union and greater co-operation between member States is made possible without the expectation that each State should give up its individual national identity. Needless to say, not every vision for the formation and integration across Europe has gone smoothly; every objective has not been achieved as well as intended. In particular the concept of ‘spillover’ that was envisaged was met with some pushback from certain States concerned with loss of autonomy and independence.\textsuperscript{1065}


\textsuperscript{1065} Supra note 1062, pp. 171-172.
6. Why do States Co-operate? What are the Benefits and Drawback of Co-operation for States?

There is an argument that as the world is becoming more global in its interactions, there is a greater need for international rules, and greater co-operation is needed to deal with international issues. It has been observed how issues such as global security, global trade and the fight against terrorism are only some of the concerns facing the international community. In dealing with these issues, the international community has a high incentive to co-operate in minimising the negative impact of these concerns. The main challenge is to ensure the ongoing co-operation of all States and to minimise the inducement to defect from full co-operation. This is essentially achieved by means of ensuring States do not find themselves in prisoners’ dilemma situations by limiting the cause to defect, as discussed further below, when analysing the barriers of co-operation. Suffice to say that one of the ways of minimising defection and incentivising co-operation is through multilateralism and collective collaboration by States.1066

Throughout this thesis the importance of sovereignty, ‘will’ and ‘consent’ of States have been discussed. It has also been discussed how benefits and advantages of long-term peace and stability require truly global multilateral co-operation, and this in turn demands a certain element of compromise. Therefore, the obvious questions to ask are: why do States co-operate? Is there an obligation on them to do so? What are the reasons leading them towards non-co-operation? What are the advantages and disadvantages of co-operation for States?

It was seen when analysing the evolution of co-operation in this Chapter how the international community has gone through a globalisation leading to an evolution in State interaction, and this has required the progress in IL into its contemporary form. As such the international community has gained an insight that a singular, independent view is no longer a feasible mode of operation, hence interdependencies are increasingly required. The increase in the interdependencies of the international community thus needs an international legal system. Within the realm of IL, influenced by reciprocity, States are able to more easily co-operate since the ability of placing a reservation and the reciprocal equivalent obligation that

1066 Supra note 1018, p. 356.
is placed on the non-reserving States, as an example, increases the incentive of co-operation. The incentive to co-operate is well observed by Abbott stressing that States have the willingness to co-operate but also have a need to preserve their independence so as to:

Structure of the interaction, the incentives perceived by other states, and the compliance of others with their obligations will be crucial to international cooperation. . . . States will be reluctant to enter into agreements without clearly defined mechanisms for the ongoing production of reasonably timely and reliable information on these matters. Such mechanisms . . . may determine the success of an agreement in practice.1067

This incentive is twofold. Firstly States can be part of the overall treaty but only provide ‘consent’ with the provisions they feel compelled to accept, and secondly States are likely to commit and abide by their obligations or duties since they have been privy to the negotiations and have provided their ‘consent’ to the parameters of their obligations. There are a great deal of common interests and aims between States, thus co-operation can provide numerous benefits that has not yet even been attempted let alone fulfilled, such as synergy in technological advancement, military operations and international trade.

In the preceding Chapter, it was observed how reciprocity acts as an enforcement mechanism for obedience to international legal obligations due to available reciprocal responses; thus abiding by these obligations is an incentive for States to avoid negative reciprocal action. Similarly, States might choose to co-operate not in pursuit of common interests but instead negative impact through non-co-operation. Reciprocity has indeed been credited for the peace that was maintained during the Concert of Europe for as long as it existed.1068 Stein refers to this form of co-operation, ‘to avoid losses’, and identifies this as an option for States when facing difficult or limited choices.1069 In such situations, rational States are likely to choose the least costly option. The cost of non-co-operation is not merely financial since any conflict is likely to result in loss of lives. A sovereign State is entrusted with protecting its citizens and as such a rational State will evaluate the consequences carefully in line with its obligations and duties, and will work towards peace.1070 This can be observed in Hobbes’

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1068 *Supra* note 953, p. 109.
1069 *Supra* note 942, p. 4.
1070 *Supra* note 986, p. 220.
view that there is a duty and obligation upon sovereigns to work towards ‘the reasons of peace’. 1071

The international community has established institutions such as the UN to help promote co-operation. This is based on the neo-liberal institutionalism which is a strand of liberalism discussed earlier where international institutions such as the UN or the WTO have relied upon reciprocity in cases of defection and/or dispute settlements and inevitably have incentivised States to co-operate and abide by their obligations. Blum’s assertion that multilateralism can lead States towards co-operation holds true since ‘looser’ and ‘decentralized’ form of enforcement mechanism through reciprocity provides incentives for co-operation and reduces possible deviation. 1072 This has been evident throughout this thesis particularly through the analysis of reciprocity in the UN Charter and the VCLT. There are many theories offered as to how reciprocity brings about international co-operation between States, but the most prominent reasons for this can be understood as, 1) induced balance of rights and duties, 2) fear of reciprocal action and its consequent losses, and 3) the ability under IL for a collective international response.

The first explanation, induced balance of right and duties, was discussed in this thesis in relation to IL and reciprocity. The example of placing a reservation was discussed and how it exempts the non-reserving State from the same duty foregone by the reserving State. This form of reciprocity will bring about a sense of co-operation since States are able to be part of the general agreement without the fear of undue and unfair obligations when other contracting members are able to exclude themselves from the same obligations. Equally each State is able to provide ‘consent’ only to the relevant parts of the agreement in line with their policies, which in turn helps to promote multilateralism since the barrier for non-participation to the agreement is diminished.

The second explanation is the ability of States to legally reciprocate a non-co-operative action ranging from loss of reputation, loss of credibility in future agreement negotiation, sanctions or severe losses in an armed attack resulting from self-defence. All of these examples are reciprocal legal counter-measures or self-defence available in IL. As discussed earlier, when

1072 Supra note 1018, p. 356.
States are faced with difficult challenges, they might choose to co-operate not due to the available gains but more in relation to avoiding losses. There are numerous examples of where States have had to co-operate despite their genuine ‘will’, such as in the Cuban Missile Crisis, or during Egyptian pursuit of relations with Israel in 1970s, where non-cooperation would have resulted in severe losses.

Under the third parameter, the availability of collective reciprocal international approach, IL has offered a further means of working towards stability. The UN Charter clearly poses an obligation on States to protect the ‘inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations…’. The Persian Gulf War was referred to previously as a reciprocal example of international collective approach. Goldstein and Pevehouse provide an interesting debate on the importance of the role played by an external (outside) power’s ability for reciprocity in a situation of non-co-operation between conflicting States. The scholars reflect on a regional (neighbouring) conflict between Serbia and Bosnia and the possibility of further co-operation with the introduction of a ‘triangular’ co-operation scheme, but the core of their argument is applicable to a wider scale and other forms of international co-operation in cases of international conflicts. In such situations, reciprocity is not restricted just to the conflicting States and the international community, insofar as allowed by IL in line with the doctrine of counter-measure and proportionality.

