

**THE TENSION BETWEEN STATE SOVEREIGNTY AND HUMANITARIAN INTERVENTION IN
INTERNATIONAL LAW**

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1. Introduction

The doctrine of humanitarian intervention and its legitimacy in international law has long been a subject of controversy. The critical issue in any debate on humanitarian intervention is the need to harmonize intervention with the principle of sovereignty, which in essence requires that a sovereign state be treated as an independent political unit, its territorial integrity be respected, and it be allowed to pursue its domestic affairs without external interference. These stipulations are essentially those regulating inter-state relations that have evolved since the peace of Westphalia and have been codified as core principles of international law.

Indeed, the issue is a conflict between the ban on the use of force and respect for sovereignty on the one hand, and the duty to uphold and promote human rights on the other. Should the emphasis be on preventing the use of force between states and maintaining stable relations between them or does the protection of citizens' fundamental rights deserve priority? The relationship between these two interests is complicated and attracted me to study the subject.

From an international law point of view, assessment of humanitarian intervention entails taking account not only of the ban on the use of force between states and respect for territorial integrity, but also of the obligation to protect human rights. Both form an essential part of the international order based on the UN charter, and both are of great importance to the stability and durability of that order. But there is a growing international concern for the protection of human rights to the effect that sovereignty implies responsibility and thus when egregious human rights violation occur, intervention is justified to protect those rights.

This paper will address the tension between state sovereignty and humanitarian intervention. The objective of the legal analysis in this paper is to determine whether the legal and legitimate basis for humanitarian intervention exists under international law and if so, when and under whose authority.

The scope of this paper is limited to the problem of intervention to address man-made humanitarian crises. Therefore, it will refrain from discussing foreign interventions to alleviate the consequences of natural disasters.

Before the discussion of historical evolution, practice, legality and legitimacy of humanitarian intervention, it would be appropriate to make some observations on the concept of state sovereignty. This is relevant because debates over humanitarian intervention are embedded in the changing character of state sovereignty.

The inquiry into the issue of the compatibility of humanitarian intervention with sovereignty will start with a chapter on the state sovereignty. This chapter contains five sections. The first section discusses the concept of sovereign equality of states. It will demonstrate states' formal equality in law. The second section discusses the corollary of sovereign equality, that is, the principle of non-intervention. The third section examines the current legal rules governing the ban on the use of force between states. The fourth section will analyse the exception to the general prohibition on the use of force in international law. The fifth section examines sovereignty in relation to a growing international concern for the protection of human rights and the right of intervention towards those ends. The clarification of that matter will create the necessary background for the later discussion of the legality and legitimacy of intervention on humanitarian grounds.

Chapter 3 discusses the doctrine of humanitarian intervention. It will begin with the definition of the principle of humanitarian intervention and then examines the relation between the doctrine and the Responsibility to Protect. It will clarify and delimit the terms properly. This chapter proceeds with the discussion of historical evolution of the principle of humanitarian intervention. It will demonstrate its development throughout different stages of history, and finally it will review cases of actual interventions that occurred in the Pre-Charter, during Cold War, and in the Post-Cold War periods.

Chapter 4 analyses the legality and legitimacy of humanitarian intervention in international law. It will discuss two categories of interventions on humanitarian grounds. The first is humanitarian intervention with a Security Council mandate. This section will analyse the power and role of the UNSC in interventions on humanitarian grounds and the requirements under the UN charter for such interventions. The second category of intervention is the one that carried out without a Security Council mandate or the so-called unilateral humanitarian intervention. This section will examine whether unilateral intervention is lawful in light of the UN Charter and

Customary international law. The final inquiry is to explore justifications, under international law, for unilateral humanitarian intervention in special circumstances.

In this way the paper will determine whether the doctrine of humanitarian intervention is compatible with state sovereignty in international law. It concludes that sovereignty implies responsibility, and when egregious human rights violations occur, intervention is justified to protect those ends. The redefinition of sovereignty to include a duty to respect human rights is reinforced in contemporary international law. The UNSC is empowered to conduct or authorise humanitarian intervention in situations internal crisis produce humanitarian catastrophe with, or even without, cross-border repercussions. Unilateral humanitarian intervention may be justified, in extreme cases, on moral and political grounds but has no legal basis under positive international law.

2. State sovereignty

One of the fundamental principles on which international law and relations rest on is the principle of state sovereignty. It is the foundation of inter-state relations and the basis of the modern world order. Most of the basic norms, rules and practices of international relations have grounded on the premise of state sovereignty.¹

The original meaning of sovereignty is related to the idea of supremacy. According to Black's Law Dictionary, sovereignty means a person, body, or state vested with independent and supreme authority.² In the Westphalia International System, the ultimate power holder is the state. This particular view of sovereignty maintains that since state is under the legal influence of no superior authority, sovereignty resides in the state, and to be sovereign is to be subject to no higher power. The result of this doctrine of state sovereignty is that human rights are regarded as a matter of domestic and not international concern.³

Scholars of 16th and 17th centuries, such as Bodin, Grotius and Hobbes, regarded sovereignty as a final political authority. Bodin defines sovereignty as: "the most high, absolute and perpetual power over the citizens and subjects in a commonweal...the greatest power to command."⁴ Hugo Grotius defined sovereignty as: "that power whose acts are not subject to the control of another, so that they may be made void by the act of any other human will."⁵ Hobbes regarded sovereignty as: "absolute, unified, inalienable, based upon a voluntary but irrevocable contract."⁶

In spite of these claims of sovereignty as an absolute power of state, some limitations on state sovereignty are widely accepted. State sovereignty is not unlimited. Limitations are imposed upon it both by customary law and treaty rules. Such limitations on state sovereignty particularly relates to immunity of foreign states and treatment of individuals.⁷

Regarding the treatment of individuals, Cassese pointed out that customary international rules on respect for human rights impose upon any state the obligation to respect the fundamental human rights of its own nationals, of foreigners residing or passing through its territory and also stateless persons.⁸ However, these rules do not regulate in details how a state must treat individuals. Rather, besides imposing certain obligations with respect to

¹ See, e.g. Abiew (1999) P.23

² Black's Law Dictionary (2004) P. 1430

³ See, Abiew (1999) p. 25

⁴ Quoted in Ibid, p.27

⁵ Quoted in ibid

⁶ Quoted in ibid, p.28

⁷ Cassese (2005) P.98

⁸ Ibid, p. 123

foreigners, customary rules require all state not flagrantly violate human rights.⁹ Rules on how a state has to treat individuals can only found in human rights treaties.¹⁰

Indeed, the principle of state sovereignty is recognized in the UN Charter as one of the main principles of the organization.¹¹ At the same time, state sovereignty is limited under the UN system. According to the charter, sovereignty is not a barrier to the application of enforcement measures under Chapter VII of the Charter¹², in particular, actions by the Security Council when taking measures with respect to a threat to the peace, a breach of the peace or acts of aggression.¹³

The principle of sovereignty can be explained by making two kinds of distinctions. It can be divided into “Internal sovereignty” and “External sovereignty”. Internally, sovereignty connotes the exercise of supreme authority by states within their individual territorial boundaries, and externally, it connotes equality of status between states consisting of the community of states.¹⁴ It would seem to be the case that state sovereignty is not recognized in absolute terms. Although the formal principle of sovereignty remains the norm of international law, its contents has shifted with respect to human rights.

2.1 Sovereign equality of states

Traditional international law based on a set of norms that protect the sovereignty of states and recognize their formal legal equality. The principle of sovereign equality was first incorporated in the Treaty of Westphalia signed in 1648, whereby the ruling monarchy was the exclusive, legitimate authority within his or her territory and could act within that territory without interference from other powers. In fact, this principle was present in customary international law as well as in the League of Nations.

The principle of sovereign equality of states, enshrined in the UN Charter, recognizes that all states are equal in law regardless of their inequalities in other respects, such as inequality of size, wealth, population, strength or level of civilization.¹⁵ According to Article 2(1) of the Charter, the organization is based on the principle of the sovereign equality of all its members. In the Norwegian Ship-owners Claims Case, the Permanent Court of Arbitration emphasized that: “*International law and justice are based upon the principle of equality between states.*”¹⁶(Emphasis added).

⁹ Ibid

¹⁰ Ibid

¹¹ UN Charter arts 2(1), 2(4) and 2(7)

¹² Ibid, art 2(7)

¹³ Ibid, art 39

¹⁴ Abiew (1999) p.24

¹⁵ Cassese (2005)P.48

¹⁶ Norway V. USA

According to Brownlie, the sovereign equality of states represents the basic constitutional principle of international law, which governs a society comprising primarily of states with similar legal personality.¹⁷ Similarly, Cassese pointed out that: “Of various principles, this is unquestionably the only one on which there is unqualified agreement and which has the purport of all groups of states, regardless of ideologies, political leanings, and circumstances.”¹⁸

The principle of sovereign equality of states was reaffirmed in the 1970 Declaration along the lines of Article 2(1) of the UN charter. This Declaration reads in part: “all states enjoy sovereign equality, they have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.”¹⁹ This Declaration applies to all states, regardless of their membership in the United Nations.²⁰

In short, the state’s sovereignty under international law is its legal independence from other states, and the legal authority or competence of a state is limited and limitable only by international law but not by the domestic law of other states.²¹ The principal corollary of sovereign equality is the duty of non-intervention in exclusive jurisdiction of other states.

2.2 Non-intervention in the internal affairs of other states

The principle of ‘no-intervention in a state’s internal affairs used to be a rule of traditional international law. There is no doubt that this principle remains well-established in contemporary international law.

The principle of non-intervention is recognized in the UN Charter Article 2(7) which provides that:

Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present charter; but this principle shall not prejudice the application of enforcement measures under chapter VII.

However, practice under Article 2(7) has developed over time, and its practical importance is by now significantly reduced. Shaw maintains: “this paragraph intended as a practical restatement and reinforcement of domestic jurisdiction, has constantly been reinterpreted

¹⁷ Brownlie (2003) P. 287

¹⁸ Cassese (2005) p.48

¹⁹ Friendly Relations Declaration(1970) Sixth principle

²⁰ Cassese (2005) p. 48

²¹ Kelsen (1944) P.208

in the decades since it was first enunciated.”²² He went on to say that “it has certainly not prevented the UN from discussing or adopting regulations relating to the internal policies of member states and the result of fifty years of practice has been the further restriction and erosion of domestic jurisdiction.”²³ At the same time, Abiew suggested that the majority of states in the course of the United Nations debates support an absolute interpretation of the Charter’s prohibition of intervention.²⁴ This view reflected in other international legal instruments, like the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, adopted by the UNGA in 1965 which reads in part: “No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any state.”²⁵

Similarly, general prohibitions of intervention have been reaffirmed in other fundamental Declaration of Principles of International Law in Accordance with the UN Charter, adopted by the UNGA in 1970. It recognised the 1965 Declaration and laid down wider non-intervention principles. However, in spite of the general proscriptions of intervention in the General Assembly, there were little condemnations of humanitarian intervention in the UN debates.²⁶ The principle of non-intervention is also reflected in many regional treaties, such as the Charter of the Organization of American States and the Constitutive Act of the African Union.

