WHO KILLED ARTICLE 2(7) OF THE CHARTER OF THE UNITED NATIONS? AN ASSESSMENT OF THE CONCEPT OF DOMESTIC JURISDICTION OF STATES IN LIGHT OF UNITED NATIONS PRACTICE

BY

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(G62/89167/2016)

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M) OF THE UNIVERSITY OF NAIROBI

SEPTEMBER, 2016

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DECLARATION

I GLADYS WAMBUI KIAMAH..., the undersigned herein, do solemnly declare that the material presented herein, is my original work both in form and substance and that all the sources used, referred to or quoted have been indicated and duly acknowledged by complete references and that the work has never been, to the best of my knowledge, presented in any other academic institution.

Signed.....

Date.....23/08/2021.....

This thesis has been submitted for examination with my knowledge and approval as the University Supervisor.

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DEDICATION

I dedicate this work to my mother, Priscilla Gathoni Wamahiu, who paid my first fees for LLM and threw me to the deep end, trusted me to find my way up and gave me unconditional support. To my father, Charles Wamahiu Kiama, who strongly battled and survived cancer, challenging me to complete this course despite the many obstacles. Your strength and bravery fueled me and continues to inspire me. To my late beloved cousin and brother, Kenneth Mathangani Kiama, who stood by my side when I was given the power to read. To my departed uncle, friend and confidant, Fredrick Moses Mundia, who missed the chance to witness the end of this journey by a whisker. It will never be the same without him, but his hunger for knowledge and education will forever burn in me. To Rose Kinyua, my angel on earth. Your genuine friendship and support is invaluable, I would never trade it for anything. To my children, Talom Wamahiu Waigumo, Ariannah Gathoni Wambui, and Ameerah Kananu Mwirigi, without whom I would have completed my thesis five years ago. You were worth the wait. And finally, to my family, relatives and friends, who bring a thrill to my life and make it absolutely

interesting. May the fruits of this work be enjoyed by us all. With love.

ACKNOWLEDGEMENTS

The completion of this paper and the research behind it was made possible by the exceptional support of my supervisor, Prof. Francis D.P. Situma. His encouragement, knowledge, enthusiasm and thorough attention to detail have been an inspiration and kept my work on track from my first encounter with him to the final draft of this paper.

Julie Wahonya and Janet Ogata, my colleagues at the University of Nairobi, have been extremely supportive both academically and personally. They have patiently answered my questions and offered their unconditional support and help in my times of need.

To my anonymous peer reviewer who did not hesitate to challenge every conclusion or hypothesis in my work. For numerously looking over my transcripts and suggesting numerous books that highly aided my research. To Dr. Evanson Njaramba Gichuki for his academic support. Your doors were always open to me and you treated any issue raised with the speed and seriousness it deserved.

The generosity and expertise of all have greatly improved this study and saved me from many mistakes. However, any errors that inevitably remain are entirely my own responsibility.

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Charter of the United Nations 1945

League of Nations 1920

Universal Declaration of Human Rights 1948

International Court of Justice 1945

Vienna Convention on the Law of Treaties 1969

CHAPTER ONE: INTRODUCTION

1.1 Background

The Charter of the United Nations was signed on 26 June, 1945 in San Francisco and came into force on 24 October 1945.[1] The United Nations (UN) is an international organization that was created by 51 member states, on 24th October 1945, for purposes of promoting international cooperation.[2] It was established as a successor to the League of Nations, after World War II, to ensure prevention of another conflict.[3] The founding states were committed to "maintaining international peace and security, developing friendly relations among nations, and promoting social progress, better living standards and human rights".[4]

Many states have joined the UN, which currently has 193 member states. The UN's duties are broad and touch on many different areas. This is because it has a special international character, and it also has powers under the UN Charter.[5] Through the UN, member states are able to air their different opinions, and settle disputes in a

[1] Clive Archer, *International Organizations* (3rd ed. Routledge Publishers, London, 2001), p. 286.

[2] Goodrich Leland, *Basic Principles and Purposes of the United Nations* (Oxford University Press, Oxford, 1956), p. 213.

[3] Baehr Gordenker, *Charter of the United Nations* (Palgrave Macmillan, London, 1994), p. 19.

[4] Charter of the United Nations 1945, Article 1.

[5] Baehr Gordenker, *Charter of the United Nations* (Palgrave Macmillan, London, 1994), p. 20.

calm and peaceful manner.[6] The functions of the United Nations include peacekeeping, peacebuilding, conflict prevention and humanitarian assistance.[7] The UN has different organs and specialized agencies which carry out its specific duties.[8]

The UN charter provides for principles and purposes of the United Nations, and it also lists basic principles which states agree to respect.[9] Article 2 of the UN Charter provides for the principles of the United Nations.[10] Article 2 is supplemented by its Preamble which expresses ideas that inspire contracting parties. These ideas are also articulated in other provisions, such as Articles 33, 55, 73 and 76 of the UN Charter. [11] Article 1 of the UN Charter provides for the primary purpose of the UN, which is the "maintenance of international peace and security".[12]

The UN Charter provides for other purposes including the "development of friendly relations among nations based on respect for the principle of equal rights and self-determination of the

[6]Baehr Gordenker, *Charter of the United Nations* (Palgrave Macmillan, London, 1994), p. 21.

[7] Priya Shah, 'Function of the United Nations' (1965) 18, Pakistan Institute of International Affairs 68.

[8] Charter of the United Nations 1945, Art. 7 UNTS XVI.

[9] Charter of the United Nations 1945, Art. 2 UNTS XVI.

[10] Charter of the United Nations 1945, Art. 2 UNTS XVI.

[11] Rudiger Wulfrom, 'UN Law Policies and Practice', in Hobe S (ed.), *United Nations: Law, Policies and Practice New* (Martinus Nijhoff Publishers, Belgium, 1998), p. 996.

[12] Charter of the United Nations 1945, Art. 1 UNTS XVI.

people, the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and to be the center for harmonizing the actions of nations in the attainment of these common ends".[13] Member states are required to comply with the principles provided for in Article 1 of the Charter, in order to realize the purposes of the UN.[14]

The importance of having these purposes and principles in the Charter was to elevate them from the level of a simple programmatic formula into the scope of law. During the deliberations that resulted in the creation of the UN, state representatives at the "Dumbarton Oaks Conference" opined that the future effectiveness of the Charter system would mostly depend upon a fundamental consensus among member states, and especially upon its acceptance by the superpowers.[15] It was felt that co-operation between the contracting parties was most likely to proceed if the latter could commit to common goals and principles, the status of which would exceed mere non-binding programmatic terms.[16]

[13] Charter of the United Nations 1945, Art. 1 UNTS XVI.

[14] Charter of the United Nations 1945, Preamble UNTS XVI.

[15] Rudiger Wulfrom, 'UN Law Policies and Practice', in Hobe S (ed.), *United Nations: Law, Policies and Practice New* (Martinus Nijhoff Publishers, Belgium, 1998), p. 998.

[16] Rudiger Wulfrom, 'UN Law Policies and Practice', in Hobe S (ed.), *United Nations: Law, Policies and Practice New* (Martinus Nijhoff Publishers, Belgium, 1998), p. 1001.

Some of the principles in the UN Charter were designed to limit the power of the UN, for instance, the "principle of sovereign equality", which protected the equality of all states despite the economic power or size and, as such, the voting powers of states were equal, hence each state has one vote. Another limiting principle is the "principle of non-intervention", which meant that the United Nations would only intervene in international problems, and not the domestic affairs of a state.[17] As such, there was a common consensus that, by creating the United Nations and becoming a member thereof, states were not giving up their autonomy, nor were they creating an international state, but instead, they were creating an international organization which provided a forum through which international affairs would be discussed and international disputes settled in a peaceful manner.

It was a medium through which states would have friendly affairs and come together to articulate and agree on issues, and enter into agreements which would make the world a better place. Consequently, the United Nations was created with rights and duties, separate and distinct from the personality of its member states.[18] As such, the legal status of the United Nations is such that

[17] Goodrich Leland, Goodrich Leland, *Basic Principles and Purposes of the United Nations* (Oxford University Press, Oxford, 1956), p. 230.

[18] Eric Ip, 'The Power of International Legal Personality' (2010) 6, Institute on Comparative Regional Integration Studies 9.

it has international legal personality. [19] Considering the failure of the League of Nations which had been established prior to the United Nations, it was important for states to form an international organization which had its own legal personality, and bound by international law.[20]

The membership of the UN is made up of sovereign states. However, due to its legal personality, the United Nations maintains a separate and distinct personality from its member states, and is an independent person in international law.[21] The relationship between the UN and its member states is such that member states acceded to the UN as an organization through which they realize their common goals, the main one being "maintenance of international peace and security". The members thus delegated to it activities which would achieve the ends of the UN.

The objective of the United Nations was to create a new subject of international law which possesses independence, to which member states entrusted the task of realizing their common goals.[22] Upon creation, the United Nations became an international organ with its

[19] See Reparation of Injuries Suffered in Service of the U.N., Advisory Opinion, 1949 I.C.J. p. 174.

[20] Clive Archer, *International Organizations* (3rd ed. Routledge Publishers, Oxford, 2001), p. 290.

[21] Eric Ip, 'The Power of International Legal Personality' (2010) 6, Institute on Comparative Regional Integration Studies 12.

[22] Baehr Gordenker, *Charter of the United Nations* (Palgrave Macmillan, London, 1994), p. 21.

own legal personality which was not connected to that of its members. It is, hence, a legal system with separate organs which have specific tasks, organs which belong to the UN itself, and not to the member states.[23]

Article 2(7) prohibits the UN, as an international legal person, from "intervening in matters within the domestic jurisdiction of a state".[24] This prohibition is not directed against states, but rather at the UN as an international legal person. However, the Article provides an exception that the above provision shall not prejudice the application of enforcement measures under Chapter VII of the UN Charter.[25] Article 39 confers upon the Security Council the power to "determine existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to restore international peace and security".[26]

The Security Council is an organ of the United Nations by virtue of Article 24, which provides that member states confer on the Security Council sole function of "maintaining international peace and security". In doing so, the members agree that the Security

[23] Baehr Gordenker, *Charter of the United Nations* (Palgrave Macmillan, London, 1994), p. 21.

[24] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[25] Chapter VII provides for the actions to be taken with respect to threats to the peace, the breaches of the peace, and acts of aggression.

[26] Charter of the United Nations 1945, Art. 39 UNTS XVI.

Council acts on their behalf.[27] Consequently, the Security Council acts on behalf of the United Nations and its members in their performance of its duties. The member states are thus bound by the decisions of the Security Council by virtue of Article 25 of the Charter.[28]

The Charter's approach is two-fold. It aims to protect the sovereignty of member states by prohibiting UN's intervention in "matters essentially within the domestic jurisdiction of states", while on the other hand, the Charter confers upon the Security Council discretion to determine whether there has been a "breach to, or threat of international peace and security, or an act of aggression", and to intervene to restore that peace. United Nations practice has indicated that Article 2(7) cannot be used as a tool to prevent UN action in a state. This makes the role of Article 2(7) seem less powerful and casts doubt on whether the purpose for which this Article was intended is still useful.

If the Security Council decides to intervene in a state which has ongoing internal conflicts, does this action contravene the provisions of the Charter as far as far as Article 2(7) is concerned? The extent of "matters essentially within the domestic jurisdiction of states" has become narrower as the Security Council exercises its

[27] Charter of the United Nations 1945, Art. 24 UNTS XVI.

[28] Charter of the United Nations 1945, Art. 25 UNTS XVI.

powers under Article 39. This research addresses this trend and the issues that arise from the contradiction, with an aim of analyzing the Security Council's powers vis a vis the concept of domestic jurisdiction as provided for under the Charter.

In as much as Article 2(7) has been invoked by states frequently, practice shows that the Article has not been an effective bar against the United Nations action even in matters which are conventionally considered to be within the scope of domestic jurisdiction of a state.[29] This, then, leads to the question whether Article 2(7) has become obsolete in the face of the apparently absolute and unconditional powers of the Security Council under Chapter VII of the Charter.[30]

It is doubtful whether the Article 2(7) of the Charter fulfills its intended purpose of protecting the sovereignty of member states.[31] The reasons for this range from the narrow interpretation of Article 2(7) of the Charter due to the emergence of new concepts in international law which demand consideration; aspects of which are discussed in this research paper, to the ambiguities in Article 2(7) of the Charter. These ambiguities have caused a legal gap in the

[29] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003), p. 132.

[30] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 Centre for International Studies 42.

[31] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 330.

interpretation of the Article.[32] For instance, the meaning and scope of application of the term "intervene", nature of matters which are "essentially within the domestic jurisdiction of a state", and who makes the decision whether a matter falls "essentially within the domestic jurisdiction of a state", are still debatable issues.[33]

This paper addresses the issue of whether Article 39 of the UN Charter has superseded the application of Article 2 (7) of the UN Charter. The Security Council has invoked its powers under Chapter VII of the Charter, and more-so Article 39, even when there has been no determination of the existence of a "threat to the peace, breach of the peace or an act of aggression". The Security Council has used its discretion and power under this Article to intervene in matters within the domestic jurisdiction of states, in blatant contravention of Article 2 (7) of the UN Charter. The political attitude of the international community appears to legitimize this practice.

Article 39 confers upon the Security Council the power to determine existence of any "threat to the peace, breach of the peace, or act of aggression", and to make recommendations, or decide

[32] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 334.

[33] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 8 Australian Journal of International Law p. 61

what measures shall be taken, in accordance with Articles 41 and 42, to maintain international peace and security.[34] This Article paves way for what has become the most important and powerful instrument of the UN.[35] The main function of the UN is to "maintain international peace and security".[36] To achieve this purpose, the UN Charter gives the Security Council broad powers by virtue of Article 39.[37] However, the UN Charter has not given any conditions or limitations for the application of the powers of the Security Council. Further, the Charter has not provided for the scope of application of the Security Council powers. Consequently, the Article has given an open cheque to the Council which enjoys full discretion to decide whether or not there has been a threat to peace or breach of it, or that an act of aggression has been committed.[38]

There is no check that is imposed on the Security Council when invoking Article 39. There is no designated person, organization or entity that has been given the mandate to ensure that the Security Council acts within its power. The Security Council's decision is

[34] Charter of the United Nations 1945, Chapter VII UNTS XVI.

[35] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003,) p. 135.

[36] Charter of The United Nations 1945, Art. 1 UNTS XVI.

[37] Charter of the United Nations 1945, Art. 39 UNTS XVI.

[38] Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing' (2000) 11, European Journal of International Law 541.

final and binding under Articles 24 and 25 of the Charter.[39] Article 39 becomes problematic when the Security Council intervenes in what would otherwise be considered to be a matter which is "essentially within the domestic jurisdiction of a state". One of these instances is when the Security Council invokes Article 39 and intervenes in an internal conflict or civil war.[40] Traditionally, only states were the subject of International law, thus international law was originally intended to oversee relations between states, and not within states.[41] Reference is made to 'international peace' time and again, and as per the wording of Article 2(4) of the Charter, for instance, the prohibition against use of force is only between states, and not within states.

Further, Article 1(1) of the UN Charter provides that the primary purpose of the UN is to "maintain 'international' peace and security", while Article 24 of the UN Charter provides for the primary responsibility of the Security Council, which is restricted to "maintenance of 'international' peace and security."[42] Applying strict interpretation, this means that an internal conflict within a

[39] Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing' (2000) 11, European Journal of International Law 545.

[40] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 330.

[41] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 342.

[42] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003), p. 139.

state cannot threaten or breach international peace, even if there is violence within that state.

However, UN practice has changed this customary narrative. The Security Council has not hesitated to intervene in civil wars, even where the state involved has invoked the prohibition against the UN in order to restrain UN action. In cases of internal conflicts which do not affect any other state, does the Security Council have mandate to intervene or is that a matter which is "essentially within the domestic jurisdiction of a state"? And if the Council so intervenes, does it not, then, act contrary to the principle set out in Article 2(7) of the Charter?

The practice of the Security Council has shown that the Council has time and again intervened in internal conflicts invoking Article 39 as far as threat to peace is concerned.[43] Among the three thresholds of Article 39, 'threat to peace' is the broadest. Of importance here is that, for a threat to peace to be present, there need not be an actual violation of international law, but if chances are that a situation has the potential to affect international peace, then it suffices to be a "threat to international peace."[44]

[43] Security Council, 'UN Security Council on the Civil War in Yugoslavia: Making the History of 1989, Item 127 http://chnm.gmu.edu/1989/items/show/127 - Accessed February 18th, 2020

[44] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 337.

As such, it may be possible that an internal conflict could be so grave that it might constitute a "threat to or breach of international peace and security".[45] It now appears that extreme violence in a state could invoke UN action through the Security Council by virtue of Article 39 of the Charter.[46] For instance, in the Yugoslav War, the Council determined that there situation met the threshold of "threat to international peace and security", implying that internal war could be so grave so as to contain aspects of a threat to international peace or act of aggression.[47]

This position reflects the fact that there have been developments in international law that have broadened the once narrow perception that international law only dealt with matters concerning inter-state affairs.[48] International law is now concerned with the internal peace of UN member states, and the wellbeing of their subjects, despite the fact that these are matters which are otherwise considered to be "essentially within the domestic jurisdiction of states". In addition, the issue of whether a threat to international peace has to constitute military action has been addressed through Security Council

[45] Alain Pellet, The Charter of the United Nations: A commentary of Bruno Simma's Commentary (Oxford University Press, Oxford, 2003), p. 139.

[46] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 330.

[47] Security Council, 'UN Security Council on the Civil War in Yugoslavia: Making the History of 1989, Item 127 http://chnm.gmu.edu/1989/items/show/127 - Accessed February 18th, 2020

[48] Thomas Weiss, 'The United Nations, Before, During and After 1945' (2015) The Royal Institute of International Affairs 1229.

practice and two Security Council resolutions which declared non-conflict situations to be threats to peace.

For instance, the Security Council has in the past determined that non-compliance with its resolutions is a "threat to international peace and security." This was the case when Libya declined to abide by UN Security Council Resolution 731 (1992)[49], and when Sudan failed to comply with the resolution seeking extradition of suspects of assassination of Egyptian President, in resolutions 748 (1992) and 1070 (1996), respectively.[50] International law has also developed as far as maintenance of international peace is concerned. Violation of human rights, for instance, is now widely accepted as a "threat to international peace".

This has broadened the scope of the Security Council in factors to consider when determining "existence of threat to international peace". States initially opposed this idea and insisted that such a matter was an internal affair, and that implementation of human rights was assigned to the General Assembly and ECOSOC, and not the Security Council. The suffering of the population in a state has become a concern of international law which traditionally governed

[49] Thomas Weiss, 'The United Nations, Before, During and After 1945' (2015) The Royal Institute of International Affairs 1233.

[50] Thomas Weiss, 'The United Nations, Before, During and After 1945' (2015) The Royal Institute of International Affairs 1240.

states only.[51] As such, the Security Council intervened in the conflict in South Africa in 1963 due to its concern with the apartheid policy against Indians in the region and determined that the situation was a "threat to international peace and security".[52]

Similarly, in Rwanda, the Council adopted Resolution 1078 on 9th November, 1996, which determined that there was a "threat to peace" due to the 'magnitude of the humanitarian crisis.'[53] On this aspect, Security Council practice has shown that the Council considers gross violations on human rights as a "threat to international peace and security".[54] The Security Council has found that cases involving "the deliberate targeting of civilian populations or other protected persons and the committing of wide-spread violations of international humanitarian and human rights law in situations of armed conflict" may constitute a "threat to international peace and security".[55]

This was the situation in South Africa xenophobic attacks, whereby nationals attacked people from foreign countries with concerns that their jobs were being taken away. As a result, Nigerians resorted to

[51] Robert Bernhardt, 'Domestic Jurisdiction of States and International Human Rights Organs' (1986) 6 International and Comparative Law Quarterly 200.

[52] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003), p. 155.

[53] Robert Bernhardt, 'Domestic Jurisdiction of States and International Human Rights Organs' (1986) 6 International and Comparative Law Quarterly 209.

[54] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 538

[55] Robert Bernhardt, 'Domestic Jurisdiction of States and International Human Rights Organs' (1986) 6 International and Comparative Law Quarterly 209.

attack South Africans living in their country in protest against the xenophobic attacks.[56] Was the situation grave enough to allow the Security Council to intervene in the domestic jurisdiction of South Africa, and in doing so would it be in contradiction of Article 2(7) of the Charter? Have the human rights violations become so gross as to threaten international peace, and in the event that they have, is a violation of human rights sufficient ground for the UN to intervene?

In light of the vagueness of the UN Charter on "matters which are essentially within the domestic jurisdiction of any state" and UN practice through its Security Council, the issue which this paper addresses is whether the concept of domestic jurisdiction is still normative and relevant in international law. Have the absolute and discretionary powers of the Security Council under Chapter VII of the Charter, to which the concept of non-intervention is subject, eroded and, eventually killed Article 2(7) of the Charter?

1.2 Statement of the Problem

Despite the principle of state sovereignty being the founding principle of the United Nations, Article 2(7) of the Charter does not describe matters which are essentially within the domestic jurisdiction of a state, leaving an uncertainty in its interpretation. Further, the Article does not set out any authority to make a determination on whether a particular matter is, or is not,

[56] https://gz.com/africa/1708814/what-is-behind-south-africas-xenophobic-attacks-on-foreginers - Accessed 27th November, 2019

essentially within the domestic jurisdiction of a state. Article 2(7) does not operate to limit the powers of the Security Council under Chapter VII, making it possible for the Security Council, led by the veto powers, to infringe the Article.

Chapter VII of the Charter has conferred absolute and unlimited powers upon the Security Council to determine situations where a threat to the peace, breach of the peace or an act of aggression has been committed, and to determine the enforcement measures to be taken to restore and maintain international peace and security. The Charter has not described any conditions to be met before the Security Council determines that any of the three elements are present in a situation, nor has it created any checks upon the Security Council to ensure it acts within its mandate.

The absence of competent authority to make a determination on matters essentially within the domestic jurisdiction, the uncertainty of interpretation in Article 2(7) of the Charter, and the absolute powers of the Security Council under Chapter VII of the Charter, have created an opportunity for the Security Council and, hence, the United Nations, to appoint itself the determinant of which matters are within domestic jurisdiction.

The Council has invoked its powers under Chapter VII of the Charter and intervened in domestic affairs of states to further its interests, even where there was no threat to peace, breach of the peace or act of aggression. Accordingly, the problem that this paper addresses is whether the UN Security Council practice has killed Article 2(7) of the Charter. Where is the protection of state sovereignty? Is the principle of domestic jurisdiction relevant in contemporary international law? Are there any matters that are still under "the domestic jurisdiction" of a state?

1.3 Broad Argument

The Security Council has, on several occasions, invoked Article 39 of the UN Charter and intervened in internal matters of a state, in contravention of Article 2(7) of the UN Charter. Article 2(7) of the UN Charter directly prohibits the UN and any of its organs from intervening in matters which are essentially within the domestic jurisdiction of a state. Matters which are essentially within the domestic jurisdiction of a state are not defined in the Charter, leaving a gap in the law. Developments in international law have narrowed the scope of matters which are be essentially within the domestic jurisdiction of states, as states continue to accede to more treaties which create international obligations on what would otherwise be internal affairs.

The UN Security Council has absolute and unconditional powers under Chapter VII of the Charter, and no institution or organ has

been put in place to check the action of the Council or to call upon the Security Council when it acts ultra vires. In the circumstances, the Security Council has acted in its power under Chapter VII of the Charter and intervened in matters which are, otherwise, essentially within the domestic jurisdiction of a state.

Consequently, UN Security Council's practice has killed the purpose of Article 2(7) of the UN Charter, whose aim was to preserve state sovereignty. The principle of domestic jurisdiction has, therefore, lost its place in international law. Article 2(7) of the Charter of the United Nations is dead in practice, killed by the Charter which gave it life, as it allows an organ of the United Nations to do the very thing that states were assured would not happen, namely, the intervention of the United Nations in their domestic affairs.

1.4 Objectives of the Study

The study's main objective is to investigate the current status of Article 2(7) of the Charter of the United Nations and the relevance of the principle of domestic jurisdiction in light of United Nation practice.

This study is guided by four specific objectives which aim to analyze

i. the purposes and principles of the United Nations with a focus on Article 2(7) of the United Nations Charter;

ii. matters which are essentially within the domestic jurisdiction of a state;

iii. the scope of application of the powers conferred upon the Security Council by Article 39 of the United Nations Charter in light of the prohibition against intervention in matters essentially within the domestic jurisdiction of a state; and

iv. analyze the relevance and state of the principle of domestic jurisdiction in contemporary international law and practice.

1.5 Research Questions

This research paper has been guided by five research questions as herebelow, that is,

i. What is the status of Article 2(7) in light of UN practice?

ii. What matters are "essentially within the domestic jurisdiction of a state"?

iii. What is the meaning of "intervention"?

iv. What is the scope of application of the powers of the Security Council under Article 39 of the Charter?

v. What is the place of the principle of domestic jurisdiction in contemporary international law and practice?

1.6 Conceptual Framework

This work is based on the concepts of sovereignty, domestic jurisdiction, and peace. Article 2(7) of the Charter enshrines the concept of sovereignty.[57] From its wording, the Article was intended to protect the sovereignty of member states to the UN. This is achieved by creating a limit on the authority of the UN and its organs, which are barred from intervening in "maters essentially within the domestic jurisdiction of states.[58] Here, the concept of non-intervention in the domestic jurisdiction is introduced. The concept of domestic jurisdiction is fundamental in this work, as one of the objectives is to investigate whether this concept is still relevant in light of the development in contemporary international law.[59]

This work is also based on the concept of peace.[60] Amongst the main goals of the United Nations is the "maintenance of international peace".[61] However, peace is construed differently as international law develops. Peace was once construed to mean lack of war, and disarmament of sovereign states. As international law develops to face modern challenges and problems, the concept of peace has also evolved. In this work, peace is taken to mean

[57] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.
[58] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[59] Edgar Grande & Louis W. Pauly, *Complex Sovereignty: Reconstituting Political Authority in The Twenty-First Century* (University of Toronto Press, Canada, 2005), p. 746.
[60] Johan Galtung, 'Cultural Violence' (1990) 3 Journal of Peace Research 179.
[61] Charter of the United Nations 1945, Preamble UNTS XVI.

"respect for sovereignty of states", and "pacific settlement of international disputes".[62]

1.7 The Concept of Sovereignty

The traditional definition of a sovereign state was, "one which exercised undivided authority over all persons and property within its borders and was independent of direct control of any other power".[63] The early understanding of sovereignty is no longer tenable. The notion that sovereignty can never be restricted is no longer applicable in modern day practice.[64] Sovereignty, as used in this paper, is conceptualized as legal equality in the international arena. Sovereignty is not conceptualized as an internal tool against external intervention. It can no longer be used as a tool of protection from any manner of external intervention. Rather, it is the tool that enables a state to contribute to international law.[65] This understanding of sovereignty is preferred because it allows room for co-existence between sovereignty and international law. The traditional concept of sovereignty is undesired because it would collapse the system under which the United Nations was formed, that of international friendly relations.

Sovereignty is what would give a state a voice to be heard in the international arena. Sovereignty, hence, is used to signify

[62] Charter of the United Nations 1945, Chapter VI UNTS XVI.

[63] Charles G. Fenwick, *International Law* (New York Publishers: New York, 1967), p. 12.

[64] Thomas Fleiner Gerster & Michael A. Meyer, 'Developments in Humanitarian Law: A Challenge to Concept of sovereignty' (1905) 34 International and Comparative Quarterly 267.