The discussions on reciprocity refers to situations requiring specific or diffuse reciprocity, as defined by Keohane, where specific reciprocity refers to situations in which equally valued items are exchanged between counterparts in a limited and specified manner, with any rights or obligations clearly defined. Diffuse reciprocity, on the other hand, relates to situations where there are more ambiguities in the actions of partners involved or where series of events are less restricted to standardise acceptable practices. There are common features that can be defined and identified in both specific and diffuse reciprocity. The concept of reciprocity in any situation can be described as having the elements of contingency and equivalence. If a

1073 Supra note 7, Article 51.
1074 Supra note 1020, pp. 515-516 and 528.
1075 For further information please see Chapter Four.
1077 Ibid. pp. 5-6.
relationship does not benefit from some form of acceptable equivalent return, it cannot be
deemed to be a reciprocal relationship. Using the two types of reciprocity situations
previously identified, specific reciprocity arises in situations where specific equivalent return
between specific partners are balanced, but diffuse reciprocity situations deem to bring about
general balance for the overall group. The importance and instances of equivalence are
evidenced more in IR or trade. For instance, even though GATT does not define reciprocity,
its director-general referred to reciprocity as ‘the equivalence of concession’. It is difficult
to calculate an exact equivalent exchange value of expectation and obligations between States
given the differences in their strengths, sizes or abilities, but the reciprocal actions create a
mutual benefit.

7. What are the Barriers of International Co-operation and how can Co-
operation be Further Achieved?

Each of the attempts at securing co-operation and collective security has been subject to
difficulties. In particular it has been difficult to achieve co-operation for a long duration due
to focus on self-interest rather than collective interest and gains. To provide an analysis of
how to achieve and maintain co-operation, it is important for the study to firstly identify the
barriers of co-operation before proceeding to explore how to overcome these barriers. An
analysis of the barriers of co-operation is provided by Booth and Wheeler who identify
concisely six important obstacles for achieving co-operation as: 1) Rational Egoism; 2)
Future Uncertainty; 3) Ambiguous Symbolism; 4) Ideological Fundamentalism; 5) Great
Power Irresponsibility; and 6) Communication. The international community must
overcome the tendencies believed by realism to divert world relations towards conflict and
away from co-operation. Notwithstanding the general difficulties in securing international co-
operation, if the international community is to succeed in its efforts, it is then important for
them to overcome these barriers.

1079 Ibid, pp. 7-8.
1080 Supra note 953, pp. 131-136.
Jervis, by referring to Meuller, suggested that co-operation is difficult to achieve without ‘shared values’, ‘identification with the other’ and equally important the ‘moral force’. Building on this belief, Booth and Wheeler go further by suggesting that sustainable and/or long-term co-operation will not be achieved through the stagnant notion of identities. In effect, overcoming the barrier of ‘rational egoism’ would require shared common values and identities and importantly the moral values must drive States towards co-operation. Looking back at the Concert of Europe and its demise, British and Russian values and motives were no longer shared, which led to the Crimean War.

The second barrier introduced, refers to how ‘long-term effectiveness’ of any co-operative plan is fundamental to its success. Thus reducing the ‘future uncertainty’ would result in a State never being made to feel vulnerable or uncertain of the future of co-operation; any uncertainty undoubtedly leads to protective attempts against the co-operative status and towards damaging the co-operation between States involved. The Cold War provides a useful example of how misinterpretation or perception of the co-operation led to mistrust between the US and the Soviet Union, where the US continued to be able to advance its military capabilities which in turn was viewed by the Kremlin as breaking the terms of co-operation and which eventually led to the fall of the détente; ‘ambiguous symbolism’ thus indicates the emphasis that must be placed on the necessity of understanding the clear terms of any co-operation to achieve a sustainable co-operative framework. Booth and Wheeler believe that international co-operation has been undermined as a result of the US Administration’s view that the internal characteristics of States constitute their external actions. An example given by the scholars is the view held by the Bush Administration that the threat to world peace is from ‘rogue states’. President Bush went as far as labelling three countries as an ‘Axis of Evil’. However despite attempting to stop these countries from achieving nuclear ambitions, the Bush Administration was not opposing India to acquire nuclear arms. This demonstrates the Bush Administration’s contrasting approach towards different States based on their ‘ideological fundamentalism’.

1081 Supra note 952, p. 348.
1082 Supra note 953, p. 131.
1083 Ibid, 131-132.
1084 Ibid, p. 132.
1085 Ibid; and Henry A. Kissinger, White House Years, 1979, p. 203, 211-212.
1086 Supra note 953, pp. 133-134.
The use of double standards in the international arena leaves the great powers open to be challenged; and ‘great power irresponsibility’ brings a sense of uncertainty in co-operation efforts. Bull discusses how the world was justified in having grave concerns with regards to the irresponsibility of the US and the Soviet Union as the two superpowers of the 1970s with their individual nuclear ambitions.\textsuperscript{1088} In the world today where we are faced with only one superpower, a similar double standard was observed in the Bush Administration’s policy and approach to nuclear power, particularly its approach towards the use of nuclear power by the ‘rogue states’ who might then possess weapons of mass destruction; so the role being played by the great powers and their responsibility towards international co-operation must not be discounted.\textsuperscript{1089}

As with any other form of harmony and co-existence, ‘communication’ is a key factor for achieving co-operation amongst States. For a long duration of the Concert of Europe, as an example, communication was open and constructive which helped to eliminate uncertainty.\textsuperscript{1090} As communication became more difficult, with the perception of the increase in ‘egoistic strategic calculations’ by the different governments a period of increasing uncertainty arose regarding the intention of each State, and moved Britain and Russia towards the Crimean War.\textsuperscript{1091} Similarly, in the Cold War, an attempt at creating co-operation between Russia and the US started from open and continuous dialogue resulting in understanding and appreciating each other’s requirements, in the co-operation known as détente.\textsuperscript{1092}

The above points provide a useful and concise summary of the factors required for co-operation to be achieved, but to overcome these barriers Kant’s approach towards peace and co-operation provide a useful guideline. It was discussed earlier how liberals believe in the impact of internal liberal government and an external co-operation and peace. Analysis have shown that liberal States do not engage in conflict with each other, but this is not to be taken to mean that they never engage in conflicts, as there is evidence of liberal States engaging in