The principle of non-intervention was reaffirmed by the ICJ, in its 1986 judgement in the Nicaragua Case, as part of customary international law:

The principle of non-intervention involves the right of every sovereign state to conduct its affairs without interference; though examples of trespass against this principle are not infrequent, the court considers that it is part and parcel of customary international law [...] international law requires political integrity [...] to be respected.²⁷

In general, the principle is recognized by international law but what was once a matter of domestic jurisdiction may become issues subject to international inquiry and hence of international concern. This is the case with the international protection of human rights.²⁸ In other words, the content of sovereignty has shifted regarding the concept of human rights. So, in case of flagrant and large-scale violation of human rights in a given state, the international community is entitled to forcefully intervene there.

Shaw comments that acts constituting a violation of the customary principle of non-intervention will also amounts to an infringement of the principle of the ‘non-use of force’ in

²² Shaw (2003) P.575

²³ Ibid

²⁴ Abiew (1999) p.68

²⁵ Res. 2131 (xx) 20 UN GAOR Supp. (No.14) cited in ibid, P.69

²⁶ Abiew (1999) P.70

²⁷ Nicaragua V. USA

²⁸ Abiew (1999) p.72

international relations, if involve directly or indirectly the use of force.²⁹ Therefore, it is important to note this principle, especially, in the light of Article 2(4) of the UN Charter.

2.3 The prohibition of a threat or use of force in international law

This section deals with the circumstances under which international law permits a state or an entity to use force against another states. While every state agrees that the use of force is generally impermissible, there is considerable disagreement over the precise circumstances in which it may lawfully be used. Humanitarian intervention is directly linked to the question of the use of force because restriction on the use of force in international relations has a crucial influence on the legality and legitimacy of humanitarian intervention. Thus, understanding of the legal regulation of the use of force will create the necessary background for the discussion of the legality and legitimacy of intervention on humanitarian grounds.

In the early days of international law, the use of force by states was regulated by the just war doctrine.³⁰ In the fifth century, a moral ground for the regulation of the use of force was developed by St. Augustine through the doctrine of just war. This theory stipulates that war could be waged against a state that had caused injury under certain conditions.³¹ In short, war was illegal unless undertaken for a just cause. Just cause encompassed a variety of situations, but mainly involved the punishment of the wrongdoers.³²

But by the nineteenth century, war had come to be viewed as a legitimate instrument of foreign policy and resort to war was an attribute of statehood.³³ During this period, the governing doctrine was the sovereign right to resort to war, so that every state had a perfect legal right to resort to war for any reason. Hence, the concept of the just war disappeared from international law.³⁴ The sovereign right to resort to war governed international relations until the establishment of the League of Nations in 1919.

The Covenant of the League of Nations introduced a limited restriction on the sovereign right to resort to war. The covenant established procedural mechanisms to encourage states to cool off before commencing hostilities. The members of the league agreed that if there should be arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the council, and they agreed in no case to resort to war until three months after the award by the arbitrators or the report by the council.³⁵ But once the procedural safeguards laid down in Articles 10 to 16 of the Covenant were

²⁹ Shaw (1999) P.1039

³⁰ Dixon (2005) P.290

³¹ McCaffrey (2006) P.234

³² Shaw (2003) P.1014

³³ Brownlie (2003) P. 697

³⁴ Shaw (2003) P.1015

³⁵ League of Nations' Covenant Art 12

exhausted, a state could resort to war. So the Covenant was not effective in prohibiting violence to any great degree.

In 1928 the Covenant was supplemented by the General Treaty for the Renunciation of War signed on 27 August 1928, commonly called the Kellogg-Briand Pact. This treaty represented the first attempt to outlaw war completely,³⁶ by which the parties “condemn recourse to war for the solution of international controversies and renounce it as an instrument of foreign policy in their relationship with one another.”³⁷ This was the vital development. However, one writer commented that: “since the prohibition applied to ‘war’ (and not ‘force’), the pact was as flawed as the Covenant.”³⁸ On the other hand, it has been suggested that “the pact laid the groundwork for the regime of the United Nations Charter concerning the use of force, and was ‘the foundation of state practice in the period 1928 to 1945’ relating to the use of force.”³⁹ Indeed, today the pact, which in force at present⁴⁰, stands together with the UN charter as one of the two major sources of the norm limiting resort to force by states.⁴¹

The prohibition of the threat or use of force was first laid down in the UN charter. Paragraph 4 of Article 2 of the UN Charter provides as follows:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.⁴²

This provision not only restrains the use of force itself but it also extends to the threat of force. This approach obviously represents departure from the pre-Kellogg-Briand pact regime, in which the emphasis was not on prohibiting force but the waging of war.⁴³

There is no doubt that all states recognize and accept the fundamental importance of the primary ban on resort to force. However, there is no unanimity among legal scholars and states on the actual content and scope of Article 2(4). There are two opposing views that interpret this provision in different ways.

The first is permissive school. It takes the general view that the Charter did not fundamentally change the direction of international law and, therefore, that reference may be had to pre-1945 rules in determining the ambit of the primary prohibition of force.⁴⁴ Permissive school further argue that Article 2(4) prohibits the use of force ‘against the

³⁶ Dixon (2005) p.291

³⁷ Kellogg-Briand pact art I

³⁸ Dixon (2005) p.291

³⁹ McCaffrey (2006) P.235

⁴⁰ Ibid, p.234

⁴¹ Brownlie (1963) P.91

⁴² UN Charter art 2(4)

⁴³ McCaffrey (2006) P.236

⁴⁴ Dixon (2005) p.292

territorial integrity or political independence' of any state or 'in any other manner inconsistent with the purposes' of the UN. So, according to this permissive view, if the use of force does not result in the loss or permanent occupation of territory; if it does not compromise the target state's ability to take independent decisions; and if it is not contrary to UN purposes, it is not unlawful.⁴⁵

The second approach is the restrictive school. It takes the view that the Charter brought about a radical change in states' right, so that Article 2(4) lays down a total and uniform ban on Non-defensive unilateral use of force. And that a right of unilateral resort to force exists only if the Charter explicitly grants such a right.⁴⁶ These are those provisions of Article 51 and Article 107 of the Charter, which are the right of self-defence and action against ex-enemy states respectively. But the later is now obsolete in that those ex-enemy states became members of the UN.

This clash of ideas on the scope of Article 2(4) of the UN Charter is a matter of judgement and interpretation. Today the interpretation of treaty provisions is governed by the 1969 Vienna Convention on the Law of Treaties, in particular Articles 31-33. According to this convention, methods of treaty interpretation can be summarised as follows: interpretation in accordance with the ordinary meaning of the terms of treaty in their context and in light of its object and purposes⁴⁷; interpretation in light of subsequent agreements between the parties regarding the interpretation of the treaty or application of its provision, together with the subsequent practice⁴⁸; and interpretation of the text by having recourse to the preparatory work of the treaty and circumstances of its conclusion.⁴⁹

The principal method of treaty interpretation is interpretation in accordance with its object and purpose. The primary purpose of the United Nations and the Charter is to maintain international peace and security, and in pursuit of this purpose, the member states have undertaken to settle their international disputes by peaceful means.⁵⁰ The Charter was born of Second World War that produced unprecedented damage and suffering, and its purpose was to save succeeding generation from the scourge of war⁵¹, to that end armed force shall not be used except in the common interest.⁵²

Thus, in my opinion, in light of the general purposes of the Charter, Article 2(4) is not to be interpreted in the way claimed by the permissive school. The prohibition of unilateral use of force by states under this provision is the general rule and the right of self-defence under Article 51 of the Charter is an exception to this general rule. Therefore, the restrictive view

⁴⁵ Ibid, p.293

⁴⁶ Ibid

⁴⁷ Vienna Convention on the Law of Treaties art 31(1)

⁴⁸ Ibid, Article 31(3)(a)(b)

⁴⁹ Ibid, art 32

⁵⁰ UN Charter arts 1 and 2(3)

⁵¹ Ibid, preamble Para.1

⁵² Ibid, preamble para.7

of the use of force, i.e., broad interpretation of Article 2(4) of the Charter, seems tenable and plausible. According to Brownlie, this view is also supported by the historic context in which the Charter was drafted, which is one of the methods of treaty interpretation, albeit considered as a supplementary means.⁵³

The prohibition of a threat or use of force in international relations also reflected in subsequent practice and resolutions of the UNGA, including the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (G.A. Resolution 2131(xx) adopted in December 1965); the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the UN (G.A. Resolution 2625(xxv) adopted in October 1970); and the Definition of Aggression (G.A. Resolution 3314(xxix) adopted in December 1974).

These Declarations are not ordinary conventions and hence do not create obligations binding on states. Nevertheless, Brownlie argued that even if these instruments cannot have a legislative effect, they are part of the subsequent practice of the member states of the UN and must be given appropriate weight for the purpose of interpreting the provisions of the Charter.⁵⁴

In addition to the UN Charter, the general ban on the use of force exists also in corresponding customary law. Even In Nicaragua Case, when examining the specific proscription of the use of force as contained in Article 2(4) of the UN Charter, the ICJ held that this rule is not only a principle of customary International law, but constitutes a *Jus Cogens* norm.⁵⁵ *Jus Cogens* norm⁵⁶, otherwise known as peremptory norms of international community, is founded in customary international law and is so fundamental it binds all states. No states can derogate from this norm either by treaties or customary rule, and it can only be modified by a subsequent norm of international law with the same character.

2.4 The exceptions to the general prohibition on a threat or use of force

The ban on the use of force has three exceptions in the UN Charter. The first exception is enforcement measures undertaken by the Security Council under Chapter VII of the Charter. The second exception is force which may be used in individual or collective self-defence under Article 51 of the Charter, and the last exception is the now obsolete article 107 provision for action against ex-enemy states. The first exception will be examined below in this section. The last two exceptions will not be considered further in this paper.

2.4.1 Action under the authority of the UN Security Council

⁵³ Vienna Convention on the Law of Treaties art 32

⁵⁴ In Cassese, The current regulation of the use of force (1986) p.492

⁵⁵ Nicaragua v. USA

⁵⁶ See Vienna Convention on the Law of Treaties arts 53 and 64

The primary purpose of the United Nations was to maintain international peace and security. Under Article 24 of the UN Charter, the Security Council has a primary responsibility for maintenance of international peace and security, and in carrying out its duty under this responsibility, the Council acts on behalf of member states. Chapter VII of the Charter (action with respect to threats to the peace, breaches of the peace and acts of aggression) gives very wide power to the SC, and sets out the framework for its enforcement powers. As mentioned above, under Article 2(7) of the Charter these powers are not limited by the normal duty on the UN not to intervene in the domestic jurisdiction of member states. In accordance with Article 25 of the UN Charter, the decision of the SC has the binding effect upon the member states of the UN.

Here again, under Article 103 of the UN Charter, the obligations undertaken by member states under the Charter prevails, in case of conflict, over their obligations under any other agreements. Indeed, the Council is empowered to use force for the purpose of maintaining international peace and security as part of its collective security function.

