

## DECONSTRUCTING THE LEGALITY OF HUMANITARIAN INTERVENTION UNDER POSITIVE INTERNATIONAL LAW

### *Abstract*

*In recent time, particularly following the end of the cold war, many commentators on international law have argued that sovereignty and domestic jurisdiction must yield to international humanitarian needs. The end of the Cold War and the concomitant vitality of the United Nations Security Council have encouraged a large amount of energy and literature advocating humanitarian intervention. We have witnessed an upsurge in multilateral military interventions in intrastate affairs in the name of humanitarianism and in most cases the intervention are justified on moral grounds, the need to save people from amss atrocity crimes and offences of grave breaches as stipulated in Geneva Conventions. The paper tries to ascertain whether the primacy of state sovereignty as encapsulated in the Westphalian Treaty is actually yielding to a morally underpinned right to intervene in intrastate affairs for humanitarian reasons? In view of the current Charter provisions on the protection of sovereignty, the paper inquires whether it is possible to undertake humanitarian intervention without breaching positive international law?. This essay examines the evolution of state sovereignty and domestic jurisdiction under a positive law framework. It analyzes the moral, political and legal aspects of humanitarian intervention; and determines if humanitarian intervention can be carried out within the margins of positive law. Despite efforts by interventionists to distort the provisions of the UN Charter to accommodate humanitarian intervention, this analysis demonstrates that this notion of humanitarian intervention cannot be reconciled with positive law under the current Charter system.*

**Keywords:** *Humanitarian Intervention, Positive International Law, Legality of, Critique*

### **1. International Law, Sovereignty and Humanitarian Intervention**

Sovereign states have been the most important political units in the international system. Moreover, states have claimed a monopoly on the legal use of force within their borders as well as freedom from interference by external forces. The word sovereignty refers to complete power to govern a country. It refers to the state of being a country with freedom to govern itself<sup>1</sup>. The concept of state sovereign which dates back to the Peace of *Westphalia* in 1648<sup>2</sup>, designed a system of independent nations based on the principles of autonomy, territory, mutual recognition and control. Its modern philosophical definition is normally ascribed to *Jean Bodin*<sup>3</sup>, who described the nature of sovereignty as the absolute power over a territory which only obligations and conditions are dictated by the laws of God and nature. He attributed the location of sovereignty in the sovereign represented in either the King or the Queen as the absolute monopoly of power. However, *Jean Bodin*'s definition of state sovereignty is rather a construction of the 18<sup>th</sup> and 19<sup>th</sup> centuries, 'when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation became the core principles of international society. *Bodin* ascribed the location of sovereignty in one body called the sovereign who is not answerable

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<sup>1</sup> See the Oxford Advanced Learner's Dictionary (International Student's Edition, New 8<sup>th</sup> ed) p.1425

<sup>2</sup> The Treat of Westphalia or otherwise called the European settlement of 1648 brought to an end the eighty years' war between Spain and the Dutch and the German phase of the thirty years' war. The Treaty was negotiated, from 1644, in the Westphalia towns of Munster and Osnabruck (a town in German). The Spanish-Dutch Treaty was signed on January 30, 1648. The treaty of October 24, 1648, comprehended the Holy Roman emperor Ferdinand III, the other Germans Princes, France, and Sweden, England, Poland, Russia, and the Ottoman Empire were the only European powers that were not represented at the two assemblies. The Westphalia treaties is credited with providing the foundation of the modern state and articulating the concept of territorial sovereignty. See [www.britannica.com/event/peace of Westphalia](http://www.britannica.com/event/peace-of-Westphalia) accessed on 09/11/15 12.01am.

<sup>3</sup> Jean Bodin (1530-1596) was a French jurist and political philosopher. He was a member of the Parliament of Paris and Professor of Law in Toulouse. He is best known for his theory of absolute sovereignty. He is credited with expounding the concept of state sovereignty. For further research see [https://en.wikipedia.org/wiki/jean\\_Bodin](https://en.wikipedia.org/wiki/jean_Bodin).

to anybody except the law of God. From *Bodin* location of sovereignty in the Queen or King as the case may be, the theory of absolute Monarch, sovereignty was later identified with the state. It means equality of states. The concept of equality of nations is linked to sovereignty concepts because sovereignty has fostered the idea that there is no higher power than the nation-state, so its sovereignty negates the idea that there is a higher power, whether foreign or international unless consented to by the nation-state.

The general perception is that the concept of sovereignty as it is thought of today, particularly as to its core of a monopoly of power for the highest authority of what evolved as the nation-state, began with that 1648 Treaty of *Westphalia*<sup>4</sup>. The Treaty represented the passing of some power from the emperor with his claim of holy predominance, to many kings and lords who then treasured their own local predominance. As time passed, this developed into notions of the absolute right of the sovereign, and or what we call *Westphalian* sovereignty. One United States government official has succinctly defined the concept of sovereignty and its associated problems in the following words:

Historically, sovereignty has been associated with four main characteristics. First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention<sup>5</sup>.

In its literal meaning, sovereignty has traditionally had two, intertwined, aspects. An internal one, of supreme authority within a country and an external one, regarding the right of being independent and not be subjected to any interference from other countries. It is understood that the importance of this idea of sovereignty as non-interference and non-intervention is also reconfirmed in the Charter of the United Nations<sup>6</sup> which was formed after the World War II. The article states that 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<sup>7</sup>. The same Charter further provides and affirms 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.. In historical terms, the relevance of this vision of sovereignty is most remarkable in its security implications.