\textsuperscript{1089} \textit{Supra} note 953, pp. 134-135.
\textsuperscript{1091} \textit{Supra} note 953, p. 135.
\textsuperscript{1092} \textit{Ibid.}, pp. 131-136.
conflict with non-liberal States. There is, therefore, a vast difference between interactions of liberal States with one another or with non-liberal States. The difference is in the relations and conduct of liberal and non-liberal States. Burley argues that this is not coincidental but rather is driven from the specific economic and political characteristics of liberal States. Rummel takes a slightly different approach and argues that liberal States, through the influence of their citizens, democratically elected governments and free press, are less prone to conflict and are more peace-seeking, therefore would not eagerly engage in war type conflicts. The views of Burley and Rummel are counter-argued by Chan who does not believe the liberal States to be ‘pacific’ or inherent peace-seekers but actually as prone to conflict as non-liberals but just not with other liberal States. In effect, the argument for non-conflict between liberal States relies more on restraint shown on the basis of mutual economic and political interconnection rather than pacific nature of liberal States. This is evident when one reflects back on the number of wars the US as a liberal State has been involved in as opposed to a less liberal State such as China. Even though the US has not waged war on another liberal State, it has nonetheless been engaged in almost every major conflict of the last 50-60 years.

There has been an increase in the number of liberal States in the last centuries, but, despite this, Doyle argues that the creation of ‘zone of peace’ and ‘zone of cooperation’ has been limited to liberal States and has failed in providing a guideline for non-liberal States. This theme of peace between liberal States is an affirmation of Kant’s theory that a condition for international peace is through liberalisation of States. Kant was critical of resorts to war and clearly stated that ‘reason absolutely condemns war as a means of determining the right and makes seeking the state of peace a matter of unmitigated duty’; and in his vision

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1097 *Supra* note 986, p. 323.
1099 *Supra* note 993, p. 437; and *supra* note 999, p. 55.
the prominent aim of IL is in establishing lasting peace.\textsuperscript{1101} This purpose for IL and international legal institutions was reverberated several centuries later in the UN Charter emphasising that ‘The Purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace…’.\textsuperscript{1102} The challenge therefore is for IL to strengthen the basis for international co-operation.

To approach this challenge, it is imperative to understand and appreciate the nature of IR for its anarchist environment. The Hobbesian view of the state of nature in world affairs holds true as much today as it did when published. There is a need for an overruling external force to guide and rule States’ relations and the international legal system. International affairs are driven and influenced by States and it is their ‘will’ and ‘interest’ that govern inter-State relations. Caution must be applied and one should not jump to the conclusion that individuals never play a role in IR since the increase in democratic States indicates a greater role played by State citizens in democratically expressing their interests. Equally, even amongst the liberal States, the degree of democracy, undoubtedly, varies and the ‘will’ of individuals may not be carried out at every turn.

Realists would have us believe that States only pursue gains and power, and thus are not likely to be persuaded towards co-operation if it is not going to end in their additional gain. Realists additionally regard the main player to be States and individuals to be secondary players. If the inter-State relation in the world today is following the realists’ view, then how can one account for the increase in the quest for democracy, freedom and liberal values internationally. In fact, the pro-democracy Arab Spring, as a recent example, is a representation of individuals in States expressing their wish and taking a more direct approach in how their will and interest is to be represented. Alternatively, is it to be automatically assumed that States’ relations are directed according to liberalism?

Kant’s ultimate vision for liberalist State interaction and IL is an ideal one and the international community has not yet reached that stage in their relations. The scholar had the vision that the world would become more liberal but the road to this state of liberalism will

\textsuperscript{1101} Immanuel Kant, \textit{Perpetual Peace: A Philosophical Essay}, (trans.) Mary Campbell Smith, 1903, p. 21.
\textsuperscript{1102} Supra note 7, Articles 1(1).
not be a steady one. As inter-State relations stand today, the liberalists do not provide an absolute view of State relations. A modified approach of liberalism, neo-liberalism, where States are considered to be in pursuit of gain but only their own ‘absolute’ gains, also does not fully explain the policies and practices of States. Realism and neo-liberalism are not oblivious to barriers for co-operation but view these barriers somewhat differently. For both schools of thought, defection or derailing from agreements is a strong possibility but liberalists regard this defection to arise from the balance of absolute gains, and hence suggest that international institutions can help overcome this barrier and enable States to work together. The most obvious example of this is the WTO.

Realists, on the other hand, recognise defection or derailing as a barrier, but with an additional barrier which is driven from the realists’ concern not only with absolute gains but also relative gain of other States. In other words, realists consider co-operation to be hindered if a State regards another to be gaining more from the co-operation. The view of realists is associated with the notion of insecurity they feel, the security dilemma, driven from their belief that in an anarchic condition of IR, national security of States is at risk since every State is in pursuit of maximisation of their gains and power. Liberalists do not give due consideration to the security dilemma in which States might find themselves, presuming that the effect of anarchy has less impact on IR compared to States’ pursuit of co-operation for absolute gains. Having said this, the realists’ perspective and emphasis on conflict to overcome the security dilemma is also not helpful in securing co-operation and lasting peace. Doyle refers to this fear when he suggests:

“For specific wars … arise from fear as a state seeking to avoid a surprise attack decides to attack first; from competitive emulation as states lacking an imposed international hierarchy of prestige struggle to establish their place; and from straightforward conflicts of interest that escalate into war because

1104 Ibid, p. 487.
1105 Security Dilemma, is a notion generally believed to exist in anarchy state of international affairs where ‘Groups or individuals living in such a constellation must be, and usually are, concerned about their security from being attacked, subjected, dominated, or annihilated by other groups and individuals. Striving to attain security from such attack, they are driven to acquire more and more power in order to escape the impact of the power of other’, John H. Herz, Idealist Internationalism and the Security Dilemma, *World Politics*, Vol. 2, No. 2, 1950, p. 157.
1106 Supra note 953, p. 12.
there is no global sovereign to prevent states from adopting that ultimate form of conflict resolution'.

Realists thus suggest that States are not naturally inclined to co-operate which is a view contradicted by liberalists. In such a situation, the powerful principle of reciprocity plays a vital role in leading to co-operation amongst the most unlikely players. For States to achieve co-operation in their relations, IL must provide the co-operative framework for States’ conduct and approach. Unlike IP and IR, however, IL does not distinguish between different sovereignties as members of the international community and all members are deemed equal until such time that a dispute or disobedience of IL has occurred. Equally the legal status of States is not influenced by their political, military or economic positions. This form of non-discriminatory and equality of States is certainly not the case in their inter-State relations. A common factor though is in their shared value of independence and non-intervention.