Brownlie comments that the design of the UN constitutes a comprehensive public order, and the assumption is that the organization, and in particular the SC has a monopoly of the use of force⁵⁷ except in cases of self-defence. Article 42 of the UN Charter provides as follows:

Should the Security Council consider that measures provided for in Article 41 [i.e. measures not involving the use of armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

This provision is premised on the existence of forces contributed to the SC by member states as envisaged in article 43 of the UN Charter, and a Military Staff Committee under Article 47 to advise and assist the SC. However, this was not how the system had worked in practice and this original Charter scheme is not fully realised.⁵⁸ The practice under the Charter has led the Security Council to authorize states to use force on behalf of the international community rather than using force itself.⁵⁹ This is attributable to the ideological confrontation between the two-blocks during the Cold War which prevented the political agreement enshrined in Article 43 of the UN Charter to set up the UN military forces.⁶⁰

It should be made clear here that the requirements of Article 39 of the Charter have to be fulfilled to invoke the use of force and the SC has to decide the measures it will take in order to restore international peace and security. Under this article, if the SC determines that

⁵⁷ Brownlie (2003) p.706

⁵⁸ Dixon (2005) p.309

⁵⁹ McCaffrey (2006) P.247

⁶⁰ Cassese (2005) p.339

there is 'any threat to the peace, breach of the peace, or acts of aggression', it may take such measures as are necessary to restore international peace, including the armed force under Article 42 of the Charter. Thus, it is of considerable importance to know what types of conduct may fall within Article 39 for this is the precondition to exercise these enforcement powers.

Clearly, armed military actions are encompassed by Article 39, but 'threats to the peace' are not limited to military situations or international conflicts. Indeed, the Security Council has gradually established a direct link between Humanitarian crises and a threat to the peace and authorised member states to use force. For instance, UNSC by Resolution 794 (1992), adopted unanimously on 3 December 1992 on Somalia, determined that "the magnitude of human tragedy caused the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance" constituted a threat to international peace and security and authorised Secretary-General and member states to use all necessary means to establish a secure environment for humanitarian relief operations in Somalia.⁶¹ Of course, "all necessary means" includes the use of force. Other examples are UNSC Resolutions 770 and 816 (1993) on the situation in Bosnia and Herzegovina, and Resolution 929 (1994) on Rwanda.

Thus, the SC has significantly enlarged the concept of 'threat to the peace' laid down in Article 39 of the charter so as to embrace humanitarian crises within one state and internal conflicts, which previously subject to national jurisdiction. In fact, it is the discretion of the Council to define which conducts constitute threat to peace under Article 39.

Indeed, the UNSC has been able to authorise member states to use force on humanitarian grounds against a state as a means of restoring international peace and security. In this regard, Resolution 794(1992) on Somalia, resolution 770 and 816(1993) on Bosnia and Resolution 929(1994) on Rwanda can be cited as an example.

In sum, the UNSC is empowered to use, or authorise the use, of force when there exists a threat to international peace. As the practice of the SC shows, humanitarian crisis in internal conflicts, among others qualified as 'a threat to international peace and security' and the Council authorised member states to halt human rights violation in a given country.

2.5 Sovereignty in relation to respect for human rights

The fundamental rule of international law prescribes that states are duty bound not to affect the preserve of other states' internal affairs as a result of the sovereign equality of states. As noted earlier, this rule is envisaged in Article 2(7) of the UN Charter. However, it has been reinterpreted in the human rights field. In the 19th century, the positivist doctrines of state sovereignty and domestic jurisdiction prevailed in state practice. Shaw commented that during this period all matters that at present would be regarded as human rights issues

⁶¹ UNSC Resolution 794 (1992), Para.10

were generally considered as a preserve of domestic jurisdiction.⁶²This rule has been reinterpreted in the human rights field so that states may no longer plead it as a bar to international concern and consideration of internal human rights situations.⁶³

Like the rules on the use of force, the principle imposing respect for human rights is typical of a new stage of development in the international community following WWII while respect for state sovereignty is the old one.⁶⁴Both were integrated with the adoption of the UN Charter. But their coexistence has not been easy: the two principles more often confronted than partnered.⁶⁵Nevertheless, modern concept of sovereignty that involves a duty to protect human rights is widely reinforced today. Cassese commented that the adoption of the UN Charter and the subsequent enactment of such fundamental instruments as the 1948 Universal Declaration and the 1966 two Covenants on Human Rights had such an influence on the world society that no state today challenges the principle that human rights have to be respected by all states.⁶⁶He further pointed out that:

*States have gradually come to accept the idea that massive infringements of basic human rights are reprehensible; they make the delinquent state accountable to the whole international community.*⁶⁷ (Emphasis added).

The UN Charter provided initial principles for the protection of human rights. The preamble of the Charter declares the determination of the peoples of the world "... reaffirming faith in fundamental human rights, in the dignity and worth of human person, in equal rights of men and women..." One of the basic purposes of the UN Charter, as stated in Article 1(3), is "promoting and encouraging respect for human rights." In accordance with Article 55, the members of the UN reaffirm a commitment to promoting universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind. And under Article 56, all members of the UN "pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." It has been suggested that the term 'pledge' in Article 56 had the consequence of converting the purposes listed in article 55 into binding obligations.⁶⁸

Hence, it would seem that the Charter provisions regarding human rights represent binding legal obligations for member states. So, gross violations of basic human rights make the delinquent state accountable to the international community. Thus, intervention on humanitarian grounds is Permissible. Abiew concluded that:

⁶² Shaw (2003) P. 252

⁶³ Ibid, p.254

⁶⁴ Cassese (2005) p.59

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Shaw (2003) P.258

*The cumulative effect of these provisions is that intervention to prevent human rights abuses is still valid. While it may be doubtful whether states can be called to account for every alleged violation of the general Charter provisions, there is little doubt that responsibility exists under the Charter for any substantial infringement of the provisions, especially when a class of persons or a pattern of activity are involved.*⁶⁹ (Emphasis added).

The cornerstone of the UN activity has been obviously the Universal Declaration of Human Rights. The preamble of this Declaration emphasises that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁷⁰ It has been suggested that during WWII, one of the aims of the allied powers was the realization that international protection of human rights as the only means to achieve international peace and progress.⁷¹ The Universal declaration proclaims the complete range of civil and political rights and economic, social and cultural rights. It is generally agreed that, currently the Universal Declaration, particularly many of its provisions have gained formal legal force by coming a part of customary international law.

The International Covenant on Civil and Political Rights (ICCPR) and the optional protocol on communication or petition was adopted in 1966 by the UNGA and entered into force in 1976. This Covenant defines and sets out, in much greater detail than the Universal Declaration, a variety of rights and freedoms. It imposes an absolute and immediate obligation on each of the states parties to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [...] covenant without distinction of any kind [...]”⁷².

The International Covenant on Economic, Social and Cultural rights (ICESCR) was adopted by the UNGA in 1966 and entered into force in 1976. It elaborates upon most of the economic, social and cultural rights provided for under the 1948 Universal Declaration and frequently sets out measures that should be undertaken to achieve their realization.⁷³

In short, these two Covenants, together with the Universal Declaration, constitute the “International Bill of Human Rights”.⁷⁴

Apart from these instruments, there are also a host of treaties and declarations adopted by the UNGA explaining specific obligations pertaining to particular human rights which include, *inter alia*, the 1948 Convention on Prevention and Punishment of the Crime of Genocide; the 1966 International Convention on the Elimination of All Forms of Racial

⁶⁹ Abiew (1999) p.79

⁷⁰ Universal Declaration of Human Rights, preamble, Para 1

⁷¹ Abiew (1999) p.75

⁷² ICCPR art 2(1)

⁷³ ICESCR art 1

⁷⁴ Steiner (2007) p.133

Discrimination; and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

There are also regional human rights systems which include: The European Convention on Human Rights which signed in 1950 and entered into force in 1953; The American Convention on Human Rights which signed in 1969 and entered into force in 1978; and The African Charter on Human and Peoples Rights which signed in 1981 and entered into force in 1986.

Regarding the customary nature of human rights, Shaw stated that besides international and regional human rights instruments, certain human rights may be considered to have gained the status of customary international law.⁷⁵ Even in contemporary international law, some fundamental human rights are recognized as part of rules of obligation *Erga Omnes*. In 1970, in the Barcelona Traction Case, the ICJ defined the meaning of *erga omnes* obligation and gave examples of such *erga omnes* rules which are vital for international human rights law. The relevant part of that opinion of the ICJ reads as follows:

*An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising Vis-a-Vis another state in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination...*⁷⁶ (Emphasis added).

In this case the definition of *erga omnes* given by the ICJ has become the well-known and most authoritative definition of *erga omnes* rules⁷⁷. It should be noted here that the list provided by the ICJ in this case is not exhaustive but rather illustrative. This is apparent from the phrase “for example”. So, proscriptions of gross violations of fundamental human rights, including but not limited to genocide, slavery, racial discrimination, are obligations owed to the international community as a whole and obligations which every state has a legal interest in having respected.

In accordance with the 2001 International Law Commission’s Articles on Responsibility of States for Internationally wrongful Acts, any state other than an injured state is entitled to invoke the responsibility of another state (presumably delinquent state) if the obligation breached is owed to the international community as a whole.⁷⁸ Thus, any state is entitled to claim from the responsible state the “cessation of the international wrongful act, and

⁷⁵ Shaw (2003) p.256-7

⁷⁶ Belgium V. Spain

⁷⁷ Steinerte (2008) p.11

⁷⁸ ILC’s Articles on State Responsibility art 48(1)(b)

assurances and guarantees of non-repetition”⁷⁹This is true for flagrant and large-scale violations of fundamental human rights.

Hence, delinquent state may no longer plead the principles of sovereignty and non-intervention as a bar to intervention by the international community to protect those rights since they are not considered today as ‘a matter exclusively within domestic jurisdiction’ but rather the concern of international community as a whole. Cassese suggested that, in different occasions the UN refused to accept the objection of state sovereignty invoked by a number of states, and considered different issues regarding human rights.⁸⁰ The UN justified its intervention by linking human rights violations to a threat to international peace.

The concern for human rights gradually inspired and shaped the decision of the UNSC which is the highest international authority empowered to define conducts which constitute ‘threats to peace’ and adopt enforcement measures, including the use of armed force⁸¹. Popovski suggested that: “in a major development of its powers from defending state sovereignty to defending human rights, the Council [UNSC] condemned and imposed sanctions against the racist regimes in Zimbabwe and South Africa.”⁸² However, the Council paralyzed by the veto in most cases, especially during the Cold War era and as a result, murderous regimes in some countries enjoyed impunity.⁸³ Nevertheless, with the end of the Cold War, the role of the UNSC has been revived. This is because most cases of serious human rights violations, like in Somalia⁸⁴, Bosnia⁸⁵ and Rwanda⁸⁶ have been qualified by the UNSC as threats to peace and authorised interventions to end such violations.

Cassese concluded that, because of the growing international conventions and the foundation of the monitoring mechanisms on human rights, UN members believed that intervention was permitted, if a state engages in flagrant and gross violations of its citizens’ fundamental rights, irrespective of whether such violations constitute a threat to peace.⁸⁷ Thus, humanitarian intervention is justified in international law at least in the case of widespread and systematic violations of human rights, if not in isolated cases.

In sum, the two major values, respect for state sovereignty, an old one, and respect for human rights, a more recent one, were integrated in international law. But their coexistence has been difficult. The principle of state sovereignty has been regarded as overwhelming and unconditional in international law since the peace of Westphalia. However, it has been redefined in the human rights field, which no longer antagonizes but rather incorporates the

⁷⁹ Ibid, art 48(2)(a)

⁸⁰ Cassese (2005) p.383

⁸¹ UN Charter, art. 39

⁸² Popovski (1December 2004) one page Article

⁸³ Ibid

⁸⁴ SC resolution 794 (1992)

⁸⁵ SC resolutions 770 and 816 (1993)

⁸⁶ SC resolution 929 (1994)

⁸⁷ Cassese (2005) p.383

concept of human rights. In other words, the redefinition of sovereignty to include a duty to protect and respect human rights is recognized in contemporary international law. State sovereignty remains the basic norm of international law, but a state cannot pretend absolute sovereignty without demonstrating a duty to protect human rights. International law becomes more permissive regarding cross-border intervention to protect human rights.