[65] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 219.

international legal personality.[66] It is sovereign equality that enables all states, regardless of economic, financial, or military power, to have a single vote in the United Nations General Assembly.[67] It is the recognition of sovereignty of a state that gives such a state locus standi before the ICJ. Consequently, sovereignty is not conceptualized as "non-intervention in internal affairs".

It is conceptualized as a means for a state to acquire rights, and discharge duties, in the international arena. Therefore, in this work, sovereignty is not conceptualized as a barrier to international regulation. It is conceptualized as an enabling tool of a state to access the international arena.[68] This paper acknowledges that the concept of sovereignty has evolved over time. The history of sovereignty and factors contributing to its evolution will be discussed in chapter three of this paper.

1.8 Concept of Domestic Jurisdiction

The concept of domestic jurisdiction refers to those matters which are considered to be outside the reach of international law, as they are still limited to the jurisdiction of individual states.[69] It is important to analyze the concept of domestic jurisdiction so as to understand its evolution over the years. This paves way for a

[66] Martin Loughlin, 'The Erosion of Sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 81.

[67] Charter of the United Nations 1945, Art. 27 UNTS XVI.

[68] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 219.

[69] Anthony D'Amato, 'Domestic Jurisdiction' (2001) 108 American Journal of International Law 1090.

discussion on the "principle of non-intervention" in relation to "matters essentially within the domestic jurisdiction of states" as provided for by Article 2(7) of the UN Charter.[70] An ideal starting point is the discussion of the history of the concept of domestic jurisdiction. This history is comprehensively addressed in chapter three of this paper.

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In this work, domestic jurisdiction is conceptualized within the confines of "matters which fall within the domestic jurisdiction of states". A state should be able to establish its legal regime, make laws, and implement those laws.[71] However, even as a state discharges its duties, it should do so in accordance to the rules of international law. In contemporary international law, states have signed numerous treaties which govern their internal affairs. In as much as states have the sole responsibility of implementing laws, they must be implemented in line with international law. In this work, domestic jurisdiction is inter-related with international law.

Domestic jurisdiction, as conceptualized, cannot exist on its own, with a clear distinction from international law.[72] The state will be accorded respect for its sovereignty. However, in the event that a

[70] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 135.
[71] Edgar Grande & Louis W. Pauly, *Complex Sovereignty: Reconstituting Political Authority in The Twenty-First Century* (University of Toronto Press, Toronto, 2005), p. 766.
[72] Edgar Grande & Louis W. Pauly, *Complex Sovereignty: Reconstituting Political Authority in The Twenty-First Century* (University of Toronto Press, Toronto, 2005) pg. 772.

sovereign state acts in a manner which threatens international peace, international law will intervene. This is despite the fact that the state's actions are confined to its territory.[73] Domestic jurisdiction, as conceptualized, is not related to territorial boundaries. Where a state threatens the peace, or fails to take measures to maintain the peace, or resolve disputes pacifically, then international law will intervene. This is regardless of state territory, internal law or policy. Not even a plea of domestic jurisdiction will stop international intervention to restore and maintain international peace and security. Consequently, the concept of domestic jurisdiction can only exist within the standards of internal law.

This understanding of domestic jurisdiction is preferred because it creates a favorable balance between sovereignty, and the application of international law. It acknowledges that all states have sovereign equality, and that the sovereignty of states must be respected. It also appreciates that the maintenance of international peace and security is paramount, and a state cannot hide behind the scope of domestic jurisdiction to deny application of international law in a situation where international peace and security is threatened. It thus strikes a balance between domestic jurisdiction and the scope of international law.

[73] Robert Bernhardt, 'Domestic Jurisdiction of States and International Human Rights Organs' (1986) 6 International and Comparative Law Quarterly 217.

1.9 Concept of Peace

Having a precise definition of peace in the international arena is not an easy process, and its meaning has been defined by historic events, ideologies and peculiar regional circumstances. Peace has been described as "a political condition that ensures justice and social stability through formal and informal institutions, practices, and norms."[74]

The concept of peace is not limited to lack of war. The lack of conflict in a state does not necessarily denote peace, indeed, reliance should not be placed on lack of violence to determine the state of peace in a state.[75] In the West, the concept of peace is taken to be a "contractual relationship that implies mutual recognition and agreement".[76]

There is also the concept of "negative peace", which is used to define the absence of any mutually agreed hostility which only excludes existence of deliberate violence between groups or states, but acknowledges the need for occasional revolts, protests, demonstrations, et cetera.[77] This concept pushes for order through 'positive peace' which is achieved by respect for human socio-cultural diversity. According to Galtung, and the same is echoed

[74] Johan Galtung, 'Cultural Violence' (1990) 3 Journal of Peace Research 179.

[75] Christopher E. Miller, *A Glossary of Terms and Concepts in Peace and Conflict Studies* (2nd ed. University of Peace: Costa Rica, 2005), p. 4.

[76] Christopher E. Miller, *A Glossary of Terms and Concepts in Peace and Conflict Studies* (2nd ed. University of Peace, 2005), p. 8.

[77] Johan Galtung, 'Cultural Violence' (1990) 3 Journal of Peace Research 310.

by Scherrer, positive peace is a situation whereby "multi-culture is respected, multi-ethnicity is loved, multi-idea is welcomed, multi religion is embraced, minorities are protected, equality of rights, equity, justice, guided liberty and freedom are guaranteed."

Hence, the features of peace as envisaged by international law in international relations could be "international peace and security".[78]

Peace, in this work, goes beyond lack of hostilities or civil war (negative peace). Threat to peace, as used in the Charter, does not only predict war. International law has developed to cover a wide range of issues that contribute to international peace.[79] These not only include political rights, but human rights, economic rights, social rights, and environmental rights.[80] The absence of war or violence is not a measure to determine whether or not there is peace in a state. It goes further to examine the protection of human dignity in a given state.[81]

[78] Johan Galtung, 'Cultural Violence' (1990) 3 Journal of Peace Research 312.

[79] Dee Maxwell, 'The Success of Peacekeeping in Liberia' (2018) Center for Strategic & International Studies, Georgetown Universit, Washington D.C, p.9.

[80] Soltani Moradi, 'The Evolution of the Concept of International Peace and Security in light of UN Security Council Practice (End of the Cold War-Until Now)' (2017) 7 Open Journal of Political Science 150.

[81] Johan Galtung, 'Cultural Violence' (1990) Vol 3 Issue 27 Journal of Peace Research 289.

Peace cannot be achieved internationally where individuals do not have access to basic needs that preserve human dignity.[82] Access to food, water, medical care, housing and education contribute to peace. Access to fair administrative action, financial institutions and fair income contribute to peace. Gender equality is a measure of peace. Environmental protection and prevention from degradation is a measure of peace.[83]

It is as a result of this concept of peace that the Security Council will determine that there is a "threat to international peace" even in cases where there is no war.[84] Gross abuse of human rights is a "threat to peace".[85] Regardless of the fact that a state is not at war against its subjects, the Security Council will intervene if there is gross violation of rights.[86] Therefore, peace in this work considers political, social, economic and environmental aspects. The traditional concept of peace (negative peace) is not fit to solve contemporary problems.[87]

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[82] Kurtz, Richard, *Encyclopedia of Violence, Peace, & Conflict* (San Diego Academic Press, Cambridge, 1999), p. 121.

[83] Soltani Moradi 'The Evolution of the Concept of International Peace and Security in light of UN Security Council Practice (End of the Cold War-Until Now)' (2017) 7 Open Journal of Political Science 139.

[84] Soltani Moradi 'The Evolution of the Concept of International Peace and Security in light of UN Security Council Practice (End of the Cold War-Until Now)' (2017) 7 Open Journal of Political Science 139.

[85] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales, Wales, 1994), p. 102.

[86] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales, Wales, 1994), p. 109.

[87] Johan Galtung, 'Cultural Violence' (1990) 3 Journal of Peace Research 318.

This understanding of peace is favorable as it takes into consideration other factors to determine whether peace has been achieved. It acknowledges that peace goes beyond lack of war or hostilities, and that the concept is concerned with the respect for humanity in all other aspects including social, economic and physiologic aspects. Thus application of international law is not limited to the existence of war, but rather the overall well-being of individuals in a state.

1.10 Theoretic Framework

This work is founded on the theory of legal positivism. Positivism holds that the society operates in accordance with general laws. Positivism further holds that the society operates within certain absolute laws, in the same manner through which the physical world operates according to gravity and other absolute laws.[88]

In international law, the theory of positivism holds that international law is based on state consent.[89] It legitimizes international law using three explanations. The first is that international law must be expressed. The second is that international law is created by sovereign states which are subjects of international law.[90] The third is that law is effective even if it is

[88] Besson Scharffer, *The Philosophy of International Law* (Oxford University Press, Oxford 2010), p. 99.

[89] Besson Scharffer, *The Philosophy of International Law* (Oxford University Press, Oxford 2010), p. 100.

[90] Besson Scharffer, *The Philosophy of International Law* (Oxford University Press, Oxford 2010), pp. 101-102.

unjust when measured against some moral standard.[91] To positivism, there is no necessary conformity of international law to morality.[92]

Legal positivism asserts that social facts determine the existence and content of law. This existence is not determined by the merits of the law. John Austin (1790–1859), one of the main proponents of this theory stated; "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry".[93]

This theory does not argue that the merits of law are not important or intelligent. It only holds that those merits do not determine whether laws or legal systems exist.[94] Therefore, in determining whether law exists in a given society, of concern is the existence of certain structures of governance, not the extent to which it satisfies ideals of justice, democracy, or the rule of law.[95] In positivism theory, law is what is ordered or posited. The nature of laws in a system becomes dependent on the social standards that its officials

[91] Besson Scharffer, *The Philosophy of International Law (*Oxford University Press, Oxford 2010), p. 103.

[92] Brunnee Toope, *Legitimacy and legality in international law (*Cambridge University Press, Cambridge, 2010), p. 412.

[93] Austin James, *The Province of Jurisprudence Determined* (Wilfrid Rumble (eds) First Published 1832, Cambridge University Press, Cambridge 1995), p. 37.

[94] Austin James, *The Province of Jurisprudence Determined* (Wilfrid Rumble (eds) First Published 1832, Cambridge University Press, Cambridge 1995), p. 38.

[95] Brunnee Toope, *Legitimacy and legality in international law (*Cambridge University Press, Cambridge, 2010), p. 414.

recognize as authoritative. The fact that a given law is unjust or inefficient does not stop it from being law, so long as it is posited as law by the sovereign.[96]

Article 2(7) of the UN Charter enshrines the foundational principle of the United Nations.[97] It protects the sovereignty of states by prohibiting the UN and its organs from intervening in matters which are essentially within the domestic jurisdiction of a state.[98] It is embodied within the UN Charter which was adopted 70 years ago and forms part of international law. There have been no amendments to the law on non-intervention and the UN and all its organs continue to be bound till date. The history of the creation of the UN reveals that states adopted the UN Charter on the understanding that their sovereignty would be protected and they would be able to conduct matters within their domestic jurisdiction without intervention from the UN and its organs.

However, the Security Council has adopted a liberal interpretation of Article 2(7) of the Charter,[99] and has taken into consideration other metaphysical and social aspects to excuse the contravention.[100]

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[96] Green Leslie, 'Legal Positivism, The Stanford Encyclopedia of Philosophy' (2019) 2 Stanford University Law Journal 218.

[97] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[98] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[99] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 127.

[100] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 128.

This liberal interpretation has seen the Security Council taking away more and more matters from the ambit of domestic jurisdiction of states, such that whether there are, practically, no matters which are within the domestic jurisdiction of states.

The positivist theory supports the objective (textual/literal) approach to treaty interpretation which places the principal emphasis on the actual words of a treaty.[101] The ICJ has confirmed this in its Advisory Opinion in the Admissions Case (1948) construing the provision of Article 4 (2) of the Charter of the United Nations.[102] This was further confirmed in ICJ's Advisory Opinion in the "Competence of the General Assembly for Admission of a State to the UN case" (1950) construing the same Article,[103], as well as ICJ's Advisory Opinion in the "Certain Expenses of the UN Case" (1962) construing of Article 17 of the Charter.[104]

In the UN Admissions Case, the Security Council, through its veto powers, rejected applications made by 12 states for admission to the

[101] Richard Gardiner, *Treaty Interpretation* (2nd ed. Oxford University Press, Oxford, 2015),pp. 2-8.

[102] ICJ Advisory Opinion 57, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* 28th May 1948 ICJ Reports p. 47 Available at http://en.advisory_opinions | Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) | International Court of Justice (icj-cij.org) Assessed 19th November 2019.

[103] ICJ Advisory Opinion Rep 4, *Competence of the General Assembly for the Admission of a State to the United Nations,* 3rd March, 1950 ICJ Reports p. 20 Available at Latest developments | Competence of the General Assembly for the Admission of a State to the United Nations | International Court of Justice (icj-cij.org) Assessed 19th November 2019.

[104] ICJ Advisory Opinion 151, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 20th July 1962 ICJ Report p. 69 Available at http://www.worldcourts.com/icj/eng/decisions/1962.07.20_expenses.htm Assessed 19th November 2019.

United Nations.[105] The General Assembly referred the question to the ICJ. The Court, in its interpretation of Article 4 of the Charter, declared that words must be given their natural meaning. It held that the conditions laid down for the admission of states were exhaustive. The ICJ declared that if those conditions were fulfilled by an applicant state, the Security Council ought to make the recommendation which would enable the General Assembly to decide upon the admission.[106]

In ICJ's Advisory Opinion in the "Competence of the General Assembly for Admission of a State to the UN case" (1950), the General Assembly referred the question concerning the competence of the General Assembly of the United Nations to admit a State to the United Nations.[107] In rendering its Advisory Opinion, the Court discussed the meaning of Paragraph 2 of Article 4 of the Charter. In so doing, it had to interpret the use of the word 'recommendation' and 'upon'. The ICJ held that; "the first duty of a tribunal

[105] ICJ Advisory Opinion 151, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 20th July 1962 ICJ Report p. 69 Available at http://www.worldcourts.com/icj/eng/decisions/1962.07.20_expenses.htm Assessed 19th November 2019.

[106] Conditions of Admission of a State to Membership in the United Nations (1948) ICJ Advisory opinion of 28 May 1948- Available at https://www.icj-cij.org/en/case/3- Accessed 20th February, 2020

[107] Conditions of Admission of a State to Membership in the United Nations (1948) ICJ Advisory opinion of 28 May 1948- Available at https://www.icj-cij.org/en/case/3- Accessed 20th February, 2020

[107] Conditions of Admission of a State to Membership in the United Nations (1948) ICJ Advisory opinion of 28 May 1948- Available at https://www.icj-cij.org/en/case/3- Accessed 20th February, 2020

[107] Conditions of Admission of a State to Membership in the United Nations (1948) ICJ Advisory opinion of 28 May 1948- Available at https://www.icj-cij.org/en/case/3- Accessed 20th February, 2020

which is called upon to interpret a text, was to endeavor to give effect to the words used in the context in which they occurred, by attributing their natural and ordinary meaning".

In the case, the ICJ found no difficulty in ascertaining the natural and ordinary meaning of the words in question, and to give effect to them.[108]

In ICJ's Advisory Opinion in the "Certain Expenses of the UN Case" (1962), the General Assembly requested an Advisory Opinion from the ICJ on interpretation of Article 17(2) of the Charter.[109] This was after the Soviet Union contended that Suez and Congo activities were not taken in accordance with the Charter.[110] The Court discussed Article 17(2) of the Charter which provides that;

"the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."[111]

There were arguments that the phrase 'expenses of the Organization' ought to have been interpreted to mean 'regular' or

[108] Competence of The General Assembly For the Admission of a State to The United Nations (ICJ) Advisory Opinion of 3rd March 1950 Available at https://www.icj.org- Accessed 20th February, 2020

[109] ICJ Advisory Opinion 151, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 20th July 1962 ICJ Report p. 69 Available at http://www.worldcourts.com/icj/eng/decisions/1962.07.20_expenses.htm Assessed 19th November 2019.

[110] ICJ Advisory Opinion 151, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 20th July 1962 ICJ Report p. 69 Available at http://www.worldcourts.com/icj/eng/decisions/1962.07.20_expenses.htm Assessed 19th November 2019.

[111] Charter of the United Nations 1945, Art. 17(2) UNTS XVI.

'administrative' expenses. The ICJ rejected that argument and followed traditional methods of statutory construction. In so doing, the ICJ held that the term 'expenses' referred to all expenses incurred by the UN in furtherance of its objectives.[112]

In all these cases, the ICJ is seen to apply a positivist approach in its interpretation of the Charter. The ICJ has given words their natural meaning.[113] Political or social factors have not been considered in the interpretation of the Charter, as the intention of the drafters would be lost if the Court were to settle for a dynamic approach in its interpretation of the Charter. The same ought to apply in the interpretation of the terms "intervene" and "matters essentially within the domestic jurisdiction of states".[114]

A positivist approach is made necessary by the unique nature of Article 2(7) as there is the intersection of law and politics on one hand, and domestic versus international law on the other.[115] Article 2(7) enshrines one of the most fundamental principles of the United

[112] ICJ Advisory Opinion 151, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 20th July 1962 ICJ Report p. 69 Available at http://www.worldcourts.com/icj/eng/decisions/1962.07.20_expenses.htm Assessed 19th November 2019.

[113] Alvarez Klein, 'Constitutional Interpretation in International Organizations' in Coicaud Heiskanen (eds), *The Legitimacy of International Organizations* (2001) London University Journal 104.

[114] Henry G. Hodges, *Doctrine of Intervention* (Princeton University Press, Princeton 1995), p. 114.

[115] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 127.

Nations.[116] A dynamic approach to its interpretation would be catastrophic. It would produce a practice with no legal basis, defeat the intention of its drafter, and result in the loss of credibility for international law. [117]

The theory of positivism as adopted in this paper, is guided by the law as is, and not as it ought to be. The law, as is, prohibits the UN from intervening with domestic affairs of states.[118] The law is not concerned with its merits, but rather, with its prescription. Social factors of the contemporary world ought not to be a justification for departure from the law.[119] Any policy, despite how just, wise, prudent or efficient it appears to be, should not be confused to be actual law.

Similarly, any law, despite it been unjust, is law and ought not to be doubted based on its merits. The international community has given the Security Council political backing in instances where it appears that intervention would realize the common goals in a given situation.[120] However, this paper is premised by the idea that

[116] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' *(2006)* 10 Singapore Year Book of International Law 180.

[117] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 27 Australian Journal of International Law 61.

[118] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[119] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 27 Australian Journal of International Law 67.

[120] Frank Furedi, *The New Ideology of Imperialism: Renewing the Moral Imperative* (London Pluto Press, London, 1994), p. 114.

the Security Council's policy to intervene in domestic affairs, for any reason beyond the exception mentioned under Article 2 (7) of the Charter, is a contravention of the law, despite how just or necessary that policy may appear to be.

1.11 Literature Review

There is vast literature which analyses different aspects of state sovereignty, and the developing scope of powers given to the Security Council for purposes of "maintaining international peace and security". The literature shows how the law has developed from both a social and political perspective, and how this has impacted the concept of domestic jurisdiction due to the absolute powers of the Security Council under the UN Charter.[121]

Brownlie argues that under general international law, matters concerned with internal affairs of states are taken to be within the domestic jurisdiction of the state in question. [122] Nevertheless, he asserts that this is a redundancy and says that the issue of domestic jurisdiction is a source of great confusion, ought to be given careful contemplation and deliberation.[123] Brownlie however fails to shed light on various ways to determine that a matter is concerned with internal affairs. This work will attempt to identify matters which

[122] Ian Brownlie, *The Principles of Public International Law* (6th ed. Oxford University Press, Oxford 1966), p. 291

[123] Ian Brownlie, *The Principles of Public International Law* (6th ed. Oxford University Press, Oxford 1966), p. 302.

were initially considered to be within the domestic jurisdiction of states, and those that have become a concern of international law.

Waldock writes on the history of domestic jurisdiction and traces it across three phases, that is, pre-League of Nations, in the Covenant of the League of Nations, and in the Charter of the United Nations.[124] Waldock argues that the founders of the Charter of the United Nations intentionally reserved the principle of domestic jurisdiction in Article 2(7). This was because they feared creating a super state and, thus, aimed to limit the authority of the United Nations.[125] By barring the United Nations and its organs from intervening in domestic affairs of states, they would preserve the sovereignty of member states.[126]

Waldock further writes that the principle of domestic jurisdiction was deliberately broadened in the Charter of the United Nations as compared to the Covenant of the League of Nations.[127] In an attempt to explore "matters which are within the domestic jurisdiction of states", Waldock comes up with two facets. On the first, he says that matters of domestic jurisdiction are activities in regard to which, at the given moment, international law does not

[124] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 127.
[125] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 195.
[126] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 140.
[127] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 127.

subject the state to any international obligation vis-à-vis a state or international organization.[128]

The second angle is that "matters of domestic jurisdiction" are those activities which are not expressly conferred to the jurisdiction of international law, hence are left within the exclusive jurisdiction of states.[129] However, Waldock's work constrains itself to the value and relevance of domestic jurisdiction as a plea before international legal tribunals. Waldock's article is not concerned with the reservation of domestic jurisdiction as a plea before international political organs, such as the General Assembly or the Security Council of the United Nations.[130] This work will appreciate that a state can raise a plea of domestic jurisdiction under Article 2(7), and will discuss whether this is an effective plea to ban UN action in a matter.

Jones writes broadly on the issue of domestic jurisdiction of states and shares his perception on the scope of "matters which are essentially within the domestic jurisdiction of states". [131] He gives an in-depth discussion of the elements of Article 2(7) of the Charter and, more importantly, discusses UN practice over the years in

[128] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 1974 pg. 131

[129] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 1974 pg. 134.

[130] Humphrey Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals,' (1974) 31 Australian Journal of International Law 1974 pg. 136.

[131] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 192.

light of the Article. He expounds on areas which were traditionally within the scope of domestic jurisdiction, and explains that the Security Council has extended its ambit into those areas, hence reducing the scope of "matters essentially within the jurisdiction of states". However, Jones does not offer any recommendations on the place of Article 2(7) in contemporary international law and its future.[132] This paper will give recommendations to secure the future of Article 2(7) of the Charter.

Jones addresses the issue of human rights violations. He writes that the drafters of the Charter purposed to ensure that the United Nations adhered to the strict prohibition on "non-intervention in matters which were exclusively within the domestic jurisdiction of states".[133] He observes the manner in which the General Assembly of the UN handled cases from 1946. He writes that the General Assembly has intervened in "matters within the domestic jurisdiction of states" in cases involving infringement of human right, despite the plea of domestic jurisdiction raised by the subject state.[134] Jones however fails to expound on whether intervention based on humanitarian grounds is legal or justifiable. This paper will address the impact of development in international law, more so with respect to growth of human rights. The paper will discuss

[132] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 197.
[133] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, South Western Printers Ltd, Wales, 1979), p. 201.
[134] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, South Western Printers Ltd, Wales, 1979), p. 201.

the practice of humanitarian intervention and examine whether that intervention is a violation of Article 2(7) of the Charter.

Higgins argues that there are issues that were initially the sole concern of states, but are now recognized as matters of international concern.[135] She identifies various issues, such as environmental protection, animal rights and protection of endangered species, and drug abuse. In her opinion, domestic jurisdiction has a mutable and developing nature, hence should be approached with flexibility. She strongly argues that this flexible approach should be based on the concept that whenever a state's actions cause significant international effects, the state in question must be held accountable to the international community.[136] Higgins however fails to clarify the relevance of domestic jurisdiction in international law, and fails to highlight instances where a state will be subjected to international law despite the principle of domestic jurisdiction. This paper will appreciate that domestic jurisdiction has mutated over the time, and will go further to examine the place of domestic jurisdiction in light of those developments. The paper will also further demonstrate instances when domestic jurisdiction will not act as a shield to intervention in order to restore international peace and security.

[135] Rosslyn Higgins, *The Legal Limits of the Use of Force by Sovereign States, United Nations Practice* (Oxford University Press, Oxford, 1963), p. 1006.

[136] Rosslyn Higgins, *The Legal Limits of the Use of Force by Sovereign States, United Nations Practice* (Oxford University Press 1963), p. 1114.

According to Wright, the principle of self-determination has added to reducing the scope of "matters within the domestic jurisdiction of states".[137] This was a topic of great concern in the 1960s when many African countries were fighting for independence. Wright argues that legal rights are raised by the inclusion of the principle of self-determination in the Charter.[138] He, therefore, argues that colonial powers which had signed the Charter were not able to include internal policies relating to the political development of their colonial territories to the scope of "matters essentially within their domestic jurisdiction" and that the principle of "non-intervention" in Article 2(7) was applicable.[139] Wright's work is however only limited to self-determination as factor that has contributed to the reduction of the scope of domestic jurisdiction. This paper considers other factors which have contributed to the diminishing scope of domestic jurisdiction such as state practice through the signing of international conventions, growth of international law, and UN practice.

There is vast literature on the concept of sovereignty. Alex Ansong gives a clear picture of the history of the concept of sovereignty, marking key turning points of developments to the contemporary

[137] Quincy R. Wright, 'Is Discussion Intervention?' (1956) 50 Australian Journal of International Law 724.

[138] Quincy R. Wright, 'Is Discussion Intervention?' (1956) 50 Australian Journal of International Law 727.

[139] Quincy R. Wright, 'Is Discussion Intervention?' (1956) 50 Australian Journal of International Law 730.

understanding of the concept.[140] Ansong says that there has been growth of international law as the concept of sovereignty is now well founded in law, and supported by the UN Charter.[141]

Ansong analyzes the concept of state sovereignty with a focus on its current manifestation to capture its current usefulness in international law.[142] He traces the concept back to Jean Bodin's *De Republica* (1576) whose idea of sovereignty was that it had law making powers, but was not itself bound by those laws.[143] This concept, according to Ansong was effective at the time as it instilled order in the European States as intended.[144]

Ansong traces the evolution of sovereignty back to Hugo Grotius' *De Indis*, stating that sovereignty has evolved from the notion of concentration of power in a ruling sovereign, to conferment of power to the state by the people.[145] He argues that according to Grotius, sovereign power comes from the state which is made up of voluntary individuals.[146] These individuals have agreed to form the state; hence, sovereignty of that state comes from its people.

[140] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 13.
[141] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 13.
[142] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 14.
[143] Sir Robert Jennings, 'Sovereignty and International Law', in Gerard Kreijen (eds), *State, Sovereign, and International Governance* (Oxford University Press, Oxford, 2002), p. 27-44.
[144] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 19.
[145] Lassa Oppenheim, 'International Law' (1962) 1 Longmans Journal For Law 124.
[146] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 21.

However, this perception, according to Ansong, was meant to legitimize the Dutch states power to start war.[147]

Ansong explains that the writing of *De Jeru Praedae* was inspired by the events surrounding the apprehension of the Portuguese merchant ship, *Santa Catarina,* by a Dutchman in Singapore in 1603.[148] Grotius' reasoning, according to Ansong, was that the capture of the ship was justified because the Portuguese had waged a systematic campaign to oust Dutch merchants from the East Indies.[149] To mark another development in the concept of sovereignty, Ansong refers to a key event in international relations which contributed to the history of sovereignty, which is the Peace of Westphalia 1648, which ended the thirty years war in Europe.[150]

Anson says that the "Peace of Westphalia" is cited as a "decisive political event with both national and international consequences for the emergence of the modern state."[151] The treaty formalized the notion of having a greater international society which was founded

[147] Martine Julia Van Ittersum, 'Introduction to Hugo Grotius, Commentary on the Law of the Prize and Booty' (1603) 1 Liberty Fund Incorporation 7.

[148] Martine Julia Van Ittersum, 'Introduction to Hugo Grotius, Commentary on the Law of the Prize and Booty' (1603) 1 Liberty Fund Incorporation 9.

[149] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 30.