In this thesis it has been examined how the reciprocity in different areas of IL acts as a tool for incentivising and ensuring that States comply and abide by their duties and obligations. Through reciprocity, States are encouraged to co-operate and maintain the balance between rights and duties since any non-co-operation is likely to result in reciprocal reaction. Reciprocity, hence, acts as deterrence for disobedience and non-cooperation. This form of co-operation, known as ‘liberal internationalism’, is driven from upholding international values and objectives. An example of this is in the discussion in Chapter Four, where in cases of deviation from its obligation and duties, State’s sovereignty might be compromised and IL permits States to reciprocate. This legal intervention is permissible for example through the means of obligations erga omnes or collective self-defence. One of the suggestions of ‘liberal internationalism’ is that establishing multinational organizations helps towards co-operation by limiting the powerful States from pursuing their political interests and influencing IR. In practical terms, organizations such as the UN or the WTO are prominent examples of organizations that have primarily liberal foundations. The opponents of this view, the realists,

1107 Supra note 986, p. 219.
1108 Supra note 1094, p. 1909.
1109 Supra note 986, p. 213.
1111 Ibid, pp. 2-5.
however claim that IR is still driven from factors such as political power and strength in economy, military and diplomacy.\textsuperscript{1112}

There is an unquestionable increase in the number of liberal States and there is greater striving towards co-operation. There are undoubtedly obstacles for achieving co-operation even for States that are moving towards co-operation, and thus the fundamental issue facing the international community is to stimulate an international environment where factors for war are lowered and co-operation is encouraged. IL as well as an increase in international institutions helps towards that goal and, as discussed, the principle of reciprocity helps reduce the fear of defection or derailing from international agreement, obligations and duties. Co-operation and peace will not be achieved without commitment to obedience of agreements and IL. As with any legal system the enforcement mechanism for legal obligations and duties plays an important role in enhancing commitment and deterrence of disobedience.\textsuperscript{1113}

Booth and Wheeler, amongst other scholars, have provided factors that can render growth in co-operation between States, which the study now discusses. The factors suggested are summarised below:

1) De-ideologising conflict – The end of the Cold War is a recent prominent example of détente between two States and its end was possible once both the US and the Soviet Union moved away from the ideological labelling of each other. For example, Reagan had previously labelled the Soviet Union as an ‘evil empire’ but on his visit to Moscow when asked about this previous label he aptly responded ‘that was another time, another era’;

2) An alternative logic of uncertainty – The steps taken by both the US and the Soviet Union to bring about an end to the Cold War and the subsequent evolution of NATO, and NATO-Russian relations, demonstrate a vision of common security by States involved. The need to co-operate was accepted, to bring about common security through an element of trust as opposed to the arms race option that was pursued throughout the Cold War;

\textsuperscript{1112} This was discussed in Chapter Four when discussing the effectiveness and influential nature of the permanent members of the Security Council in enforcing international law.

\textsuperscript{1113} For further information on enforcement mechanism of international legal system refer to Chapter Four.
3) Importance of personalities – The end of the Cold War has been attributed to the vision and the roles played by the leaders, and their agents, of both superpowers. Both leaders, Reagan and Gorbachev, demonstrated their willingness and ability to shift from their original standpoint when confronted with co-operative opponents. Equally the relationship between Clinton and Yeltsin paved the way for the expansion of NATO into NATO-Russian relations;

4) Security dilemma sensibility – Gorbachev and Reagan were able to express their joint fear and risk of an arms race and devastating consequences of any misinterpretation of action by either side. Independently they felt the importance of the need to disseminate an element of trust necessary to bring about co-operation in order to eliminate the risk of nuclear war;

5) Transparent defensiveness – For effective co-operation, it is important to be able to distinguish the difference between offensive and defensive actions, in particular in the area of military expansion and accessibility. The aim is to encourage and enhance reciprocity by reassuring the other party of your intent, which is associated with the notion of ‘costly signalling’. The main issue always is the correct action in line with the intent at the same time as preserving military enigma. The challenge is in ensuring that a signal is not so little as to be disregarded by the other side and not so large as to limit States and put them at risk. This risk factor is seen and argued by military staff as being the reason that any such signalling and co-operation requires a ‘margin of safety’. A good example of this was in the latter years of the Cold War where the Soviet Union sent such signals to the US in relation to the Soviet military intent, with safety in the knowledge that such signals would not be taken advantage of by the US.

6) Values and identities – Shared values help towards achieving co-operation, as previously suggested by referring to Jervis’ view of the importance of moral force and the requirement of similar identity to maintain co-operation. As mentioned previously, the leaders of both the US and the Soviet Union showed a shift in their view towards their historical adversaries where Reagan almost retracted his previous labelling of the
Soviet Union as an ‘evil empire’ and began to move towards common ideals of collective security through co-operation.\textsuperscript{1114}

The factors suggested by Booth and Wheeler, are useful consideration for co-operation but they are more relevant to situations when States have reached the understanding that the best route is co-operation. The more important factors that need to be considered are how to pacify States and to encourage them to co-operate. As Kant envisaged,\textsuperscript{1115} the path to cooperation and peace is not likely to be steady and without obstacles, but since there is evidence of peace being reached more often amongst liberal States and there are benefits from this co-operation and peaceful co-existence, then the challenge for the international community is how to encourage those States that are not naturally and inherently co-operative towards a state of co-operation.

8. Conclusion

In this Chapter, co-operation and its importance to world peace and security was examined. Peaceful co-existence is the concern of all States and as such the international community has been striving to reach a peaceful co-existence throughout the evolution of inter-State actions and inter-State dependency. This ideology was behind the creation of the international institutions such as the UN or the WTO at international level, and the European Union at regional level, and the evolution of contemporary IL. The principles that are considered in IL, relating to IR, clearly articulate that measures are adopted to limit the conflicts between States which consequently promote security, world peace, HR, and economic growth.

The doctrine of co-operation between States has been considered as being more geared to prevention rather than cure. However, we observe how co-operation between States, world peace and international security are damaged or undermined as a result of unilateral actions and subsequent non-co-operative response to the unilateralism. The incentive for co-operation between States helps develop a liberal internationalism, with multilateral benefits for all parties including others who are not directly involved. It is in the collective interest for such strategies to develop in a framework and action through relationship-building between

\textsuperscript{1114} Supra note 953, pp. 165-170.
States. Hence the source-control dominant mechanism is a co-operative approach, which is beneficial for parties involved even when a State does not wish to co-operate.

IL has played an important role in leading the interaction of States through relationship-building and co-operation. The thesis has shown the extent to which IL has been inextricably connected with IP, and both disciplines are argued to be driven from the ‘will’ and ‘interest’ of States. The unilateral actions, mostly adopted by the US, demonstrates that the result is not only the consequent escalating crisis in the world, but also the approach has been powerless to assist or support the development of source-led solutions for the international community.