Rules that prevented interference in another state's jurisdiction would help safeguard this sovereignty. According to the Grotian conception of law, other principles of international law would emerge as a consequence of the lasting arrangements that sovereign states make among themselves<sup>8</sup> In the absence of any higher authority, restraints were mostly self-imposed, voluntarily observed, and enforced principally by the threat of retaliation. It is in this era—after *Westphalia* and the World Wars wherein sovereignty was then seen as a responsibility rather than authority that the notion of humanitarian intervention first emerged<sup>9</sup>.

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<sup>4</sup> Op. Cit., Footnote 2, Available at <http://fletcher.tllfts.edu/multi/texts/historical/westphalia.txt>

<sup>5</sup>Richard N. Haass, former ambassador and Director of Policy Planning Staff, U.S. Department of State, *Sovereignty: Existing Rights, Evolving Responsibilities*, Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, at 2 (Jan. 14,2003), available at [http://www.georgetown.edu/sfs/documents/haass\\_sovereignty\\_20030114.pdf](http://www.georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf) last visited on 14/11/15 at 12:44pm.

<sup>6</sup> .Article 2(4) of the UN Charter

<sup>7</sup> Ibid

<sup>8</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres [The Law Of War And Peace]*, trans. Francis W. Kelsey (New York: The Bobbs-Merrill Company, Inc., 1925), 102-104, 133.

<sup>9</sup>Leo Gross, *Essays on International Law and Organization* (Dobbs Ferry: Transnational Publishers, 1984), 3 and 12; and K.J.

Holsti, *International Politics*, 5th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1988), 363.

Before this period, most legal scholars and governments espoused the proposition that international law did not obstruct the inherent right of each equal sovereign to treat its subjects as it deemed necessary<sup>10</sup>. Such acts as torture and execution were considered legally significant internationally only when those acts were perpetrated against the citizens of another state. In these instances, international law did not consider the victims in the context of individual rights, but in the context of rights belonging to the governments of the victims. Moreover, attacks committed against the citizens of one state by the representatives of another state were considered attacks on the interests and dignity of the victims' state, thereby requiring compensation. Although most of the purported 'humanitarian interventions' during this period were essentially actions aimed at compelling compensation for assaults against one's own nationals, it is from this practice that standard arguments advocating humanitarian intervention derive<sup>11</sup>.

Before delving into the U.N. Charter and humanitarian intervention, it is necessary to examine briefly the relevant articles in the Covenant of the League of Nations. Although the League will always be most famous for its inefficacy in preventing World War II, the Covenant did further codify the principle of non-intervention and the sanctity of domestic jurisdiction which would re-emerge in an even stronger form in the U.N. Charter. The Covenant of the League of Nations provided thus: 'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'<sup>12</sup>. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled. Although the Covenant provided for potentially effective economic and military countermeasures against aggressors, it allowed for each member to determine whether aggression had been committed and if sanctions would be applied. That was the weakness of the system then and that accounted for the enormous powers given to the UN Security Council under the Charter to determine whenever and what constitute threat to international peace and security<sup>13</sup>.

Nonetheless, in formulating the domestic jurisdiction clause of the Covenant, the drafters made it clear that the League should only possess such competence as was delegated to it: should any doubt emerge between the authority of the organization and the sovereignty of the state, the latter should receive the benefit<sup>14</sup>. As a result, The Covenant of the League of Nations has a provision to the effect that: 'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement'.

The insertion of this clause was aimed at assuaging some member state who fear that a world government that might encroach into their domestic jurisdiction. Subsequently, in devising a much wider functional scope for the League's successor— particularly relating to economic and social matters—the designers of the United Nations system would formulate a stronger domestic jurisdiction clause, with a broader range of

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<sup>10</sup> Robert M. Cassidy, *Sovereignty Challenged: Sovereignty versus the Chimera of armed Humanitarian Intervention* (1997) Fletcher Forum of World Affairs; page 2 available on [www.fletcherforum.org/archives/212](http://www.fletcherforum.org/archives/212) accessed on 18/08/2018

<sup>11</sup> Tom J. Farer, 'The United Nations and Human Rights: More Than a Whimper, Less Than a Roar,' in *Human Rights in the World Community*, 2nd ed., ed. Richard Pierre Claude and Burns H. Weston (Philadelphia: University of Pennsylvania Press, 1992), 227

<sup>12</sup> Article 10 of the Covenant of the League of Nations.

<sup>13</sup> See Article 39 of the UN Charter

<sup>14</sup>Inis L. Claude, *Swords into Plowshares*, 4th ed. (New York: Random House, 1984), 181, cited by Robert M. Cassidy, Op. cit pg. 4

application, in order to protect the domestic domain of states<sup>15</sup>. The U.N. Charter, further integrated and reflected the values of the *Westphalian* state system, and reaffirmed the principles of non-intervention in domestic affairs and non-use of force across international borders by affirming that the United Nations itself 'is based on the principle of the sovereign equality of all of its Members'<sup>16</sup>. Most importantly, the Charter urges member states: 'To refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state' that would not be consistent with the purposes of the organization'<sup>17</sup>. This provision shows that the framers of the UN Charter intend to preserve the sanctity of the sovereignty as agreed in the *Westphalian* Treaty. In addition to the foregoing provisions, the Charter went further to discourage even the UN itself from notion of interfering in any internal affairs of the sovereign state. The important of the concept of state sovereignty within the framework of the Charter was illustrated thus:

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<sup>18</sup>.