[150] The Peace of Westphalia was a series of peace treaties signed between May and October 1648 in the Westphalian cities of Osnabrück and Münster. The treaties ended the Thirty Years' War, which as a series of wars in Central Europe between 1618 and 1648. Initially a war between various Protestant and Catholic states in the fragmented Holy Roman Empire, it developed into a conflict involving most of the great powers.

[151] Joshua Castellino, *International Law and Self-Determination, the Hague* (Matinus Nijhofff Publishers, Belgium, 2000), pp. 75-76.

by sovereign States.[152] The "Peace of Westphalia" is an important foundational framework whose principals have been adopted in modern day theories of international law.[153] Anson says that it introduced the "horizontal system of the sovereign state", which prohibited external intervention in the internal affairs of the state.[154] Hence, the sovereign was not a subject of external rule, and was supreme within its territory. This was contrary to the Papacy's system which exercised its authority over political matters which were within its religious authority. [155]

Ansong, however, states that this concept of territorial sovereignty was "euro-centric in nature", as it was un-applicable to all states.[156] Hence, the Westphalian system of sovereignty was only enjoyed by European states for centuries. As a result, Ansong says that the UN Charter clearly expressed, under of Article 78, that the foundational principle of sovereign equality of members did not apply to the colonies of the European states which were under the trusteeship system.[157]

[152] Steven Patton, 'The Peace of Westphalia and its Affects on International Relations, Diplomacy and Foreign Policy' (2019) 10 The Histories 93.

[153] Istyan Hont, *The Permanent Crisis of a Divided Mankind: Contemporary Crisis of the Nation State* (Oxford University Press 1955), pp. 63-68.

[154] Steven Patton, 'The Peace of Westphalia and its Affects on International Relations, Diplomacy and Foreign Policy' (2019) 10 The Histories 96.

[155] David Chandler, 'International Justice' (2000) 1 New Life Review 376.

[156] Anthony Angthie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, Cambridge, 2004), p. 892.

[157] Charter of the United Nations 1945, Art. 78 UNTS XVI.

Nevertheless, Ansong argues that the UN Charter cured the defect by introducing the principle of "self-determination" which was effectively invoked in the decolonization of the colonies to sovereign states.[158] Ansong notes a weakness in the concept of state sovereignty introduced by the "Peace of Westphalia". He argues that states continued to wage war regardless of the prohibition on "non-intervention". He thus contends that it is futile to have a prohibition on "non-intervention" without a concurrent prohibition on the use or threat of force, without which the prohibition on "non-intervention" would only be successful to states with substantial military that would deter exterior intervention.[159] This was resolved by the UN Charter which directly prohibits the use of force at Article 2(4).[160]

In conclusion, Ansong opines that sovereignty, both in its traditional and current manifestation, has a disconnection between theory and practice.[161] He doubts whether the application of a "pure concept of sovereignty" is necessary, and argues that such application would limit a legitimate expression of sovereignty. He, however, adds that not all restrictions to sovereignty are

[158] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 34.

[159] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 37.

[160] Charter of the United Nations 1945, Art. 2(4) UNTS XVI.

[161] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 43.

desirable, as theory and practical applicability defer.[162] Ansong however fails to conclude on whether the principle of sovereignty can be relied on by a state to reject application of international law in a matter that such a state considers to be within the domestic jurisdiction of states. This paper addresses the tension between sovereignty and application of contemporary international law. It discusses whether sovereigny, in is current manifestation, can lock out application of international law. This work gives a clear explanation on the place of sovereignty and Article 2(7) vis a vis UN action, and concludes on the relevance of sovereignty in the modern context.

Stephen Krasner identifies four applications of sovereignty is used.[163] He categorizes them as "international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty".[164] According to Krasner, "international legal sovereignty" refers to the equal recognition of sovereignty among states.[165] "Westphalian sovereignty" prohibits external intervention in the governance of states.[166]

[162] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 48.

[163] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersey, 1999), p. 3.

[164] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersey, 1999), p. 11.

[165] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersy, 1999), p. 15.

[166] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersy, 1999), p. 16.

Krasner argues that the emphasis on domestic sovereignty is on the ability of public authorities to exercise effective control within the borders of their own polity.[167] He says that there is a focus on the domestic system of political authority and how it is organized and used to achieve desired results within the territorial confines of a given polity.[168] It is, therefore the state's use of its sovereignty, within its domain, over its citizens.[169] The last identification is "interdependence sovereignty", which provides that ability of a state to control outflows from, and inflows into its territory.[170] Krasner notes that the different manifestations of sovereignty are not independent of each other, though theoretically distinct. Krasner however fails to address the contemporary manifestation of sovereingty, and its usefulness in modern day practice. This work illustrates the contemporary understanding of sovereignty, and appreciates its usefulness in that it enables a state to assert its rights in the international forum. This paper distinguishes between sovereignty as a bar to external intervention, and sovereignty as a legal right of a state to participate and contribute to international law.

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[167] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersy, 1999), p. 16.

[168] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersy, 1999), p. 17.

[169] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersy, 1999), p. 19.

[170] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersy, 1999), p. 20.

When it comes to practice, there is no clear line of separation. The common aspects in all facets of sovereignty include existence of territory, population, hierarchy of power at the domestic level, independence, absence of external intervention, international recognition, and capacity to regulate trans-border flows.[171] Muge Kinacioglu analyzes the "principle of non-intervention", which he says is the logical corollary of the principle of sovereignty.[172] In doing so, he investigates the practice of international relations and says that Article 2(4) of the UN Charter prohibits the threat or use of force in international relations between states, hence the scope excludes the domestic use of force.[173] He argues that Article 2(4) does not take away a state's ability to ensure peace and order in its terror.[174]

As such, states may use force to suppress disorder and restore peace without breaching international law.[175] He adds that the framework of international relations indicates that the provision

[171] Stephen Kranser, 'Problematic Sovereignty' in Stephen Krasner (eds) *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press, Columbia, 2001)19-23.

[172] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 8.

[173] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 9.

[174] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 13.

[175] Muge Kinacioglu, The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 21.

does not apply to civil wars.[176] This indicates the common agreement that internal conflicts are not within the confines of international law, as the Article only governs relations between states.[177] However, once the UN Security Council declares that such a situation is a "threat to international peace and security", then the case is no longer a matter of internal affairs.[178]

Kinacioglu argues that external assistance, upon request, is allowed. However, aiding rebel forces of that government is prohibited. Hence, traditional legal doctrine allows intervention by a third party in a civil war, but only to aid the legitimate government, but prohibits giving any assistance to rebel groups.[179] He identifies the complexity that arises in such a situation, as there is no standard criterion that guides how outside governments recognize internal disturbances.[180] He refers to the "1949 Essentials of Peace Resolution" which implores states to "refrain from any threat or acts, direct or indirect, aimed at impairing the freedom, independence, or integrity of any state, and encouraging civil strife and subverting the will of the people in any state."[181]

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[176] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 11.

[177] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 13.

[178] Belatchew Asrat, 'Prohibition of Force Under the UN Charter: A Study of Art. 2(4)' (2008) .40 International & Comparative Law Quarterly 70.

[179] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 15.

[180] Belatchew Asrat, 'Prohibition of Force Under the UN Charter: A Study of Art. 2(4)' (2008) Cambridge University Press 40. International & Comparative Law Quarterly 74.

[181] GA Res. 290 (IV), 1 December 1949; UN Doc A/PV/261.

He also refers to UN General Assembly Resolution 290 (IV) which was adopted in 1950, condemning "intervention or assistance in a civil conflict aimed at changing a legitimate government by the threat or use of force".[182] This Resolution introduced the essential principles for peace and urged member states to observe those principles to promote co-operation, which was a foundation of the United Nations.[183] Kinacioglu discusses Article 2(7) of the UN Charter, which lays down the principle of non-intervention.[184] He writes that it is a prohibition against the UN, and is not identical to the prohibition against intervention implored on states. Muge however fails to appreciate UN practice in relation to civil wars, and the vast powers of the Security Council under Chapter VII. This work addresses the power of the Security Council under Chapter VII and studies instances where the Security Council has declared that civil wars are a threat to international peace and security. This work also examines whether there is anything in the Charter that limits the Council's power to make such determination, and questions whether Article 2(7) can really bar the Security Council from intervening.

[182] GA Res. 380 (V), 17 November, 1950; UN Doc A/1401.

[183] UN General Assembly, *Declaration on the Inadmissibility of Interventions in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, 21 December 1965, A/RES/2131, Available at: https://www.refworld.org/docid/3b00f05b22.html - Accessed 29th November 2019

[184] Charter of the United Nations 1945, Article 2(7).

Muge refers to Article 2(7) of the Charter as the life saver clause of member states. This is because it provides states with power to bar the jurisdiction of the UN and its organs. He argues that Article 2(7) bears three rules.[185] The first is aimed at UN organs which are restricted from interfering with the "domestic jurisdiction" of states.[186] The second is directed at the member states themselves who are prohibited from submitting matters that are "essentially within their domestic jurisdiction" to the UN for peaceful dispute settlement.[187] The third creates the only exception to the rule of "non-intervention" and excludes enforcement measures contained in Chapter VII of the Charter from application of the prohibition. [188]

He further identifies the difficulties arising from Article 2(7), more so interpretation of the terms "intervene" and "matters which are essentially within the domestic jurisdiction", arguing that the Article has not provided criteria for identifying and determining matters to be regarded as "essentially within the domestic jurisdiction of states", or action which has components of

[185] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 20.

[186] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 20.

[187] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 21.

[188] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 23.

intervention and this, he states, gives the UN discretion in applying those terms to a particular case.[189] Kinacioglu further investigates the scope of the United Nations jurisdiction vis-a-vis Article 2(7), and argues that the Article only prohibits intervention, and not all acts and decisions of the UN.[190]

He says that the meaning of the term "intervene" should not to be limited to interference by the UN. He explains that intervention should be extended to acts of the UN which do not comprise of enforcement action.[191] Here, he argues that the history of UN's practice demonstrates that the Organization may undertake either indirect or direct intervention in domestic affairs of a state.[192]

Kinacioglu's analysis of Article 2(7) of the UN Charter is crucial to this paper which aligns itself to his conclusion that, while the UN Charter is restrictive with respect to use of force and intervention by states, it is substantively open-ended with regards to

[189] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 30.

[190] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 34.

[191] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 38.

[192] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 40.

intervention and use of force by the UN itself.[193] The Charter leaves a great deal of room for political considerations and deliberations by assigning broad powers, especially to the Security Council, in matters of international peace and security.[194] In as much as the only exception under Article 2(7) of the Charter is enforcement measures, the UN has developed other mechanisms for its intervention (including humanitarian intervention) which are short of enforcement measures.[195] This work however goes further to analyze the short-comings in Article 2(7) as far as the exemption therein is concerned. The work demonstrates how these ambiguities and unlimited powers of the Security Council have disadvantaged the application of Article 2(7), and firmly confirms whether Article 2(7) is a dead law. It also gives recommendations that can be considered to cure the defects in Article 2(7), and align the application of the principles therein with contemporary international law.

Wright analyzes what intervention entails. [196] In doing so, he argues that discussion of domestic affairs is not interference. He argues

[193] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 41.

[194] Daniel Francis, 'Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action', in John Harbeson and Donald Rothchild (eds), *Africa in World Politics: Post-Cold War Challenges* (Westview Press, Boulder 1995), p. 229.

[195] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 University of London, Centre for Strategic Research 39.

[196] Quincy R. Wright, 'Is Discussion Intervention?' (1956) 50 Australian Journal of International Law 257.

that the United Nations would not be the organization envisioned by its founders if its organs are not allowed full and free discussion. The discussion phase is relevant at the General Assembly's meeting. This is the point whereby agenda are considered through debate. However, Wright's work is only limited to discussion as non-interference. This work has a broader discussion on what intervention entails, and further discusses contemporary concepts that have affected the understanding and application of intervention.

Eagleton attempts to define intervention.[197] He, however, says that there is a shortage of evidence in relation to the legal character of the rule of non-intervention.[198] He cites the important works of Hodges,[199] in his discussions on the doctrine of intervention as well as Fenwick's[200] works on individual and collective intervention. Hodges defines intervention as, "an interference by a state or states in the external affairs of another state without its consent, or in its internal affairs with, or without, its consent".[201] This definition includes, among others, war of any manner, as well as treaty rights involving internal affairs. Fenwick writes on the complexity of

[197] Clyde Eagleton, *International Government* (Ronald Press Corporation, London, 1957), p. 84.
[198] Clyde Eagleton, *International Government* (Ronald Press Corporation, London, 1957), p. 87.
[199] Henry G. Hodges, *Doctrine of Intervention* (Princeton University Press, Princeton, 1995), p. 114.
[200] Charles G. Fenwick, 'Intervention: Individual and Collective' (1945) 39 Australian Journal of International Law p. 119.
[201] Henry G. Hodges, *Doctrine of Intervention* (Princeton University Press, Princeton, 1995), p. 117.

defining the term "intervention". He writes that it could mean different things to different writers. To one writer, for instance, "intervention is the interference of one state in the affairs of another." To another, it is "unwarranted" interference. Hodges work does not offer a modern illustration of intervention. This work attempts to redefine intervention as it appreciates the mutation of the concept of intervention, and illustrates how the UN has applied intervention past and recent situations.

Gilmour discusses the meaning of the term "intervene" as used in Article 2(7) of the Charter.[202] He appreciates that there have been many developments since the Charter became operational, and that the political conditions of the world in which the Charter was drawn up have fundamentally changed. He asserts that there is universal recognition that the concept of intervention has narrowed down compared to what it was in 1945 at the adoption of the Charter. However, Gilmour's discussion ends there and he is silent on whether or not this development is desirable. This work thus addresses the impact of such development and examines whether the various developments have completely displaced the prohibition against intervention in matters essentially within the domestic jurisdiction of states.

[202] David Gilmour, 'The Meaning of Domestic Jurisdiction Within Article 2(7) of the United Nations Charter- A historical Perspective' (1967) Vol. 16 No 7 International Comparative Law Quarterly 331.

Winfield offers an important discussion in his treatise on the development of the rule on "non-intervention" in international law.[203] He says that the doctrine is covered in "confused nomenclature" and argues that regardless of the vagueness of this doctrine, it can be applied in three definite senses which he says are exhaustive. He classifies them as internal intervention, punitive intervention and external intervention. However, Winfield's treatise confines the meaning of intervention to the interaction of states *inter se.* Winfield does not discuss the affairs of international organizations vis-a-vis the jurisdiction of states. This work analyzes state practice and UN practice as regards the affairs between the UN and states, and examines whether the UN action has contravened the prohibition on non-intervention.

Watson argues that states have never yielded the power to make authoritative interpretations of Article 2(7) of the Charter to political organs of the United Nations. [204] He argues that member states have the power of auto-interpretation. He applied a positive approach and, according to him, this is an untenable position. However, his work has a shortcoming in that it does not provide any recommendations on the proper authority to determine whether a matter is within the domestic jurisdiction of states. This works attempts to draft an amendment which would cure this defect.

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[203] Percy Henry Winfield, *The History of International Law* (Cambridge University Press, Cambridge, 1923) p. 130.

[204] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 8 Australian Journal of International Law p. 61.

J. S. Bains compares Article 2(7) of the Charter to its predecessor, Article 15(8) of the League Covenant.[205] He notes that Article 2(7) is not clear on who is to make the final determination on whether or not a "matter is essentially within the domestic jurisdiction of a state". [206] He identifies the ICJ as the appropriate organ to make the determination, and disputes any assertion that a state has power to determine for itself that a "matter is essentially within its domestic jurisdiction."[207] He concludes that if a state party raises the plea of domestic jurisdiction, the ICJ, when approached, would be the competent determinant on whether the dispute in question regards a "matter which is essentially within the domestic jurisdiction of a state".[208] Bains however fails to appreciate the political aspect of UN action. This works takes into consideration both political and social aspects in its recommendations.

Wheaton, on the other hand, refers to a report by the American delegates on the results of the San Francisco Conference. [209] Their understanding of Article 2(7) was that each member state was able

[205] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 398.

[206] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 491.

[207] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 499.

[208] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 512.

[209] Henry Wheaton, *Digest on International Law Cases* (Greenwood Publishing Group, Carlifonia, 2013), p. 302.

to determine, on its own, "matters which were essentially within its jurisdiction". Jones disproves this conclusion, citing it as absurd and has no basis in the records of the conference. [210] Wheaton however fails to make a better recommendation on the proper authority to determine whether a matter is essentially within the domestic jurisdiction of states. This work makes such recommendations.

Despite the fact that there are two significantly opposing views, there is limited literature on the issue of authority to determine the operation of Article 2(7) of the Charter.[211] There are those who contest the competence of the UN organs to determine which "matters are essentially within the domestic jurisdiction of a state".[212] They hold that each state is its own judge. The opposing view is held by those who recognize the competence of the United Nations to make such determination.[213] The question of the meaning and scope of Article 2(7) had more weight in the formative years of the United Nations. Today, modern literature is more

[210] Goronwy J. Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, South Western Printers Ltd, Wales, 1979), p. 1409.

[211] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 257.

[212] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 259.

[213] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 8 Australian Journal of International Law 67.

concerned with the application of Article 2(7) in light of recent developments and problems.[214]

Verzijl writes that the prohibition directed to the UN and its organs by Article 2(7) of the Charter is losing its power and relevance, as a legal injunction, at a fast rate.[215] He argues that the place of Article 2(7) is becoming diminished, and is being reduced to a "play thing of opportunist international policy." To him, ultimately, the application of the "principle of non-intervention" is being swayed to fit political interests.[216] Despite such conclusions, Verzijl fails to make recommendations on the future of Article 2(7) of the Charter. This work addresses this gap by offering such recommendations.

Watson laments that Article 2(7) of the Charter has now taken an almost supranational jurisdiction instead of international jurisdiction due to the overwhelming abuse of the Article to further ideological purposes.[217] He argues that in modern practice, whenever there is need to suit powerful interests, the Article is manipulated or ignored. As such, he poses the question whether it

[214] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 8 Australian Journal of International Law 69.

[215] Hendrik Jan Willem Verzijl, *International Law in Historical Perspective* (Nijhoff Publishers, Belgium, 1973), p. 598

[216] Hendrik Jan Willem Verzijl, *International Law in Historical Perspective* (Nijhoff Publishers, Belgium, 1973), p. 616.

[217] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 8 Issue Australian Journal of International Law 62.

is prime time to adopt a dynamic, theological approach which prioritizes the goals of the United Nations. He also wonders whether the better approach is to find that the primary source of law is to remain in written documents,[218] and that the documents are to be interpreted in accordance to the agreed upon methods of interpretation.[219] Watson fails to conclude whether Article 2(7) is applicable in modern times. This work makes a firm stand on whether Article 2(7) is a dead law, identifies those responsible for its death and makes recommendations on the way forward.

Many authors have contributed to the literature on Article 2(7) of the Charter. There are many lamentations on the vagueness of Article 2(7). The literature reveals that Article 2(7) is vague. The interpretation of the term "intervene" is not provided for, making it unclear what action would constitute intervention.

The literature also reveals that "matters which are essentially within the domestic jurisdiction of states" have not been defined anywhere in the Charter.[220] This leaves a gap in the proper organ or institution to determine whether or not a matter falls within the

[218] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 8 Australian Journal of International Law 68.

[219] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 8 Australian Journal of International Law 70.

[220] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p.191.

domestic jurisdiction of states.[221] As a result, the literature shows that the United Nations, through the Security Council, has become the judge. The practice of the Security Council is that once a state in dispute claims that a matter is within its domestic jurisdiction, the Council has taken upon itself to determine whether or not that "matter is essentially within the domestic jurisdiction of the state in question".[222]

The literature shows that the Security Council has continuously contravened the principle in Article 2(7) of the Charter.[223] Consequently, Article 2(7) of the Charter cannot be used by a state to lock out UN action. The literature reveals that Article 2(7) is no longer achieving its intended purpose; that of protecting state sovereignty by limiting the jurisdiction of the United Nations in domestic affairs of states.[224] In addition, the literature shows that the developments in international law have left no room for the plea of domestic jurisdiction. This is because international law has extended its reach over the years. The scope of matters which are exclusively "within the domestic jurisdiction of states has

[221] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 351.

[222] Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing' (2000) 11, European Journal of International Law 545.

[223] Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing' (2000) 11, European Journal of International Law 550.

[224] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 69.

reduced".[225] As a result, the purpose of the principle of state sovereignty is becoming diminished in contemporary international law.[226]

This work will contribute to the existing literature by giving recommendations on the way forward. There is little literature that gives solutions to solve the ambiguity in Article 2(7). As it is, Article 2(7) as provided for in the Charter is a dead letter. It does not serve the intended purpose and has lost its place in contemporary international law.

1.12 Research Methodology

The main research method is desk top research. This entails collecting and examining secondary data which can be collected without fieldwork.

This study adopts a descriptive research design and applies qualitative techniques. Qualitative research is concerned with the deepening of understanding of a given problem. It produces in-depth and illustrative information in order to understand the various dimensions of the problem under analysis.

1.13 Chapter Breakdown

This study is organized into five chapters. Chapter one is the general introduction to the thesis. It provides a background to the

[225] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 73.
[226] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 76.

study, statement of the problem, conceptual framework, theoretical framework, objectives of the study, research questions, broad argument, literature review and research methodology.

Chapter two analyzes the purposes and principles of the United Nations, with a specific focus on Article 2(7) of the Charter. The history of the United Nations is also analyzed. The chapter also examines the genesis and history of Article 2(7) as one of the foundational principle of the United Nations.

Chapter three entails a critical analysis on the concept of state sovereignty, as well as the principle of domestic jurisdiction. There is an in-depth discussion on the history and development of the concept of state sovereignty, an examination on the contemporary manifestation of state sovereignty, and a discussion on the effect of the concept of human rights on state sovereignty. The principle of domestic jurisdiction is also discussed with a focus on Article 2(7) of the UN Charter. The terms used in Article 2(7) are also examined, such as the meaning of matters essentially within the domestic jurisdiction of states, and intervention.

There is an examination on the object of the prohibition in Article 2(7) of the Charter, and whether there is a designated authority to decide whether a matter is within the domestic jurisdiction of

states. The concept of non-intervention is addressed, as well as contemporary issues which affects the meaning of intervention. Here, the concepts of humanitarian intervention and responsibility to protect are examined.

Chapter four addresses the exemption in Article 2(7) of the Charter. It discusses the powers and practice of the Security Council under Chapter VII. The concept of "threat to peace" is also analyzed. The case of Libya is examined as a case study to examine UN practice vis a vis Article 2(7) of the UN Charter.

Chapter five entails the conclusion and recommendations. The relevance of Article 2(7) of the Charter in modern international law and the place of the concept of domestic jurisdiction in contemporary international law is determined.

CHAPTER 2: PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

2.0 Introduction

This chapter tracks the history and establishment of the United Nations, focusing on the events that led to the formulation of the principles of the United Nations. The purposes of the UN as provided for in the charter are also comprehensively analyzed. The chapter then analyzes the principles of the United Nations, more so that of sovereign equality as a founding principle of the Charter. The principle of domestic jurisdiction as found in the League of Nations and the UN Charter is then analyzed. The history of Article 2(7) is also analyzed with a specific focus on the current manifestation of the principle of domestic jurisdiction under the Charter of the United Nations.

2.1 History of The United Nations

It has been almost 75 years since the establishment of the United Nations. The United Nations was established in 1945 after the UN

Charter was adopted on 25th June, 1945.[1] The main aim of the UN was the prevention of future wars, and "maintenance of international peace and security". It is debatable whether, 75 years later, the United Nations has achieved its purposes.[2]

After the League of Nations failed in its efforts to prevent war, several governments realized the need to form an international organization under which they could achieve their common goals.[3] The Charter of the United Nations was adopted at the Dumbarton Oaks Conference on 25th June, 1945 and became operational on 24th October, 1945.[4] At the adoption of the Charter, the United Nations had 51-member states, a number that has increased to 193 member states. This membership grew after decolonization of colonies around the 1960s.[5]

The main objective of the UN was to preserve world peace. At its early age, it was difficult to achieve this objective due to the Cold War between the United States and the Soviet Union, and their allies.[6] The UN's mission initially involved unarmed military

[1]Thomas Weiss, 'The United Nations, Before, During and After 1945', (2015) 67 The Royal Institute of International Affairs 1222.

[2] David Mitrany, *The Functional Approach to World Organization: International Affairs and a Working Peace System* (University of Chicago, Chicago Press, Chicago, 1966), p. 350.

[3] Howard Miller, *The Invention Of Peace: Reflections On War And International Order* (Yale University Press, Connecticut, 2001), p. 111.

[4] Thomas Weiss, 'The United Nations, Before, During and After 1945', (2015) 67 The Royal Institute of International Affairs 1226.

[5] Nye Welch, *Understanding Global Conflict and Cooperation: An Introduction to Theory and History* (Pearson Press: Boston, 2013), pp. 338-351.

[6] Andrew Williams, *International history and International Relations* (Routledge Press, London, 2012), p. 332.

observers. However, since the 1970s, the UN's work has greatly expanded to economic and social development programs.[7] Following the end of the Cold War, the UN expanded its peacekeeping functions and increased its missions in ten years more than it had previously. The UN adopted numerous Security Council resolutions between 1988 and 2000, and it increased its peacekeeping budget.[8] Among its successes around the time, the UN launched a successful peacekeeping mission in Namibia, assisted in the end of the Salvadoran Civil war, and oversaw democratic elections in South Africa and Cambodia.[9]

In the 1990s, the UN was faced with the challenge many internal crisis rising in different states such as Mozambique, former Yugoslavia, Somalia, and Haiti.[10] This was despite the fact that the UN Charter was drafted to prevent war by one state against another. The crises exposed UN's failures. The UN mission to Bosnia was criticized for being an indecisive and confused mission at a time of ethnic cleansing.[11] The UN mission in Somalia was a failure after the US withdrew its army from Somalia, leading to the

[7] David Mitrany, *The Functional Approach to World Organization: International Affairs and a Working Peace System* (University of Chicago, Chicago Press, Chicago, 1966), p. 354.

[8] Andrew Williams, *International history and International Relations* (Routledge Press, London, 2012), pp. 335-362.

[9] Thomas Weiss, 'The United Nations, Before, During and After 1945' (2015) 67 The Royal Institute of International Affairs 1229.

[10] Thomas Weiss, 'The United Nations, Before, During and After 1945' (2015) 67 The Royal Institute of International Affairs 1231.

[11] Fredrick Rico, 'The fall of Srebrenica and the Failure of UN Peackeeping' (1995) 7 Journal on Human Rights 761.

Battle of Mogadishu which left many casualties.[12] In 1994, the UN did not intervene in the Rwanda genocide as the Security Council could not decide.[13]

The UN was also criticized by United States and other European countries for mismanagement of funds and corruption.[14] In 1984, the United States, United Kingdom and Singapore withdrew funds, citing mismanagement. The Secretaries General to follow, such as Boutros-Ghali and Kofi Annan, attempted to reform the management of the organization amidst threats from the United States to withhold its UN dues.[15]

In the period between 1990s and 2000s, the UN's interventions expanded in nature. UN's invasion of Afghanistan in 2001 was overseen by North Atlantic Treaty Organization,[16] and its mission in the Sierra Leone Civil War was supplemented by British army. In 2003, the United States invaded Iraq despite the fact that there was no Security Council resolution which authorized such a move. This raised doubts on UN's effectiveness in prevention of war. The UN

[12] Chester Crocker, 'The Lessons of Somalia: Not Everything Went Wrong' (1995) 74 International Journal on Foreign Affairs 3.

[13] Dominique Maritz, 'Rwandan Genocide: Failure of the International Community?' (2012) 1 Human Rights Watch 13.