Further to this point, the hegemonic approach has left the international community (including the world powers themselves) with huge costs and burdens to carry. The question to ask is: why the US, a State which claims to be democratic and governed by rule of law, does not always comply with international rules, norms and obligations, and has taken steps to circumvent these through unilateral actions. The interrelated factor of the unilateral US actions in IR analysed in this study, shows that when a superpower, the US, would easily circumvent international rules to fulfil its own interests, it becomes easier for the others to follow suit. In other words, looking at the US hegemonic approach where disobedience of international treaties and deviation from international rules has become their common practice, the negative reciprocity as a licence is given to others to act in a similar manner, or at least prefer not to co-operate. The reason for this is that in a reciprocal system of IL commitment to its rules play a pivotal role for States and they are required to honour international agreements and rules rather than undermining them. In this respect, an important point to note is that the element of commitment to IL has become a primary issue since IL has issues with its own enforcement mechanisms.\textsuperscript{1116} Hence, co-operation in IL system is a prerequisite to achieve its goals. Looking at the consequence of deviation from international rules on the one hand, and increasing instability around the world, on the other hand, shows that it is a mistake of superpowers to give the opportunity to States to be un-cooperative,\textsuperscript{1117} or to provide them with easy escape routes.

\textsuperscript{1116} The necessity of State commitment has been examined throughout this thesis.
\textsuperscript{1117} Imposing sanction against a State by the Security Council is an example of this situation. The outcome of imposing sanction differs from one State to another. In some cases, the final outcome of the sanction is successful. But, it should not be applied against the targeted States similarly. For example, the Security Council particularly the United States believed that they could achieve their goals by isolating the Islamic Republic of
Through the advancement of technology and the ability to easily access up-to-date information, the nature of interactions has changed and therefore to win this, the strategy of battle and confrontation need to change. We observe how the incentive for co-operation between States can help develop a multilateral benefit for all parties including others who are not directly involved. It is in the collective interest for such strategies to develop in a framework and action through relationship-building between States. Even though the notion of co-operation and its importance is outlined by some scholars namely Booth and Wheeler, there is limited suggestion as to how co-operation is to be achieved in the world today considering the escalating crisis. It is the belief of this thesis that therefore, an alternative solution to overcome the above discussed international issues is to ‘increase co-operation’. This is to say that, as a preventative measure, instead of choosing a strategy to isolate a non-co-operative State, superpowers should ‘increase co-operation’ even where a State is not willing to co-operate. It should be reiterated that this approach should be adopted for prevention of a crisis rather than curing after it has escalated.

The debates around the state of IR amongst liberalists and realists as discussed in this Chapter, allow us to understand the barriers facing the international community. The route to lasting peace is through co-operation and therefore, for peace and security of the international community, every effort in minimising the barriers to co-operation must be made. Liberalism provides a useful approach towards achieving peace and Kant’s visionary work has passed the test of time. Doyle articulates how the world is moving towards democracy and liberalism by addressing the increase in the number of liberal States. Furthermore, evidence indicates that war between liberal States has been a rare occurrence. This evidence is uncontested and even realists have been unable to provide a convincing counter-argument for this.

This leaves the international community with a dilemma since realists’ view does hold true in certain aspects of IR. For example, from the fear of States in their security dilemma, the international community has reached the foresight that international co-operation has advantages, most of all economic gains. Liberalism, however, provides useful insight to IR but is more far-reaching and ideal than the current inter-State relations. For example as Grieco has acknowledged, IR since World War II have been more aligned to realist thinking through imposing sanctions. However, the evidence shows that they faced with unintended consequences. For example, not only Iran is not weakened but also, it has gained more power.

This was discussed in Chapter Four when analysing the Security Council’s resolutions.
but simultaneously liberal institutionalism and international co-operation was not dismantled.\textsuperscript{1119} The obvious reason is that the international community understands that there are lessons to be learnt from both schools of thought. Liberalism may not be fully achieved at the present time but its teachings on co-operation towards peace, and the ability of international institutions such as the UN or the WTO in increasing obedience to agreements, have been influential.

IL and international institutions have paved the way for the above vision and as the discussion has suggested, the fundamental role of reciprocity has been pivotal for bringing about the forum for more States to be party to treaties and agreements, not withholding the role played in balancing rights and duties of States. Equally important is the reciprocal ability towards States pursuing additional gains or advantages. The best example of this is in the role of reciprocity in the VCLT in relation to the reservations. As aptly cited by Slaughter, it is common for negotiations and agreements between liberal States to be conducted in ‘an atmosphere of mutual trust’ which would assist in the enforcement and compliance of such agreements, and as such ‘this mode of enforcement contrasts with the traditional ‘horizontal’ mode involving State responsibility, reciprocity, and countermeasures’.\textsuperscript{1120} IL strives to increase the commitment of States to their obligations and duties through the principle of reciprocity and a possibility of counter-measure against defectors.

\textsuperscript{1119} Supra note 1103, p. 485, 409-491.
\textsuperscript{1120} Supra note 985, p. 532.
Final Conclusions

The thesis set out to explore how reciprocity manifests itself in different areas of IL, and to ask if reciprocity is a foundation of IL, or whether IL creates reciprocity. In addressing this central research question the study examined both IL and reciprocity in order to evaluate the role and nature of the latter within the former. The study of the role and significance of reciprocity in IL is fascinating in the sense that the study explores how IL shapes the international community’s actions and interactions of States and how, in turn, these actions and interactions shape IL. The significance of the role of the principle of reciprocity in IL is not only in operating as an incentivising tool for States to abide by their obligations, but also is in its multiple functions for creating stability, co-operation, mutual dependency, continuity, legitimate expectation, equality of rights, and coherency, whilst also creating, supporting and maintaining the balance between interests, rights and duties of States. Reciprocity as a principle in the framework of IL is a standard whose establishment and observance brings about equality and fairness between the rights and duties of States, thereby acting to preserve justice and fairness without addressing them directly. Reciprocity aims to protect and safeguard the rights but also to establish equality and balance between the rights and duties of States. The principle of reciprocity establishes a set of guidelines and parameters for the fulfilment of duties, imposing obligations and responsibilities in order to establish mutual exchange of advantages and disadvantages between States.