The significant differences according to Cassidy between Article 2(7) of the Charter and Article 15(8) of the League of Nations Covenant were the substitution of 'essentially' for 'solely,' the concept of United Nations intervention, and the absence of a reference to an international law standard<sup>19</sup>. He maintained that as demonstrated by the exception for enforcement under Chapter VII, these changes were not intended to weaken the effectiveness of the organization in maintaining international peace and security but that the revisions were aimed at strengthening the principle of domestic jurisdiction as a method of limiting the jurisdiction of the organization. Article 2(7) of the Charter therefore is concerned with the relations of the United Nations and its members, not with the intervention by one state in the domestic affairs of another. The United Nations cannot intervene in matters that in principle are not governed by international law.

Interestingly, in many cases when the UN has called for intervention, like the Libyan crisis using resolution 1973, no one has invoked article 2(7) before the political organs, nothing specific has been proposed to address the issue of competence of such intervention in view of article 2(7). In February, 2011 UN Security Council adopted Resolution 1970<sup>20</sup> which imposes an arms embargo on Libya and Resolution 1973<sup>21</sup> which imposes a no-fly zone over Libya and authorized member states to take all necessary measures to protect civilians-populated areas under attack or threats of attack from the Libyan regime. Again, no political organ of the United Nations has requested the International Court of Justice to render an advisory opinion on the interpretation of Article 2(7). An issue which has inhered in interpretation and practice since the inception of the United Nations is whether other provisions of the Charter in effect internationalize some aspects of domestic jurisdiction or whether Article 2(7) effectively prevents such internationalization<sup>22</sup>.

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<sup>15</sup> Ibid, at pg. 4. See also Leland M. Goodrich, Edvard Hambro, and Anne Patricia Simons, *Charter of the United Nations*, 3rd ed. (New York: Columbia University Press, 1969), 61-62 all cited by Robert M. Cassidy, Op. cit, pg 4

<sup>16</sup> See Article 2(1) of the UN Charter

<sup>17</sup> Article 2(4) UN Charter

<sup>18</sup> Article 2(7) UN Charter

<sup>19</sup> Robert M. Cassidy, Op. cit pg. 6

<sup>20</sup> See the summary of NATO intervention in Libya. Available on [https://www.nato.int/cps/en/natolive/topics\\_71652.htm](https://www.nato.int/cps/en/natolive/topics_71652.htm) last visited on 20/11/15 by 5.30am

<sup>21</sup> Ibid

<sup>22</sup> Benedetto Conforti, 'The Principle of Non-Intervention,' in Mohammed Bedjaoui, ed., *International Law: Achievement and Prospects* (Paris: UNESCO, 1991), 477

While there is nothing in the Charter which addresses armed humanitarian intervention, there are some who embrace the Charter's provisions on human rights and claim that such provisions and subsequent declarations attenuate the effect of Article 2(7) thus paving the way for a broader and more permissive UN approach to humanitarian problems.

The interventionists emphasize Article 55 of the Charter as giving the member states specific responsibilities with regard to the 'universal observance of human rights and fundamental freedoms. In addition, Article 56 furthers member's responsibility by calling upon them to 'take joint and separate action in cooperation with the UN for the achievement of the purposes set out in Article 55. The Preamble of the Charter reaffirms 'faith in fundamental human rights ... in the equal rights of men and women and of nations large and small.' Moreover, one of the purposes of the United Nations is to 'achieve international cooperation in solving international problems of a humanitarian character' and in 'promoting and encouraging respect for human rights'<sup>23</sup> Furthermore, the Charter also charges the General Assembly with initiating studies and making recommendations 'for the purpose of ... assisting in the realization of human rights'<sup>24</sup>. Finally, the Charter charges the Economic and Social Council with 'setting up commissions ... for the promotion of human rights'<sup>25</sup>.

The subsequent Universal Declaration of Human Rights in 1948 and the UN Convention on Genocide<sup>26</sup> have been consistently cited as strengthening the human rights machinery of the United Nations, thereby making state boundaries more porous in the face of international human rights efforts. Subsequently, after the adoption of the UN Charter additional treaties and resolutions were ratified or adopted which has helped to strengthen the argument in favour of intervention, namely the two U.N. Human Rights Covenants of 1966<sup>27</sup>, the Declaration on Principles of International Law of 1970<sup>28</sup>, and Resolution 46/182<sup>29</sup> that seek to strengthen U.N. coordination of humanitarian assistance. These documents are often cited to help legitimize and invigorate the new propensity for armed humanitarian intervention. However, the argument is not valid for obvious reasons. These instruments and the joint statement by the Security Council as well as the secretary-general's rhetoric do not bind states to use force for humanitarian purposes and as they do not belong to any of the sources of international law<sup>30</sup>. However, it is important to note that the Declaration only establishes

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<sup>23</sup> Article 1(3) of the Charter

<sup>24</sup> Article 13 of the UN Charter

<sup>25</sup> Article 68 of the UN Charter

<sup>26</sup> The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December, 1948 as General Assembly Resolution 260. The Convention entered into force on 12 January, 1951 with 39 Signatories but has since been ratified by all member nation of the United Nations. Available on <https://en.m.wikipedia.org/wiki/Genocide> accessed on 25 September, 2018.