3 Humanitarian intervention

3.1 Definition of humanitarian intervention

There is no generally accepted definition of humanitarian intervention. Chesterman suggested that “the term ‘humanitarian intervention’ only emerged in the nineteenth century as a possible exception to [...] rule of non-intervention, but its meaning was far from clear: some writers held it to be a legal right; others confidently rejected it; a third group held that international law could or should have little to say about the matter.” He added that “Neither the writings of publicists nor state practice establishes any coherent meaning of this ‘right’...”⁸⁸ Since the issue of humanitarian intervention is related to international law, political science, morality and international relations, one may come across different definitions and categorisations.

Although there is no generally agreed definition of humanitarian intervention, some scholars defined the concept in a similar ways. Teson defines it as the “proportionate help, including forcible help, provided by governments (individually or in alliances) to individuals in another state who are victims of severe tyranny (denial of human rights by their own government) or anarchy (denial of human rights by collapse of the social order.)”⁸⁹ For J.L. Holzgrefe, humanitarian intervention is “the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.”⁹⁰ Again, according to Kardas, humanitarian intervention is “forcible action by states to prevent or to end gross violations of human rights on behalf of people other than their own nationals, through the use of armed force without the consent of the target government and with or without UN authorisation.”⁹¹

These definitions do overlap in important aspects. Some common points exist between them which include: first the use of military force. Although some scholars tend to add non-forcible measures in its definition, the majority exclude them. The second common point is the absence of the consent of the target state. This is the main point which makes it a humanitarian intervention and distinguishes it from both peacekeeping and humanitarian assistance. The third common point is the aim of the intervention, i.e. to protect non-nationals. Intervention to protect a state’s own nationals abroad is a category of self-defence. Hence, the term ‘humanitarian intervention’ is reserved to those cases that intended to protect non-nationals.

⁸⁸ Chesterman (2001) P.3

⁸⁹ Teson (2005) P.6

⁹⁰ The Humanitarian Intervention Debate (2003) p.18

⁹¹ Kardas (2001) p[]

The widespread and systematic infringement of basic human rights of such non-nationals must also taking place. The question of which rights are involved is subject to differing interpretations. Nevertheless, although it is difficult to give a comprehensive list of rights that can be involved, in the first place it concerns the right to life. Also it includes the rights and freedoms the violation of which effect the right to life. It is also meaningful in the sense that such an intervention is generally carried out in cases of gross violations caused by the target state itself or the state's collapse. However, the party responsible for such violation is not necessarily a state. It may also be an organized group having *de facto* authority over certain territory. There is a growing consensus on basic criteria and the threshold for intervention. These may include such serious human rights violations as genocide, crimes against humanity and other serious infringement of international humanitarian law.⁹²These crimes are recognized also as the most serious crimes of concern to the world community as a whole.⁹³

The last point relates to the agency of intervention. Although some confine the term to interventions by states, there is a recent practice to include interventions by international organizations, such as the UN and regional arrangements like the NATO.

In general, humanitarian intervention is forcible action performed, and aimed at compelling a sovereign to respect fundamental human rights of its citizens in the exercise of its sovereign power.

3.2 Humanitarian intervention v. responsibility to protect

Although usually considered to be categorically distinct from most definitions of humanitarian intervention⁹⁴, the concept of "Responsibility to Protect" deserve mention. The concept of the responsibility to protect, also called R2P, was developed in response to the genocide in Rwanda and the deliberate targeting of civilians in Kosovo and Srebrenica. Since these crises, a series of governmental and non-governmental initiatives have focused on reconciling the traditional notion of state sovereignty with respect for human rights, with the moral imperative to act with force if necessary in the face of core international crimes.

In 2000, Canada launched the International Commission on Intervention and State Sovereignty (ICISS) with a mandate to tackle this issue, and has developed its remarkable report, entitled "the responsibility to protect", as a vital framework to reach international consensus around the legitimate use of force to halt serious crimes. The report sought to establish a set of clear guidelines for determining when intervention is appropriate, what the appropriate channels for approving an intervention are and how the intervention itself should be performed.

⁹² See, eg. Newman (2002) P. 118

⁹³ See the ICC Statute, art 5

⁹⁴ See, eg. Dorota (2010) p. 110-128

The R2P refers to the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by international community as a whole: it is a principle based on the idea that sovereignty is not a privilege, but a responsibility.⁹⁵ The R2P focuses on preventing and halting four crimes, namely genocide, war crimes, crimes against humanity and ethnic cleansing, which it places under the generic umbrella term of “mass atrocity crimes.”

The R2P is said to involve three stages. The first is responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.⁹⁶ The second is responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecutions, and in extreme cases military intervention.⁹⁷ The third stage is responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.⁹⁸

According to the 2001 ICISS report, prevention is the single most important dimension of the R2P. Prevention options should always be exhausted before intervention is carried out, and more commitment and resources must be devoted to it. According to this report, the exercise of the responsibility both to prevent and to react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.⁹⁹

Regarding legitimacy, the ICISS identified five criteria that should be applied by the UNSC to test the validity of any form of military intervention initiated under the premise of R2P. These five criteria are:

- 1 Just cause: Is there serious and irreparable harm occurring to human beings, or imminently to occur, like large-scale loss of life, large-scale ethnic cleansing¹⁰⁰;
- 2 Right intention: Is the primary purpose of the proposed military action to halt or avert human suffering, whatever other motives may be in play¹⁰¹;
- 3 Last resort: Has every non-military option for the prevention or peaceful resolution of the crisis been explored, and are there reasonable grounds for believing lesser measures will not succeed¹⁰²;

⁹⁵ Evans (2006) P. 708

⁹⁶ ICISS report (2001) Chapter 3

⁹⁷ Ibid, Chapter 4

⁹⁸ Ibid, Chapter 5

⁹⁹ Ibid, 7.15

¹⁰⁰ Ibid, at XII

¹⁰¹ Ibid

¹⁰² Ibid

- 4 Proportional means: is the scale, duration, and intensity of the planned military action the minimum necessary to secure the defined human protection objective¹⁰³; and
- 5 Reasonable prospects: Is there a reasonable chance of the military action being successful in meeting the threat in question, and are the consequences of action not likely to be worse than the consequences of inaction.¹⁰⁴

Evans noted that all the above five criteria were also requirements not only in Christian just war doctrine but in other major world religions and intellectual traditions as well.¹⁰⁵

As to the R2P in the UN, at the 2005 World Summit, member states included R2P in the Outcome Document agreeing to paragraphs 138 and 139, which gave final language to the scope of R2P, as applies to the four atrocity crimes only. The outcome document represents the first global consensus on the responsibility of individual states and of the world community to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing. It affirms the international community's willingness to take timely and decisive action, through the UNSC, when peaceful means prove inadequate and national authorities are manifestly failing to protect their populations from such crimes.¹⁰⁶

The World Summit consensus on the R2P was further endorsed by the UNSC in 2006 in its resolution on the Protection of Civilians in Armed Conflict, thereby formalizing its support for the principle.¹⁰⁷ However, it was still unresolved whether states could intervene unilaterally for humanitarian purpose if the UN was deadlocked.

Here, it is important to note the distinction between the principle of humanitarian intervention and the R2P just to clarify and delimit the terms properly. Here, the question arises whether the two concepts are the same or different?

There are a number of differences between the two concepts. In the first place, the principal element in the definition of humanitarian intervention is the use of military force while R2P offers a broader set of tools with which to prevent and halt mass atrocity crimes. As noted earlier, although some writers tend to include non-forcible actions in the definition of humanitarian intervention, the majority exclude them. Under R2P, the use of military force is the last of many options. In other words, unlike humanitarian intervention, the R2P advocates a greater reliance on non-military measures. Secondly, even when it comes to military intervention, there are still differences between the two concepts: intervention under R2P is confined to preventing and halting only four crimes, namely genocide, war crimes, crimes against humanity and ethnic cleansing whereas humanitarian intervention can be applied to situations beyond these crimes. Third, intervention under R2P is generally

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Evans (2006) p.710

¹⁰⁶ The 2005 World Summit Outcome Document. Paras. 138-139

¹⁰⁷ UNSC Resolution 1674 (2006)

carried out multilaterally only with the approval of the UNSC while humanitarian intervention can be implemented unilaterally without a mandate of UNSC.

The 2001 report of the ICISS also attempts to change the terminology surrounding the issue of humanitarian intervention. According to Evans Gareth, the chairman of the ICISS, one of the main contributions of the report to the international policy debate was that it invents a new way of talking about humanitarian intervention.¹⁰⁸ He explained that the commission sought to turn the whole debate about the right to intervene on its head and to re-characterize it not as an argument about any 'right' at all but rather about a 'responsibility'.¹⁰⁹ Hence, according to the ICISS, under the R2P rather than having a right to intervene in the conduct of other states, states are said to have a responsibility to intervene and protect the citizens of another state where that other state has failed in its primary obligation to protect its own citizens.

3.3 Historical evolution of the principle of humanitarian intervention

Humanitarian intervention has long been a routine feature of the international system. The genesis of the principle dated back to ancient time. According to Abiew, one of the earliest known instance occurred in 480 BC where the prince of Syracuse, in defeating the Carthaginians, laid down as one of the conditions of peace that they refrain from the barbarous custom of sacrificing their children to Saturn. Intervention was also common in the Greek City-State system and the Roman Empire.¹¹⁰

The early discussions of the concept of humanitarian intervention traced back to 16th and 17th Century classical writers on international law, like Grotius and Vattel, particularly in their discussion on just war theory. Here again, the classical formulation of the right of humanitarian intervention was inspired by natural law ideas and the doctrine of just war. Grotius regarded maltreatment by a sovereign of his subjects a just cause to wage war on their behalf. He stated that "if a sovereign, although exercising his rights, acts contrary to the rights of humanity by grievously ill-treating his own subjects, the right of intervention may be lawfully exercised."¹¹¹ The Grotian formulation allows the full-scale use of force to end human suffering.