Contemporary IL unites the international community through a legal framework. The creation of the UN was a concerted international effort for pursuing justice, peace and security, as well as promoting respect for the obligations and duties of States. IL possesses a unique consensual and voluntary nature, where its rules are not imposed upon States but generated by them through their ‘consent’. IL’s nature is highly derived from two important principles which are based on sovereignty and equality of rights of States. This has led to the uniqueness of IL where States are the law-makers, law-breakers, and at times law-enforcers. In such legal system the rule of law ensures that the rules are durable and not arbitrary or subjective to the ‘will’ and interests of States. More importantly, this is where reciprocity plays a fundamental role within IL and works towards limiting it from being consumed by the pursuit of self-interest of States whilst preserving inter-State relations from chaos. The effectiveness of such international legal system, which is set to regulate inter-State relations,
must therefore encompass and include equality of rights amongst its subjects, an element of
give and take amongst its subjects, and an element of bilateral and reciprocal obligation in a
tit-for-tat format.

The analysis of reciprocity within the context of sociology and anthropology provided an
insight into how people tend to reward kindness with kindness whilst retaliating against
unkindness. The rightness and wrongness of responses or behaviours are assessed in line with
the social, moral and value system of individuals/communities, whilst taking the cost-benefit
analysis into consideration. The protection of equality and cost-benefit determines the value
of return of a gift or kindness to be in equal measure. When this is coupled with the principle
of utility, the moral aspect is thus taken into consideration where right action leads to benefit
and wrong action leads to pain. States, similar to individuals, in general are willing to accept
obligations and duties that are within a reciprocal framework, in the sense that others would
consider themselves similarly obligated. Similar to the social or anthropological analysis of
human inter-actions, this form of reciprocal framework tends to provide a form of rules that
are based on and promote stability, longevity, fairness and justice in inter-relations that would
otherwise be under jeopardy. When applying rationale for engaging in an action or in reacting
to an action, States reflect similar mind-sets for protection of their interests, and anticipation
of their obligations. In the world today, States co-operate not just because they are
considerate or that they are friendly towards each other rather for the reason that they need
and depend on each other. Hence, there is an increased interdependency of States which is
heightening the importance of States inter-relations for their operations and growth.
Retrospectively, this growth is vitally dependent on a sense of stability built upon
international peace and co-operation. This interdependence brings about greater interactions
and has contributed to the creation of reciprocal inter-State relations. Reciprocity encourages
States to take a long-term view of their interactions and co-operation in their relations and not
jeopardise the long-term gain with short-sightedness.

Reciprocity is a double-edged sword. On the one side, it is a main tool for limiting States’
actions, abstaining from wrongful acts and abiding by their obligations, and on the other side,
it is a tool for establishing the right to act in response to previous act, either in positive
(namely diplomatic immunities) or in negative forms (for instance self-defence through the
use of force). Additionally reciprocity helps by incentivising and encouraging long-term
commitment and obedience whilst limiting States’ obligations only on a reciprocal level, hence safeguarding States’ benefits or interests. States cannot attempt to impose duties and obligations on others without incurring some reciprocal obligations and duties themselves. The principle of reciprocity in IL has many functions, least of all, it confines the rights being claimed by States since the same rights will be made available to all States. Equally it influences how States go about proclaiming their rights and responding to the rights claimed by others. Reciprocity in this respect essentially influences and focuses on State practice and behaviours, in the sense that, the presence of reciprocity is a strong tool to encourage and incentivise States towards taking other aspects into consideration than just pursuing their unilateral or individualistic self-interest. Reciprocity, linked together with the principle of equality of rights, essentially brings about a sense of fairness and balance in State interactions where States benefit from similar rights and have similar obligations. The principles of equality and reciprocity play a pivotal role in safeguarding the impact of States’ wealth or power from interfering with their equality of rights.

Significance and the manifestation of reciprocity in different areas of IL demonstrated how the balance of interest, rights and duties of States are created, supported and maintained as to minimise unfair advantages gained. This research demonstrated how IL operates under a reciprocal framework but the manifestation of reciprocity varies in different areas and in different contexts. For example in CIL, a State’s practice is regulated by reciprocity since States are careful to ensure conduct chosen by them would not be detrimental if reciprocated. This will limit ambitious self-gain and unfair advantages in CIL which is one of the most flexible areas of IL and not centrally governed or regulated. In treaty law it follows a similar theme, in relation to the right of States to place reservations, where reciprocity plays a significant role by sharing the benefit from reduced obligations and limiting any advantages sought by reserving State since reciprocity restricts the duty of other States towards reserving State in a reciprocal manner.

Treaties have the most obvious manifestation of reciprocity given the bilateral nature of treaty law within multilateral inter-State relations. Reciprocity plays a role in this area of IL from the early outset. States begin at the very early stages of negotiations and discussions on agreeing the treaties that need to be drafted and what provisions are to be contained within them, as well as in the signing and/or ratification stage of a treaty. An example of this is in
the ILC workings on drafting the Articles of State Responsibility and the debates that took place in order to conclude the final draft. Reciprocity further manifests itself when States are building consensus amongst the international community for signing and ratification of treaties. Once a rule has come into effect, there are further reciprocal entitlements available to States in response to non-fulfilment or breach of agreements. Similarly the ‘remedial’ features of reciprocity manifest themselves in the right to adopt counter-measures, in the form of ‘self-help’ or ‘self-protection’. A more pertinent example of the ‘remedial’ features of reciprocity is in ‘inherent right’ to self-defence within the UN Charter. Alternatively, in a more positive light reciprocal respect, as referred to in diplomatic immunity, is an incentivising tool for States to abide by their obligations and safeguard their own overseas diplomats. Similar theme is evident in the working of the WTO. The WTO sets its primary objective as aiming to establish and maintain the balance and equality amongst its members. Its framework is based upon establishing a basis upon which one State cannot benefit through deviating away from their membership agreements, thus highlighting reliance on principle of reciprocity. Accordingly, in cases of disputes, the injured party can turn to a well-established ‘remedial’ dispute settlement process and achieve compensation for any losses suffered.

The above examples show the clear manifestation of reciprocity but reciprocity takes different forms as the IL rules crystallise. Many IL rules and obligations are set through lobbying, reciprocal dialogues and negotiations between States thus rendering reciprocity as an important aspect in the early stages of IL rule-making. A strong example of this was seen in the efforts relating to treaties connected to environmental concerns as well as in the general progressive and development of IL. At the negotiation stage reciprocity takes a more encouraging role in order to bring as many people on board with the new legal rules that are being requested or created; and once the rules are created, reciprocity thus takes an incentivising role to create adherence to IL. The significance of reciprocity in IL continues after rules have been created since IL operates, in general, as a reciprocal system, in the sense that it aims to set equal and corresponding obligations for States and operates through an underlying power to continuously encourage States away from pursuing their interests and incentivise them towards abiding by their obligations. This is done by reducing the limit of the obligation of a State if the other party has chosen to limit its own obligation and/or by permitting the injured States to reciprocate against wrong-doers or those who seek to gain an

\[1121\] Supra note 197, para. 10.
undue and unfair advantage. Within the primary sources of IL, particularly treaty law and CIL, reciprocity plays an integral part when the law is dealing with inter-State relational aspects of IL. The thesis has examined the extent to which reciprocity plays a role in the creation of the law and continues to manifest itself in the interpretation, application, adjudication, operation and enforcement of IL, particularly in non-centralised form of enforcement. Reciprocity within IL system, plays a significant underlying role to encourage adherence to IL rules as well as incentivising States to fulfil their obligations. However, this encouraging and incentivising role functions in parallel with maintaining the balance between interests and rights of States.