<sup>27</sup> The convention includes ' International Covenant on Civil and Political Rights, ICCPR a multilateral treaty adopted by the UN General Assembly with resolution 2200A on December, 16 1966 and in force from 23 March, 1976 in accordance with Article 49 of the Covenant and available on [www.un-documents.net/a18r1966](http://www.un-documents.net/a18r1966) accessed on 18/09/2018 International Covenant on Economic, Social and Cultural Rights also adopted by the UN General Assembly on 16 December, 1966 with resolution 2200 (XXI) and available on [www.un-documents.net/icescr](http://www.un-documents.net/icescr) accessed on 18/09/2018

<sup>28</sup> The Declaration on Principles of International Law concerning Friendly Relations and Co-operation with the Charter of the United Nations adopted with resolution A/RES/25/2625. Available on [www.un-document.net](http://www.un-document.net) accessed on 18/9/2018

<sup>29</sup> A/RES/46/182 of 1991 'Strengthening the Coordination of Humanitarian Assistance, adopted on 19 December, 1991 available on [www.un-org/documents/res/46](http://www.un-org/documents/res/46) accessed on 18/9/2018.

<sup>30</sup> Statute of the International Court of Justice (ICJ) provides for function which according to Article 38 in the Statute of the ICJ, is to decide disputes in accordance with international law and the Article went on to list in hierarchical order, the sources of international law. Article 38(1)(a) covers international treaties as 'establishing rules expressly recognized by states;' Article 38 (1)(b) addresses 'international custom' manifested by state practice accepted as law; Article 38(1)(c) concerns the 'general principles of law recognized by civilized nations;' and lastly, at the bottom of the hierarchy, Article 38(1)(d) includes 'the decisions and teachings of the most highly qualified publicists,' but only as a secondary source for determining international law.

the minimum conditions and standards of human rights toward which all states should aim. It is neither binding nor enforceable under international law but formed a core document in this discuss of human rights in international law.

This is because the Genocide Convention actually defines and codifies the crime of genocide, however, it does not aim to attenuate or erode the principle of sovereignty. Though the Statute of the International Criminal Court<sup>31</sup> has jurisdiction to try the offence of genocide, it is the individual actors that can be subjected to prosecution. This is because the Genocide Convention requires the parties to punish individuals who commit genocide ‘pursuant to their municipal laws<sup>32</sup>.’ The jurisprudence of International Court of Justice considers the prohibition of genocide as peremptory norms of international law and recognizes that the principles underlying the Convention are principles which are recognized by civilized nations binding on states, even without any conventional obligation<sup>33</sup>. The Genocide Convention stipulates that those accused of genocide ‘shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted this jurisdiction. The language of the Statute<sup>34</sup> is merely persuasive as it does not require any party to submit to the jurisdiction of such a tribunal.

There was not a strong collective will of the international community to break through the barrier of state sovereignty in favour of the Charter provisions relating to human rights wherever it shielded some form of oppression against it’s acts. The subordination of human rights in the hierarchy of the United Nations' purposes is manifested in the reality that the U.N. Charter excludes a provision for intervention on humanitarian grounds. And it is this absence of provision for intervention on humanitarian ground that has been the root cause of the tension between sovereignty and intervention. The only way to lift the protective barrier afforded to sovereignty by the combined readings of articles 2(4) and 2(7) of the Charter is to activate the only one exception to the sanctity of domestic jurisdiction<sup>35</sup>. This will now take us to the enforcement measures of the UN as articulated in the Charter.

## **2. UN Enforcement Measures under Chapter VII**

This is the provision<sup>36</sup> that allows the UN Security Council to authorize enforcement action under Chapter VII. The Charter<sup>37</sup> binds members of the United Nations ‘to carry out the decisions of the Security Council in accordance with the present Charter.’ The main provision is article 24 of the Charter that vests the UN Security Council with powers to maintain international peace and security on behalf of the member nations of the international community, and urge the members to carry out any decision of the Security Council. Again 39 gives the Security Council the responsibility of determining that a threat to the international peace exists and of deciding what enforcement measures to undertake according to Articles 41 and 42. In essence, activating Article 39 renders Article 2(7) inoperative. This is because of the effect of the last paragraph of article 2(7) of the Charter which say that ‘nothing in this Charter shall prejudice the enforcement action under chapter VII’. 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 Articles 41 and 42, to maintain or restore international peace and security. Enforcement measures rest on the requirement that the Security Council will determine the existence of a threat to peace thereby opening the door to intervention under Chapter VII. An Article 39 judgment of the Security Council

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<sup>31</sup> Article 6 of the ICJ Statute also known as the Rome Statute

<sup>32</sup> See Article II and III of the Convention

<sup>33</sup> See Reservations on the Convention of Genocide; I.C.J Rep. 15, 23; see also Case Concerning Barcelona Traction, Light and Power Co. (Belgium V. Spain), 1970 I.C.J ., Rep 3, 32.

<sup>34</sup> Referring to article 6 of the ICJ Statute

<sup>35</sup> Op. Cit, footnote 11

<sup>36</sup> Referring specifically to article 39 of the Charter

<sup>37</sup> Article 25 of the Charter

determining a threat to the peace which is based on a majority decision (at least nine of the 15 members) without a dissenting vote by a permanent member is legally binding.