Vattel recognized the right to intervene against a government at the request of the oppressed people. He stated that "if the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested assistance."¹¹²

¹⁰⁸ Evans (2006) p. 708

¹⁰⁹ Ibid

¹¹⁰ Abiew (1999) P.22

¹¹¹ Quoted in *ibid*, p.35

¹¹² Quoted in *ibid*. P.36

From the time of the reformation, European powers often used force or diplomatic pressure against each other to protect religious minorities from persecution. Knudsen noted that the greater part of the history of humanitarian intervention is the history of intervention to protect persecuted religious minorities.¹¹³

During the 18th and 19th Centuries, Philosophers of political liberalism tended to link the concept of humanitarian intervention to the concept of human rights.¹¹⁴ Towards the end of 18th Century, some scholars began to treat it as an exception to the general principle of non-intervention, which they place as one of the pillars of international law in their new positivist theory. In the years 1770-80, Johan Jakob referred to the right to intervene when necessary to protect individuals from religious persecution. He emphasized that the motive should be humanitarian and not religious, and that this should be seen as an exception to the principle of non-intervention.¹¹⁵

Most observers of international law held the belief that world society as a whole recognized the existence of some minimum standards of humanity which could justify departure from the general rule of non-intervention.¹¹⁶

The modern concept of humanitarian intervention is generally associated with state practice in the 19th Century, when states started to invoke humanitarian sentiments to justify their interventions. In the 19th Century, humanitarian intervention became a standard subject of discussion in the works published on international law, as a result of the increasing and more dramatic use of that right in state practice.¹¹⁷ According to Brownlie, by the end of 19th century the majority of scholars agreed that a right of humanitarian intervention existed.¹¹⁸ The well-cited cases were generally directed against Ottoman Empire for the protection of Christians, like the Greek and Lebanon-Syria. However, legal positivist writers of the 19th Century acknowledged the right or practice of humanitarian intervention on moral and humanitarian grounds alone. Nevertheless, other writers recognised the existence of the legal right of humanitarian intervention.¹¹⁹

In the first half of 20th Century, the conception of the right of humanitarian intervention continued to attract the support of out-standing scholars of international law. For instance, Lassa Oppenheim maintained that “should a state venture to treat its own subjects or part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the powers to exercise intervention.”¹²⁰ Similarly, Lauterpacht stated that “the exclusiveness of domestic jurisdiction stops where outrage upon humanity

¹¹³ Knudsen (2009) P.4

¹¹⁴ Kardas (2001) P []

¹¹⁵ Cited in Knudsen (2009) P.7

¹¹⁶ Ibid

¹¹⁷ Ibid P.7

¹¹⁸ Brownlie (1963) p.338

¹¹⁹ Knudsen (2009) p.10

¹²⁰ Quoted in ibid

begins”¹²¹ According to Knudsen, Lauterpacht was one of the leading international lawyers, who also advocated the right of humanitarian intervention as being part of international law even at a time where it had disappeared from state practice.¹²² Indeed, the right of humanitarian intervention had a solid basis in state practice before WWI. The absence of prohibitions of use of force in international relations was a reason to explain the existence of this practice.

After WWII, the UN Charter introduced a new rule imposing limits upon the use of force in international relations. It left the “threat to international peace and security” as the only possible justification for intervention in the domestic affairs of states, and all acts of intervention were subjected to authorisation by UNSC as part of its collective security function. Since 1945, the UNSC has authorised the use of force to end human rights violations. However, practice in the Cold War period shows that SC was hardly able to implement the provisions of the Charter on collective security due to ideological confrontation between the two superpowers and the emergence of third world states with their valuation of sovereignty. As a result, the issue of intervention became perceived as forcible self-help by states to uphold human rights in other states.¹²³ There were some unilateral interventions which frequently cited in the literature as recent examples of humanitarian intervention, such as Indian intervention in East Pakistan, Tanzanian intervention in Uganda and Vietnamese intervention in Kampuchea.

Brief enquire of the period indicates that state practice throughout the Cold War did not establish the doctrine in customary international law. The Cold War made non-intervention a universal norm while the right of humanitarian intervention remained an exception.¹²⁴

With the end of the Cold War, human rights norms developed significantly and received general support. The end of this war brought about revolutionary change in the concept and practice of humanitarian intervention. The UNSC get the chance to take and authorise measures under provisions of chapter VII of the Charter against aggressor states as well as regimes allegedly violated human rights of their citizens.¹²⁵ Kardas pointed out that: “Humanitarian interventions [after the end of the Cold War] are not only responses to the suffering caused by repressive governments, but also they are directed to situations produced by internal conflicts, state disintegration and state collapses, as a result of which human rights are grossly violated.”¹²⁶ In the Post Cold War era, the majority of armed conflicts were internal in character and this has resulted in the growing number of UNSC resolutions whereby gross violations of human rights qualified as ‘a threat to international

¹²¹ Quoted in *ibid*

¹²² *Ibid*.

¹²³ Kardas (2001) p[]

¹²⁴ *Ibid*

¹²⁵ Lillich (1995) p.5

¹²⁶ Kardas, p.[]

peace and security'. In some cases, the SC decided to impose economic sanctions. In others, it authorised to use armed force. In this regard, cases of Somalia, Rwanda and Bosnia, can be cited as an examples. In the Post -Cold War era, some interventions of humanitarian character were also implemented without the explicit authorisation by the UNSC, such as NATO's intervention in Kosovo in 1998-9.

3.4 State practice on humanitarian intervention

This section reviews cases of actual interventions on humanitarian grounds that occurred in the pre-Charter, during Cold War and Post- Cold War periods. It confines to discuss only those interventions undertaken on humanitarian grounds and to examine whether such interventions as state practice contributed for the formation of customary norm. It will not raise the issues of the legality and legitimacy of such interventions, which will be examined later under the next chapter.

3.4.1 The practice in the pre-Charter period

State practice on humanitarian intervention dated back to ancient times. However, most of the examples of state practice that can be offered from the time before the establishment of the European Concert are cases of diplomatic interference and attempted dictate on humanitarian grounds. So it is difficult to find clear example of humanitarian intervention in the 17th and 18th centuries.¹²⁷ Thus, it is in the 19th and early 20th centuries that the institution of humanitarian intervention gained ground in state practice. Knudsen noted that "As a consequence of the establishment of the European Concert in 1815, the occasional resort to diplomatic interference and attempted dictate in the 18th Century gave way to a practice of outright humanitarian intervention."¹²⁸

The earliest instance of a genuine humanitarian intervention, frequently cited in the literature, is the 1827 joint intervention of Great Britain, France and Russia to stop the Turkish massacres against Greek population.¹²⁹ The majority of scholars have accepted this intervention as based on humanitarian considerations.¹³⁰

Another instance of humanitarian intervention is the 1860-61 French intervention in Syria. From 16th Century until the WWI, Syria was an integral part of the Ottoman Empire. The Turkish rule led to the massacre of thousands of Christians by the Muslim population. The French intervention was authorised and supervised by the five European great powers to stop the massacres of the Maronite Christian committed by the Muslim Druses under Turkish supremacy. The French force withdrew in 1861 after accomplished their tasks.¹³¹ According to Chesterman the most important element of this incident as an

¹²⁷ Knudsen (2009) p.14

¹²⁸ Ibid

¹²⁹ Chesterman (2001) p.28

¹³⁰ Abiew (1999) p.49

¹³¹ Ibid, p.50

instance of humanitarian intervention is the relative disinterestedness of the acting parties, and the humanitarian concerns of the five European powers appear to have been genuine.¹³²

The US intervention in Cuba in 1898 can also be cited as instance of humanitarian intervention. Some writers noted that US intervention in Cuba is an example of unilateral humanitarian intervention in pre-Charter state practice.¹³³ The intervention was on the basis of reports of atrocities committed by Spanish military authorities attempting to suppress Cuban rebellions. Although other motives may have prompted the US action, the evidence points also to the presence of humanitarian sentiments, and thus fall within the ambit of humanitarian intervention.

Regarding the practice of humanitarian intervention in the Pre-Charter period, Teson argued that an important precedent for a right of humanitarian intervention is the WWII itself. He concluded that “the allies fought Fascism not just because Hitler and Mussolini engaged in military aggression, but to defend ‘dignity, reason, human rights and decency against degradation, authoritarianism, irrationality, and obscurantism’”.¹³⁴

In addition to examples given above, the doctrine has been relevant on a number of occasions in the Pre-Charter period, although less clear than the instances discussed above. In most cases, several of the major powers acted multilaterally under the auspices of the Concert of Europe typically against the Ottoman Empire. In short, during the 19th and early 20th centuries, in cases of intervention states invoked humanitarian sentiments. This clearly constitutes state practice sufficient to recognize the right of humanitarian intervention.

3.4.2 The practice during the Cold War era

After the establishment of the United Nations, in particular during the Cold War, some interventions were undertaken by states without authorisation of UNSC and frequently cited in the literature as recent instances of humanitarian intervention.

In 1971, Western Pakistan’s military forces launched an operation against the struggle of Eastern Pakistan for independence, as a consequence of which around one million persons were killed and more than ten million refugees fled to India. This led to Indian intervention in East Pakistan in November 1971 which resulted in the establishment of new country Bangladesh. Regarding the motives of the intervention, although India initially asserted humanitarian motives, it ultimately relied on the traditional ground of self-defence.¹³⁵ In fact India addressed the problem of ten million refugees and atrocities committed by Pakistani troops. Some writers claimed that India’s intervention in East Pakistan is to be generally one

¹³² Chesterman (2001) p.33

¹³³ Ibid, p.34

¹³⁴ Teson (2005) P.227

¹³⁵ Chesterman (2001) p.74

of the better instances of humanitarian intervention.¹³⁶ India's action constitutes state practice for the purposes of customary international law formation but there is little evidence of *opinio juris*.¹³⁷

Another intervention during this period is the 1978-9 Tanzanian intervention in Uganda. The cruelty of Amin's regime in Uganda was notorious. The dictatorial regime of Idi Amin resulted in the deaths of several thousands of innocent people. In November 1978, Ugandan troops occupied Kagera Salient region of Tanzania. In response to this, Tanzanian military forces attacked Uganda's armed forces in the said region. By January 1979, Tanzanian forces penetrated into the territory of Uganda with the support of Uganda's anti-governmental National Liberation Front. In April 1979, Tanzanian military forces controlled the Ugandan capital which ended with the overthrow of Amin's regime who fled the country.

The result of Tanzania's intervention in Uganda is widely advocated as a desirable result and mostly considered as a victory for human rights.¹³⁸ According to Teson, humanitarian considerations were prominent in this intervention and in general Tanzanian action was legitimized by the international community.¹³⁹ He concluded that it was a genuine instance of humanitarian intervention.¹⁴⁰ On the other hand, it has been suggested that Tanzania's actions typically equivocate between its humanitarian motives and the motive of self-defence.¹⁴¹ In terms of state practice, Chesterman suggested that it can be said with confidence only that "the action was not condemned" and he concluded that "there is little evidence of *opinio juris* beyond an affirmation of the right of self-defence."¹⁴²

The 1978-9 Vietnamese intervention in Kampuchea (Cambodia) was also the one that is commonly regarded as instance of humanitarian intervention in the literature. In 1975, Pol Pot overthrew General Lon Nol and came into power. Oppression of the people began immediately in which more than two million people were reported dead. The victims of this repression include the ethnic Vietnamese. Following the fighting along the Vietnamese-Kampuchean border throughout 1978, Vietnamese military forces invaded Kampuchea in December 1978. In February 1979, the Vietnamese military forces involved members of the United Front for National Salvation of Kampuchea, an insurgent group formed earlier by exiled Kampuchians, established control over most of the territory of Kampuchea. Pol Pot fled to the mountains and the new government supported by Vietnam was established. Vietnam claimed, in its official position in the UN debate, that it used force after Kampuchean aggression in self-defence and that it undertook military action against inhuman conditions which Pol Pot's regime committed against its subjects. Humanitarian

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid, p.77

¹³⁹ Teson (2005) p.233

¹⁴⁰ See e.g. Chesterman (2001) P.78

¹⁴¹ Ibid, p.77

¹⁴² Ibid, p.79

concerns were also discussed in the SC debate.¹⁴³ Chesterman stated that like Tanzania's intervention in Uganda, Vietnamese concern with Kampuchea was only partly humanitarian in origin.¹⁴⁴ In general, Abiew comments that:

*The failure of the international community, including the UN, to find a diplomatic solution or to take any concrete measures of response, left the Vietnamese course of action as the viable option and the immediate solution to end the atrocities that were being committed.*¹⁴⁵ (Emphasis added).