The role of reciprocity in IL is pertinently visible through the guidelines provided to States through principles such as *pacta sunt servanda* and ‘good faith’. The presence of the role of reciprocity in IL is in itself a strong deterrent for breaching IL rules. The role of reciprocity could be further argued as an essential component of the de-centralised system of IL in an absence of overarching legal authority which can formulate, adjudicate or address all legal disputes. In the uniqueness of IL system, deterrent factors play a significant, if not fundamental role in enforcement of IL. This deterrent role of reciprocity both in law-making and within IL rules themselves is a strong positive form of reciprocity which helps restrict States’ conduct away from individualistic approaches and enhance co-operation and peaceful co-existence.

The vital point of observation is that reciprocity in IL has many applications. This application is varied and is largely dependent on the type of norms or values that are being protected and the type of relationship that is being governed. Additionally there is an underlying theme within IL that promotes collective responsibility, commitment and reciprocal respect to the rights of others. The contemporary IL has evolved from bilateral obligations covering limited subjects towards a more multilateral context. The rules of IL cover a vast range of inter-State relation rules, namely Law of Diplomatic Relations or the VCLT to the general commitment of States, to uphold the international communities’ values and norms. For instance, the rules protecting *jus cogens* rules and obligations *erga omnes*. The principle of reciprocity is characteristically more relevant to balancing equality of rights without directly addressing the morality and justness of the reciprocal reaction. This suggests that HR laws and IHL do not possess reciprocity since their aim is to protect the international communities’ fundamental
values and norms and therefore cannot be based on any reciprocal relationship. Equally obligations *erga omnes* are non-bilateralisable, clearly suggesting that these obligations and *jus cogens* rules cannot be reduced to bilateral relations and impose obligations that are beyond one-to-one relation, thus are not restricted to only reciprocal and mutual exchanges of benefits. States cannot revert to the principle of reciprocity to breach *fundamental rights* on this ground. Therefore, as a significant element, *jus cogens* rules and obligations *erga omnes* do not have a reciprocal foundation in IL.

Treaties such as Law of Diplomatic Relations are set to govern inter-State relations and are by their very nature bilateral agreements or multilateral agreements that are bilateralisable. The important point to note is that HR laws and humanitarian aspects of IHL are unidirectional, unilateral and are not open to being subject to bilateralisable obligations. HR laws or humanitarian aspects of IHL such as the Genocide Convention or sections of the 1949 Geneva Convention protecting the rights of individuals are regarded as norm-creating rules aiming to create obligations by instilling a sense of values and norms within the international community. The distinctions between these two categories are that the former is an agreement set to govern the inter-State relations and agreements, and the latter are declarations by States to uphold and protect the rights of individuals and citizens.\(^{1122}\) HR laws are norms established for the relationship between States and their own citizens and stipulations among States are for the protection of individuals, and humanitarian aspects of IHL are adopted to protect the rights of individuals or those people set to be protected at the time of war.\(^{1123}\) For instance, parties to the Genocide Convention do not enter into this agreement in order to stop genocide in relation to one another’s citizens but rather these conventions aim to instil a code of conduct and obligations on States and are ‘norm-creating conventions’ in nature, setting the norms for the international community regardless of protecting the citizens of just the parties to the conventions.

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For this purpose, reciprocity takes a step back when looking at the application of the legal instruments created for the protection of human rights and human dignity. However, reciprocity does play a role in some aspects of IHL where it relates to bilateralisable obligations within it.\textsuperscript{1124} set for the protection of the interests of States and the treatment of their armed forces. Additionally, reciprocity is evident in the interplay at the times of the creation of HR laws or humanitarian aspects of IHL in the form of negotiation for the promotion, creation of such rules and/or in its enforcement through peer-pressure or strong reaction by the international community such as sanctions.\textsuperscript{1125} Those who do not observe or respect the fundamental values of the international community are often isolated or shunned as a form of punishment. IL acts to promote the fundamental values of the international community and to create a universal sense of respect and responsibility towards the protection of such norms. Essentially in an ideal legal system where the protection of individuals is paramount to the values of the international community and every State endeavours to protect and uphold these values, reciprocity should play no role in any aspect of HR laws or IHL. However, despite the continued development in this area of IL through the advancement of IHL and HR laws, unfortunately there is still reliance on reciprocity, least of all, as part of the formulation and enforcement of such rules as well as where the interests of States play a role.

The importance of reciprocity is further relied upon given the weaknesses identified in its centralised enforcement processes and in the absence of an overarching or a powerful legal enforcing mechanism, and the reliance upon the commitment of States to fulfil their individual and collective responsibilities. Reciprocity is effectively relied upon as an alternative enforcement mechanism in IL, where reciprocity plays a vital role in response to non-obedience, or a wrong-doer. The tit-for-tat policy view of reciprocity in IL, where a State can be retaliated against or be punished if and when it has deviated from co-operation is essential for the international community. Its significance lies in the fact that even though there are permissible reciprocal reactions available, the punishment is not so severe as to never induce long-term co-operation.\textsuperscript{1126} Even in cases of self-defence, where its legality is

\textsuperscript{1124} An example of this can be seen in the right to resume ‘hostilities’ in case of a violation of an ‘armistice’. International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Article 40.

\textsuperscript{1125} Supra note 487, pp. 132-133.

\textsuperscript{1126} Supra note 198, p. 71.
dependent on necessity and proportionate reciprocal response, then it is arguable that the use of force is only a ‘remedial’ approach and reciprocal reaction to a violation of IL, and the attacking State was aware of the consequences of its own initial actions. Therefore, IL permits reciprocal reaction to States as a right in cases where there is a breach and violation of IL rules and agreements. For instance, where States’ sovereignty rights is under attack they have a right to remedial counter-measures or right to self-defence in IL. The vital point to note is that this right exists only in the form of a response and is applicable when an action has been taken or there are strong anticipation of harmful actions which might be detrimental to the rights of States, as is the case for instance with anticipatory, pre-emptive, interceptive, preventive self-defence.