[14] Thomas Weiss, 'The United Nations, Before, During and After 1945' (2015) 67 The Royal Institute of International Affairs 1233.

[15] Nye Welch, *Understanding global conflict and cooperation: an introduction to theory and history* (Pearson Press, Boston, 2013), p. 367.

[16] Thomas Weiss, 'The United Nations, Before, During and After 1945' (2015) The Royal Institute of International Affairs 1235.

continued to intervene in internal crises such as in Sudan in 2011, and Syria in 2015. In 2013, a review of UN's internal activities revealed that the UN had suffered systematic failure.[17]

2.2. The Guiding Principles and Purposes of The United Nations

Though the League of Nations was not successful, the United Nations reproduced and redefined many of its structures.[18] The United Nations is guided by its Charter. The UN Charter provides for the UN's organizational structure, principles, powers and functions.[19] The Preamble to the Charter provides for the central purpose of the United Nations.[20] This is the prevention of the scourge of war through a commitment to collective security and human rights. The UN does not have a military nor does it have means of enforcing measures. It mostly relies on cooperation and good will of its members. The Charter provides for principles and purposes of the United Nations.[21] However, UN practice plays a big role in determining the functions and purposes of the organization.[22]

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[17] UN/ICI/CONF.2013/1, *Final report of the Preparatory Committee for the 2013 Review Conference*, 16th January 2013, Available at https://www.un.org/en/conferences/ici2013/documents Assessed 24th November, 2019

[18] Stanley Meisler, *United Nations: The First Fifty Years* (Atlantic Monthly Press, New York, 1995), p. 342.

[19] Charter of the United Nations 1945, Article 7 UNTS XVI.

[20] Charter of The United Nations 1945, Article 1 UNTS XVI.

[21] Charter of the United Nations 1945, Article 2 UNTS XVI.

[22] Le Roy Bennet, *International Organizations: Basic Principles and Organizations of the United Nations* (7th ed. Prentice Hall Publishers, Nevada, 1984), p. 57.

2.3 Purposes of the United Nations

The main purpose of creating the United Nations was to form a framework for cooperative problem solving amongst states. Recently, the UN has expanded its objectives to political, social, economic and technological issues that face humanity.[23] The core objective of the UN is the promotion of peace and security.[24] The UN has, however, developed, through practice, and this core objective is now supplemented by an ever-expanding economic and social agenda.[25]

Having a statement of objectives for an organization is not a reflection of the importance of the welfare for humankind.[26] Further, such statement does not necessarily guarantee fulfillment of those objectives. What is important is the effort put towards achievement of those goals by an organization. However, whether or not those objectives are achievable, the statement of objectives gives the direction that action will take. At the creation of the United Nations, 50 states came together and formed an organization that would achieve their common purposes.

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[23] Ekpotuatin Ariye, 'The United Nations and Its Peace Purpose: An Assessment' (2014) 51 Journal of Conflictology I24.

[24] Charter of the United Nations 1945, Article 1 UNTS XVI.

[25] Ekpotuatin Ariye, 'The United Nations and Its Peace Purpose: An Assessment' (2014) 51 Journal of Conflictology I27.

[26] Le Roy Bennet, *International Organizations: Basic Principles and Organizations of the United Nations* (7th ed. Prentice Hall Publishers, Nevada, 1984), p. 59.

This was an indication that there was a desire to lay down their objectives in an agreed upon statement which would be incorporated in the final draft of the document which laid down the guiding principles to be followed, in the achievement of those objectives.[27] The Charter of the United Nations summarizes its objectives in its' preamble.[28] The common goal of the state members to the United Nations is the "maintenance of international peace and security". The action provided for the achievement of this goal is the "peaceful settlement of disputes and collective measures for the prevention and removal of threats to the peace or acts of aggression".[29]

The main organ tasked with the responsibility of maintenance of peace is the Security Council, together with the General Assembly and International Court of Justice.[30] The Charter provides for the methods of peaceful settlement of disputes in Chapter VI.[31] The Charter also provides for the measures to be taken in grave situations involving "threat to the peace, breach of the peace, and acts of aggression".[32]

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[27] Le Roy Bennet, *International Organizations: Basic Principles and Organizations of the United Nations* (7th ed. Prentice Hall Publishers, Nevada, 1984), p. 62.
[28] Charter of the United Nations 1945, Preamble UNTS XVI.
[29] Charter of the United Nations 1945, Article 1 UNTS XVI.
[30] Charter of the United Nations 1945, Article 24 UNTS XVI.
[31] Charter of the United Nations 1945, Chapter VI UNTS XVI.
[32] Charter of the United Nations 1945, Arts. 39, 40, 41 UNTS XVI.

Another important objective is the promotion of international economic and social cooperation.[33] The Economic and Social Council, ECOSOC, is one of the organs of the United Nations.[34] It is the organ that is tasked with the implementation of this objective with assistance of the General Assembly and other specialized agencies dealing with economic and social affairs.[35] The third objective is the promotion of human rights for all people as reflected in Article 1 of the Charter.[36] However, the Article does not specify the meaning, and it does not provide any guidelines for implementation of the objective, The Charter does not make any other provision for the definition of human rights.[37]

The Charter confers responsibility for promoting human rights on the General Assembly and ECOSOC.[38] ECOSOC is assigned the role of establishing commissions on human rights, making recommendations and drafting conventions on human rights.[39]

There are other objectives reflected in the Preamble or Article 1 of the Charter. However, they do not provide for their specific meaning or means of implementation. These include, "practicing

[33] Charter of the United Nations 1945, Art. 3 UNTS XVI.
[34] Charter of the United Nations 1945, Art. 62 UNTS XVI.
[35] Charter of the United Nations 1945, Art. 50 UNTS XVI.
[36] Charter of the United Nations 1945, Art. 50 UNTS XVI.
[37] Le Roy Bennet, *International Organizations: Basic Principles and Organizations of the United Nations* (7th ed. Prentice Hall Publishers, Nevada, 1984), p. 66.
[38] Charter of the United Nations 1945, Art. 62 UNTS XVI.
[39] Charter of the United Nations 1945, Art. 55 UNTS XVI.

tolerance and living together in peace as good neighbors, acting as a centre for harmonizing the actions of nations in the attainment of the more specific goals, establishing justice and respect for international law and developing friendly relations among nations".[40] Consequently, the statement of purposes in the Charter of the United Nations is general and repetitive.[41]

2.4 Principles of the United Nations

Article 2 of the United Nations Charter provides for the principles of the UN.[42] These principles are legally binding and a representation of the basic foundational obligations of member states.[43] They are the legal standards which member states commit to adhere to, in order to promote achievement of the common objectives.[44]

Article 2(1) provides for the most fundamental principle, that of sovereign equality of the members.[45] This means that every member state is sovereign and independent, irrespective of its wealth, size or power. State sovereignty is, therefore, a legal status. It is on the basis of state equality that the Charter confers each state with one

[40] Charter of the United Nations 1945, Preamble UNTS XVI.

[41] Le Roy Bennet, *International Organizations: Basic Principles and Organizations of the United Nations* (6th ed. Prentice Hall Publishers: Nevada 1984), p. 116-123.

[42] Charter of the United Nations 1945, Art. 2 UNTS XVI.

[43] Ian Brownlie, *The Principles of Public International Law* (6th ed. Oxford University Press, Oxford 1966), p. 295.

[44] Ekpotuatin Ariye, 'The United Nations and Its Peace Purpose: An Assessment' (2014) 51 Journal of Conflictology I36.

[45] Charter of the United Nations 1945, Art. 2 (1) UNTS XVI.

vote in the General Assembly.[46] The principle of state sovereignty limits the powers of the organization. The member states of the UN have not conferred any real authority to the organization, and they retain the power of making decisions for themselves. The UN is therefore dependent on the good will and cooperation of its members in the discharge of its obligations.[47]

There are other principles provided for by the UN Charter by virtue of Article 2 of the Charter. These include a requirement to members to fulfill in good faith the obligation conferred to them by the charter. Member states are required to settle international disputes by peaceful means without endangering international peace and security. The members also undertake to give the UN assistance in its actions. The Charter also provides for the principle prohibiting the threat or use of force against a state, and entrusts the UN to ensure that even non-member states act in accordance with principles of the UN for the maintenance of international peace and security.[48]

2.5 The principle domestic jurisdiction under the League of Nations

[46] Charter of the United Nations 1945, Art. 18 (1) UNTS XVI.
[47] Jacques Fomerland, *The A to Z of the United Nations* (Scarecrow Press, Washington DC, 2009) pg. 442
[48] Charter of the United Nations 1945, Article 7 UNTS XVI.

The principle of domestic jurisdiction is provided for by virtue of Article 2(7) of the UN Charter. This principle has roots in the Congress System, the Concert of Europe, in the era of the League of Nations, and, finally, in the drafting of the UN Charter.[49] The genesis of Article 2(7) is discussed in detail under chapter three of this work.

It is however paramount to note that the Covenant of the League of Nations was the first document that raised domestic jurisdiction into the status of a distinct doctrine of international constitutional law.[50] Through Article 15, the Covenant recognized that there was existence of a reserved domain of matters which related to states which were not, in principle, the subject of international jurisdiction.[51]

Article 15 of the League Covenant provided that where a party to a dispute invoked the plea of domestic jurisdiction, the Council was to so report and was barred from making any recommendations as to the settlement of that dispute.[52] The League Covenant provided for pacific settlement of international disputes and the enforcement

[49] The Congress System was created to protect the public law of the European states other than the Turkish empire because of the differences between Russia and Britain.

[50] Covenant of the League of Nations 1919 Available at https://www.ungeneva.org/en/covenant-lon Assessed 24th November, 2020

[51] James Brierly, 'Matters of Domestic Jurisdiction' (1925) 6 No Columbia Law Review 10.

[52] Covenant of the League of Nations 1919, Art. 15(8).

of peace.[53] The Covenant required member states to submit any disputes which would lead to disagreement to "arbitration, judicial settlement, or to inquiry by the Council".[54] Any claim made by a state that a "matter was solely within its domestic jurisdiction" was first tested as per provisions of international law.[55]

Any claim of domestic jurisdiction had to be determined through the criteria provided in the League Covenant. There were three major cases under which this criterion was practiced. The first was the case of Finland versus Sweden[56] and United Kingdom versus France.[57] The case of Finland versus Sweden was regards to a declaration of independence from Russia by inhabitants of Aaland Island.[58] The declaration was supported by Sweden which argued that Aaland had a right to self-determination.[59] The mater was referred to the Council by Britain, citing that the situation posed a

[53] Gillian Ridgley, *The Covenant of the League of Nations* (Oxford University Press, Oxford, 1951), p. 45.

[54] David Hunter, *The Drafting of the Covenant* (Macmillan Publishers, New York, 1928), p. 76.

[55] Gillian Ridgley, *The Covenant of the League of Nations* (Oxford University Press, Oxford, 1951), p. 45.

[56]League of Nations, OJ Special Supp. 3 *Finland vs Sweden* (1920) Encyclopaedic Dictionary of International Law (3) Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095342699 Assessed 24th November 2019.

[57] *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice, 7 February 1923 Encyclopaedic Dictionary of International Law Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100224306 Assessed 24th November 2019.

[58] Philip Marshall, 'The Aaland Island Question' (1921) 15 The American Journal of International Law 268.

[59] Philip Marshall, 'The Aaland Island Question' (1921) 15 The American Journal of International Law 269.

"threat to international peace." Finland attempted to refrain the Council from taking action, claiming that the dispute concerned its treatment of ethnic minorities in its territory, and hence was within its domestic jurisdiction.[60]

Finland's claim was an objection to the Council's jurisdiction by virtue of Article 15(8). The Council thus established a committee of three jurists to deliver an advisory opinion.[61] The Committee rejected Finland's argument and found that the Council indeed had jurisdiction to make appropriate recommendations as the matter was not "exclusively within the domestic jurisdiction" of Finland in accordance with international law.[62]

The Nationality Decrees in Tunis and Morocco was a conflict between France and Britain.[63] The dispute concerned the Nationality Decrees issued in Tunis and France, as well as the application of the decrees to British subjects. French declined to

[60] Philip Marshall, 'The Aaland Island Question' (1921) 15 The American Journal of International Law 271.

[61] ICJ Advisory Opinion *Accordance With International Law of the Unilateral Declaration of Independence* December 2009- Available at https://www.icj-cij.org/public/files/case-related/141/17888.pdf- Accessed 28h April 2020.

[62] ICJ Advisory Opinion *Accordance With International Law of the Unilateral Declaration of Independence* December 2009- Available at https://www.icj-cij.org/public/files/case-related/141/17888.pdf- Accessed 28h April 2020.

[63] Elias Taslim, 'The era of protectorates, colonies and capitulations: The International Court of Justice and Some Contemporary Problems' (1983) 3 American Journal on International Law 16.

resolve the matter through arbitration.[64] Britain referred the matter to the Council, however, France declined the Council's competence by claiming that the "matter was solely within its domestic jurisdiction".[65]

The Council referred the matter to the Permanent Court of International Justice (PCIJ).[66] The Court held that the dispute was not one that constituted "a matter solely falling within the domestic jurisdiction of France".[67] However, the parties later on settled the dispute before the Council made its determination.[68]

In the case of United Kingdom versus France (1923), the PCIJ held that; "The words 'solely within the domestic jurisdiction' seem rather to contemplate matters which, though they may very closely concern the interests of more than one state, are not in principle matters regulated by international law. As regards such matters, each state is sole judge. The question whether a certain matter is or is not solely within the jurisdiction of a state is an

[64] Elias Taslim, 'The era of protectorates, colonies and capitulations: The International Court of Justice and Some Contemporary Problems' (1983) 3 American Journal on International Law 19.

[65] Thomas Maktos, 'Nationality and Domestic Questions' (1930) 24 American Society of International Law 46.

[66] Thomas Maktos, 'Nationality and Domestic Questions' (1930) 24 American Society of International Law 48.

[67] PCIJ Advisory Opinion *Nationality Decrees Issued in Tunis and Morocco* 4 7 February 1923 Available at https://www.refworld.org/cases,PCIJ,44e5c9fc4.html [accessed 14 August 2021]- Accessed 28th April 2020.

[68] Thomas Maktos, 'Nationality and Domestic Questions' (1930) 24 American Society of International Law 50.

essentially relative question; it depends upon the development of international relations."[69]

The PCIJ also added that a state's invocation of Article 15 (8) of the Covenant was not enough to demonstrate a state's sole jurisdiction over a matter. It was also found that France was bound by the international covenants that I had entered into with Britain, and could not override its obligations under the agreements by raising a plea of domestic jurisdiction.[70]

During the existence of the League of Nations, the domestic jurisdiction of Article 15(8) was tested in few cases. Despite the fact that the issue of domestic jurisdiction was debated upon in several occasions at the League Assembly and in the Council, there is no state that successfully invoked the domestic jurisdiction clause of Article 15(8).[71]

2.6 The principle of domestic jurisdiction under Article 2(7) of the Charter

At the drafting of the UN Charter, the main difficulty was on how to create a constitution of a unique kind of international

[69] PCIJ Advisory Opinion *Nationality Decrees Issued in Tunis and Morocco* 4 7 February 1923 Available at https://www.refworld.org/cases,PCIJ,44e5c9fc4.html [accessed 14 August 2021]-Accessed 28th April 2020.

[70] PCIJ Advisory Opinion *Nationality Decrees Issued in Tunis and Morocco* 4 7 February 1923 Available at https://www.refworld.org/cases,PCIJ,44e5c9fc4.html [accessed 14 August 2021]-Accessed 28th April 2020.

[71] Herbert Jones, 'Domestic Jurisdiction—From the Covenant to the Charter' (2006) 12 Singapore Year Book of International Law 300.

organization.[72] The principle of non-intervention contained in the Dumbarton Oaks Proposals was discussed intensively.[73] The authority of the idealized organization was to depend on the measure of national sovereignty which the member states, and more so the great powers, were ready to yield so as to empower it to actualize the purposes it was intended to govern.[74]

The founders had the objective of ensuring that they would create a Charter that provided for the powers which the member states had to surrender to the United Nations.[75] This had to be balanced with the objective of self-preservation. The drafters of the Charter had to ensure that the UN would not be so powerful as to interfere in matters which were "within the domestic jurisdiction of member states".[76] Article 2(7) of the UN Charter had its genesis in the reservation based on domestic jurisdiction.[77]

This reservation was included in the proposals for a general international organization agreed to by the great powers which

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[72] Russell Muther, *A history of the Unted Nations Charter, The Role of the United States, 1940-1945)* The Brookings Institution, Washington DC, 1958), p. 901.

[73] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 149.

[74] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003), p. 138.

[75] Sreeranga Rajan, *United Nations and Domestic Jurisdiction (*2nd ed. Asia Publishing House, London, 1961), p. 25.

[76]Kaswer Ahmed. *The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View* (2006) 10 Singapore Year Book of International Law 180.

[77] Sreeranga Rajan, *United Nations and Domestic Jurisdiction (*2nd ed. Asia Publishing House, London, 1961), p. 25.

included China, Soviet Union, Great Britain, and the United States.[78] In the Dumbarton Oaks, the "domestic jurisdiction clause" was intended to limit the jurisdiction of the idealized international organization in the peaceful settlement of disputes arising out of "matters solely within the domestic jurisdiction of states".[79]

The domestic jurisdiction clause was enshrined in paragraph 7 of section A in Chapter VIII of the Dumbarton Oaks proposals.[80] The first 6 paragraphs laid down the proposed criteria guiding the Security Council and member states in the settling of disputes that were likely to disturb the peace.[81] Parties to such disputes had an obligation to submit the matter to the Security Council if the methods of pacific settlement failed.[82] It followed, then, that paragraph 7 gave international law as the yardstick for determining whether a dispute arose out of "a matter which was within the domestic jurisdiction of a state".[83]

[78] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 150.
[79] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 153.
[80] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 158.
[81] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 159.
[82] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 162.
[83] Hula Erich, 'The Dumbarton Oaks Proposals' (1945) 12 Journal for Social Research 164.

However, in contrast to Article 15(8) of the Covenant of the League of Nations, the paragraph did not identify a determinant of which matters were outside the reach of the international organization.[84] Due to that critical omission, the four great powers reached consensus on some amendments. The main issues were whether they would retain the international law criterion, and whether a state involved in a dispute had capacity to decide whether or not the matters in dispute were within their domestic jurisdiction.

The agreement was that the solution would be found upon widening the ambit of the "domestic jurisdiction clause", and by replacing the word "solely" with "essentially" in the description of domestic jurisdiction. Discussion on the issue led to the drafting of an approved paragraph which read; "Nothing contained in this Charter shall authorize the Organization to interfere with matters which (by international law) are essentially within the domestic jurisdiction of the State or shall require the members to submit such matters to settlement under this Charter. Should, however, a situation or dispute arising out of such a matter assume an international character and constitute threat to peace occur in consequence of such a situation or dispute, it shall be open to the Security Council, acting in accordance with Chapter VIII, Section B, to take such action as it may deem necessary".[85]

[84]Kaswer Ahmed. *The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View* (2006) Singapore Year Book of International Law and Contributors 187.

[85] Kaswer Ahmed. *The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View* (2006) Singapore Year Book of International Law and Contributors 189.

The draft was presented to Committee 1 of Commission 1 for deliberations. Dr. Evatt, the Australian delegate, proposed an amendment to the effect that the words "but this principle shall not prejudice the application of Chapter VII section B" be deleted and replaced with "but this principle shall not prejudice the application of enforcement measures under Chapter VII Section B".[86]

He argued that such amendment would prohibit the Security Council from recommending terms for the settlement of a dispute arising out of domestic jurisdiction of a state, even though it may have determined the existence of a threat to peace.[87] The Australian amendment was approved by 31 votes to 3 with 5 delegates abstaining and 11 making no responses.[88] The amendment was thus approved and the paragraph provided; "Nothing contained in this Charter shall authorize the Organization 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 this Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VIII, Section B".[89]

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[86] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law and Contributors 192.

[87] Herbert Jones, 'Domestic Jurisdiction—From the Covenant to the Charter' (2006) 12 Singapore Year Book of International Law 301.

[88] Herbert Jones, 'Domestic Jurisdiction—From the Covenant to the Charter' (2006) 12 Singapore Year Book of International Law 301.

[89]Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law and Contributors 2006 197

The Greek delegation proposed an amendment to the Article to the effect that the decision whether or not such dispute arises out of "matters which fall within the domestic jurisdiction" of the state concerned was to be left to the International Court of Justice.[90] This proposal was not voted for by a two-third majority vote hence it failed.[91] The text suggested by the Australian delegate was submitted for discussion to the final meeting of Committee 1. Several amendments were suggested but none of them was successful.

Finally, the Australian amendment was approved by Committee 1 by 33 votes to 4 and was accepted as Article 2(7) of the Charter. Consequently, Article 2(7) of the UN Charter became one of the founding principles of the United Nations as it preserved the sovereignty of states by limiting intervention in "matters within the domestic jurisdiction of states".[92]

Article 2(7) of the Charter enshrines one of the founding principles of the United Nations, that of domestic jurisdiction and sovereignty. It was an assurance that states were not yielding their sovereignty, and that they were still in control of their internal matters. However, Article 2(7) as drafted has a multitude of

[90] Leland Goodrich, *Charter of the United Nations: Commentary and Documents*, (3rd ed. Columbia University Press, New York, 1969) pp. 665-67

[91] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law and Contributors 2006 200.

[92] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press 2003) pg. 139

ambiguities that have led to great discourse and debates in the international forum. It is not clear what the term "intervene" means. It is not also clear what matters are "essentially within the domestic jurisdiction of states." The lack of consensus on the interpretation and application of the principles enshrined therein has led to the abuse of Article 2(7), such that it is doubtful whether the Article still provides the assurance intended by the drafters of the charter.

2.7Conclusion

This chapter discusses the purposes and principles of the United Nations. The manifestation of domestic jurisdiction under the League of Nations is also discussed. The drafting history of Article 2(7) of the Charter is also discussed, as well as its manifestation under the UN Charter. It was found that the main purpose of creating the UN was to form a forum for cooperative problem solving. It was also found that though the UN has expanded its objectives to political, social, economic and technological issues that face humanity, the main objective of the UN was the promotion of international peace and security. It was found that this objective was to be achieved through the peaceful settlement of disputes.

It was also found that Article 2(7) enshrines the founding principles of the UN, that of sovereignty and domestic jurisdiction. That despite this, the article has many ambiguities that have been the subject of abuse. These ambiguities are concerned with the meaning, interpretation and application of the terms found in Article 2(7) such as "matters essentially within the domestic

jurisdiction of states" and "intervention". It was found that the confusion surrounding the understading of these terms has led to the abuse of Article 2(7) such that it is doubtful whether it still plays its intended purpose; that of preserving the sovereignty and domestic jurisdiction of states.

CHAPTER 3: STATE SOVEREIGNTY AND DOMESTIC JURISDICTION

3.0 Introduction

Article 2(7) of the UN Charter provides for two principles; state sovereignty and domestic jurisdiction. The history and development of these principles is discussed. The terms used in Article 2(7) of the Charter are also discussed in a bid to analyze the contemporary interpretation and application of Article 2(7) of the Charter. The ambiguities in Article 2(7) of the Charter are also analyzed.

Development in international law has led to emergence of new concepts, including humanitarian intervention and the responsibility to protect. These new concepts have had an impact on the scope and application of the principles of sovereignty and domestic jurisdiction. The relationship between these two principles in light of recent developments is discussed, with the aim of finding out whether there is a co-relation, or whether the vast development in international law has undermined the relevance of thesee two principles.

3.1 History and development of state sovereignty

Article 2(7) of the UN Charter prohibits the UN and its organs from interfering with "matters essentially within the domestic jurisdiction of states".[1] This prohibition is based on the concept of state sovereignty. The purpose of "Article 2(7) of the UN Charter is to protect the sovereignty of states".[2] This is not a new concept in international law. The intention of the founders of the UN was not to create a multi-national state. The intention was to create an international body that would create a forum for them to achieve common goals, while protecting their sovereignty.[3]

State sovereignty developed from principles contained in the "Treaty of Westphalia 1648".[4] These principles were first fully articulated in Hobbes's book titled "Leviathan" (1651).[5] Since then, they have undergone a series of modernized changes due to different interpretations which are influenced by political philosophy. Traditionally, the concept of sovereignty corresponded to a fusion of the individual and the authoritarian state.[6] It reflected Hobbes's theory of an all-compassing sovereign, the Leviathan. Following its mutations, the concept of state sovereignty referred to

[1] Charter of The United Nations 1945; Art. 2 para 7 UNTS XVI.

[2] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p.197.

[3] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 199.

[4] Thomas Hobbes, *Leviathan* (Penguin Books, United Kingdom, 1651), p. 468.

[5] Thomas Hobbes, Leviathan (Penguin Books, United Kingdom, 1651), pp. 468-470.

[6] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 221.

the sovereignty of the state as a legal entity.[7] In contemporary international law, political philosophy has now influenced sovereignty so much so that the individual is considered to be the foundation of the democratic state.[8]

State sovereignty is founded on mutual recognition of independence among states, equality of states, mutual co-existence of states, and "non-intervention in matters within the domestic jurisdiction of states".[9] A state's internal structure was considered during the establishment of the concept of state sovereignty. This is because the concept was based the existence of a government endowed with absolute law making and power.[10] Sovereignty is traced back to the medieval period.[11] The feudal system was segmented into territorial units and quasi-autonomous institutions.[12] The main political idea was based on religious

[7] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 224.

[8] James Burgess, 'Ethics of Humanitarian Intervention: The Circle Closes' (2002) 33 Peace Research Institute, Sage Journals 262.

[9] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 231.

[10] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 227.

[11] Galina Shinkaretskaya, 'Content and Limits of Domestic Reserve', in Grigory Tunkin & Rudiger Wulfrum (eds), *International Law and Municipal Law* (Duncker & Humbolt, Berlin, 1988), p. 2123.

[12] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 14.

[12] Sir Robert Jennings, 'Sovereignty and International Law', in Gerard Kreijen (eds), *State, Sovereign, and International Governance* (Oxford University Press, Oxford, 2002), p. 43.

authority *(Respublica Christiana)* which was under the Po, whereas the political authority *(Sacerdotium)* was headed by the Emperor.[13]

The medieval political order, however, declined in the sixteen century. There were political, economic and social developments in individual states leading to centralization of power in each given state. Further, powers began to centralize into governments following growth in trade, manufacturing and introduction of royal taxes.[14] The authority of the church also declined with the revival in art, literature and philosophy. The outcome was the emergence of a new state system, which was made up of territorially bound sovereign states with an individually centralized system.[15] This state system was formalized in the seventeenth century by the Peace of Westphalia.[16]

Djura Nincic identifies three major characteristics that were entailed in the concept of sovereignty during the seventeenth century. The first was that sovereignty was an essential attribute of state power. The second was that the basis of sovereignty was to protect the

[13] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 17.

[14] Galina Shinkaretskaya, 'Content and Limits of Domestic Reserve', in Grigory Tunkin & Rudiger Wulfrum (eds), *International Law and Municipal Law* (Duncker & Humbolt, Berlin, 1988), p. 2124.

[15] Robert Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', in Robert Jackson (eds), *Sovereignty At the Millennium* (Blackwell Publishers, Massachusetts, 1999), p. 14.

[16] Joseph Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Edward Elgar Publishing: England, 1994), p. l2.

political independence of a state from exterior interference.[17] The final characteristic absolved the state from any limitation of its power, and related state's sovereignty to a state's ability to use force to assert its independence.[18]

The application of the concept of state sovereignty, as understood then, was only internal. Its main purpose was the definition of functions of the government, in order to assist in the establishment of law and order.[19] It did not apply to international relations of the State, such relations were not significant to states at the time.[20] The idea that power ought to have been taken from the ruler and given to its subjects was popularized between the 18th and 19th century.[21] The notion of state equality was also accepted around the time. Internal and external state development were noted, and happened simultaneously.