As example of state practice, Chesterman noted that, like in the other two cases discussed above, there is lack of *opinio juris* for the formation of customary right of humanitarian intervention.¹⁴⁶

In sum, this brief examination of state practice during Cold War period shows the lack of *opinio juris* which is the necessary requirement for the formation of customary international law in addition to state practice. After recognized these cases as the three 'best cases' of humanitarian intervention in the Cold War period, Chesterman noted that even these cases lack the necessary *opinio juris* and thus remained an exception to the rule.¹⁴⁷ Thus, contrary to the Pre-Charter period, state practice throughout the Cold War period did not establish itself in customary international law for the right of humanitarian intervention.

3.4.3 The practice in the post-Cold War period

In the Post-Cold War period, the majority of armed conflicts were internal in character and this resulted in the growing number of UNSC resolutions which characterised gross violations of human rights in internal conflicts as a threat to international peace and security. In some cases the SC decided to impose economic sanctions while authorised the use of armed force in others. There were also unilateral interventions that implemented without the prior authorisation by UNSC.

In Somalia, after the assassination of president shermarke in 1969, Siad Barre seized power. The regime of Siad Barre became increasingly totalitarian. The Somali civil war started in 1988. The state of chaos quickly spread throughout the country. By the summer of 1992, 1.2 million people were displaced and 4.5 million were threatened with severe malnutrition. Various humanitarian relief efforts failed due to extreme insecurity for UN agencies and NGOs in distributing relief assistance to the people in need. Faced with a humanitarian disaster in Somalia, the UN had created the United Nations Operation in Somalia (UNOSOM I) in April 1992 with a mandate to restore peace and protect humanitarian relief operations. However, the rivalries of the local warlords with each other meant that the mission of

¹⁴³ Abiew (1999) p.128

¹⁴⁴ Chesterman (2001) p.81

¹⁴⁵ Abiew (1999) p. 131

¹⁴⁶ Chesterman (2001) p.81

¹⁴⁷ Ibid, p.84-87

UNOSOM I could not be performed. As the situation was deteriorating, in December 1992 the SC unanimously adopted resolution 794, authorising the use of “all necessary means to establish ... a secure environment for humanitarian relief operations...”¹⁴⁸

The United Task Force (UNITAF) was established to perform this resolution. It was the United States led multinational force which entrusted to carry out the task stated in this resolution. By Resolution 794 (1992), the SC characterised a Somali humanitarian catastrophe as a threat to international peace and security. The UN Secretary-General stated that “the Security Council had ‘established a precedent in the history of the United Nations: it decided for the first time to intervene militarily for strictly humanitarian purposes’.”¹⁴⁹ However, UNITAF and the United Nations Operations in Somalia (UNOSOM II) failed to restore peace in Somalia and the mission was terminated in 1995.

Another instance of humanitarian intervention with a mandate of UNSC in the Post-Cold War period is the case of Rwanda. The ethnic tension between Hutu and Tutsi in Rwanda traces back to the Belgian colonial era. Intervention in Rwanda was a response to the genocide and civil war. The genocide in Rwanda estimated to have claimed between 800,000 and 1.017,100 victims over 100 days. 1.3 million people fled to neighbouring countries and 2.2 million people internally displaced within four months.

Eventually, on 20 June 1994 the French government proposed to UNSC to intervene unilaterally to halt the bloodshed and protect refugees.¹⁵⁰ On 22 June 1994, SC adopted Resolution 929, recognizing that the situation ‘constitutes a unique case which demands an argent response by the international community’ and determining ‘that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region’. The Council authorised France, under chapter VII, to conduct an operation under national command and control aimed at contributing to the security and protection of displaced persons, refugees and civilians at risk, using ‘all necessary means’ to achieve these humanitarian purposes.¹⁵¹ French forces stayed in Rwanda and neighbouring Zaire, establishing safe havens for refugees and helped distributed relief supplies. Finally, French troops withdrew from Rwanda after two months and urged the UN to send replacements as soon as possible.¹⁵² The SC gave also authorisation for the establishment of International Criminal Tribunal for Rwanda (ICTR).¹⁵³

As to intervention in the Socialist Federal Republic of Yugoslavia (Bosnia), the war began in Bosnia-Herzegovina as a result of the dissolution of Yugoslavia. Following the Slovenian and Croatian secessions in 1991, the multiethnic Socialist Republic of Bosnia and Herzegovina, which was inhabited by, mainly Muslim Bosniaks, Orthodox Serbs and Catholic Croats,

¹⁴⁸ UNSC Resolution 794(1992), para. 10

¹⁴⁹ Quoted in Chesterman (2001) P.142

¹⁵⁰ Teson (2005) p.321

¹⁵¹ UNSC resolution 929(1994) preamble, paras 2,3

¹⁵² Teson (2005) p.321

¹⁵³ UNSC resolution 955(1994)

passed a referendum for independence on 29 February 1992. This was rejected by Bosnian Serb political representatives, who had boycotted the referendum and established their own republic. Following the declaration of independence, Bosnian Serb forces, supported by Serbian government of Slobodan Milosevic and the Yugoslav People's Army (JNA) attacked the Republic of Bosnia-Herzegovina and war soon broke out across Bosnia, accompanied by the ethnic cleansing of the Bosniak population. Teson noted that the atrocities that were reported were of the same gravity and magnitude as those committed by Nazi during WWII.¹⁵⁴

In the summer of 1992, the UNSC authorised coercive measures in the conflict. The SC acting under Chapter VII, called upon states "to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery [...] of humanitarian assistance [...] in Bosnia-Herzegovina."¹⁵⁵ Deeply concerned by the reports of abuses against civilians, the council recognized that the situation in Bosnia constituted a threat to international peace and security. Faced with the failure of several efforts to protect Bosnian Muslims, the SC imposed a no-fly zone over Bosnia in order to prevent Serbian assaults from obstructing transfer of humanitarian supplies.¹⁵⁶

But this was proved difficult to enforce. Thus, the Council took decisive step to influence the situation in the region and authorised member states to take "all necessary measures in the airspace of the Republic of Bosnia and Herzegovina in the event of further violations to ensure compliance with the ban on flights."¹⁵⁷ Under resolution 816, the Council made reference to the previous resolution 770 and emphasised the need to put an end, by force if necessary, to the victimization that Bosnia Serbs were inflicting on civilian population.

On the basis of these two resolutions, NATO air forces conducted a series of military operation against Bosnian Serb position. Teson comments that while the initial UN authorisation to use air power seemed to be limited to securing the delivery of humanitarian assistance and the enforcement of the "no-fly" zone, the intervention by NATO far exceeded those limited purposes.¹⁵⁸ Nevertheless, he concluded that:

*The intervention by NATO can be explained in part as a humanitarian effort, that is, as an action by a military alliance authorised by the United Nations with the purpose of putting an end to the intolerable human rights violations that were occurring in that war.*¹⁵⁹ (Emphasis added).

¹⁵⁴ Teson (2005) p.323-4

¹⁵⁵ UNSC resolution 770(1992)

¹⁵⁶ UNSC Resolution 781(1993)

¹⁵⁷ UNSC Resolution 816(1993)

¹⁵⁸ Teson (2005) p.325-6

¹⁵⁹ Ibid, p.325

Following the NATO demonstration, the belligerent parties initiated peace negotiations that concluded in the accord signed in Paris in December 1995.¹⁶⁰

Another intervention, frequently cited in the literature as having humanitarian character, occurred in the Post-Cold War period was the one that conducted unilaterally by NATO in Kosovo in 1998-99. The tension between ethnic Albania and ethnic Serbians in Kosovo traces back to the 20th Century, particularly during WWI and WWII.

At the time of the dismemberment of the former Yugoslavia, Kosovo was autonomous province. But the Belgrade authorities removed that status in 1989. This fact was the main reason for the development of nationalist sentiments in both Kosovo and Serbia.¹⁶¹ Internal civil war in Kosovo lasted from February 1998 to March 1999. NATO's intervention and bombardments of Belgrade and other parts of the country was a response to this conflict which created humanitarian crisis. The fighting was between Kosovo Liberation Army and the federal forces. Although abuses were reported on both sides, it is Serb atrocities that are well documented. The Serb forces committed their most horrific massacres including 'ethnic cleansing' in the attempt to terrorize, kill and expel ethnic Albanians from Kosovo.

The UNSC and the European Union strongly condemned the atrocities. Although the UNSC declared the humanitarian catastrophe in Kosovo as a threat to the peace¹⁶², NATO's intervention was carried out without the explicit authorisation of the Council. According to Teson, one striking feature of Kosovo incident is its being genuine instance of humanitarian intervention. He also suggested that "on the whole, the intervention was not overtly condemned by any international organization or human rights NGOs, although many deplored that NATO had been unable to secure Security Council authorisation."¹⁶³ The 2000 report of the Independent International Commission on Kosovo disclosed that the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.¹⁶⁴ There were no strategic or material interests of NATO nations in Kosovo.¹⁶⁵ Indeed, the dominant motivation of NATO was to counter the ongoing repression of the Kosovars by Milosevic regime.

Another most recent instance of humanitarian intervention with a mandate of SC is the case of Libya. First, on Feb. 26, 2011 the SC called up on Libya's responsibility to protect by referring the situation to the ICC and imposing initial financial sanctions and arms embargo.¹⁶⁶ And then on 17 March, the Council approved enforcement of no-fly zone, calling for an immediate cease-fire and for all necessary measures to protect civilians.¹⁶⁷ This

¹⁶⁰ Ibid

¹⁶¹ Ibid, p.375

¹⁶² UNSC resolution 1999(1998)

¹⁶³ Teson (2005) p.382

¹⁶⁴ See the Kosovo Report (2000) P.4

¹⁶⁵ Teson (2005) p.384

¹⁶⁶ SC resolution 1970 (2011)

¹⁶⁷ SC resolution 1973 (2011), para.4

resolution condemned the Libyan government for allowing gross violations of human rights and attacks that may amount to crimes against humanity.

In sum, in the Post-Cold War period, several resolutions of UNSC declared humanitarian crisis as threats to international peace and authorised states to intervene to end human sufferings. The practice in the Post-Cold War period indicates that international community used extensive conception of humanitarian intervention. Thus, it is safe to conclude that state practice in this period constituted evidence for the existence of the right of humanitarian intervention with the SC mandate. Its legality and legitimacy will be examined in the next chapter.

4 The legality and legitimacy of humanitarian intervention

This chapter will examine the legal and legitimate basis for humanitarian intervention in relation to the principle of state sovereignty, non-intervention and regulation of the use of force in international law. It will address the main objective of this paper and attempts to answer the question as to whether legal and legitimate basis for humanitarian intervention exist under international law and if so, when and under whose authority? In this chapter humanitarian intervention with UN Security Council mandate and the one carried out without such a mandate and their legality and legitimacy will be discussed below separately.