IL plays an important role in promoting international co-operation, particularly through reciprocity where observing legal obligations can avoid reciprocal responses as well as establishing a sense of balance between States’ interests. The legal equality of States helps in safeguarding the possible imbalances and differences that inherently exist between States, working towards a sense of harmony and co-operation. In the international arena, no State wishes to give up its authority to another or to forego its ability to restrict its international legal obligations. On the other hand, the international community has evolved in its understanding for the importance of co-operation as the cornerstone of achieving long-term international peace and security. Here lies the dilemma between these two needs and requirements. As it stands, IL is facing limitations and weaknesses for enforcement of its rules in the absence of a legal and compulsory enforcing authority; however States require long-term stability and co-operation. Accordingly there is a requirement for additional forms of encouragement to increase commitment and obedience of States to international duties and obligations. These limitations and dilemmas in IL and IR must have been identified from the outset of the inception of contemporary IL. The need to achieve long-term stability and co-operation without States losing their control or to submit to a higher international authority required a delicate balance to be created and maintained. This is where the principle of reciprocity plays a significant role and bridges the gap between creating stability and co-operation together with maintaining States’ control and safeguarding their interests.

Attempts made so far at securing peace, have not only been unsuccessful in establishing international peace and security, but arguably have led to an increase in international tension.
Thus the international community keeps failing itself. Despite the existence of the theoretical knowledge, the belief of wishing and seeking co-operation, the failure of the international community surfaces in its approach and mind-set. Hegemony and arbitrary rule is not eliminated and still exists. Political peer-pressure within the international community leads to inconsistent approaches and at times even towards disregard for IL. A recent example of this can be seen in the political approaches to Syria as well as the US and the EU sanctions against IRI. This is the main reason why international peace, security and co-operation are not yet achieved. It is the recommendation of this thesis that the international community needs to enter a new stage of co-operation since previous attempts at establishing international peace and security keep failing. Hence, long-term international peace and security is achievable only through increased co-operation even with those States who wish to isolate themselves. The increased co-operation is in the collective interest for the international community to develop a framework and action through relationship-building. Despite this negative outlook on international peace and co-operation, it must be concluded that reciprocity as a principle has played and continues to play a fundamental role in IL, and without it the international community would be facing graver calamities.

Answering the central research question is fascinating, particularly taking into consideration the outcome of this research relating to the role and significance of reciprocity in different areas of IL. Reciprocity plays two distinct roles in IL: one is its role as an underlying principle of IL, and the other, is a right of States to a remedial reaction towards an action in order to bring about a continuing sense of balance between their rights and duties. States have the right to limit their obligations and duties but through the principle of reciprocity the same right must be granted to others. Also States have a right to react to breaches in their agreements and action can be taken in response to an action. This coupled with its role as facilitating the compliance and obedience of States to their international duties and obligations bringing about a reciprocal right to react legally to wrong-doing States as well as preserving any unfair advantage sought by any State. All of these cases show that the role of reciprocity in IL is fundamental to inter-State relations for the governing of their interactions. In IL, instances of reciprocity strongly present themselves relationally between States, namely in international treaty law, CIL in so far relating to inter-State relations, dispute settlements between States like the WTO agreements, remedial actions in the form of enforcement of IL, as well as taking a role in supporting the principle of equality of rights of
States by minimising self-gain and balancing their rights and duties. Reciprocity does not play a role in the application of HR laws and humanitarian aspects of IHL since the nature of obligations bestowed in these rules are more in the form of ‘unilateral declaration of States’ addressing the relationship between States and their own citizens or citizens of other States rather than regulating reciprocal ‘contractual agreements’ aimed at inter-State relations. The establishment of HR laws and humanitarian aspects of IHL are not supposed to produce particular advantages for States in their interactions with each other but instead they create obligations that are supposed to endorse ‘elementary principles of morality’ shared by, and for the benefit of, the international community. The intended purpose of these types of agreements must be preserved and should not be subject to forms of contractual agreement where the balance between rights and duties of States is the predominant aim. This is where a clear distinction can be made between contractual and norm-creating treaties with their specific nature and type of obligations.

It is therefore the conclusion of this thesis that reciprocity is not a legal or foundational principle of IL since it does not encompass an integral part of all aspects of IL and does not play a role in all IL decisions and actions. Unlike the rule of law, reciprocity does not necessarily exist as a requirement for deciding all international cases and when deciding on legality of actions under all international situations and circumstances. In IL, there are legal international actions and obligations which are not reciprocal or do not allow reciprocity to take a role. Reciprocity is an underlying principle of IL in relation to obligations and rules governing and regulating inter-State relations.

This discussion generates two challenging questions as to whether reciprocity plays a role as a source of IL as well as how reciprocity fits in with models for the sources of IL. Reciprocity could be defined as a social source of IL when IL establishes relations at inter-State level. When addressing a model for the sources of IL, the legal positivism conception and structure of sources of law opens up an interesting debate for this study. Examining reciprocity within its origin in sociology and anthropology led the thesis to discuss how reciprocity functions as a social scientific concept which following Malinowski and other social anthropologists who

1128 This was also seen in the International Court of Justice reasoning in their advisory opinion relating to reservations to the Genocide Convention, Genocide Case, supra note 148, p. 23.
1129 Supra note 148, p. 23.
developed reciprocity, as a primarily functionalistic notion with limited explanatory scope. This underlines the importance of a key point that reciprocity is characteristically about social functions and not about normative validity of relationships. Subsequently, it does not properly fit into the model of legal positivism. In fact, it challenges the legal positivist concept of sources of law demonstrating that legality requires social infrastructures which are socially constructed. These social infrastructures are not legal but they are socio-political and economic in character and makeup. We could not talk about the role and function of reciprocity and remain firmly grounded within legal positivism. This brings the debate into the key point that reciprocity, as a social source of IL, takes us beyond the limited sphere of legality (or positive law) as defined by legal positivism.

When IL defines relations at inter-State level reciprocity operates as a decisive and underlying principle of IL, and could be considered a social source of IL in contrast to the formal legal sources. Reciprocity takes a step back when States assume obligations that have a unilateral dimension rather than a bilateral or multilateral dimension, since there is no requirement for reciprocity in unidirectional or unilateral obligations or duties. Reciprocity is therefore neither a foundation nor a consequence of IL since it is embedded as an underlying principle in the international legal system to better control and deter self-interests and unfair advantage by bringing a sense of balance in inter-State relations. Reciprocity is vitally important to creating a legal balance between States’ rights and duties in the international community that includes actors with varying levels of strengths, be it from military, economic, political, technological advancement, natural resources and so on. Reciprocity could not be considered a foundational principle of IL since not all IL obligations result from contractual relationships but its significance in IL as the balancing factor in inter-State relations cannot be underestimated or challenged.
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