According to Article 41, the Security Council can decide which measures should be implemented in order to enforce its decisions ‘these may include complete or partial interruption of economic relations and of rail, sea....’. The most significant limitation on Article 41 is the exclusion of the use of armed force: ‘measures not involving the use of armed force.’ Article 42, however, is more germane to armed intervention, since it is the only article which provides for the use of armed forces to the effect that:

Should the Security Council consider that measures provided for in Article 41 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. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations<sup>38</sup>.

The Charter affords the Security Council latitude in deciding whether a given situation requires the use of military force. Article 42 does not require the Security Council to wait for proof that Article 41 measures are insufficient, nor does it require those measures to have been previously implemented. Instead, it is satisfactory if the Security Council elects to implement Article 42 measures immediately based on an assessment that Article 41 would be ineffective. Furthermore, enabling the Security Council to make decisions that all members are obligated to carry out, the Charter's enforcement modalities surpass those which were established under the Covenant, whereby the League Council could only recommend military measures<sup>39</sup>.

From the reading of the provisions of the Charter and after examining its provisions which pertain to multilateral military intervention, the unambiguous absence of any humanitarian purpose is evident. To be justified legally within the scope of the Charter for any intervention, humanitarian or otherwise, the Security Council must determine a ‘threat to the peace, breach of the peace, or act of aggression’ in order to apply collective military force ‘to maintain or restore international peace and security<sup>40</sup>. Any moral or humanitarian impetus must only be ancillary to the threat to the peace. And the UN Security Council has on several cases activated article 39 on the ground that humanitarian crises is a threat to international peace and security<sup>41</sup>. This view is supported by most of the UN Security Council resolutions like Resolution 1973<sup>42</sup> authorizing a no fly zone in Libya to protect civilian population from attacks by the regime forces.

### 3. Post-Cold War Humanitarian Intervention

It was the former Secretary - General of the United Nations who stated in 1992 that ‘the time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality’<sup>43</sup>. He stated that it is the task of leaders of states today to understand this and find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. The end of the Cold War heralded

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<sup>38</sup> Article 42 of the Charter

<sup>39</sup> Jochen A. Frowein, ‘Article 42,’ in *The Charter of the United Nations*, (Oxford: Oxford University Press, 1994), 631

<sup>40</sup> Article 39

<sup>41</sup> For example, Resolution 688 on Iraq in 1991 viewed the mistreatment of the Kurds in Northern Iraq as a threat to international peace and security. The growing over flow of refugees from Iraq to her regional neighbors was viewed as sufficient to activate chapter 39 of the Charter.

<sup>42</sup> Resolution 1973 was adopted by the UN Security Council in 2011 authorizing a no fly zone in Libya to protect the civilian population of eastern Libya from the regime army.

<sup>43</sup> Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping* (New York: United Nations Printing Office, 1992), par. 17.

a new era of unprecedented cooperation in the Security Council and unparalleled collective action under the auspices of the United Nations. Even before the Cold War officially ended, the abatement of bipolar rivalry had allowed the international community to rally against Iraq's seizure of *Kuwait* and to address the plight of the *Kurds* and *Shi'a* within Iraq. The above statement of *Boutros-Ghali* subsequently appeared in 'An Agenda for Peace' in June 1992, which to humanitarian interventionists implied that sovereignty was becoming more malleable; the 'An Agenda for Peace' itself being a proposed framework for a more active United Nations role in maintaining the peace. Many humanitarians and promoters of human rights consequently embraced these developments as providing new opportunities for humanitarian intervention<sup>44</sup>.

However, even General Assembly Resolution 46/182<sup>45</sup>, which was adopted at a time when there was high hope of collective UN action, because it came immediately following the end of the cold war still stipulates that 'sovereignty, territorial integrity, and national unity of states must be fully respected in accordance with the Charter of the United Nations.' Despite the evidently popular support for humanitarian intervention which increased after the end of Cold War, there has not been any successful attempt to amend the Charter, and it is therefore clear that the provisions of the Charter particularly relating to protection of sovereignty remain in force. There has been several interventions since the end of the cold war. From Iraq to Haiti, Somalia and belatedly Rwanda all against the territorial integrity of a sovereign state but with a justification by the UN Security Council that the internal crises constitute threat to international peace and security under Article 39 of the Charter. In resolution 688<sup>46</sup> even though the UN Security Council approved same, some members showed some dissent because the affairs were purely within the territorial sovereignty of Iraq. That was why the use of armed force was never included in the resolution. Resolution 688 demanded that Iraq 'cease its repressive acts and permit immediate access by international relief organizations to persons in need of assistance'<sup>47</sup>. However, the Resolution was not unlimited in its scope concerning the UN's power to enforce its demands. The Resolution contained no mention of Chapter VII of the Charter, which authorizes the Security Council to use force to intervene, nor does it mention any 'collective enforcement measures. The purpose of the intervention was not to remedy the internal violations of human rights, but rather it was the external effects of the Iraqi tyranny and this arguably is the first time the trans-border effect of human rights violations was considered grounds for UN intervention<sup>48</sup>. The Resolution had precedential worth because 'this was the first time that the (Security) Council had characterized severe human rights deprivations having minimal external effects as a threat to international peace and security'<sup>49</sup>.

#### **4. Some United Nations Humanitarian Intervention**

Arguably, the U.N. interventions in Somalia, Iraq, Rwanda etc clearly conformed to the definition of humanitarian intervention presented in the introduction which occurs as a result of massive humanitarian impetus; a multilateral action under a UN mandate. We shall now examine few instances of UN humanitarian intervention to see however, politics and positive law irregularities inhered in the some of the operations particularly the Somalia operation.