As freedoms and equality of individuals developed within states, independence and equality of states on the international arena also developed. Sovereignty, hence, was characterized by the legal expression of independence and equality. Around the same time,

[17] Alex Ansong, 'The Concept of Sovereign Equality of States in International Law' (2016) 2 GIMPA Law Review 18.

[18] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 200.

[19] Robert Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', in Robert Jackson (eds), *Sovereignty At the Millennium* (Blackwell Publishers, Massachusetts, 1999), p. 16.

[20] R.P. Anand, *lnternational Law and the Developing Countries: Confrontation or Co-operation* (Banyan Publications, New Delhi, 1986), p. 75.

[21] Charles Tilly, *The Formation of Nation-States in Western Europe* (Princeton University Press, Princeton, I975), p. 7I5.

the "principle of non-intervention" was incorporated into the concept of state sovereignty.[22]

3.1.1 Absolute and Relative Theories of Sovereignty

The 19th century version of sovereignty led to the growth of what is now termed as absolute sovereignty.[23] It first developed in Germany and, later on, in England. Those who supported this theory argued that sovereignty did not just entail supreme authority. They argued that it was not just an authority over which there was no other authority, but also full and unlimited power. The result of such argument was that states would be independent of each other, or of any other higher authority or principle. Moreover, it would mean that states would be at will to either fulfill or denounce their obligations, depending on national interests.[24]

Such an approach would be drastic in two ways. Its consequence was such that the element of equality was removed from the concept of sovereignty. Secondly, it would suggest that sovereignty was equal to having the actual power to exercise it. Hence, sovereignty would be identified with force. Moreover, such an approach prioritized domestic laws to international laws.[25]A more

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[22] Charles Tilly, *The Formation of Nation-States in Western Europe* (Princeton University Press, Princeton, I975), p. 718.

[23] James Anderson and Stuart Hall, 'Absolutism and Other Ancestors', in James Anderson (eds), *The Rise of the Modern State* (Wheatsheaf Books, Brighton, I986), p. 28.

[24] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 217.

[25] Preston Theodore King, *The Ideology Of Order: A Comparative Analysis Of Jean Bodin And Thomas Hobbes* (Psychology Press Ltd, East Sussex, 1999), p. 357.

acceptable theory of sovereignty developed during the first and second world wars. This was the "relativist approach" to sovereignty.[26]

This theory was readily accepted in the international arena and in political decision making. With the increasingly developing state interdependence, there was need to adjust the approach to sovereignty, thus the development of relativist theory. Its main purpose was to dissolve the theory of "absolute sovereignty".[27] The important characteristic of this theory was that it supported the idea of subjecting sovereignty to the rules of international law.[28] More importantly is that sovereignty cannot be subordinated to another state, as the principle of state equality is enshrined within the relativist approach.

This approach appreciated the superiority of international law over state sovereignty on the basis that sovereignty was defined by the law of nations, and not by the state itself. Thus, international law defined the limits of sovereignty. [29] Further, this theory identifies sovereignty with external independence. This means that theory

[26] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 219.

[27] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 222.

[28] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 229.

[29] Robert Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', in Robert Jackson (eds), *Sovereignty At the Millennium* (Blackwell Publishers: Massachusetts, 1999), p. 18.

recognizes that a state is independent from any other external authority, without suggesting that the state is independent from the norms which govern the sovereign, that is, international law. [30]

The theory of relative sovereignty also incorporates the "principle of non-intervention". It supports the notion that each state is sovereign within its jurisdiction. Consequently, the independence of states is protected from any manner of intervention.[31] This right is not absolute. There are factors that limit a state's independence including international treaties, the equal independence of other states, and specific agreements executed by states.[32] This theory of relative sovereignty, therefore, provided a foundation for the co-existence of states.[33]

3.2 Contemporary Manifestation of State Sovereignty

The concept of sovereignty has developed over time to its modern manifestation. Sir Robert Jennings observed that sovereignty is not static , as it evolves in theory and application depending on the particular needs of a given time."[34] An understanding of the current

[30] Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Columbia University Press, New York, 1970), p. 236.

[31] James Anderson and Stuart Hall, 'Absolutism and Other Ancestors' in James Anderson (eds), *The Rise of the Modern State* (Wheatsheaf Books, Brighton, I986), p. 812.

[32] John Dewey, 'Austin's Theory of Sovereignty' (1984) 9 The Academy of Political Science Quarterly 49.

[33] John Dewey, 'Austin's Theory of Sovereignty' (1984) 9 The Academy of Political Science Quarterly 54.

[34] Sir Robert Jennings, 'Sovereignty and International Law', in Gerard Kreijen (eds), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002), p. 29.

expression of sovereignty is purposeful in investigating its relevance in international law.

In the international sphere, sovereignty cannot be taken to mean independence without the limits of international law, but independence within the limits of international law.[35] Further, sovereignty not only defines the relationship of a superior, the government, to its inferiors, the people, within a state (internal sovereignty), but also the relationship of the ruler or of the state itself towards other states (external sovereignty).[36]

Oppenheim identifies supreme power as the defining character of sovereignty in international law.[37] He writes that a sovereign state enjoys absolute legal authority. He thus defines sovereignty as "independence all round within and without the borders of the country"."[38] Oppenheim explains that on the international plane, the concept of sovereignty is de-absolutized.[39] This is because relations between States are characterized by equality and interdependence. His idea of sovereignty is that its main mandate is to provide a means to identify statehood. If international law recognizes an entity as a state, the state automatically acquires its

[35] Sir Robert Jennings, 'Sovereignty and International Law', in Gerard Kreijen (eds), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002), p. 36.

[36] Ian Brownlie, *The Principles of Public International Law* (6th ed. Oxford University Press, Oxford 1966), p. 342.

[37] Lassa Oppenheim, 'International Law' (1962) 17 Longmans Law Journal 119.

[38] Sir Robert Jennings and Sir Robert Arthur Watts, 'Oppenheim's International Law' in Lassa Oppenheim (eds), *International Law* (9th ed. Longman Publishers, London, 1997), p. l22.

[39] Sir Robert Jennings and Sir Robert Arthur Watts, 'Oppenheim's International Law' in Lassa Oppenheim (eds), *International Law* (9th ed. Longman Publishers, London, 1997), p. l24.

own legal personality that has rights and duties in international law.[40]

Hersch Lauterpacht identifies two aspects of sovereignty of states in international law. The first is the internal aspect, whereby a state qualifies to be a subject of international law if it meets two conditions. It must be independent from other states, and it must have a supreme government.[41] The second aspect is the external sphere, where sovereignty implies independence from other States.[42] Lauterpatch's approach to sovereignty signifies that a state's sovereignty is a concern of international law.[43] This enables a state to contribute to the establishment and growth of international law.[44] R. P. Anand, who strongly advocates for "relative sovereignty", argues that the theory of "absolute sovereignty" is undesirable as it does not advocate for interdependency of states.[45] This, he explains, is against the norms of international law which are founded on reciprocation of rights and obligations.[46]

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[40] Sir Robert Jennings and Sir Robert Arthur Watts, 'Oppenheim's International Law' in Lassa Oppenheim (eds), *International Law* (9th ed. Longman Publishers, London, 1997), p. 126.

[41] Sir Robert Jennings and Sir Robert Arthur Watts, 'Oppenheim's International Law' in Lassa Oppenheim (eds), *International Law* (9th ed. Longman Publishers, London, 1997), p. l29.

[42] Hersch Lauterpacht, *Function of Law in the International Community* (Stevens and Sons, London, 1933), p. 3.

[43] Hersch Lauterpacht, *Function of Law in the International Community* (Stevens and Sons, London, 1933), p. 7.

[44] Hersch Lauterpacht, *Function of Law in the International Community* (Stevens and Sons, London, 1933), p. 5.

[45] R. P. Anand, *lnternational Law and the Developing Countries: Confrontation or Co-operation?* (Banyan Publications, New Delhi, 1986), p. 81.

[46] R. P. Anand, *lnternational Law and the Developing Countries: Confrontation or Co-operation?* (Banyan Publications, New Delhi, 1986), p. 81.

State sovereignty is the concept that states are in complete and exclusive control of all the persons and activities within their territory, and that all states are equal to each other.[47] This means that despite the size, population or finances, all states have an equal right to function as a state and make decisions about what occurs within their territory. [48] The 1970 UN General Assembly Resolution on Friendly Relations[49] defines sovereign equality and provides that

"all States enjoy the rights that are inherent in full sovereignty and that each state has the right to choose and to develop its political, social, economic and cultural systems".[50]

Increasingly, States have acceded to more international treaty obligations and accepted a broad interpretation of the powers of international organizations.[51] However, by entering into a treaty, states do not give up their sovereignty entirely to the international

[47] Lassa Oppenheim, 'International Law' (1962) 17 Longmans Law Journal 123.

[48] Martin Loughlin, 'The Erosion of Sovereignty' (2016) 27 Netherlands Journal of Legal Philosophy 63.

[49]UNGA Res 2625 (XXV), 24th October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* A/RES/25/2625 25th Session Available at http://www.un-documents.net/a25r2625.htm Assessed 24th November, 2019.

[50] UNGA Res 2625 (XXV), 24th October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* A/RES/25/2625 25th Session Available at http://www.un-documents.net/a25r2625.htm Assessed 24th November, 2019.

[51] Martin Loughlin, 'The Erosion of Sovereignty' (2016) 27 Netherlands Journal of Legal Philosophy 64.

law governing the treaty.[52] For example, despite that many states have joined the European Union, they still retain their sovereign rights.[53] Indeed, the European Union receives its mandate from the consent of its members, and has limited competences.[54] There is no clear line between independence and loss of independence; it depends on degree and opinion.[55] This is in line with Sir Robert Jennings' sentiments on the theory of sovereignty developing to fit the needs of a particular time.[56]

Initially, states did not readily accept the idea of acceding to a supranational organization such as the European Union. Currently, states readily join such organizations appreciating the economic advantages and disadvantages.[57] In the West, the theory of sovereignty has been changing from the initial strict interpretation and is losing weight in light of the international interdependence, whereas for developing countries, sovereignty is still very

[52] Duru O. W. Ceaza, 'The Shrinking Scope of The Concept of Domestic Jurisdiction In Contemporary International Law' (2002) 18 University of Nigeria Journal 102.

[53] Martin Loughlin, 'The Erosion of Sovereignty' (2016) 27 Netherlands Journal of Legal Philosophy 65.

[54] Martin Loughlin, 'The Erosion of Sovereignty' (2016) 27 Netherlands Journal of Legal Philosophy 70.

[55] Sir Robert Jennings and Sir Robert Arthur Watts, 'Oppenheim's International Law' in Lassa Oppenheim (eds), *International Law* (9th ed. Longman Publishers, London, 1997), p. l29.

[56] Sir Robert Jennings and Sir Robert Arthur Watts, 'Oppenheim's International Law' in Lassa Oppenheim (eds), *International Law* (9th ed. Longman Publishers, London, 1997), p. l30.

[57] Martin Loughlin, 'The Erosion of Sovereignty' (2016) 27 Netherlands Journal of Legal Philosophy 88.

important and is regarded as a "cornerstone of international relations".[58]

This view of the concept of sovereignty confirms the relativist approach to the concept in the context of international law.[59] It follows that the idea of an absolute and independent sovereign state is not compatible with the structure of international relations in the contemporary world.[60] Recent developments have led to growing interdependence among States. Further, there is increased consciousness of promotion of the human interests. This has led the international community to form an organization, to whom states surrender some of their sovereignty."[61]

These changing dynamics in the international arena have made it necessary to have a modification of the concept of sovereignty. It is now necessary that the concept of sovereignty takes into consideration the different interests of humanity. It should also allow room for growth and development of the other organs along with the state through mutual cooperation.[62]

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[58] Luzius Wildhaber, 'Sovereignty and International Law', in Macdonald Johnston (eds) *Modern Introduction to International Law'* (Max Planck Publishers, Munich, 1983), p. 425.

[59] Robert Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', in Robert Jackson (eds), *Sovereignty At the Millennium* (Blackwell Publishers, Massachusetts, 1999), p. 27

[60] Robert Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', in Robert Jackson (eds), *Sovereignty At the Millennium* (Blackwell Publishers, Massachusetts, 1999), p. 29-37.

[61] Harold Laski, *Grammar of Politics* (4th ed. George Allen and Unwin Ltd, London, 1938), p. 605.

[62] Harold Laski, *Grammar of Politics* (4th ed. George Allen and Unwin Ltd, London, 1938), p. 616.

3.3 Effect of the Concept of Human Rights on State Sovereignty

One of the contemporary issues in the concept of sovereignty is the aspect of human rights.[63] Human rights have now become an international concern. Historically, the treatment of individuals by a state was an internal issue. With developments in international law, states have entered into international agreements governing human rights issues.[64] There are evident tensions between contemporary sovereignty and human rights.[65] It appears that there is a conflict between the rights of states as against the human rights of individuals.[66] The doctrine of sovereignty endorses the state with the right to non-interference with their in their internal affairs. However, less matters that are now regarded as purely internal.[67] The development of human rights law have transformed the international system and international law.[68]

[63] Jack Donnelly 'State Sovereignty and Human Rights' (2014) 28 Ethics and International Affairs 216.

[64] Anthony D'Amato, 'Domestic Jurisdiction', (2001) 108 American Journal of International Law 1112.

[65] Jack Donnelly 'State Sovereignty and Human Rights' (2014) 28 Ethics and International Affairs 216.

[66] David Forsythe, 'The UN Security Council and Human Rights' (2012) 41 International Policy Analysis 7.

[67] David Forsythe, 'The UN Security Council and Human Rights' (2012) 41 International Policy Analysis 9.

[68] Henkin Louis, 'Human Rights and State Sovereignty' (1995) 25 Georgia Journal of International and Comparative Law 45.

Historically, there has always been a struggle for the establishment of international rules which oblige state leaders to treat their subjects in a certain way.[69] The forms of such struggles, and the consequences of such action, have changed over time. The contemporary global human rights regime was established through a historical journey of the fight towards globalizing human rights. For instance, there was establishment of treaties that directly barred any engagement in slave trade.[70] Increasingly, states addressed and regulated the issues of minority rights in limited ways.[71]

However, states were uncommitted and there was no global understanding on the standards of human rights to be observed, hence each state applied its own policies differently.[72] This was a sharp different approach in comparison to the current concept of human rights under contemporary international law.[73] The current human rights regime addresses issues of human rights more comprehensively and extensively.[74] Before World War II, the mere

[69] Jack Donnelly 'State Sovereignty and Human Rights' (2014) 28 Ethics and International Affairs 225.

[70] Ethan Nadelman, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44 Cambridge Law Journal 526.

[71] Stephen Krasner, 'Westphalia and All That', in Judith Goldstein and Robert Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, (Cornell University Press, New York, 1995), p. 113.

[72] David Forsythe, *Human Rights in International Relations* (3rd ed. Cambridge University Press, Cambridge, 2012), pp. 369.

[73] David Forsythe, *Human Rights in International Relations* (3rd ed. Cambridge University Press, Cambridge, 2012), pp. 372.

[74] Jack Donnelly, 'State Sovereignty and Human Rights' (2014) 28 Ethics and International Affairs 225.

discussion of human rights violations in other countries was seen as an unjustified infringement of states' sovereign prerogatives.[75]

In as much as the Covenant of the League of Nations was idealist, human rights were not mentioned.[76] Moreover, there were no multilateral treaties or institutions that were devoted to human rights.[77] Further, states rarely addressed the issue of human rights in their foreign policy, and inter-state action was very limited both in terms of quantity and impact. This was a sharp contrast to contemporary international law which has numerous treaties clarifying universal human rights and calling for implementation in states.[78]

Sovereignty in the traditional context afforded states the freedom to violate the right of their subjects. International law did not require any behavioral norms from states.[79] Currently, states do not have a right to violate the human rights of their subjects. International human rights and norms coerce certain kinds of behavior, while

[75] Allan James Alan, *Sovereign Statehood: The Basis of International Society* (Allen & Unwin, London, 1999), p. 457.
[76] David Forsythe, 'The UN Security Council and Human Rights' (2012) 41 International Policy Analysis 9.
[77] David Forsythe, *Human Rights in International Relations* (3rd ed. Cambridge University Press, Cambridge, 2012), pp. 381.
[78] Allan James Alan, *Sovereign Statehood: The Basis of International Society* (Allen & Unwin, London, 1999), p. 473.
[79] Bettati Mario, 'The International Community and Limitations of Sovereignty, (1996) 44 International Organization 109.

prohibiting others.[80] Donnelly, however, advises against the underestimation, or overestimation of this development. He argues that efforts in human rights developments have modified domestic conceptions of legitimacy.[81] They have also led to development of many channels through which human rights are promoted, especially through international treaties and conventions on human rights.[82].

Daniel relates the spread of international human rights norms to several historical events.[83] He writes that such rapid developments to some extent contributed to the fall of the Soviet Union.[84] He further relates the spread of human rights to the death or defeat of dictatorial leaders and their regime, as well as the efforts put in by states in Africa and Asia towards liberalization.[85] However, despite the admirable developments in contemporary international law, the international community has no legitimate power to prevent or put an end to gross violations of human rights.[86] Such authority is only

[80] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 214.

[81] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 217.

[82] Ethan Nadelman, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44 Cambridge Law Journal 479.

[83] Daniel Francis, 'Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action', in John Harbeson and Donald Rothchild (eds), *Africa in World Politics: Post-Cold War Challenges* (Westview Press, Boulder 1995), p. 221.

[84] Daniel Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton University, Princeton 2001), p. 193.

[85] Daniel Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton University, Princeton 2001), p. 201.

[86] Daniel Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton University, Princeton 2001), p. 206.

applicable in cases of genocide. The conclusion, thus, is that the development of international law as regards universal human rights has not taken away the sovereignty of states.

Despite the role played by the international community in the implementation of universal human rights, the final authority, also called sovereignty, still resides with states, but for the rare exception of genocide.[87]

Sovereignty has been revolutionized, and not eroded, by human rights.[88] The re-definition of sovereignty by human rights and other developments in international law has not taken away the sovereignty of states.[89] Donnelly says that, "the reshaping of sovereignty by human rights has left states today no less sovereign than they were fifty, a hundred, or three hundred and fifty years ago".[90] In contemporary international law, the Westphalian sovereignty is applicable in as far as the human rights regime limits the exercise of state independence. [91] In practice, states have now

[87] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 218.

[88] Adam Hall, 'The Challenges to State Sovereignty from the Promotion of Human Rights' (2010) 4 Journal for International Relations 671.

[89] Adam Hall, 'The Challenges to State Sovereignty from the Promotion of Human Rights' (2010) 4 Journal for International Relations 680.

[90] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 221.

[91] Marti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 397.

created room for human rights in their exercise of state sovereignty.[92]

States have taken up the role of implementation of universal rights within their territories. It is now common practice that states integrate universal rights with their internal bill of rights. They also oversee actualization of those universal rights within their territories.[93] A state's obligation to promote and implement international human rights obligations is only limited to its subjects, hence this obligation is territorial.[94]

The role that the international community plays in the supervision of national human rights practices is tremendously limited.[95] However, considerable international monitoring takes place.[96] States have a duty to submit reports to an international committee of experts under most covenants.[97] Further, The United Nations Commission on Human Rights takes up the role of examining the

[92] Stephen Krasner, 'Westphalia and All That', in Judith Goldstein and Robert Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, (Cornell University Press, New York, 1995), p. 117.

[93] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 225.

[94] Vesselin Popovski, 'Sovereignty as Duty to Protect Human Rights' (2004) 13 Journal for International Affairs.

[95]Geoffrey Howe, 'Sovereignty, Democracy and Human Rights', (1995) 8 Political Quarterly No. 379.

[96] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 19.

[97] Geoffrey Howe, 'Sovereignty, Democracy and Human Rights', (1995) 8 Political Quarterly 396.

situation of human in states, more so to investigate on whether states have taken measures to establish policies international human rights.[98]

Many states have made monitoring human rights an integral part of their foreign policy.[99] It then follows that implementation and enforcement of universal human rights is left to states within their territories.[100] The rare exception is only found in those states that have inefficient individual complaint mechanisms, but are subjects of effective systems of regional judicial enforcement.[101] Consequently, international human rights are now part of states internal system, and have an impact on how states exercise authority over their subjects.[102] Due to this development, international law is now concerned with how a state treats its nationals, a matter that was conventionally "within states domestic jurisdiction". Thus, the issue of human rights is addresses by many international treaties which states have acceded to.[103]

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[98] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 225.

[99] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 20.

[100] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 28.

[101] David Forsythe, *Human Rights and World Politics* (2nd ed. University of Nebraska Press, Lincoln, 2000), p. 1121.

[102] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 34.

[103] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 35.

Donnelly argues that States can influence national human rights practices by use of using their regular policies and laws, without the need to resort to the use or threat of force.[104] He adds that the international community has a limited role in the enforcement of human rights, but for very few and extremely limited exceptions.[105] He refuses the argument of those who insist that the international community have authority to address issues concerning the implementation and enforcement of human rights within state's jurisdiction.[106] He maintains that those are maters which remain within the sole jurisdiction of states.[107] He writes that the progression of human rights has not abolished the concept of sovereignty as states possess sovereignty over human rights within their territories.[108]

There are authors who have addressed the limitation of sovereignty by international norms. Helmut writes that international legal obligations limit a state's freedom of action, hence limiting its sovereignty. Nevertheless, such limitation does not this does not

[104] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 231.
[105] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 233.
[106] Jack Donnelly 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 237.
[107] Jack Donnelly 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 245.
[108] Jack Donnelly 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 249.

dissolve the sovereignty of states.[109] During the era of the Westphalian sovereignty, states were obliged to several natural laws.[110] This was not considered contrary to sovereignty, and the notion of obligation to natural law was accepted. Therefore, sovereign leaders were supreme within their territories, and considered themselves only answerable to God.[111]

There has been a dramatic shift in contemporary international law.[112] Currently, despite a state's will, it is bound to international human rights norms. A state is bound by the norms of customary international law, obligations *erga omnes*, and jus cogens.[113] States are further bound by a wide range of treaty-based obligations.[114] Accordingly, given that in the globalization of human rights regime, the international obligations do not create a higher authority to which states are secondary, universal human rights are completely compatible with full sovereignty.[115] In the contemporary context, supremacy, which goes hand in hand with sovereignty, means that a state is not subject to any higher

[109] Helmut Steinberger, 'Sovereignty', in Rudolf Bernhardt (eds), *Encyclopedia of Public International Law* (North-Holland Elsevier, Amsterdam 2000), p. 349.

[110] Jack Donnelly 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 250.

[111] Helmut Steinberger, 'Sovereignty', in Rudolf Bernhardt (eds), *Encyclopedia of Public International Law* (North-Holland Elsevier, Amsterdam 2000), p. 351.

[112] Geoffrey Howe, 'Sovereignty, Democracy and Human Rights', (1995) 8 Political Quarterly 398.

[113] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 40.

[114] Geoffrey Howe, 'Sovereignty, Democracy and Human Rights', (1995) 8 Political Quarterly 399.

[115] Geoffrey Howe, 'Sovereignty, Democracy and Human Rights', (1995) 8 Political Quarterly 403.

authority, and that a state's independence is absolute and unlimited.[116]

The logical interpretation of the dynamic understanding of sovereignty is that sovereignty is flexible. Its understanding and applicability continue to change in nature as form, so as to become effective when addressing emerging challenges.[117] These alterations and modifications of sovereignty are evidence that there is an ongoing process of articulating new norms.[118] Currently, there are new understandings of old norms, and these are incorporated into the framework of international law and politics.[119]

Human rights are now integrated to international law and are also considered in the modern day application of the concept of sovereignty.[120] The current understanding of sovereignty envisage a world where there can be no clear separation between state sovereignty and universal human rights.[121] Sovereignty can, and

[116]Benno Teschke, 'Theorizing the Westphalian System of States: International Relations from Absolutism to Capitalism' (2002) 13 European Journal of International Relations 48.

[117] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 238.

[118] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 47.

[119] Thakur Malcontent, 'From Sovereign Impunity to International Accountability: The Search for Justice in a World of States' (2004) 29 Journal on International Affairs 48.

[120] Marti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 400.

[121] Marti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 402.

does, continue to exist, and states often exercise their sovereign rights with recognition and respect for universal human rights.[122] The implementation of those rights lies singularly with sovereign states. The major role of the international community is to influence those sovereign states to ensure compliance in implementation of human rights law.[123]

Following this argument, it then becomes clear that a State's authority to implement and enforce human rights has not been lost, and has not been transferred to any other actor.[124] Despite the development of international law, the concept of state sovereignty is still relevant, and has only being modified to create room for implementation of universal human rights which are a concern of the international community.[125]

3.3.1 Genocide, War Crimes and Crimes Against Humanity

The implementation of universal human rights is solely left to sovereign states. That is the general rule.[126] The exception to this rule is that of genocide, war crimes, and crimes against humanity.[127] It is now accepted practice that intervention to stop genocide is

[122] Marti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 405.

[123] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 239.

[124] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 242.

[125] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 244.

[126] Helmut Steinberger, 'Sovereignty', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland Elsevier, Amsterdam, 2000), p. 353.

[127] Helmut Steinberger, 'Sovereignty', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland Elsevier, Amsterdam, 2000), p. 354

allowed, upon authorization by the Security Council. This similarly applies to war crimes and crimes against humanity.[128] Security Council practice indicates that these international crimes have been taken out of jurisdiction of sovereign prerogative. States have lost their right to commit such crimes, in the same way they have lost their right to wage aggressive war.

This, however, does not mean that they have lost their sovereignty.[129] Heiberg argues that any discussion about the subduing of sovereignty on the premise of humanitarian intervention, is just but a gross exaggeration.[130] Murphy writes that international enforcement of universal rights would mark an essential change of sovereignty in practice. He further writes that the removal of such political issues from a state's authority, would be evidence of considerable loss of sovereignty.[131] However, the idea of a right to humanitarian intervention has not been widely accepted either in theory or in practice.[132] Further, there have been no recent efforts to strengthen global, or even regional, human rights institutions.

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[128] Nick Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000), p. 174.

[129] Nick Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000), p. 181.

[130] Heiberg Marianne, *Subduing Sovereignty: Sovereignty and the Right to Intervene* (3rd ed Pinter Publishers: London, 1994), p. 37.

[131] Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press: Philadelphia 1996), p. 516.

[132] Heiberg Marianne, *Subduing Sovereignty: Sovereignty and the Right to Intervene* (3rd ed Pinter Publishers: London, 1994), p. 38.

This means that states continue to be the final enforcement authority for all human rights, other than genocide, war crimes, and crimes against humanity.[133] States continue to raise claims of sovereignty, forcing the international community to accept those claims, albeit reluctantly. Indeed, Malmvig has argued that humanitarian intervention can, in some cases, work to re-affirm the "principle of non-intervention" and, therefore, state sovereignty.[134] It may not be the traditional understanding of sovereignty, but nevertheless, the force of sovereignty remains real and robust.[135]

The discourse around the popularized aspect of responsibility to act is not descriptive, and neither is it predictive. It is only prescriptive. It is not deniable that the international community is accepting that there is, in a way, a moral responsibility to act. However, there have not been any efforts to convert this into an actual legal duty or obligation. Instead, in actual practice, the international community has accorded itself the freedom to intervene, or not to intervene, as it deems fit.[136]

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[133] Heiberg Marianne, *Subduing Sovereignty: Sovereignty and the Right to Intervene* (3rd ed Pinter Publishers: London, 1994), p. 41.