4.1 Humanitarian intervention with a Security Council mandate

This section discusses the power and role of the UNSC in the implementation of humanitarian intervention. The SC has the power and primary responsibility under the UN Charter for the maintenance of international peace and security. Over the years, the SC has not exercised its powers extensively against states that have engaged in gross and persistent violations of their citizens' human rights due to the use or threatened use of the veto by one or more of the Council's permanent five. However, in few cases the Council has found a state's violations of human rights to constitute a threat to the peace and adopted mandatory sanctions against that state, for instance economic sanction against Southern Rhodesia (Zimbabwe) in 1966¹⁶⁸ and arms embargo against a partied rule in South Africa in 1977.¹⁶⁹ Nevertheless, with the end of the Cold War, the Council authorised intervention against states engaged in gross human rights violations.

The question arises whether the SC has the authority, under the UN Charter, to conduct or authorise humanitarian intervention?

It is generally agreed that the SC has the authority, under chapter VII of the UN Charter, to conduct or authorise humanitarian intervention.¹⁷⁰ Again the remaining question is when and how the intervention should be carried out? In general, the SC is empowered, under chapter VII of the UN Charter, to use, or authorise the use, of force including forcible intervention when there exists a threat to international peace and security. It is worth reminding that under Article 24(1) of the Charter, members "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf."¹⁷¹ In turn, under Article 25, members "agree to accept and carry out the decision of

¹⁶⁸ UNSC Resolution 221(1966)

¹⁶⁹ UNSC Resolution 418(1977)

¹⁷⁰ See eg. Henkin (1999) P.824-28

¹⁷¹ UN Charter art 24(1)

the Security Council.”¹⁷²The SC has also the power to determine which member states shall be authorised to carry out its decisions.¹⁷³

In short, the specific powers granted to the SC which enable it to discharge its duties are found in chapter VII of the Charter. Article 39 provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

Article 41 authorises the SC to order economic sanctions against states that have violated Article 39, while Article 42 permits it to order military action including “demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations.”¹⁷⁴Chesterman observed that Article 39 of the UN Charter suggests “that a determination of a threat to the peace, breach of the peace, or act of aggression *must be* made before the Security Council *can* decide what measures should be taken.”¹⁷⁵(Emphasis added). So, it seems to be the case that the determination of the occurrence of, in particular “threats to the peace” is a prerequisite for the SC to take military action envisaged in article 42 of the Charter.

4.1.1 The requirement of a threat to the peace

It is of considerable importance to know what types of conducts may fall within Article 39 of the UN Charter as it’s a precondition for enforcement measures to be taken by the SC. In short, what constitute “a threat to the peace”?

None of those three phrases mentioned under Article 39, “threat to the peace”, “breach of the peace” and “act of aggression”, defined in the UN Charter. The historic context in which article 39 was drafted indicates that the intention of the drafters was to give the SC wide discretion to define these terms.¹⁷⁶It was thought that an exhaustive list of “threat to the peace”, “breach of the peace” or “act of aggression” would be impossible as it limits the freedom of the SC to perform its duty in maintaining international peace and security.¹⁷⁷

In fact, armed military actions are encompassed by Article 39, but, *inter alia*, “threats to the peace” are not limited to military situations or international conflicts. Since the end of the Cold War, the SC has interpreted the phrase “threat to the peace” broadly as not limited only to inter-state conflicts. During the meeting of the Council at its 47th Session, on 31 January 1992, it was confirmed that the absence of war and military conflicts among states

¹⁷² Ibid, art 25

¹⁷³ Ibid, art 48(1)

¹⁷⁴ Ibid, art 42

¹⁷⁵ Chesterman (2001) p.124

¹⁷⁶ The Charter of the United Nations, a Commentary (1994) P.607-8

¹⁷⁷ Ibid

does not ensure in itself international peace and security, and further recognised that non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.¹⁷⁸

Humanitarian crisis do have international consequences, in particular the flow of refugees across state borders. However, such crises, in general, do not pose the threat of armed conflict across border. So, the question arises whether humanitarian crises can be called threat to the peace. Nevertheless, the language of Article 39 expressly gives the SC the authority to determine what constitute a threat to the peace. Thus, it is the discretion of the SC to determine this matter.

4.1.2 Humanitarian crises as threat to the peace

Can large-scale and systematic violations of human rights in a given state amount to a threat to international peace and security sufficient to justify humanitarian intervention?

It has been suggested that even though the Charter does not specifically grant the SC the authority to initiate military intervention to protect human rights in crisis situations, such inherent power recently was validated by resolutions of the Council in response to internal crisis.¹⁷⁹The concept that respect for sovereignty is conditional on respect for human rights has been reflected in the practice of UNSC which has increasingly considered gross violation of human rights in internal conflicts as legal grounds for international action. When authorising humanitarian intervention, the SC typically determines that a humanitarian crisis poses a threat to the peace.

Article 2(7) of the UN Charter stipulates that the Charter does not authorise the UN to intervene in “matters which are essentially within the domestic jurisdiction of any state”. It has been suggested that this might seem to rule out authorised humanitarian intervention.¹⁸⁰As the last sentence of this provision indicates, however, non-intervention principle shall not prejudice the application of enforcement measures under chapter VII. It follows that Article 2(7) is generally not taken to limit the authority of the SC under chapter VII of the Charter. Today even the violation of fundamental human rights cannot be considered to be a matter of domestic jurisdiction.

As noted earlier, there has been a progressive development of international human rights law since the establishment of the UN and it has been recognised by ICJ in 1970, in Barcelona Traction Case, as most of fundamental rights of human person belong to *Erga Omnes* obligations. Javier Leon concluded that “the SC may take enforcement measures without taking into account the general principle of non-intervention in the internal affairs

¹⁷⁸ UN DOC. S/PV.3046 47th Session 1992

¹⁷⁹ Lillich (1995) P.4

¹⁸⁰ Stein (2004) P.17

of a state when determining whether a particular situation is a threat to international peace and security.”¹⁸¹ Thus, humanitarian intervention is lawful if authorised by the UNSC as part of its collective security function. This is supported by the majority of scholars.¹⁸²

Some writers, however, tend to limit the authority of the SC to authorise intervention only if internal crisis has trans-boundary elements to justify intervention. For instance, Chesterman stated that “a credible argument can be made that refugee flows may, in some circumstances, constitute a threat to international peace and security.”¹⁸³ Indeed, in the early resolutions of the Council, trans-boundary effects of humanitarian crisis emphasised as a basis to justify chapter VII enforcement measures. But in recent SC practice, there has been a gradual shift away from reliance on trans-boundary repercussions of a situation to consider gross violations of human rights and humanitarian law in internal conflicts as threats to peace and security. The approach followed by the SC to characterise gross violations of human rights as threats to international peace and security in the Post-Cold War period has resulted in considering humanitarian catastrophes in internal conflicts with or without cross-border effects as constituting threats to international peace and security.

In short, since the end of the Cold War, the SC has availed itself of a right of humanitarian intervention by adopting a series of resolutions which have progressively expanded the definition of “a threat to international peace and security” under Article 39 of the Charter and authorised member states to intervene even where such crises have been purely domestic in nature. This is what the SC did in the cases of Somalia¹⁸⁴, Bosnia-Herzegovina¹⁸⁵ and Rwanda.¹⁸⁶ However, some states objected to this broad interpretation of “a threat to international peace” on the ground that the SC may act arbitrarily in future cases.

Regarding the question of when and how to intervene in a domestic crisis or how interventions should be carried out, Kardas suggested that “there has not emerged a consensus among states or within international organisations, including the UN.”¹⁸⁷ The UN practice was developed on a case by case approach. Nevertheless, when authorise states to conduct humanitarian intervention, the SC defines (1) the objectives states to pursue when using force; (2) the duration of the mandate; and (3) the duty to report to it on the conduct of military interventions.

In recent practice of UNSC, the link is made between widespread human rights violations within a country and the threats of international peace and security. For example by using such languages as the following: “...*deeply disturbed by the magnitude of the human*

¹⁸¹ Leon-Dias (2002) Available at www.javier-leon-diaz.com

¹⁸² Henkin (1999) P.828

¹⁸³ Chesterman (2001) p.151

¹⁸⁴ UNSC Resolution 794(1992)

¹⁸⁵ UNSC Resolutions 770(1992) and 816(1993)

¹⁸⁶ UNSC Resolution 929(1994)

¹⁸⁷ Kardas (2001) p.[]

*suffering caused by the conflict and concerned that the continuation of the situation...constitutes a threat to international peace and security....*¹⁸⁸ There were no reference to the human rights provisions of the Charter which require member states to take joint and collective action for the achievement of universal respect and observance for human rights.¹⁸⁹ Rather SC resolutions link human rights violations to the threats to international peace. Kardas noted that SC authorised interventions were justified not on a purely humanitarian basis, rather it was connected to international peace and security.¹⁹⁰

There is an argument that the UNSC is not entitled under the Charter to authorise humanitarian intervention based purely on violations of human rights without cross-border repercussions. Regarding the legal status of humanitarian intervention with a UNSC mandate, Teson observed that "...international law today recognizes, as a matter of practice, the legitimacy of collective humanitarian intervention, that is, of military measures authorised by the Security Council for the purpose of remedying tyranny."¹⁹¹ He further concluded that "While traditionally the only ground for collective military action has been the need to respond to breaches of the peace [...] international community has accepted a norm that allows collective humanitarian intervention as a response to serious human rights abuses."¹⁹²

It is safe to conclude that internal crisis with external effects justify humanitarian intervention with SC mandate. Further, I argue here that international human rights law takes humanitarian intervention outside the ban on intervention in domestic affairs of states. The authority of the SC under chapter VII of the Charter is unimpaired to conduct or authorise humanitarian intervention in situations internal crisis produce humanitarian catastrophes with or without cross-border repercussions. Thus, the answer to the questions posed at the beginning of this section is that UNSC has legal authority, under chapter VII of the Charter, to conduct or authorise humanitarian intervention when a state engages in gross and persistent violations of its citizens' human rights.

4.2 Humanitarian intervention without a Security Council mandate (Unilateral humanitarian intervention)

The linkage between human rights and international peace in the UNSC practice was widely recognised by the international community and humanitarian intervention with a mandate of the SC did not create so much controversy.¹⁹³ But if intervention is not authorised by the SC, its legality under the Charter is more controversial.¹⁹⁴ Although the UNSC authorised most of the Post-Cold War interventions, the practice of intervention without the SC

¹⁸⁸ UNSC Resolution 746(1992) on Somalia, Preamble

¹⁸⁹ UN Charter arts 55 and 56

¹⁹⁰ Kardas (2001) p.[.]

¹⁹¹ Teson (2005) p.281

¹⁹² Ibid

¹⁹³ Newman (2010) P.104

¹⁹⁴ Ibid

mandate has not disappeared completely. In several instances states have intervened with force and without advance authorisation from the SC, at least in part to halt alleged violations of human rights. Recent examples include ECOWAS intervention in Liberia, intervention after the Gulf War to protect Kurds in northern Iraq as well as NATO's intervention in Kosovo. The Iraqi and Kosovo cases are quite complicated because there were prior SC resolutions defining the situation as a threat to peace, but none giving explicit authorisation for the use of military force. The debate about these cases has not been settled among scholars.

4.2.1 Unilateral intervention and the UN Charter

The question arises whether legal basis exist under the UN Charter for states to conduct humanitarian intervention without the SC mandate?