##### **Operation Provide Comfort**

Operation Provide Comfort I and Operation Provide Comfort II were military operations initiated by the US, Britain, and some of the gulf war allies starting in April 1991<sup>50</sup>, to defend Kurds fleeing from their homes in

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<sup>44</sup> Lori F. Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993)

<sup>45</sup> Ibid

<sup>46</sup> Op. cit

<sup>47</sup> Ibid

<sup>48</sup> Richard B. Lillich, *The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World*, 3 Tul. J. Int'l & Comp. L. 1, 6 (1995)

<sup>49</sup> Ibid

<sup>50</sup> Operation Provide Comfort as recorded [https://en.wikipedia.org/wiki/Operation\\_Provide\\_Comfort](https://en.wikipedia.org/wiki/Operation_Provide_Comfort) last visited on 20/11/15 by 6.12am.



northern Iraq in the aftermath of the Persian Gulf war and deliver humanitarian aid to them. On 5<sup>th</sup> April, the UN passed UN Resolution 688<sup>51</sup>, calling on Iraq to end the repression of its population. This did not happen and on April 6, Operation Provide Comfort began to bring humanitarian reliefs to the Kurds. A no-fly zone was established by the United States, United Kingdom and France. This was enforced by American, British and French aircrafts. Included in this effort was the delivery of humanitarian reliefs and military protection of the Kurds by a small allied (US-UK-FRANCE-TURKEY) ground force based in *Turkey*. Operation Provide Comfort II began on 24<sup>th</sup> July, 1991, the same day Operation Provide Comfort 1 ended. This operation was primarily military in nature and its mission was to prevent Iraqi aggression against the *Kurds*. Partly as a result of Western Commitment to the *Kurds*, Iraqi troops were withdrawn from the *Kurdish* regions in October 1991 and these areas assumed de facto independence from Iraq<sup>52</sup>.

### **Operation Uphold Democracy**

Operation uphold Democracy started from 19<sup>th</sup> September, 1994 to 31<sup>st</sup> March, 1995<sup>53</sup> and was an intervention designed to remove the military regime installed by the 1991 *Haitian coup d'état* that overthrew the elected president *Jean Bertrand Aristide*. The operation was effectively authorized by the 31<sup>st</sup> July, 1994 United Nations Security Council Resolution 940<sup>54</sup>. The operation began with the alert of the US and its allies for a forced entry into the island nation of *Haiti*. The Civilian elected government was restored but this cannot be called humanitarian intervention since the main objective of the US and her allies was to remove the military government. However, the US had argued in defence of the intervention that it was to help restore peace to Haiti and halt the cross-boarder exodus of people which will have the effect of destabilizing the region, thus constituting a threat to international peace and security.

### **East Timor**

The United Nations Transitional Administration in East Timor<sup>55</sup>, was another humanitarian intervention recorded and it was established through (UN Resolution 1272) of 1999. It was an intervention by the United Nations in East Timor which provided an interim civil administration and a peacekeeping mission in the territory of East Timor, from its establishment on 25<sup>th</sup> October 1999 until its independence on 20<sup>th</sup> May 2002, following the outcome of the East Timor Special Autonomy Referendum. A coalition of nations sent troops to support the peace keeping mission. The Forces were led by Australia, which provided the largest contingent and the out of theatre base for operations, supported by New Zealand and other allied forces<sup>56</sup>.

### **Intervention in Libya**

The NATO intervention in Libya is one of the most recent humanitarian interventions recorded and it was the first intervention anchored on the emerging norm of responsibility to protect. A peaceful protests in *Benghazi* meet with violent repression by the *Qadhafi* regime. In February, 2011 UN Security Council adopted Resolution 1970<sup>57</sup> which imposes an arms embargo on *Libya*. By 17<sup>th</sup> March 2011, the UN Security Council adopted another resolution (Resolution 1973) which imposes a no-fly zone over *Libya* and authorized member states to take all necessary measures to protect civilians-populated areas under attack or threats of attack. Following the repression targeting civilians in February 2011, NATO answered the United Nations call to the International Community to protect the *Libyan* people. In March 2011, a coalition of

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<sup>51</sup> Op. cit

<sup>52</sup> *Ibid*

<sup>53</sup> Operation Uphold Democracy, [https://en.m.wikipedia.org/wiki/Operation\\_Uphold\\_Democracy](https://en.m.wikipedia.org/wiki/Operation_Uphold_Democracy) last visited on 12/07/15 by 3.08am.

<sup>54</sup> *Ibid*

<sup>55</sup> United Nations Transitional Administration in East Timor, 1999-2002, [https://en.m.wikipedia.org/wiki/United\\_Nations\\_Transitional\\_Administration\\_in\\_East\\_Timor](https://en.m.wikipedia.org/wiki/United_Nations_Transitional_Administration_in_East_Timor) last visited on 12/6/15 by 2.34am.

<sup>56</sup> *Ibid*

<sup>57</sup> See the summary of NATO intervention in Libya. Available on [https://www.nato.int/cps/en/natolive/topics\\_71652.htm](https://www.nato.int/cps/en/natolive/topics_71652.htm) last visited on 20/11/15 by 5.30am

NATO Allies and partners acting on UN Resolution 1973<sup>58</sup> of 2011 began enforcing an armed embargo, maintaining a non-fly zone and protecting civilian populated areas from attack or the threat of attack in *Libya* under Operation Unified Protector (OUP). OUP was successfully concluded on 31<sup>st</sup> October, 2011<sup>59</sup>.