[134] Helle Malmvig, 'The Reproduction of Sovereignties: Between Man and State During Practices of Intervention' (2001) 43 International and Comparative Law Quarterly 270.

[135] Helle Malmvig, 'The Reproduction of Sovereignties: Between Man and State During Practices of Intervention' (2001) 43 International and Comparative Law Quarterly 272.

[136] Thomas Weiss and Jarat Chopra, 'Sovereignty Under Siege: From Intervention to Humanitarian Space', in Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia?: State Sovereignty and International Intervention* (Johns Hopkins University Press, Baltimore, 1992) p. 121.

The conclusion here is that sovereignty has been revolutionized by human rights.[137] Universal human rights form part of state sovereignty, and are hence "within the domestic jurisdiction of a state". It remains a state's duty to implement and oversee the promotion and respect of universal human rights. International law will only take effect upon commission of the crime of genocide, war crime or crime against humanity by a state's government. The prohibition against these crimes is considered a peremptory norm of international law applicable to all states, from which no derogation is permitted.[138] In such a situation, international intervention backed by Security Council's authorization would be legal and legitimate, as states do not have a right to commit these crimes.

Indeed, this is the attitude applied by the Security Council in war crimes which are limited to internal armed conflicts. International humanitarian law has been applied to such situations, necessitating intervention despite that the war crimes are within a state's territory.[139] For instance, the Security Council intervened in the armed conflict on Mali in 2012. This is after hostilities broke out between armed groups and the Malian armed forces. International humanitarian law was applied to determine whether there were war crimes in Mali, having found in the positive, the Security

[137] Jack Donnelly, 'State Sovereignty and Human Rights', (2014) 28 Ethics and International Affairs 250.

[138] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 154.

[139] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 155.

Council intervened.[140] This is evidence that states do not have a right to commit international crimes even within their territory, and the doctrine of sovereignty will not stop UN action where such crimes are committed by a state.[141]

3.4 History and Development of Domestic Jurisdiction

Kawser Ahmed begins this discussion by tracing the concept of "domestic jurisdiction" back to the Congress System, the Concert of Europe, the League of Nations, and, finally, in the inception of Article 2(7) of the UN Charter.[142] At the Congress System, Russia, Austria, and Prussia, intended to preserve the monarchy system in Europe. Delegates of the three states argued that the Congress System could legitimately intervene in the domestic affairs of states, whose constitutional developments were not suitable in their opinion.[143]

Britain's Foreign Secretary, Castlereagh, in opposition to this argument, argued in support of a law on "non-intervention" in "matters within the domestic jurisdiction of states." He argued that allowing intervention on the grounds laid by the continental power would destroy the unity of the Congress. He further argued that the

[140] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 156.
[141] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 58.
[142] Duru O. W. Ceaza, 'The Shrinking Scope Of The Concept Of Domestic Jurisdiction In Contemporary International Law' (2002) 18 University of Nigeria Journal 91.
[143] David Gilmour, 'The Meaning of Domestic Jurisdiction Within Article 2(7) of the United Nations Charter- A historical Perspective' (1967) 16 International Comparative Law Quarterly 331.

Congress System was never created with the intention of intervening in the domestic matters of other states.[144] His stand was that intervention would only be legitimate in situations where "their immediate security, or essential interests, were seriously endangered by the internal activities of another state".

Castlereagh, however, cautioned that such intervention could only be allowed where there was extreme necessity.[145] This argument was rejected by the continental power, and the Congress System collapsed in 1925, leading to the emergence of the Concert of Europe.[146] Kawser Ahmed explains that the Concert of Europe was created for the purpose of preserving "territorial integrity and status quo among European nations".[147] It called for the respect of the "principle of non-intervention in matters within the domestic jurisdiction of states". The Concert of Europe was not successful in its mission of ensuring that states obliged with this principle, especially amongst the great powers. For instance, in 1736, Russia intervened in Turkish domestic affairs regarding how it treated its Christian nationals.[148]

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[144] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 137.

[145] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 138.

[146] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 140.

[147] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 142.

[148] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 143.

The next important phase for the concept of domestic jurisdiction was the era of the League of Nations.[149] This was discussed in detail under clause 2.6 of chapter two, together with the development phase at the drafting of the UN Charter.

The determination of the boundaries of domestic jurisdiction is difficult and has become a subject of great international debate. Anthony D'Amato discusses five approaches to the boundaries of the concept of domestic jurisdiction.[150] The first is the "essentialist theory of domestic jurisdiction", which suggests that there are matters which naturally fall "within the domestic jurisdiction of states", such as the treatment of nationals by their government.[151] This approach, however, has no place in contemporary international law. Developments in international law have now extended its ambit to such matters, including human rights. Hence, any gross violation of human rights would pave way for international intervention, despite the violations being conducted within a state.

[149] George Scott, *The Rise and Fall of the League of Nations* (Macmillan, New York, 1974), p. 1012.

[150] Anthony D'Amato, 'Domestic Jurisdiction' (2001) 108 American Journal of International Law 908.

[151] Anthony D'Amato, 'Domestic Jurisdiction' (2001) 108 American Journal of International Law 1101.

The second approach to determining boundaries of the concept of domestic jurisdiction is the relative theory. Anthony D'Amato explains that this approach is found in Article 15 (8) of the League Covenant. This approach suggests that the boundaries are coexistent with the rules of international law.[152] However, this leaves the question of what would then constitute the boundaries of international law, as this approach implies that "matters within the domestic jurisdiction of states" are those which are left after international law has established its jurisdiction.[153]

The third approach which, according to D' Amato, is found in Article 2(7) of the UN Charter, is to avoid the question of delimitation of its boundaries.[154] This approach combines the first and second approaches. It implies that whatever was not covered by international law at the adoption of the UN Charter is not within the reach of international law. This would, however, not be practical as different states became members at different times, and the Charter cannot be interpreted to be a non-changing instrument. On the other hand, this approach represents an expanding domain of domestic jurisdiction.

[152] Anthony D'Amato, 'Domestic Jurisdiction' (2001) 108 American Journal of International Law 1000.

[153] Anthony D'Amato, 'Domestic Jurisdiction' (2001) 108 American Journal of International Law 1108.

[154] Anthony D'Amato, 'Domestic Jurisdiction' (2001) 108 American Journal of International Law 1010.

The fourth approach is the auto-interpretive theory, whereby the state is the determinant of which matters are within its domestic jurisdiction. Any areas that is not claimed by the state is thus within the scope of international jurisdiction. This approach would be undesirable as it does not promote the existence of international law. The final approach is to consider the concept of domestic jurisdiction and international jurisdiction as coexisting. This approach is flexible as a matter may be determined to be within the scope of either or both concepts. Anthony D'Amato however says that this approach is not normally associated with domestic jurisdiction.[155]

This discussion shows that the principle of domestic jurisdiction has many interpretations and approaches. This principle has evolved over the years and its understanding has been influenced by the circumstances and interests of a certain time.

3.4.1 Analysis and Application of Domestic Jurisdiction

The concept of domestic jurisdiction is founded on the principle of state sovereignty.[156] It denotes to the fact that there are areas which are solely governed by a state's policy, hence are not the subject of

[155] Anthony D'Amato, 'Domestic Jurisdiction' (2001) 108 American Journal of International Law 1112.

[156] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 60.

any other exterior authority, including international law.[157] The principle of domestic jurisdiction is thus premised on the idea that a state ought to possess and enjoy its right to be "free, equal and independent in all those things that concern that state's domestic or sovereign affairs".[158]

The Charter of the United Nations reaffirms this by prohibiting the intervention of the UN and its organs in "matters which are essentially within the domestic jurisdiction of any state" under Article 2(7) of the United Nations Charter.[159] More specifically, the Charter prohibits the threat or use of force "against the territorial integrity or political independence of any state".[160] It then follows that states have an independent legal domain of domestic jurisdiction over their own internal affairs.[161] The question that arises, then, is what matters constitute "domestic" or "internal" affairs of states?

The concept of domestic jurisdiction addresses this question. All The principle of jurisdiction is concerned with matters which are subject to the sole authority of a state, without the limitation of

[157] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 61.
[158]Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 63.
[159] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.
[160] Charter of the United Nations 1945, Art. 2(4) UNTS XVI.
[161] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 66.

international law.[162] This description is narrow, and is only theoretically correct. It fails to address provisions in international law which are invoked to restrain intervention.[163] The concept of domestic jurisdiction addresses areas which are outside the reach of international law. Domestic jurisdiction, thus, begins where international jurisdiction ends.

It is concerned with those areas which are not appropriate for international control. There are issues which belong, or ought to belong, to the exclusive jurisdiction of states.[164] Others are subject to both domestic and international jurisdiction, whereas others are exclusively within the province of the international rule of law.[165] Over time, there have been developments in international law. Such developments raise doubt as to whether there are matters which are still "essentially within the domestic jurisdiction of states", so much that they ought to be excluded from regulation by international laws and principles.[166]

[162] Eine Stellungnahmen, 'The Plea of Domestic jurisdiction before an International Tribunal and a Political Organ of the United Nations' (1968) 16 International Law Journal 34.

[163] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 157.

[164] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 158.

[165] Akehurst Michael, 'Jurisdiction in International law' (1975) Vol 16 No 46 British Yearbook of International 152.

[166] Francis Nwoke, 'The Concept of Domestic Jurisdiction in International Law: Revisited', (2016) 125 Yale Law Journal 787.

The category of matters which are within this domain is getting narrower at a rapid pace. Areas, such as technology, manufacturing, environment, commerce, communication and even crime, have been pushed into the jurisdiction of international institutions and international authorities.[167] This has been necessitated by the need to have universal laws which are just and equal, and the same are not solely left to the domestic regulation of states.[168]

There is vigorous argument on the boundaries of domestic jurisdiction. However, it is widely agreed that state sovereignty is not absolute.[169] The concept of domestic jurisdiction is relative, and its scope has been reduced by the expanding reach of international regulation of matters which were traditionally internal.[170] The central provision for domestic jurisdiction under the Charter is found under Article 2(7) of the Charter.[171] This was one of the core provisions during the foundation of the Charter.

It was a reassurance that states were not creating a supra national organization by acceding to the Charter. There was a fear that the UN would have been an overly powerful government, hence the

[167] Francis Nwoke, 'The Concept of Domestic Jurisdiction in International Law: Revisited', (2016) 125 Yale Law Journal 789.

[168] Henry Wheaton, *Elements Of International Law* (8th ed. Carey, Lea and Blanchard Publishers, North Carolina, 1836), p. 557.

[169] Henry Wheaton, *Elements Of International Law* (8th ed. Carey, Lea and Blanchard Publishers, North Carolina, 1836), p. 581.

[170] Francis Nwoke, 'The Concept of Domestic Jurisdiction in International Law: Revisited', (2016) 125 Yale Law Journal 795.

[171] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

provision was necessary to limit the UN's jurisdiction. However, regardless of the purpose aimed to be achieved by those who drafted Article 2(7) of the Charter, UN practice has indicated that Article 2(7) has not been very effective in limiting UN action.

One of the historical examples of UN's intervention in a matter despite the claim of domestic jurisdiction is action of the UN General Assembly in South Africa.[172] Despite South Africa's attempt to invoke the plea of domestic jurisdiction in matters concerning treatment of its own nationals, the General Assembly addressed the matter. In so doing, it adopted Resolution 44(I) which condemned Soouth Africa's treatment of Indian minorities in its territory, and asserted that such action violated the human rights provisions of Articles 55 and 56 of the Charter.[173]

In the same year, the General Assembly again undermined the principle of domestic jurisdiction. The General Assembly intervened in the form of government in Spain.[174] Both Britain and The Netherlands invoked Article 2(7) of the Charter in attempt to

[172] UN General Assembly, *Treatment of people of Indian origin in the Union of South Africa*, 11 November 1953, A/RES/719 Available at: https://www.refworld.org/docid/3b00f0802c.html Assessed 4th April, 2020.

[173] UN General Assembly, *Treatment of people of Indian origin in the Union of South Africa*, 11 November 1953, A/RES/719 Available at: https://www.refworld.org/docid/3b00f0802c.html Assessed 4th April, 2020.

[174] Cancado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations', (1976) 4 International Comparative Law Quarterly 715.

restrain UN action in the matter.[175] The claim of domestic jurisdiction was rejected, and the General Assembly proceeded to adopt Resolution 39(I). This resolution declared that the "Franco governance" of Spain was a "threat to international peace".[176] It is thus evident that from the early years of the United Nations, the doctrine of domestic jurisdiction has not prohibited the UN and its organs from intervening in "matters essentially within the domestic jurisdiction of states".[177] Indeed, UN practice for the past 75 years has contributed to the defiant breach of Article 2(7) of the Charter, and the erosion of the principle of domestic jurisdiction.[178]

The General Assembly adopted the "1950 Uniting for Peace Resolution", consequently endorsing itself with more power.[179] The General Assembly now has authority to take up questions involving "a threat to or breach of the peace" in the event of a deadlock in the Security Council's veto.[180] Furthermore, the General Assembly is empowered to make recommendations to member

[175] Cancado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations', (1976) 4 International Comparative Law Quarterly 717.

[176] UN General Assembly,*Relations of Members of The United Nations With Spain,* 12th December 1946, A/RES/39 Available at https://hispanismo.org/english/10044-un-resolutions-landmark-documents-spain-after-wwii.html Accessed 4th April, 2020.

[177] Duru Onyekachi, 'The Shrinking Scope of The Concept Of Domestic Jurisdiction In Contemporary International Law' (2011) 18 Public International Law Journal 413.

[178] Duru Onyekachi, 'The Shrinking Scope of The Concept of Domestic Jurisdiction In Contemporary International Law' (2011) 18 Public International Law Journal 413.

[179] UN General Assembly, *Uniting For Peace,* 3rd November 1950, A/RES/5/377, Available at A/RES/5/377 - Uniting for Peace - UN Documents: Gathering a body of global agreements (un-documents.net) Assessed 4th April, 2020.

[180] UN General Assembly, *Uniting For Peace,* 3rd November 1950, A/RES/5/377, Available at A/RES/5/377 - Uniting for Peace - UN Documents: Gathering a body of global agreements (un-documents.net) Assessed 4th April, 2020.

states for collective military measures.[181] Such powers have the effect of narrowing the meaning of the term "intervene" in Article 2(7).[182] However, even before the creation of the United Nations, colonial issues were not considered to be within the domestic jurisdiction of the concerned state.[183] In fact, the very idea of domesticating colonial issues was not entertained.[184]

Domestic jurisdiction, along with its related principle of "non-intervention", appears to clash with the current form of international law. Of all clashes, the greatest is humanitarian intervention. A strict application of non-intervention would rule out any possibility of humanitarian intervention.[185] Such a strict interpretation of domestic jurisdiction, and non-intervention, is not conducive in contemporary international law, where there is widespread interstate relations. The result would be prohibition of economic boycotts, and the prohibition of exchange of cultural information and communication, among other effects that would be

[181] UN General Assembly, *Uniting For Peace*, 3rd November 1950, A/RES/5/377, Available at A/RES/5/377 - Uniting for Peace - UN Documents: Gathering a body of global agreements (un-documents.net) Assessed 4th April, 2020.

[182] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 331.

[183] Cancado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations', (1976) 4 International Comparative Law Quarterly 717.

[184] Cancado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations', (1976) 4 International Comparative Law Quarterly 719..

[185] David Gilmour 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective', (1967) 16 International and Comparative Law Quarterly 342.

unconducive for states, and for international growth and development.[186]

It therefore follows that a relative approach is applied in the application of domestic jurisdiction. As international law continues to broaden its scope to govern more and more subjects, the sphere of domestic jurisdiction will continue to shrink accordingly. The finding, thus, is that the interpretation of domestic jurisdiction has been influenced over time by acts of the United Nations, and developments in international law.[187] The conclusion, therefore, is that the domain of domestic jurisdiction shrinks as international law continues to expand its reach into more and more matters that were traditionally considered to be "essentially within the domestic jurisdiction of states".[188]

3.5 Matters Essentially Within the Domestic Jurisdiction of States

Article 2(7) of the Charter prohibits the United Nations from intervening in "matters essentially within the domestic jurisdiction

[186] David Gilmour 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective', (1967) 16 International and Comparative Law Quarterly 337.

[187] Duru Onyekachi, 'The Shrinking Scope of The Concept of Domestic Jurisdiction In Contemporary International Law' (2011) 18 Public International Law Journal 416.

[188] uru Onyekachi, 'The Shrinking Scope of The Concept of Domestic Jurisdiction In Contemporary International Law' (2011) 18 Public International Law Journal 419.

of any state".[189] Several questions arise from this phrase include; Which matters are these? Can there be a classification of matters which belong to this domain? What aim did the drafters of the article intend to achieve?)? How has this phrase been interpreted over the past? Finally, are there matters which are still considered to be "within the domestic jurisdiction of states"? The drafters of the Charter did not list the matters that were to be the subject of Article 2(7) of the Charter. By doing so, they left a lacuna which has, over the years, led to speculation on the meaning of "matters essentially within the jurisdiction of a state".[190]

The word "essentially" is used in Article 2(7) of the Charter. This was a shift from the word "solely'' which appeared in Article 15(8) of the League Covenant.[191] During the Conference at San Francisco, John Foster Dulles of the United States argued for the use of the word "essentially".[192] He argued that the continued use of the word "solely" would completely destroy the purpose of Article 2(7) of the Charter, which was to limit UN action.[193] He reasoned that even though modernization would cause some domestic matters to be of international concern, this did not mean that those matters were

[189] Charter of The United Nations 1945, Art. 2(7) UNTS XVI.

[190] James Brierly, 'Matters of Domestic Jurisdiction', (1925) Vol 6 Columbia Law Review 19.

[191] Kaswer Ahmed, 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View', (2006) 10 Singapore Year Book of International Law and Contributors 176.

[192] Kaswer Ahmed, 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View', (2006) 10 Singapore Year Book of International Law and Contributors 178.

[193] Kaswer Ahmed, 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View', (2006) 10 Singapore Year Book of International Law and Contributors 180.

removed from the domain of domestic jurisdiction.[194] It was, thus, the intention of the drafters to expand the scope of domestic jurisdiction.[195]

It is important to make a determination as to the degree of domesticity of a matter, because it is only those "matters which are essentially within domestic jurisdiction of states" that are subjects of Article 2(7).[196] It is also not clear what the word "domestic" means as used in the Charter. Brierly, while discussing the approach of interpreting Article 15(8) of the League of Nations, discusses the interpretation of the word "domestic".[197] He writes that a matter which is regulated by international law cannot be considered to be solely within the jurisdiction of a state.[198]

This is in line with the advisory opinion of the PCIJ in the case of Nationality Decrees.[199] In 1923, the PCIJ delivered a judgment

[194] Kaswer Ahmed, 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View', (2006) 10 Singapore Year Book of International Law and Contributors 181.

[195] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View', (2006) 10 Singapore Year Book of International Law and Contributors 185.

[196] James Brierly, 'Matters of Domestic Jurisdiction', (1925) 6 Columbia Law Review 21.

[197] James Brierly, 'Matters of Domestic Jurisdiction', (1925) 6 Columbia Law Review 22.

[198] James Brierly, 'Matters of Domestic Jurisdiction', (1925) 6 Columbia Law Review 26.

[199] PCIJ Ser. B No. 4 *Nationality Decrees (of Tunis and Morocco) Case* 1923 Encyclopaedic Dictionary of International Law Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100224306 Assessed 4th April, 2020

which is considered to be the leading pronouncement on the concept of domestic jurisdiction.[200] In the case, the PCIJ addressed itself on the question of what matters were within a state's reserved domain.[201] It found such maters included "matters which are not, in principle, regulated by international law, and with respect to which states, therefore, remained sole judge."[202] In its dictum, the PCIJ held that, "The question whether a certain matter is or is not solely within the jurisdiction of a state is an essential relative question; it depends on the development of international relations".[203]

In the Nottebohm case (1955), the ICJ deliberated on whether international law was disinterested in the question of nationality, which the PCIJ in the case of Nationality Decrees case had held to be "in principle" a matter of domestic jurisdiction.[204] The dispute in question related to a claim of naturalization. Guatemala raised an

[200] James Brierly, 'Matters of Domestic Jurisdiction', (1925) 6 Columbia Law Review 25.

[201] PCIJ Ser. B No. 4 *Nationality Decrees (of Tunis and Morocco) Case* 1923 Encyclopaedic Dictionary of International Law Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100224306 Assessed 4th April, 2020

[202] PCIJ Ser. B No. 4 *Nationality Decrees (of Tunis and Morocco) Case* 1923 Encyclopaedic Dictionary of International Law Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100224306 Assessed 4th April, 2020

[203] PCIJ Ser. B No. 4 *Nationality Decrees (of Tunis and Morocco) Case* 1923 Encyclopaedic Dictionary of International Law Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100224306 Assessed 4th April, 2020

[204] ICJ Report 4, *Nottebohm Case Liechtenstein v. Guatemala* 6th April 1955 p 26 Available at https://www.icj-cij.org/en/case/18/judgments Assessed 29th April 2020.

objection as to the jurisdiction of the Court.[205] The ICJ rejected this objection and held that international law entered the matter at the point where two competing claims to naturalization had to be reconciled, since only when the conditions laid down for naturalization under international law were fulfilled was a third state obliged to give recognition to the naturalization.[206]

This suggests that despite international law regulating naturalization up to a certain point, the subject is essentially within domestic jurisdiction. Consequently, the United Nations is prohibited, by virtue of Article 2(7) of the Charter, from intervening, even in cases whereby the conditions for nationality laid down by international law have not been fulfilled.[207] If this is the case, then, it is a reflection that the distinction between domestic, and non-domestic matters under the Charter is not determined by investigating whether or not the matters in question are regulated by international law.[208] The formula for the interpretation of Article 2(7) of the Charter is different from that of

[205] ICJ Report 4, *Nottebohm Case Liechtenstein v. Guatemala* 18th November 1953 p 12 Available at https://www.icj-cij.org/en/case/18/judgments Assessed 29th April 2020.

[206] ICJ Report 4, *Nottebohm Case Liechtenstein v. Guatemala* 18th November 1953 p 12 Available at https://www.icj-cij.org/en/case/18/judgments Assessed 29th April 2020.

[207] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 180.

[208] David Gilmour 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective', (1967) 16 International and Comparative Law Quarterly 349.

Article 15(8) of the League of Covenants.[209] What then is the new interpretation under the Charter? There is no universal agreement, and the debates in the UN are evidence that there is no consensus on the current form, and application, of domestic jurisdiction.[210]

Jones writes that the intention of the drafters of Article 2(7) of the Charter was that the UN ought to comply with the "principle of non-intervention" in "matters essentially within the domestic jurisdiction of states".[211] Such matters include but are not limited to a state's form of government, and its treatment of its own subjects.[212] This touches on a broad aspect of human rights. Jones writes that domestic jurisdiction further covers "the size of a state's national armaments and armed forces, internal conflicts within a state's territory, and a state's administration of non-self-governing territories, if any, not placed under the trusteeship system of the United Nations".[213] However, such an approach to domestic jurisdiction would not fit the purpose of contemporary international law.[214]

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[209] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 185.

[210] David Gilmour 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective', (1967) 16 International and Comparative Law Quarterly 350.

[211] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 194.

[212] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 195.

[213] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 197..

[214] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 194.

This approach fails to appreciate that even those matters are not static. They are dynamic, and as international law develops, they are likely to change their character, to the effect that they would be considered matters of international concern.[215] One such notable development is the progressive regime on human rights.[216] During the early years of the UN, there were many debates regarding the question whether the Charter provisions on human rights reduced the scope of domestic jurisdiction.[217] At the time, some states argued that the Charter did not have provisions creating international obligations with respect to human rights.[218] Therefore, they argued that the Charter did not take away human rights from the scope of domestic jurisdiction of States.[219]

Supporters of this argument maintained that the provisions in the Charter were declarations of purposes and principles of the UN, but not obligations, as they were not defined in the Charter.[220] On the other hand, other states argued that the field of human rights

[215] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003), p. 156.

[216] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales, Wales, 1994), p. 102.

[217] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 160.

[218] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 161.

[219] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 163.

[220] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford 2003) pg. 156

was removed from the domestic jurisdiction of states.[221] They argued that the Charter provisions on human rights, and more so Articles 1(3), 55, 56, 13(b) and 62(2), created international obligations for all member states. Consequently, human rights fell within the jurisdiction of the UN.[222]

Supporters of this point of view argued that if the claim of domestic jurisdiction was allowed in relation to human rights, it would defeat the Charter's purpose of the protection of human rights, thereby making some of its provisions on human rights redundant.[223] This school of thought was evidenced in the practice of the UN, and specifically by the General Assembly's Resolutions "616 A (VII), 616 B (V11) and 721 (VIII) concerning South Africa".[224] General Assembly "Resolutions 1016 (XI), 1178 (XII), and 1248 (XIII) mentioned GA. Res. 917 (X)" in their preamble, which directed South Africa to observe Article 56 of the Charter.[225]

[221] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 164.

[222] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 165.

[223] Marek Korowics, 'Sovereignty in the Practice of International Law: Domestic Jurisdiction' (1959) 15 Public International Law Journal 167.

[224] UN General Assembly, *Treatment of people of Indian origin in the Union of South Africa*, 11 November 1953, A/RES/719 Available at https://www.refworld.org/docid/3b00f0802c.html Assessed 24th April, 2020.

[225] UN General Assembly, *The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa,* 5th December 1952, A/RES/616(VII)[A] Available at https://digitallibrary.un.org/record/666104 Assessed 24th April, 2020.

South Africa's claim that the General Assembly violated Article 2(7) on the restriction of non-interference was constantly rejected by most states. Their grounds for rejection was that the apartheid policy in South Africa was in contravention of the Charter. Consequently, the member states, through General Assembly Resolution 1248 (XIII), were called upon to conform their policies with Article 56 of the Charter, in order to promote the observance of human rights.[226]

The states that were opposed to the idea of human rights being within the jurisdiction of the Charter argued that the "Universal Declaration on Human Rights" only provided recommendations, but did not create international obligations.[227] They maintained that it was not binding on states. However, by the 1960s, most states were in agreement that matters such as apartheid were no longer "essentially within the domestic jurisdiction of states."[228] Consequently, the human rights regime has become an essential part of international law, and the UN has put effort in the growth and implementation of human rights within states.[229] Its jurisdiction

[226] UN General Assembly, *The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa,* 30th October 1958 A/RES/1248/XIII Available at http://www.worldlii.org/int/other/UNGA/1958/ Assessed 24th April, 2020.

[227] Universal Declaration of Human Rights 1948 Available at https://www.un.org/en/universal-declaration-human-rights/index.html Assessed 24th April, 2020.

[228] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 68.

[229] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 69.

and competence to deal with human rights matters has become more accepted.[230]

Currently, there is enough evidence to show that human rights are no longer exclusively "within the domestic jurisdiction of states".[231] States have now reduced, to a great extent, their scope of exclusive decision making by acceding to a large number of human rights declarations and treaties.[232] States also actively participate in the establishment of customary international human rights. Consequently, the rigid argument that Article 2(7) must be interpreted as per the intentions of its drafters fails. Many matters which were traditionally considered to be "within the domestic jurisdiction of states" have long entered into the sphere of international law, hence the scope of domestic jurisdiction has greatly reduced.[233]

Other scholars have argued that the reserve domain of states relates to state activities, whereby the jurisdiction of a state is not bound by

[230] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 71.

[231] Alison Brysk, *Global Good Samaritans; Human Rights as Foreign Policy* (Oxford University Press, Oxford, 2009), p. 1312.

[232] Alison Brysk, *Global Good Samaritans; Human Rights as Foreign Policy* (Oxford University Press, Oxford, 2009), p. 1315.