Relevant to the legality of humanitarian intervention is Article 2(4) of the UN Charter which prohibits the use of force in international relations. This provision is discussed above under chapter two of this paper, but it is worth reminding that this provision interpreted in different ways. Some interpret it in the context of the Charter as a whole, as prohibiting all use of force with only two exceptions: as authorised by the SC, and in exercise of the right of self defence recognised in Article 51 of the Charter.¹⁹⁵ Others disagree with this broad interpretation of Article 2(4) of the Charter. They point out that the language of this provision imposes not a general prohibition, rather three specific prohibitions. They argue that unauthorised humanitarian intervention is permitted under this provision if it:

- 1 Does not constitute the use of force against territorial integrity;
- 2 Does not constitute the use of force against political independence; and
- 3 Is not otherwise inconsistent with the purposes of the United Nations.¹⁹⁶

When the term 'territorial integrity' is interpreted broadly, every territorial incursion is a violation of territorial integrity. Under a more narrow interpretation of 'territorial integrity', a state violates it only if it seizes part of the other state's territory. It should be noted that even the more narrow interpretation of 'territorial integrity' raise a problem for unilateral intervention.

When we interpret the term 'political independence', a state's political independence is violated when interveners change its political path in any way.

When we come to the last point-the use of force not otherwise inconsistent with the purposes of the UN-under article 1 of the Charter, the first-listed and the primary purpose of the UN is the maintenance of international peace and security. The promotion and protection of human rights is also listed as a purpose of the organization. To ensure the maintenance of international peace, article 2(3) requires member states to settle their

¹⁹⁵ See Schachter (1991) p.128

¹⁹⁶ . See D'Amato (1995) P.56-72

disputes by peaceful means and not by use of force. In short, non-defensive unilateral use of force against the territorial integrity or political independence of a state is a breach of peace and inconsistent with the primary purpose of the UN. It follows that article 2(4) of the UN Charter prohibits all non-defensive use of force not authorised by the UNSC and hence unilateral humanitarian intervention has no legal ground under the UN Charter.

4.2.2 Unilateral intervention and customary international law

In addition to the UN Charter, the legal status of humanitarian intervention may be affected by customary international law, as evidence of a general practice accepted as law.¹⁹⁷ So, if there is no legal basis for unilateral humanitarian intervention under the UN Charter, then the question arises whether this right exists under customary international law either as survived the adoption of the UN Charter or as an emerging norm of customary law that has modified existing Charter regulations on use of force?

Elements of customary international law are: (1) state practice and (2) *Opinio Juris* (a conviction that state practice have legal obligation.) In short, international custom may become a law if state practice is uniform and extensive. Short passage of time is not necessarily a bar to the formation of customary international law.¹⁹⁸ In addition, this practice need not be in absolute uniformity but only of general consistency.¹⁹⁹ It is important to note that a state which has consistently expressed its opposition to such practice, for instance the practice of unilateral humanitarian intervention, will not be bound by any rule of customary international law emerging from that practice.²⁰⁰ This is what we call *persistent objectors* rule.

There is great controversy over the content of customary international law in the area of humanitarian intervention as in other areas. Some find a strong prohibition against unilateral intervention in customary international law while others find no prohibition against it. As noted earlier, the right of humanitarian intervention had a solid basis in Pre-Charter state practice. But did it survived or co-exist with the Charter's prohibition on use of force?

Contrary to the Pre-Charter practice, in the Post-Charter period, in particular during the Cold War era, state practice did not establish itself in customary international law. For instance, India's, Tanzania's and Vietnamese actions constitute state practice for the purpose of customary law formation but there were little evidence of *Opinio Juris*. State practice in the Post-Cold War period cannot constitute precedents for a doctrine of unilateral intervention, nor can it establish a norm in customary international law. For instance, the debate about

¹⁹⁷ . See the ICJ Statute art 38(1)

¹⁹⁸ . Germany V. Denmark, Germany V. Netherlands, ICJ Reports 3, 1969

¹⁹⁹ . Nicaragua V. USA, ICJ Reports 14, 1986

²⁰⁰ See Anglo-Norwegian Fisheries Case. ICJ Report 116, 1951

NATO's intervention in Kosovo has not been settled among scholars. Again, there were opposition to this intervention on the part of Russia and China in the UNSC and other states in the UNGA. This may amount to the concept of persistent objectors which is a bar to its being a precedent.

From this brief examination of state practice, we can conclude that there is no crystallized customary international law (*de lege lata*) in the area of unilateral humanitarian intervention. The Pre-existing customary law of humanitarian intervention did not survive or co-exist with the charter's prohibition of non-defensive unilateral use of force. However, in theory the Charter can be amended through the process of emerging customary law (*de lege ferenda*). So, the question arises whether there is emerging customary norm of unilateral humanitarian intervention or the one that will emerge from state practice?

A number of commentators believe that repeated humanitarian intervention without SC mandate could establish a right to humanitarian intervention or even a general permission to use of force in international relations. Both the Danish report²⁰¹ and the Dutch report²⁰² concluded that state practice after the end of the Cold War concerning humanitarian intervention is neither sufficiently substantial nor has there been sufficient acceptance in the international community to support the view that a right of humanitarian intervention without SC authorisation has become part of customary international law. But these reports suggested further that a legal justification asserting a new emerging right of unilateral intervention may, if supported by a vast majority of states, lead to the creation of corresponding new legal norms.

However, in my view, even if this may be true from the point of view of international law making process, it is difficult to think the possibility for the formation of such norm in contradiction with *a jus cogens* rules, such as the ban on the use of force. Because they are peremptory norm of international community from which no derogation is permitted and which can only be modified by subsequent norm of international law with the same character. To conclude from the foregoing, current international law, both under the UN Charter and customary international law, does not provide sufficient legal ground for humanitarian intervention without the UNSC mandate.

4.2.3 Other justifications for the legitimacy of unilateral humanitarian intervention

If unilateral humanitarian intervention is illegal under positive international law, what measures should be taken, in particular when the UNSC fails to take timely and decisive action, such as the Rwandan genocide case? If one proves unilateral humanitarian intervention to be at odds with the criterion of legality-since it clearly contradicts one of the main pillars of the UN Charter, i.e. the ban on non-defensive unilateral use of force-, can it

²⁰¹ The Danish Report (1999) p.93

²⁰² The Dutch Report (2000) P.23

be justified with recourse to the concept of legitimacy? What is the distinction between 'legality' and 'legitimacy'?

For instance the Kosovo report hinges upon the distinction and the gap between law and legitimacy. The Kosovo Commission concluded that the NATO military intervention was 'illegal but legitimate.'²⁰³ It was illegal because there was no way to reconcile such a use of force with international law and the UN Charter. At the same time it was legitimate in terms of its aim to prevent an imminent humanitarian calamity and because the evidence supported the claim of humanitarian emergency. The Commission enumerated a series of guidelines to give support to its sense of legitimacy, including adherence to international humanitarian law governing the conduct of such an operation and reliance on force as a last resort.

Here, it is worth examining whether the distinction between 'legality' and 'legitimacy' can be of any use in assessing justifications for unilateral humanitarian intervention. The concept of 'legality' recalls that of law: an action or a decision is considered legal when it complies with a positive rule belonging to a legal system. Thus, 'the notion of legality'-is the intervention lawful?-is a purely legal concept. So, unilateral humanitarian intervention is illegal because it does not comply with the UN Charter's and general international law's prohibition of use of force.

When we turn to the question of legitimacy, it appears to be more complicated. There is no general definition for it, nor does it necessarily refer to positive law. Legitimacy is intertwined with morality and ethics, since it is often seen as a justification for political and legal power. However, we can provide general understanding of it and of its connections with legality. The ordinary meaning of legitimacy is the validity or justifiability of an action, something for which there is a fair and acceptable reason.²⁰⁴ Technically, legitimacy along with legality requires that the substance of the legal system is to be consistent with the diffused conceptions of the social parties, that is, law/legality has to adopt itself to the key values and to the basic ideals of the political community.

Both the Dutch report²⁰⁵ and the Danish report²⁰⁶ affirmed the exclusive legal authority under international law of the UNSC to take decisions on humanitarian intervention, yet both argued that 'in extreme cases', humanitarian intervention may be necessary and justified on moral and political grounds even if an authorisation from the UNSC cannot be obtained. They observed that the scope of sovereignty has gradually been reduced due to international norms and requirements of human rights. These reports seek to clarify the circumstances under which intervention is necessary; the procedures that should be followed in order to ensure that alternative non-military options have been exhausted; and

²⁰³ See the Kosovo report (2000) P.4

²⁰⁴ See Oxford Dictionary (2005) P.878

²⁰⁵ See the Dutch report (2000) P.3

²⁰⁶ See the Danish report (1999) P.128

operational steps and safeguards that optimise the legitimacy and effectiveness of the use of force.

According to these reports, there is a growing international consensus on basic criteria and the threshold for intervention which can be regarded as genocide, crimes against humanity and other serious violations of international humanitarian law. Finally, they suggested, without offering a solution, that the position of international law may inadvertently be undermined if it does not provide for intervention in cases of flagrant violations of fundamental human rights. Thus, the dilemma of unilateral humanitarian intervention is not solved.

To conclude, humanitarian intervention is lawful if authorised by the UNSC in cases of flagrant and large-scale violations of fundamental human rights. Although there is an argument to the effect that unilateral humanitarian intervention in extreme cases may be justified on moral and political grounds, such kind of intervention has no legal basis under positive international law.

5 Conclusion

The two major values, respect for state sovereignty and respect for human rights were integrated to international law with the adoption of the UN Charter. The principle of sovereignty is the foundation of inter-state relations and the basis of the modern world. It is the old principle of international law. On the other hand, the principle imposing respect for human rights is typical of a new stage of development in international community following the WWII. The coexistence of these two principles has not been easy. They often confronted than partnered. Sovereign equality of states together with the principle of non-intervention also incorporated to the UN Charter. In short, the fundamental rule of international law prescribes that states are duty bound not to intervene in the preserve of other states domestic affairs.

However, the scope of this principle has gradually been reduced due to international norms and requirements on human rights and no longer antagonizes but rather incorporates the concept of human rights. The redefinition of sovereignty to include a duty to respect human rights is widely reinforced in contemporary international law. Even if state sovereignty remains the basic norm of international law, a state cannot pretend absolute sovereignty without demonstrating a duty to protect human rights. International law becomes more permissive regarding cross-border intervention to protect human rights. Thus, where a state engages in systematic and large-scale violations of its citizens' fundamental human rights, the international community through UNSC may forcefully intervene to end such violations.

The linkage between human rights violations and threats to international peace in the UNSC practice was widely recognized by the international community and humanitarian intervention authorised by the SC did not create so much controversy. The power of the SC is not limited by the normal duty on the UN not to intervene in the domestic jurisdiction of member states. Thus, the authority of the SC under charter VII of the Charter is unimpaired to conduct or authorise humanitarian intervention in situations internal crisis produce humanitarian catastrophes with or without cross-border repercussions. But if intervention is not authorised by the UNSC, its legality under international law is more controversial.

The UN Charter prohibits all non-defensive use of force not authorised by the UNSC and hence unilateral humanitarian intervention has no legal grounds under the UN Charter. The pre-existing customary law of unilateral humanitarian intervention did not survive or co-exist with the Charter's prohibition of non-defensive unilateral use of force. Thus, there is no crystallized customary international law (*de lege lata*) in the area of unilateral humanitarian intervention.

In sum, current international law, both under the UN Charter and customary international law, does not provide sufficient legal ground for unilateral humanitarian intervention. Unilateral humanitarian intervention, in extreme cases, may arguably be justified on moral

and political grounds, but such kind of intervention has no legal basis under positive international law.

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