### **UNOSOM I Somalia**

Faced with the humanitarian disaster in *Somalia*, exacerbated by a complete breakdown in civil order, the United Nations had created the UNOSOM I Mission in April 1992<sup>60</sup>. However, the complete intransigence of the local faction leaders operating in Somalia and their rivalries with each other meant that UNOSOM I could not be performed. The mission never reached its mandated strength. Over the final quarter of 1992, the situation continued to worsen<sup>61</sup>. Factions were splintering into small factions, and then splintered again. Agreements for food distribution with one party were worthless when the stores had to be shipped through the territory of another. Some elements were actively opposing the UNOSOM intervention. Troops were shot at, aid ships attacked and prevented from docking, cargo aircraft were fired upon and aid agencies, public and private, were subjects to threats looting and extortion. By November, General *Mohamed Farrah Aidid* had grown confident enough to defy the UN Security Council and formally demanded the withdrawal of peacekeepers as well as declaring hostile intent against any further UN deployments. This angered the United Nations. The Unified Task Force (UNITAF) was formed, which was a US led United Nations-sanctioned Multinational Force which was operated in Somalia from 5<sup>th</sup> December 1992 to 4<sup>th</sup> May 1993. A United States initiated (Code named Operation Restore Hope) UNITAF was charged with carrying out United Nations Security Council Resolution 794 to create a protected environment for conducting humanitarian operation in the southern half of the country. After the killing of several *Pakistani* peacekeepers, the Security changed UNITAF's mandate issuing the resolution 837 that establishes that UNITAF troops could use "all necessary measures" to guarantee the delivery of humanitarian aids in accordance with Chapter VII of the United Nations Charter and it was regarded as a success<sup>62</sup>. In the context of humanitarian exigencies, Somalia clearly provided a very strong moral impetus for action. On the other hand, the evolving mandate for the use of force was adopted in accordance with the Charter, more or less. Although the Security Council did not specifically invoke Article 39, it did determine that there was a threat to international peace and security. The Council also stated that it was acting under Chapter VII when it authorized the use of force. The major positive law irregularity inhered in the apparent absence of any threat to international peace and security because the alleged threats were within the territorial boundaries of Somalia and there was no cross-boarder movement of either troops or refugees. The Security Council determined that the 'magnitude of human tragedy' constituted this threat<sup>63</sup> (S/RES/794). There were refugee flows resulting from the catastrophe, but nowhere in the Security Council documents were the refugees considered a threat. It is evident that the Security Council contrived the legal fiction that intrastate human suffering presented a threat to the international community in order to bypass Article 2(7) for moral and political reasons.

Clearly, it is submitted that approach overstep the bounds of positive law. Resolution 733 of January 20, 1992 for example expressed alarm at 'the heavy loss of life' and concern 'that the continuation constitutes ... a threat to international peace and security.' Moreover, this resolution made a decision under Chapter VII to implement a 'complete embargo on all deliveries of weapons and military equipment,' although it did not explicitly invoke Article 39 or 41 of the Charter. Though the Charter left the UN Security Council with the wisdom to determine what constitute threats to international peace and security, it becomes a matter of national and geopolitical interest of the permanent members of the UN Security Council to decide when an

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<sup>58</sup> *Ibid*

<sup>59</sup> *Ibid*

<sup>60</sup> Unified Task Force Somalia, [https://en.m.wikipedia.org/wiki/Unified\\_Task\\_Force](https://en.m.wikipedia.org/wiki/Unified_Task_Force) last visited on 21/11/15 by .43am.

<sup>61</sup> *ibid*

<sup>62</sup> *ibid*

<sup>63</sup> See UN/S/RES/794

intrastate crisis constitute such threat under article 39 so as to authorize intervention. The situation in Syria since 2011 is worse than the situation in Iraq when resolution 688 was adopted in 1991, and cannot be compared to the situation in Libya when resolutions 1973 was adopted in 2011. Yet the paralysis and inaction of the Security Council in the case of Syria cannot be justified except to add say it is not in the geopolitical interest of Russia and China to intervene militarily in Syria against the *Assad* regime.

We shall now examine humanitarian intervention without a UN mandate to see if the concept has any positive law endorsement.

### **5. Humanitarian Intervention without a UN Security Council Mandate**

The linkage between human rights and international peace in the UN Security Council practice was widely recognized by the international community and humanitarian intervention with a mandate of the Security Council did not create so much controversy<sup>64</sup>. But if intervention is not authorized by the Security Council, its legality under the Charter is more controversial<sup>65</sup>. Although the UN Security Council authorized most of the Post-Cold War interventions, the practice of intervention without the Security Council mandate has not disappeared completely. And in the emerging state practice as we have seen with AU/ECOWAS legal regime<sup>66</sup>, some organizations are now inclined to embark on humanitarian intervention in their regions with or without UN Security Council authorization<sup>67</sup>. In several instances states have intervened with force and without advance authorization from the Security Council, 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<sup>68</sup> as well as NATO's intervention in Kosovo<sup>69</sup>. The Iraqi and Kosovo cases are quite complicated because there were prior Security Council resolutions defining the situation as a threat to peace, but none giving explicit authorization for the use of military force. The debate about these cases has not been settled among scholars.