[233] David McGoldrick, 'The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law' (2007) 2 Australian Journal of International Law 664.

international law.[234] This approach depends on international law to decide whether or not a matter is "within the domestic jurisdiction of a state".[235] However, international law itself is dynamic. Whatever was outside the ambit of international law a few years ago, is now a subject of international law.[236]

The question of which matters are "essentially within the domestic jurisdiction of states" remains controversial. The UN Charter does not specify which matters are domestic. Further, it does not empower any authority to make determinations of the matters to be considered "essentially within the domestic jurisdiction of a state". The UN and its organs have taken up this role, and even then, they have not been clear or consistent on what they regard as "a matter essentially within the domestic jurisdiction of a state".[237]

There is no clear definition of specific areas which are covered by the concept of domestic jurisdiction.[238] Since the creation of the United Nations, international laws, policies, and norms have drastically developed, expanding the reach of international law to

[234] Davis Llewelyn, 'Domestic Jurisdiction: A Limitation on International Law' (1946) 32 Transactions of the Grotius Society 73.

[235] Robert Bernhardt, 'Domestic Jurisdiction of States and International Human Rights Organs' (1986) 12 British Year Book Of International Law 197.

[236] Robert Bernhardt, 'Domestic Jurisdiction of States and International Human Rights Organs' (1986) 12 British Year Book Of International Law 200.

[237] Dominick McGoldrick, 'The Principle of Non-Intervention: Human Rights' (1996) 2 Australian Journal of International Law 664.

[238] Marti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 397.

many areas. It has been argued that this is the basis of the reducing scope on domestic jurisdiction.[239] In as much as this may be correct, it does not shed light on how to ascertain whether "a matter is essentially within the domestic jurisdiction of states". Moreover, practice of the UN organs has not been consistent or uniform in what they regard as "matters which are essentially within the domestic jurisdiction of a state".[240] The test is thus relative and is dependent on the growth and application of international law.[241]

Post-World War II, there have been major developments in international law.[242] As a result, rules of international law have governed, or affected, many areas.[243] This expansion of international law continues to reduce the scope of domestic jurisdiction. There is no standard test to be applied in the identification of "matters essentially within the domestic jurisdiction of states", and the changing dynamics of international law makes it difficult to have an all-inclusive list of such matters.[244]

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[239]Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 128.

[240] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 350.

[241] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) Singapore Year Book of International Law and Contributors 188.

[242] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 353.

[243] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 360.

[244] James Watson, 'Auto-interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter', (1977) 9 Australian Journal of International Law 65.

It has also been argued that such determination is influenced by moral and political judgments. This is based on the fact that the drafters of the Charter deliberately failed to offer a juridical explanation of the phrase "matters essentially within the domestic jurisdiction of state."[245] The deliberate lack of explanation left a lacuna in the law, allowing for speculation. The traditional understanding of domestic jurisdiction was that there was no limitation to states in relation to how they treated their citizens, or how they used their territories. Overtime, however, states have not been able to prevent external intervention, and more so by the UN.[246]

An observation of UN practice makes it clear that "a matter is essentially within the domestic jurisdiction of states" only if no political organ of the UN has found to the contrary.[247] In as much as there have been attempts at juridical interpretations, the same have been rendered useless, as the UN has blatantly ignored the intentions of the founders of the San Francisco instructions, and have repeatedly defined domestic jurisdiction.[248]

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[245] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 188.

[246] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003), p. 161.

[247] Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford 1963), p. 129.

[248] Quincy R. Wright, 'Is Discussion Intervention?' (1956) 50 (1956) Australian Journal of International Law 1060.

3.6 Who is the Object of the Prohibition in Chapter 2(7) of the Charter?

There has been debate on who exactly is the subject of the prohibition in Chapter 2 (7) of the Charter.[249] The important question to address here, is, "Who is prohibited by Article 2(7) from intervening, in matters which are essentially within the domestic jurisdiction of a state?"

The debate is whether the United Nations is the only subject of the prohibition, or whether the prohibition similarly apply against individual member states of the United Nations?[250] The complicated use of the terms "the Organization" in some of the Articles of the Charter, and "all Members" in others, and even "the Organization and its Members" in yet other Articles, further contributes to the persistent problem of interpretation of the Charter.[251] Article 2(7) expresses that "Nothing contained in the present Charter shall authorize the United Nations to intervene ..."

[249] David Gilmour, 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective' (1967) Vol 16 No 7 International and Comparative Law Quarterly 1020.

[250] David Gilmour, 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective' (1967) Vol 16 No 7 International and Comparative Law Quarterly 1023.

[251] Sreeranga Rajan, *United Nations and Domestic Jurisdiction* (2nd ed. Asia Publishing House: London, 1961), p. 25.

The arising question, then, is whether this prohibition extends to individual members, despite being expressly mentioned in Article 2(7) that the prohibition relates to the UN and its members. Here, it is undeniable that an international organization enjoys a separate legal identity and personality from its members.[252] Consequently, the rights and duties of an international organization are separate from those of its individual members.[253] It is, hence, unnecessary to have a debate along these lines. The important issue of concern should only be whether the prohibition at Article 2(7) should apply to individual member states of the United Nations, and if so, on what basis.[254]

The debate that the prohibition only applies to the United Nations would be untenable. The reason behind this is simple. The Charter is a treaty, and one of the most important principles of treaty interpretation is the presumption that parties to the treaty have no intention to act in a manner which will defeat its intention.[255] Indeed, the preamble of Article 2 of the UN Charter provides that

"the Organization and its Members in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles ...."

[252] Prasad Menon, 'The Legal Personality of International Organizations' (1992) 12 Sri Lanka International Journal 11.

[253] Prasad Menon, 'The Legal Personality of International Organizations' (1992) 12 Sri Lanka International Journal 15.

[254] David Gilmour, 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective' (1967) Vol 16 No 7 International and Comparative Law Quarterly pg. 1029.

[255] Michael Waibel, 'Principles of Treaty Interpretation: Development for and Applied by National Courts?' (2015) University of Vienna Law Journal 77.

Article 1(1) of the Charter provides for the purposes of the UN.[256] One of the Purposes of the United Nations is "To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

The drafters of the Charter intended that member states be free to act in those matters within their domestic jurisdiction devoid of intervention either from the Organization.[257] It is thus clear that it is the United Nations, which is an international organization with separate legal personality from its members, which is prohibited from intervening in "matters essentially within the domestic jurisdiction of states".[258]

[256] Charter of the United Nations 1945, Art. 1 (1) UNTS XVI.

[257] Alf Ross, 'The Proviso Concerning Domestic Jurisdiction' in Article 2(7) of the Charter of the United Nations,' (1950) Vol 6 No 1 The American Journal of International Law 562.

[258] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

3.7 Who Determines Whether a Matter is Essentially Within the Domestic Jurisdiction of States?

One of the ambiguities of Article 2(7) of the UN Charter is that it does not identify an organ authorized to decide upon its applicability or to interpretation.[259] Article 15(8) of the League Covenant had no defect on decision making power.[260] The Covenant was clear on the competent authority to make the determination on whether "a matter was essentially within the domestic jurisdiction of states". This power to decide was vested in the League Council. The notion of states being their own determinant was thus cured by the clarity of decision-making power. The draft proposal of the Charter was silent on the competent authority to make such determination. This discussion was held at the Conference in San Francisco. Greece proposed an amendment which gave this authority to the ICJ.

Its proposed draft read, "It should be left to the International Court of Justice at the request of a party to decide whether or not such situation or dispute arises out of matters that, under international law, fall within the domestic jurisdiction of the State concerned."[261] This proposal was rejected. Belgium similarly

[259] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 62.

[260] Covenant of the League of Nations 1919 Available at https://www.ungeneva.org/en/covenant-lon Assessed 24th April, 2020.

[261] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003) pg. 170.

proposed that the power should be given to the organization. This proposal was equally rejected.[262]

Despite the silence of Article 2(7) on the competent authority to "determine whether or not a matter is essentially within the domestic jurisdiction of states", it is not to be interpreted that each individual state is its own determinant.[263] On the other hand, states have not yielded the power to make authoritative interpretations of Article 2(7) to the political organs of the UN.[264] This power remains vested in states. Watson argues that due to the unique nature of Article 2(7) of the Charter, a positivist approach is necessary.[265] This is because there is conflict between the application of law and politics, which affects the applicability of the prohibition on "non-intervention".[266]

He notes that the trend in UN practice is that over time, it has prioritized political interests of members if the Security Council to

[262] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003) pg. 170.

[263] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003) pg. 172.

[264] Alain Pellet, *The Charter of the United Nations: A commentary of Bruno Simma's Commentary* (Oxford University Press, Oxford, 2003) pg. 176.

[265] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 1977 60.

[266] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 1977 65.

such an extent that such political activity is legally justified.[267] He however, warns against such a dynamic approach when interpreting a foundational principle of the entire organization. He argues that a dynamic approach cannot be used to transform a foundational system that is based on "state consent" to one that is based on "international consensus".[268] Such direction would produce a legal rule that lacks basis in reality. This would then lead to the loss of credibility for international law.[269]

It is this dynamic approach that has killed Article 2(7) of the UN Charter. The Security Council has vested itself with the power to interpret the Charter, and in so doing, taken a dynamic approach. The Security Council has narrowed the interpretation of Article 2(7) of the Charter, almost to extinction, to fit political and self-interests. The Security Council waters down the principle of domestic jurisdiction whenever it fits its interests. On the other hand, where there are no advantages in an intervention against a state, the Security Council, and even member states to the UN, will readily raise the plea of domestic jurisdiction. It, hence, turns out that state sovereignty and domestic jurisdiction have become a tool, only to be used when it fits self-interest of the Security Council.[270]

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[267] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter', (1977) 9 Australian Journal of International Law 1977 68.

[268] George Schwarzenberger, *The Fundamental Principles of International Law* (6th ed. Professional Books Limited, New York, 1955), p. 37.

[269] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter', (1977) 9 Australian Journal of International Law 61.

[270] James Watson, "Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter" ,(1977) 9 Australian Journal of International Law 63.

Article 2(7) of the Charter should be interpreted based on positivist jurisprudence.[271] However, the UN Security Council has, through its practice, conveniently shifted the UN system from one based on state consent, to one based on "international consensus".[272] It should be noted that before there were permanent international organizations, the concept of sovereignty included the power of auto-interpretation of international obligations.[273] There was a strict requirement on state consent, such that a state was not bound by any international obligation which it did not consent to. Further, an exterior body's interpretation of a state's obligation was not binding on the concerned state, unless the state had yielded interpretative powers to the organ.[274]

Article 15(8) of the League Covenant o took away that power of auto-interpretation, and vested it in the League Council. Upon its collapse, this power shifted back to the states.[275] Nothing in the Charter vested this power in the Security Council. Article 2(7) does

[271] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 65.
[272] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 70.
[273] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 72.
[274] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 83.
[275] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 86.

not address itself to this issue, and this omission was intentional.[276] Now, the Security Council's practice has been to interpret Article 2(7) in a manner that is convenient to further self-interest. It is such practice that has led to the death of Article 2(7) of the UN Charter.

3.8 The meaning of intervention

The word "intervention" is one of the most ambiguous words in international law.[277] It lacks a straight forward meaning, and has prompted many debates amongst publicists. For instance, Hoffman states that intervention includes acts which try to affect not just the external activities of a state, but its domestic affairs too.[278] Hersh Lauterpatch, on the other hand, writes that intervention is a technical word.[279] It refers to "dictatorial interference which amounts to the denial of the independence of the state". He explains that intervention entails a dogmatic demand either for some action, or abstention, and if that demand is not complied with, the intervening state resorts to threats of, or recourse to compulsion.[280]

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[276] James Watson, 'Auto interpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter' (1977) 9 Australian Journal of International Law 88.

[277] Percy Henry Winfield, *The History of International Law* (Cambridge University Press: Cambridge, 1923), p. 130.

[278] Scott Hoffman, 'The Problem of Intervention', in Hedley Bull (eds), *Intervention in World Politics* (Oxford University Press: Oxford, 1984), p. 10.

[279] Hersch Lauterpatch, *International Law and Human Rights* (Stevens and Sons Ltd: Minnesota 1950), p. 168.

[279] William Edward Hall, *International Law* (7th ed. Clarendon Press, Oxford, 1880), p. 596.

[280] Hersch Lauterpatch, *International Law and Human Rights* (Stevens and Sons Ltd, Minnesota, 1950), p. 169.

Hall writes that intervention occurs when a state interferes in the relations of two states without the consent of both, or either of them.[281] He defines intervention as; "a state's interferes in the domestic affairs of another state irrespective of the will of the latter, for the purpose of either maintaining or altering the actual condition of things within it".[282]

Every state possesses a right to independence, and sovereignty.[283] Consequently, each state has a right to exercise its authority free of intervention by other foreign states in matters in which it acts as a sole independent community.[284] The violation of this independence by another state is what is termed as intervention. Intervention thus occurs when, "a state, or a group of states, interferes with the internal or external affairs of another state, with the purpose of imposing its will without consent, for the purpose of maintaining or altering the condition of things".[285] One cannot purport to discuss independence, or sovereignty, without discussing intervention.

[281] William Edward Hall, *International Law* (7th ed. Clarendon Press, Oxford, 1880), p. 592.

[282] William Edward Hall, *International Law* (7th ed. Clarendon Press, Oxford, 1880), p. 596.

[283] David Gilmour, 'Article 2 (7) of the United Nations Charter and the Practice of the Permanent Members of the Security Council", (2001) 16 The International and Comparative Law Quarterly 153.

[284] William Edward Hall, *International law* (7th ed. Clarendon Press: Clarendon, 1880), p. 621.

[285] William Edward Hall, *International law* (7th ed. Clarendon Press: Clarendon, 1880), p. 632.

If at all a state has a right to exist as a sovereign juridical person in the international arena, then that right comes with a correlative duty of "non-intervention" in both the internal and external affairs of another state.[286] It is from this reasoning that the doctrine of "non-intervention" arises. The right to independence comes with a correlative duty of non-intervention. States, therefore, have a duty to refrain from undertaking any act which would interfere with the internal autonomy or the external independence of other states.[287]

There are many varying interpretations of the term "intervention". It is necessary to ascertain the purpose intended to be realized by those who drafted Article 2(7) of the Charter, in order to understand the meaning intended to be given to this term. It would be in order to question whether the drafters themselves were sure of the meaning of the term "intervention".[288] Gilmour opines that it could be possible that the drafters of the Charter avoided having lengthy discussions on the meaning of intervention as they feared that such discussions would hinder the establishment of the organization itself.[289]

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[286] Varlien Jesse, *An Introduction to the Law of Nations*, (4th ed. Oxford University Press, Oxford, 1955), p. 123.

[287] Henry Wheaton, *Digest of International Law Cases* (Pinter Publishers, London, 1994), p. 3331.

[288] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales Press, Wales, 1994), p. 102.

[289] David Gilmour, 'Article 2 (7) of the United Nations Charter and the Practice of the Permanent Members of the Security Council', (2001) 5 The International and Comparative Law Quarterly 332.

It has been argued that the drafters were confused by the use of the word "intervene", whereas at the initial stages of drafting, the term 'to interfere' had been used, yet these two words had different technical meanings.[290] Jones argues that by including the "non-intervention" rule in Article 2(7) of the Charter, the drafters meant no interference in any form.[291] Some authors have argued that the intention of the drafters of the Charter of the UN can be inferred from the "preparatory work of the San Francisco Conference".[292]

The understanding of this term at the San Francisco conference was that, it referred to; "any action by any organ of the United Nations concerning a matter which was within the domestic jurisdiction of particular states."[293] This meant that intervention included any inquiry, recommendation, study or discussion, relating to the domestic affairs of a state.[294] The delegates who were concerned with the drafting of Article 2(7) clearly indicated that by the term intervene, they meant interference, pure and simple.[295] There was no indication that intervention was only limited to

[290] Goronwy J. Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979) 203.

[291] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales Press, Wales, 1994), p. 102.

[292] Scott Hoffman, 'The Problem of Intervention', in Hedley Bull (eds), *Intervention in World Politics* (Oxford University Press: Oxford, 1984), p. 10.

[293] Scott Hoffman, 'The Problem of Intervention', in Hedley Bull (eds), *Intervention in World Politics* (Oxford University Press: Oxford, 1984), p. 13.

[294] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 361.

[295] David Gilmour "The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective" (1967) 16 International and Comparative Law Quarterly 367.

dictatorial interference.[296] This approach has, however, been denied by authors such as Higgins.

Higgins denies that such a strict interpretation was intended by the drafters of Article 2(7) of the Charter.[297] She refers to Articles 10, 11, 13 and 14 of the Charter. Her argument is that these Articles endow the General Assembly with powers of discussion and recommendation. Therefore, a broad interpretation of the word "intervention" would limit the role of the General Assembly.[298] From the speech made by Dulles, the delegate representing the United States of America, it can be inferred that the drafters of Article 2(7) of the Charter did not intend that word "intervene" was to be interpreted in its traditional sense as argued by Lauterpacht.[299]

Instead, it appears that the drafters used the word "intervene" to mean interference in any form. Even though the idea of inter-governmental cooperation in solving common economic and social problems was welcome, notably through the General Assembly and Economic and Social Council, any form of intervention by those organs in the economic and social policies of states was strongly

[296] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales Press, Wales, 1994), p. 116.
[297] Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 129.
[298] Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 131.
[299] Scott Hoffman, 'The Problem of Intervention', in Hedley Bull (eds), *Intervention in World Politics* (Oxford University Press: Oxford, 1984), p. 13.

opposed.[300] The drafters did not intend that those organs should "hold discussions, institute investigations, and pass recommendations on the economic and social policies of a state".[301] The effect of such "intervention" was that the concerned state would be subjected to embarrassment by imposition of measures such condemnation, or coercion in the implementation of a pacific settlement of an international dispute arising out of a matter which was within the states domestic authority.[302] The only agreed upon exception was as regards the Security Council's power to authorize enforcement action where matters arising out of economic or social issues constituted "a threat to or a breach of international peace and security".[303]

Since the creation of the UN, there have been different interpretations of the phrase "Nothing … shall authorize the United Nations to intervene". UN action has been criticized in line with the principles of domestic jurisdiction, and "non-intervention". Some publicists have argued that the term 'intervene' refers to; "dictatorial interference with imperative

[300] David Gilmour 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective' (1967) 5 International and Comparative Law Quarterly 378.

[301] Scott Hoffman, 'The Problem of Intervention', in Hedley Bull (eds), *Intervention in World Politics* (Oxford University Press: Oxford, 1984), p. 17.

[302] David Gilmour 'The Meaning of 'Intervene' within Article 2 (7) of the United Nations Charter—An Historical Perspective' (1967) 5 International and Comparative Law Quarterly 379.

[303] Goronwy J. Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press, Wales, 1979), p. 203.

pressure as defined under classical international law".[304] Those who subscribe to this argument agree, to a great extent, with the work of Sir Hersch Lauterpacht.[305]

On the other hand, others have insisted that the term 'intervene', as used in Article 2(7) of the Charter, ought to be simply understood as pure interference.[306] The "UN General Assembly Resolution 2131(XX) of 21 December 1965" was the first attempt to offer a detailed construction of the principle of non-intervention.[307] The resolution clearly declared illegal armed interference, and interference by other means. However, the "principle of non-intervention" has not been immune from change, and over time, there has been documentation of the obligation of states to refrain from intervening in the affairs of other states.[308]

In 1981, the "Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States" was adopted, thereby

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[304] Hersch Lauterpacht, *Function of Law in the International Community* (Stevens and Sons, London, 1933), p. 12.

[305] Hersch Lauterpacht, *Function of Law in the International Community* (Stevens and Sons, London, 1933), p. 14.

[306] Galina Shinkaretskaya, 'Content and Limits of Domestic Reserve', in Grigory Tunkin & Rudiger Wulfrum (eds), *International Law and Municipal Law* (Duncker & Humbolt, Berlin, 1988), p. 2126.

[307] UN General Assembly, *Declaration on The Inadmissibility of Intervention In The Domestic Affairs Of States And The Protection Of Their Independence And Sovereignty*, 21st December 1965 A/RES/2131/XX Available at https://legal.un.org/avl/pdf/ha/ga_2131-xx/ga_2131-xx_e.pdf Assessed 24th April, 2020.

[308] Galina Shinkaretskaya, 'Content and Limits of Domestic Reserve', in Grigory Tunkin & Rudiger Wulfrum (eds), *International Law and Municipal Law* (Duncker & Humbolt, Berlin, 1988), p. 2129

offering a more detailed explanation of non-intervention.[309] This treaty prohibited the use of political power by stronger states to intervene and force certain action in weaker states.[310] It documented the prohibition of inter-state intervention. Article 2(7) protects the member states against acts of the UN and its organs only.[311] It does not prohibit intervention of a state against another state.[312]

Practically, intervention manifests itself in different ways. International law concerns itself mainly with intervention by means of force, as this is the most invasive mode of intervention.[313] Further, the UN Charter directly prohibits "the use of force against the territorial integrity or political independence of any state."[314] The UN and its organs are prohibited from intervening in "matters that are "essentially within the domestic jurisdiction of any state", by virtue of Article 2(7) of the Charter.[315] States are under a similar

[309] UN General Assembly, *Declaration on The Inadmissibility of Intervention In The Domestic Affairs Of States And The Protection Of Their Independence And Sovereignty*, 18th May 1981 A/RES/3851/IV Available at https://legal.un.org/avl/pdf/ha/ga_2131-xx/ga_2131-xx_e.pdf Assessed 24th April, 2020.

[310] Kaswer Ahmed. 'The Domestic Jurisdiction Clause in The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law 184.

[311] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[312] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View', (2006) 10 Singapore Year Book of International Law 186.

[313] Kaswer Ahmed. 'The Domestic Jurisdiction Clause In The United Nations Charter: A Historical View', (2006) 10 Singapore Year Book of International Law 180.

[314] Leland Goodrich, *Charter of the United Nations: Commentary and Documents*, (3rd ed. Columbia University Press, New York, 1969), p. 665.

[315] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

prohibition, and are duty bound to refrain from inter-sate interventions.[316]

However, there are various instances under which the Charter anticipates the "use of force". For instance Article 42 foresees a situation where the Security Council may resort to the "use of force" to maintain and restore "international peace and security".[317] Article 51 also allows room for states to apply "use of force" as a measure of self-defence, pending the Security Council's action to maintain "international peace and security".[318]

The application of the "principle of non-intervention", as well as the "principle of domestic jurisdiction", depends on other principles and purposes that justify the international order itself.[319] This includes, for example, "the equality of states, protection of fundamental human rights, and gender equality".[320] This reasoning insinuates that there are legally justified interventions and, indeed, many scholars have supported this school of thought.

[316] Mortimer Sellers, 'Intervention under International Law', (2014) 19 Maryland Journal of International Law 992.

[317] Charter of the United Nations 1945, Art. 42 UNTS XVI.

[318] Charter of the United Nations 1945, Art. 51 UNTS XVI.

[319] Mortimer Sellers, 'Intervention under International Law' (2014) Vol 19 Maryland Journal of International Law 994.

[320] Mortimer Sellers, 'Intervention under International Law' (2014) Vol 19 Maryland Journal of International Law 996.

This discussion is an illustration that there is no definition of the term "intervention", hence its meaning is not easily ascertainable.[321]

3.9 Contemporary Issues in Intervention

There has been robust growth and development in international law. His development has led to the emergence of new concepts that were not traditionally part of international law. These include "humanitarian intervention" and "the responsibility to protect."[322] These two concepts have grown over time, and are now widely popularized by both UN and state practice.[323] The two concepts are linked to the regime of human rights, which were originally kept "within the domestic jurisdiction of states." With advancements in international law, there has been a realization that human rights form an integral part of international law, and their implementation and observance have become a matter of concern for international law.[324]

[321] Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 131.
[322] Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 137.
[323] Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 138.
[324] Rosslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963), p. 142.

3.9.1 Humanitarian Intervention

In as much as the doctrine of non-intervention goes hand in hand with the right to independence, it has often been abused by states. Eagleton writes that with the backing of the rule against intervention, states are capable of oppressing those within their territories, and waging war against them in order to maintain their legal rights.[325] It is this line of reasoning that has led to the development of humanitarian intervention.[326]

Humanitarian intervention has been defined as, "coercive action by one or more states involving the use of armed force in another state, without the consent of its authorities, and with the purpose of preventing widespread suffering or death among inhabitants".[327] This definition is two-fold. One purports to endow certain rights and privileges based on humanitarian principles or human rights.[328] The other element specifies the nature and scope of the concept of state sovereignty. [329]

[325] Clyde Eagleton, *International Government* (Ronald Press Co.,New York, 1957), p. 83.
[326] Adam Roberts, 'The So-Called Right of Humanitarian Intervention' (2000) 3 Yearbook of International Humanitarian Law 15.
[327] Adam Roberts, 'The So-Called Right of Humanitarian Intervention' (2000) 3 Yearbook of International Humanitarian Law 16.
[328] Adam Roberts, 'The So-Called Right of Humanitarian Intervention' (2000) 3 Yearbook of International Humanitarian Law 17.
[329] James Burgess, 'Ethics of Humanitarian Intervention: The Circle Closes' (2002) 33 Peace Research Institute 262.

Humanitarian intervention is a contemporary term. It begun to appear in international law literature in the mid-19th century.[330] This was after a series of interventions done by European nations in the Ottoman Empire. Those interventions were justified by the argument that states were internationally liable for acts committed within their own borders.[331] There have been new and unforeseen elements in the practice of intervention since the early 1990s, more so in terms of its authorization.[332] There have been a series of interventions by external military forces in states such as Kosovo, Haiti, Somalia and Northern Iraq, which have triggered debates on whether there is a "right of humanitarian intervention".[333]

Despite disagreement regarding the degree and purpose of intervention in the cases mentioned above, the similarity was that there was military intervention in domestic affairs of the states involved, without their consent.[334] The intervention was conducted for alleged humanitarian purposes.[335] The major difference between pre-cold war, and post-cold war interventions, is the source of the legitimacy of the intervention.[336] In the pre-1990 cases,

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[330] Abiew Kofi, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, London, 1999), p. 9.

[331] Abiew Kofi, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, London, 1999), p. 12.

[332] Colin Warbrick, *The Principle of Non-Intervention: Use of Force* (Routledge Press, New York, 1994), p. 66.

[333] Adam Roberts, 'The So-Called Right of Humanitarian Intervention' (2000) 3 Yearbook of International Humanitarian Law 20.

[334] Colin Warbrick, *The Principle of Non-Intervention: Use of Force* (Routledge Press, New York, 1994), p. 68.

[335] Colin Warbrick, *The Principle of Non-Intervention: Use of Force* (Routledge Press, New York, 1994), p. 69.

[336] Colin Warbrick, *The Principle of Non-Intervention: Use of Force* (Routledge Press, New York, 1994), p. 73.

the right to intervene on humanitarian grounds was claimed and exercised by one and the same agent, the intervener.[337] The post-1990 cases, however, were legitimated either by the United Nations, as was the case in former Yugoslavia, Somalia, Rwanda, Haiti, Sierra Leone, East Timor, or by an international coalition or NATO,[338] as was the case in Liberia, northern Iraq.[339]

In the discussion of whether there is a right of humanitarian intervention, the issue of authorization is of importance.[340] The nature of the authorization of a military operation influences legitimacy of that operation. The UN's Security Council authorization of an operation has an essential impact. Most of the arguments revolve around the question whether a "right of humanitarian intervention". This is especially in regard to serious situations that require urgent action, whereby the Security Council delays in its determination of whether the case poses as a "threat to international peace and security".[341]

[337] Abiew Kofi, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, London, 1999), p. 12.

[338] Abiew Kofi, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, London, 1999), p. 13.