### **6. 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 Security Council 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 has been discussed 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 authorized by the Security Council, and in exercise of the right of self defence recognized in Article 51 of the Charter<sup>70</sup>. Others<sup>71</sup> 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 specific prohibitions.

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

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<sup>64</sup> Newman, Edward. *Review Article-Humanitarian Intervention Legality and Legitimacy*. (The International Journal of Human Rights vol.6) 2002 Available on-line at <http://dx.doi.org/10.1080/714003777>

<sup>65</sup> See Newman, Ibid

<sup>66</sup> Both the African Union in her AU Constitutive Act, Article 4(h), (g) and the ECOWAS MCPMPRS Protocol Article 10 & 25 now empowers the AU and ECOWAS to undertake military intervention in Africa and West Africa respectively even without the UN Security Council approval.

<sup>67</sup> See Article 4(h) of the AU Constitutive Act, Article 4(j) & (k) of the AUPSC Protocol and Article 10 of the ECOWAS MCPMPRS Protocol

<sup>68</sup> United Nations Security Council Resolution 688 adopted on 5<sup>th</sup> April, 1991 in which the Council condemned the sufferings of the Iraqi Kurds but failed to authorize intervention. The US and her allies were later to launch an intervention without the UNSC authorization. Available on <https://en.m.wikipedia.org/wiki/united-nations> accessed on 20/08/2018

<sup>69</sup> Security Council Resolution 1244 on the Situation relating to Kosovo/ UN available on <https://peacemaker.un.org>kosovo-resolution> accessed on 20/08/2018. This resolution provides a framework for the resolution of the conflict in Kosovo by authorizing the deployment of an international civilian peace keeping mission. This fell short of military intervention. The US and her allies under the auspices of NATO later launched a military intervention in Kosovo without the UNSC approval.

<sup>70</sup> Oscar Schachter, *Intervention and The United Nations*: available on [heinonline.org>cgi-bin>get\\_pdf](http://heinonline.org>cgi-bin>get_pdf) accessed on 20/08/2018

<sup>71</sup> D'Amato, Anthony. *International Law: Process and Prospect*. (Irvington, NY: Transnational Publishers) 1995

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 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 does not have the sanction of positive international law under the Charter. It follows that article 2(4) of the UN Charter prohibits all non-defensive use of force not authorized by the UNSC and hence unilateral humanitarian intervention has no legal ground under the UN Charter.

## **7. Conclusion**

The concept of armed humanitarian intervention is viable from a purely moral perspective. To be certain, the moral motives for all such endeavors are clear and compelling. The hundreds of thousands of deaths that resulted from the internecine warfare and self-interested power struggles of the Somali warlords (for example) was a clear and compelling moral impetus behind which the international community eventually rallied. The situation in Somalia seemed to provide sound moral reasons for doing something. However, after closer examination it is evident that the decision to launch the operation was influenced by political factors as well. It is impossible to divorce political reality from moral motives. Although the situation in Somalia presented a genuinely compelling moral motive, morality did not prompt significant action for almost two years. The action in Somalia was backed by a Security Council authorization based on a disingenuous application of Article 39. The Security Council did authorize both UNITAF and UNOSOM II to apply force in accordance with Articles 39 and 42, but it conjured up the interpretation that intrastate human suffering presented a threat to peace and security.

The interpretation of humanitarian crises as constituting threats to international peace and security under article 39 by the Security Council is a clever move by the UN body to accommodate intervention on moral grounds. For now, there is no prevalent state practice for humanitarian intervention which could be considered as a source of law under the ICJ Statute<sup>72</sup>. Even the Operation Provide Comfort<sup>73</sup> which was adopted by the UN could not lend such support because Operation Provide Comfort did not authorize for armed intervention and thus cannot support existing state practice under Article 38 (1)(b) to justify the notion of armed humanitarian intervention. This is because General Assembly humanitarian resolution (Resolution 46/182) reaffirmed the primacy of domestic jurisdiction and territorial integrity of states. As earlier stated, Resolution 688 itself did not authorize the use of military force within Iraq's borders. Although the Security Council distorted the Charter to justify intervention in Somalia, its members tried to avoid any precedent-setting implications by qualifying their actions as 'exceptional' and 'unique'<sup>74</sup>.

Since the principal sources of positive law do not currently authorize armed humanitarian intervention, it seems that the publicists who promote humanitarian intervention are relying on a subsidiary means of international law under Article 38 (1) (d) to justify armed intervention. However, appealing to morality, non binding resolutions, and politically expedient Security Council behavior to legally justify intervention is dangerous. Not only are the publicists failing to appreciate the paramountcy of domestic jurisdiction, but, advocating humanitarian intervention jeopardizes the already tenuous international legal order. The Charter system is based on the consent of sovereign states and it relies on those state actors to contribute to the system. States cooperate within the framework of the Charter to derive some benefit from its functions. States did not join the United Nations only to surrender their sovereignty to either a notion of humanitarian primacy or Security Council control over their internal operations that were never envisioned or codified. The bottom line is that law, politics and morality must all coalesce in order to create the conditions for the successful conduct of UN collective actions. But in the absence of such UN collective action, there is no legal impetus in international law for unauthorized humanitarian intervention.

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<sup>72</sup> See article 38 (a-d)

<sup>73</sup> Op. cit, footnote 48

<sup>74</sup> See 47 S/PV.3145, 17; and S/RES/794 all passed in the midst of the Somali crisis