[339] Frankling Kings, 'The Principle of Non-Intervention: Use of Force', in V. Lowe & C. Warbrick, eds., 'The United Nations and the Principles of International Law' (Routledge Press, New York, 1994), p. 1046.

[340] Frankling Kings, 'The Principle of Non-Intervention: Use of Force', in V. Lowe & C. Warbrick, eds., 'The United Nations and the Principles of International Law' (Routledge Press, New York, 1994), p. 1048.

[341] Nick Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000), p. 184.

The question, then, becomes whether states, or regional bodies, have any right to act in such circumstances.[342] The international community has not reached a consensus on the question whether there is a principle of a "right of humanitarian intervention", with or without the Security Council's blessing, as the case may be.[343] Some states have argued in support of the existence of such a right. For example, this was Britain's argument in relation to "Operation Provide Comfort in Northern Iraq". The Security Council justified its action in Kosovo along the same argument.[344] However, there is no evidence, even vide state practice, to support the claim that the idea of "humanitarian intervention" is now a formalized customary rule of international law.[345]

There is no international document that has directly recognized states alleged "right to humanitarian intervention".[346] The UN Charter is silent on the issue of humanitarian intervention. There is no single provision that directly addresses the question of humanitarian intervention.[347]

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[342] Nick Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000), p. 190

[343] W.E. Hall, A Treatise on International Law, 8th ed. (Clarendon Press, Oxford, 1924) pp. 342-344.

[344] Christine Grey, *International Law and the Use of Force* (Cambridge University Press, 2018), p. 216.

[345] Adam Hall, 'The Challenges to State Sovereignty from the Promotion of Human Rights' (2010) 4 Journal for International Relations 671

[346] Helen Dubby, 'The 'War on Terror' and the Framework of International Law (2005) 77 British Yearbook of International Law 425.

[347] Nick Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000), p. 192.

The approach of the Charter is substantially non-interventionist.[348] Article 2(4) of the Charter is one of the strongest prohibitions on intervention. It prohibits states from the "threat or use of force against the territorial integrity or political independence of any other state".[349]Article 2(7) of the Charter similarly provides for the principle of non-intervention.[350] It directly prohibits the UN and its organs from intervening in "matters which are essentially within the domestic jurisdiction of any state", and forbids the UN from requiring members to submit such matters to settlement under the present Charter.[351]

Nevertheless, supporters of the idea of a "right of humanitarian intervention" argue that there are certain articles in the Charter which suggest that the Charter has left some room for humanitarian intervention.[352] One of the purposes of the UN is to "develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".[353] The Charter also provides for the purpose to "achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and

[348] Adam Hall, 'The Challenges to State Sovereignty from the Promotion of Human Rights' (2010) 4 Journal for International Relations 671.

[349] Charter of the United Nations 1945, Art. 2(4) UNTS XVI.

[350]Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[351] Charter of the United Nations 1945, Art. 2(7) UNTS XVI.

[352] Abiew Kofi, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International: London, 1999,) p. 19.

[353] Charter of the United Nations 1945, Art. 1(2) UNTS XVI.

encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".[354]

Adams however writes that these provisions in the Charter only address the issue of what ought to be done in the instance where most fundamental human rights and humanitarian norms are openly defied within a state.[355] Another Article that arguably creates room for humanitarian intervention is Article 39. Article 39 empowers the Security Council to act in situations which are considered to constitute a "threat to the peace, breach of the peace, or act of aggression".[356] In reality, a humanitarian crisis within a state's territory can entail any, or all, of the elements in Article 39.

Moreover, despite that Article 2(7) of the Charter directly prohibits UN intervention in "matters which are essentially within the domestic jurisdiction of states", the Charter empowers the Security Council to take enforcement measures partially or wholly within a sovereign state.[357] It is worthwhile to note that members to the UN have the duty to abide by the Council's.[358] Scholars have argued that some Charter provisions, notably those in Chapter VII suggest

[354] Charter of the United Nations 1945, Art. 2(3) UNTS XVI.
[355] Adam Roberts, 'The So-Called Right of Humanitarian Intervention' (2000) 3 Yearbook of International Humanitarian Law 20.
[356] Charter of the United Nations 1945, Art. 39 UNTS XVI.
[357] Charter of the United Nations 1945, Art. 39 UNTS XVI.
[358] Charter of the United Nations 1945, Art. 25 UNTS XVI.

that the Security Council has the power to authorize intervention in "matters essentially within the domestic jurisdiction of states on humanitarian grounds".[359]

In contemporary international law, human beings within a state are a concern of international law.[360] The idea of sovereign rights is derived from "fundamental human rights and the inherent dignity of human beings".[361] The most critical of these human rights are the ones that international law is directly concerned with.[362] These are clarified by "The Universal Declaration of Human Rights" as well as other human rights covenants.[363] International law has a broad reach over such rights. It then follows that the scope of domestic jurisdiction is narrowed, as the internationalization of human rights expand.[364]

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[359] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 540.

[360] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 541.

[361] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 546.

[362] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 549.

[363] Universal Declaration of Human Rights 1948 Available at https://www.un.org/en/universal-declaration-human-rights/index.html Assessed 24th April, 2020.

[364] Mortimer Sellers, 'Parochialism, Cosmopolitanism, And The Foundations Of International Law' (2014) 19 Maryland Journal of International Law 537.

Mortimer Sellers explains that the freedom and independence of states is a fundamental value, in the same manner that freedom and independence of human beings are fundamentally valuable.[365] He argues that the freedom and independence of states is legitimate because they are made up of real human beings who value community and share culture, customs, and local circumstances.[366] He further argues that jurisdiction and decision-making powers ought to devolve as much as possible to local authorities.[367] What is important is that those local authorities respect the predominant standards of general international law.[368]

The role of International law becomes the enforcement and implementation of universal human rights and other international norms.[369] Humanitarian intervention becomes activated once a state fails, or refuses, to implement these rights. Such intervention is also necessitated in a situation where a state violates basic human rights and international standards as per their obligation in international

[365] Mortimer Sellers, 'Republican Principles In International Law: The Fundamental Requirement Of A Just World Order' (2006) 71 Maryland Journal of Internation Law. 648.

[366] Mortimer Sellers, 'Republican Principles In International Law: The Fundamental Requirement Of A Just World Order' (2006) 71 Maryland Journal of Internation Law. 651.

[367] Mortimer Sellers, 'Republican Principles In International Law: The Fundamental Requirement Of A Just World Order' (2006) 71 Maryland Journal of Internation Law. 660.

[368] Ulrich Beyerlin, 'Humanitarian Intervention', in Robert Bernhardt (eds), *Encyclopaedia of Public International Law* (North-Holland Publishing, Amsterdam, 1982), p. 211.

[369] Ulrich Beyerlin, 'Humanitarian Intervention', in Robert Bernhardt (eds), *Encyclopaedia of Public International Law* (North-Holland Publishing, Amsterdam, 1982), p. 212.

law.[370] A violation of universal human rights by a state in its territory, is similarly a violation of fundamental principles of international law.[371] However, enforcement of those rights ultimately violates the concept of domestic jurisdiction.[372] These situations demonstrate circumstances where there is conflict between the plea of domestic jurisdiction, and fundamental human rights.[373] However, any response to human rights violations must respect the domestic jurisdiction of the concerned state.[374]

The conclusion is that there is no international provision for a "right to humanitarian intervention" under contemporary international law.[375] The upshot is that intervention without consent of a state, even on humanitarian grounds, in "matters essentially within the domestic intervention of a state", is a violation of Article 2(7) of the Charter.[376]

[370] Ulrich Beyerlin, 'Humanitarian Intervention', in Robert Bernhardt (eds), *Encyclopaedia of Public International Law* (North-Holland Publishing, Amsterdam, 1982), p. 214.

[371] Ulrich Beyerlin, 'Humanitarian Intervention', in Robert Bernhardt (ed), *Encyclopaedia of Public International Law* (North-Holland Publishing, Amsterdam 1982), p. 224.

[372] Mortimer Sellers, 'Republican Principles In International Law: The Fundamental Requirement Of A Just World Order' (2006) 71 Maryland Journal of Internation Law. 679

[373] Mortimer Sellers, 'Republican Principles In International Law: The Fundamental Requirement Of A Just World Order' (2006) 71 Maryland journal of international law 682.

[374] Quincy Wright, 'Recognition, Intervention and Ideologies' (1958) 8 The Indian Year Book of International Affairs 937.

[375] Adam Hall, 'The Challenges to State Sovereignty from the Promotion of Human Rights' (2010) 4 Journal for International Relations 673.

[376] Adam Hall, 'The Challenges to State Sovereignty from the Promotion of Human Rights' (2010) 4 Journal for International Relations 675.

A conflict thus persists. Whereas the notion of human rights is fully and deeply embodied in the institutional foundation, context, and body of the UN Charter (1945), the principle of state sovereignty is the universal category for political recognition in international law.[377] These two concepts reflect an irresolvable contradiction of modern global politics. The concept of state sovereignty, and that of human rights, are yet to be fully developed, and continue to conflict with each other. UN practice, through its Security Council, has contributed to the reducing scope of state sovereignty. There are numerous interventions which have been authorized by the Security Council, legitimizing the intervention based on authorization and humanitarian justification.[378]

The above discussion reflects a change in the concept of state sovereignty, and domestic jurisdiction.[379] It implies that the recognition and spread of human rights has had an impact on state sovereignty.[380] Those who vigorously advocate for human rights deem the state as the problem. However, the state remains the principal protector of human rights. The state is the central legal and political solution for the protection and implementation of

[377] Adam Hall, 'The Challenges to State Sovereignty from the Promotion of Human Rights' (2010) 4 Journal for International Relations 677.

[378] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 553.

[379] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 554.

[380] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), pp. 557-562.

rights.[381] It is evident that the global human rights regime has influenced more and more states to respect wide ranges of human rights, and there are fewer cases of state induced gross and continuing violations of human rights.[382] It is upon states to take measures to protect and respect the human rights of their subjects.[383]

The question whether or not states have taken upon this duty is determined on a case-to-case basis.[384] This would depend on the state in question, in terms of how it treats its subjects and those within its territory, the measures taken to foresee the implementation of human rights, and most importantly, the political goodwill to align national policies with international standards.[385] This ideology is not harmful either to human rights, or sovereignty. It is even argued that the provisions for "non-intervention" and state sovereignty should only be judged on the grounds of how effectively they protect and implement human values, such as the protection of rights.[386]"

[381] James Burgess, James Burgess, 'Ethics of Humanitarian Intervention: The Circle Closes' (2002) 33 Peace Research Institute 266.

[382] Jack Donnelly 'State Sovereignty and Human Rights' (2014) Vol 28 Ethics and International Affairs 207.

[383] Jack Donnelly 'State Sovereignty and Human Rights' (2014) Vol 28 Ethics and International Affairs 212.

[384] Jack Donnelly 'State Sovereignty and Human Rights' (2014) Vol 28 Ethics and International Affairs 213.

[385] Jack Donnelly 'State Sovereignty and Human Rights' (2014) Vol 28 Ethics and International Affairs 216.

[386] Henry G. Hodges, *Doctrine of Intervention* (Princeton University Press: New Jersey, 1995), p. 114.

3.9.2 The Responsibility to Protect

Another contemporary issue that has an impact on the concept of domestic jurisdiction and state sovereignty is the notion of "Responsibility to Protect'.[387] The need to protect the civilians was derived from the concept of the Responsibility to Protect, a term generally coined as 'R2P'.[388] This concept originated from the lack of an international response capable of preventing the mass slaughters of the late twentieth century.[389] These were seen in states, such as Rwanda, Liberia, and the former Yugoslavia, where the UN was faulted for taking no action despite the massive loss of innocent civilian life during internal armed conflicts. The catastrophe of these situations ignited the idea that states had a moral responsibility to protect civilians from the effects of war.[390]

[387] Frank Furedi, 'The New Ideology of Imperialism: Renewing the Moral Imperative' (Pluto Press: London, 1994), p. 139.

[388] Bruno Pommier, 'The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya And Beyond' (2011) 93 International Review of the Red Cross 1072.

[389] Frank Furedi, 'The New Ideology of Imperialism: Renewing the Moral Imperative' (Pluto Press: London, 1994), p. 141.

[390] Bruno Pommier, 'The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya And Beyond' (2011) 93 International Review of the Red Cross 1080.

The then "UN Secretary-General, Kofi Annan", made a clarion call at the General Assembly, for the need to recognize the responsibility to protect.[391] Consequently, the "International Commission on Intervention and State Sovereignty (ICISS)" was founded in September 2000.[392] The main mandate of the Commission was to support the discussions in the UN on the Responsibility to Protect.[393]

In 2005, the "World Summit Outcome Document" finally presented the concept of R2P, a minimal agreement between states after long and laborious negotiations.[394] This concept addressed a range of situations, including armed conflict.[395] In 2006, while directly referring to the 2005 text, the Security Council passed "Resolution

[391] Ramesh Chandra, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics'* (Routledge Publishers, New York, 2011), p. 56.

[392] Kofi Annan, *'We the peoples: the role of the united nations in the twenty-first century'* UNGA Doc. A/54/2000, 27 March 2000 Available at: http://unpan1.un.org/ intradoc/groups/public/documents/un/unpan000923.pdf Accessed 20th September, 2020.

[393] Ramesh Chandra, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics'* (Routledge Publishers, New York, 2011), p. 59.

[394] See 'The 2005 World Summit', High-level plenary meeting of the 60th session of the General Assembly, 14–16 September 2005, available at: http://www.un.org/summit2005/ Accessed 20th September, 2020

[395] Ramesh Chandra, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics'* (Routledge Publishers: New York, 2011), p. 65.

1674 on protection of civilians in armed conflict".[396] The resolution attempted to reconcile national sovereignty which is a founding principle of international law, with the rather controversial right or duty of humanitarian intervention.[397] In the preamble of the resolution, the members of the Council reaffirmed their commitment to the United Nations Charter, acknowledging that "peace, security, international development and human rights were the four interlinked pillars of the United Nations system".[398]

The concept of R2P essentially provides that, "every state has the primary responsibility of protecting populations within its jurisdiction against acts of genocide, war crimes, ethnic cleansing, and crimes against humanity".[399] In the event that the state in question is unable to stop such crimes and restore peace in its

[396] United Nations Security Council, *Protection of civilians in armed conflict*, 28 April 2006 S/RES/1674 Available at http://unscr.com/en/resolutions/1674 Assessed 20th September 2020.

[397] Ramesh Chandra, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics'* (Routledge Publishers, New York, 2011), p. 67.

[398] United Nations Security Council, *Protection of civilians in armed conflict*, 28 April 2006 S/RES/1674 Available at http://unscr.com/en/resolutions/1674 Assessed 20th September 2020.

[399] Ramesh Chandra, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics'* (Routledge Publishers, New York, 2011), p. 56.

territory, the international society of states is obligated to take measures for the purpose of protecting the state's civilians from the wrath of war.[400]

R2P is founded on three main blocks.[401] They include, "the responsibility of each state, the responsibility of the international community to support a particular state in exercising its responsibility to protect its people; and finally, in cases where a state fails in its duty, the responsibility of the international community to take diplomatic, humanitarian action or other means to stop these violations".[402] Though the intention is to avoid resort to "the use of force", often the measures have included armed or unarmed coercive means in accordance with Chapter VII of the UN Charter.[403]

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[400] Ramesh Chandra, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics'* (Routledge Publishers, New York, 2011), p. 64.

[401] Ramesh Thakur, *Theorizing the Responsibility to Protect* (Cambridge University Press, Cambridge, 2015), p. 290.

[402] Frank Furedi, 'The New Ideology of Imperialism: Renewing the Moral Imperative' (Pluto Press: London, 1994), p. 143.

[403] Ramesh Thakur, *Theorizing the Responsibility to Protect* (Cambridge University Press, Cambridge, 2015), p. 300.

Applicability of R2P is based on consideration of several factors including, "seriousness of the harm done to the population; a just cause for intervention; intervention as a last resort; proportionality of the means used and an assessment of its consequences".[404] These criteria were established in 2001 by the ICISS, which brought together members of the UN General Assembly.[405]

Despite that these criteria were also in the report of the UN Secretary-General in 2005, it was not included in the outcome document of 2005 which founded the R2P.[406] Consequently, the criterion is not a formal requirement in the concept. Further, R2P is a political concept and is not, and does not purport to be, a new norm of international law.[407] It is neither a new label aimed at authorizing military intervention, and is primarily focused on preventive efforts.[408]

[404] Judson AnneMarie, 'Where is R2P grounded in International Law?' (2012) 12 University of Otago Law Journal 86.
[405] Ramesh Thakur, *Theorizing the Responsibility to Protect* (Cambridge University Press, Cambridge, 2015), p. 314.
[406] Judson AnneMarie, 'Where is R2P grounded in International Law?' (2012) 12 University of Otago Law Journal 88.
[407] Judson AnneMarie, 'Where is R2P grounded in International Law?' (2012) 12 University of Otago Law Journal 90.
[408] Judson AnneMarie, 'Where is R2P grounded in International Law?' (2012) 12 University of Otago Law Journal 92.

3.10 Concluding remarks

Article 2(7) of the UN Charter has existed for 75 years now. However, not much is known about its exact meaning and scope. Article 2(7) of the Charter is one of the fundamental provision in the UN Charter, and it is crucial to the very existence of the UN. This is by virtue of the fact that Article 2(7) is on a large part responsible for the consent of most states to join the UN and be bound by its Charter. It creates understanding that by joining the United Nations, states are not surrendering their sovereignty to the Organization, and neither are they giving it absolute authority to meddle in affairs which those states consider their sole prerogative.[409]

Ironically, this very important domestic jurisdiction clause is the most ambiguous, controversial and the object of subjective interpretation.[410] The domestic jurisdiction clause was meant to address the fear of states of the possibility of external interference in their domestic matters. Though the interpretation and application of the principles of sovereignty and domestic jurisdiction have evolved to fit the developments in international law, they remain relevant.[411] Notably, Article 2 (1) of the UN Charter provides that

[409] Charles G. Fenwick, 'Intervention: Individual and Collective' (1945) Vol 39 Australian Journal of International Law 1007.

[410] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) Centre for Strategic Research 39.

[411] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 67.

the organization is based on the principle of the sovereign equality of all its members.[412] The founder s of Article 2(7) of the Charter intended its provision to be a "basic principle of the Organization" and not "merely a technical and legalistic formula".[413] Consequently, Article 2(7) of the Charter ought to be observed by the UN, and should not be subjected to defiance and abuse.

Initially, this provision was captured in the Chapter on the pacific settlement of disputes[414], and was then transferred to the Chapter on the basic principles of the organization.[415] This was an important departure from Article 15 (8) of the Covenant of the League whose provision on domestic jurisdiction was limited, as it only applied to the procedures for peaceful settlement of disputes by the Council of the League.[416] According to Dulles, the nature of the UN and the powers conferred to is organs made it necessary to have a clear limitation of the authority of the UN and its organs in relation to "matters essentially within the domestic jurisdiction of states", so as to preserve the sovereignty and independence of the member states.[417]

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[412] Charter of the United Nations 1945; Art. 2(1) UNTS XVI

[413] Muge Kinacioglu, 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' (2005) 10 Centre for International Studies 42.

[414] Henry G. Hodges, *Doctrine of Intervention* (Princeton University Press, New Jersey, 1995), p. 114.

[415] Charter of the United Nations 1945; Art. 2 UNTS XVI

[416] Henry G. Hodges, *Doctrine of Intervention* (Princeton University Press, New Jersey, 1995), p. 117.

[417] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 70.

This reflects the fundamental value of the principle of state sovereignty and domestic jurisdiction.[418] It has become an acceptable argument that external interventions can be considered as legal, legitimate, or both, under international law. This is the case whenever serious humanitarian catastrophes necessitate interventions, and so long as the intervening state respects the territorial integrity and political independence of the peoples they protect.[419]

What has been noted in UN practice, however, is persistent abuse of the so called 'humanitarian intervention.' Further, UN action has continued to narrow the scope of domestic jurisdiction, almost to extinction. The ambiguity of Article 2(7) of the Charter on who is the proper authority to decide "whether a matter falls within the domestic jurisdiction of states", has further aided UN's continued practice to discredit claims of domestic jurisdiction. The assumption is that the general rule of interpretation of the Charter, should be used in the interpretation of Article 2(7).[420]

[418] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 71.
[419] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 74.
[420] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 491.

However, the UN and its organs has taken it upon themselves to interpret and apply the principle of domestic jurisdiction.[421] Common practice is that member states will often down play the principle of domestic jurisdiction in cases where they desire UN action, and insist on its value and inviolable nature wherever it is in their interest not to have UN action. Consequently, the application of the principle of domestic jurisdiction by the UN organs depends on block alignments, and a valuation of advantages.[422]

3. 10. 1 Conclusion

This chapter traces the history of the concept of state sovereignty and the principle of domestic jurisdiction. It was found that these two concepts have revolutionized over the years due to the development of international law. It was found that developments in the area of human rights have reshaped the concepts of state sovereignty and domestic jurisdiction, in that international law now has a wider reach, thus narrowing the scope of domestic jurisdiction.

The terms in Article 2(7) of the Charter are discussed, and there is an in-depth discussion of what matters are considered to be within the domestic jurisdiction of states. It was found that the scope of domestic jurisdiction has narrowed so much, whereas that of

[421] Murphy S, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Cambridge University Press, Cambridge, 1996), p. 473.

[422] Murphy S, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Cambridge University Press 1996), p. 482.

international law has continued to widen, such that it is doubtful whether there are any matters considered to be essentially within the domestic jurisdiction of states.

This chapter also discusses the object of the prohibition in Article 2(7) of the Charter. It was found that the UN and all its members was bound to the prohibition. It was also found that there was no organ or body empowered with making the determination of which matters were essentially within the domestic jurisdiction of states. The chapter also discusses the meaning of the term intervene. It was found that this term was ambiguous and there was no agreement on its exact meaning. It was also found that there was an emergence of contemporary concepts such as humanitarian intervention and responsibility to protect.

These concepts emerged as a result of growth in international law, more so humanitarian law, and they have an effect of further diminishing the scope of domestic jurisdiction. It was found that state practice and the UN have legitimized intervention based on these concepts, despite that such intervention contravened Article 2 (7) of the Charter.

CHAPTER FOUR: UN PRACTICE IN RELATION TO ARTICLE 2(7) OF THE CHARTER

4.0 Introduction

Article 2(7) of the UN Charter restrains the UN and its organs from interfering with matters which are essentially within the domestic jurisdiction of states. The article also provides for an exemption, whereby the application of enforcement measures are exempted from the plea of domestic jurisdiction. UN practice is examined, with an aim of investigating the extent to which the UN and its organs has complied with the Charter. The nature and extend of the Security Council's enforcement measures under Chapter VII of the Charter will be discussed, with an aim of finding out how these measures are interpreted and applied in practice vis a vis the law in Article 2(7) of the Charter. The case of Libya is used to study UN practice in relation to Article 2(7) of the Charter, and the contribution of the Security Council to the death of Article 2 (7).

4.1 The Exemption in Article 2(7) of the Charter

Article 2(7) of the UN Charter prohibits the UN and its organs from interfering with matters essentially within the domestic jurisdiction

of states. However, it also provides for an exemption to this rule. Despite the injunction directed to the UN and its organs, the Charter exempts the application of enforcement measures from the plea of domestic jurisdiction.[423] Article 2 (7) refers to measures of a military nature under Article 42, and to those measures which do not include military action.[424]

The purpose of the exception in Article 2(7) of the Charter was to enable the Security Council to deal with an issue at its early stages, before it became a massive security threat.[425] The effect of the exemption clause in Article 2(7) of the Charter is that all the enforcement actions taken by the Security Council under Articles 41 and 42 of the Charter, are exempted from the prohibition in Article 2(7) of the Charter. Consequently, resolutions adopted in order to effectuate such enforcement measures are similarly protected by the exception clause.[426]

However, this exception does not extend to recommendations made with reference to Article 39 of the UN Charter.[427] This is evident from the preparatory works of Article 2(7) where the term

[423] Frank Mathews, *Fairness in the International Legal and Institutional System* (Oxford University Press: Oxford, 1998), p. 1240.

[424] Benedetto Conforti, *The Law and Practice of the United Nations* (3rd ed. Martinus Nijhoff Publishers, Belgium, 2005), p. 147.

[425] Preuss Lawrence, 'Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Juridiction' (1946) 79 Hague Academy of International Law, 2740.

[426] Benedetto Conforti, *The Law and Practice of the United Nations* (3rd ed. Martinus Nijhoff Publishers, Belgium, 2005), p. 149.

[427] Benedetto Conforti, *The Law and Practice of the United Nations* (3rd ed. Martinus Nijhoff Publishers, Belgium, 2005), p. 150.

"enforcement measures" was opted to instead of the entire Chapter VII. The intention of the drafters was to exempt recommendations under Article 39 from the plea of domestic jurisdiction.[428] This is also inferred from the context of the Charter. The recommendations provided for in Articles 36 and 37, which are the subject of Article 2(7), are similar to those under Article 39. Important to note is that the scope of enforcement actions goes beyond military action.[429] Despite the understanding that the term "enforcement measures" as used in Article 53 of the Charter excludes non-military sanction, there is general agreement that the term, when used in Article 2(7), is inclusive of all action taken by the Security Council under Chapter VII.[430]

4.2 The UN Security Council and Its Powers under Chapter VII

Chapter VII confers the Security Council with extensive powers in maintaining international peace and security. It is important to note that the decisions of the Security Council are binding on UN member states.[431] Chapter VI of the Charter provides for the Pacific Settlement of Disputes. Under this law, the Security Council is

[428] Benedetto Conforti, *The Law and Practice of the United Nations* (3rd ed. Martinus Nijhoff Publishers, Belgium, 2005), p. 154.

[429] Khagendra Chandra. 'The United Nations and Enforcement of International Law.' (1952) 13 The Indian Journal of Political Science, pp. 16–25.

[430] Benedetto Conforti, *The Law and Practice of the United Nations* (3rd ed. Martinus Nijhoff Publishers, Belgium, 2005), p. 157.

[431] Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Power of Judicial Review', (1995) 17 Pace International Law Review 281.

empowered to investigate a dispute which may threaten international peace and security, and make recommendations.[432]

Scholars including Stephen Zunes argue that resolutions made under Chapter VI are still directives by the Security Council, the main difference being that they lack strict enforcement measures like the use of military force".[433]

The Security Council has broader powers under Chapter VII of the Charter. It decides on the measures to be enforced upon determining that there exists a "threats to the peace, breaches of the peace, or acts of aggression". Under such circumstances, the Security Council has power to not only make recommendations, but also take action. Here, the Security Council is authorized by the Charter to use armed force for purposes of maintaining or restoring international peace and security.[434]

Indeed, it was on this basis that the Security Council resorted to armed action in several states including Korea in 1950. The Council also authorized coalition forces in Iraq and Kuwait in 1991 and

[432] Khagendra Chandra. 'The United Nations and Enforcement of International Law.' (1952) 13 The Indian Journal of Political Science, pp. 16–25.
[433] Stephen Zunes, 'International Law, the UN and Middle Eastern Conflicts' (2004) 16 Peace Review, A Journal of Social Justice 285.
[434] Khagendra Chandra. 'The United Nations and Enforcement of International Law.' (1952) 13 The Indian Journal of Political Science, pp. 16–25.

Libya in 2012.[435] It is worthwhile to note that UN member states are bound to the decisions made by the Security Council under Chapter VII. In fact, there is no other organ of the UN that has power to make binding decisions.[436]

Upon making a determination whether there exists a threat to the peace, breach of the peace, or act of aggression, the Council then makes a decision on the action it will take.[437]" The Council has a range of options which have been referred to as carte blanche. Chapter VII provides for a list of actions that the Council may opt for in dealing with situations.[438]

The Security Council can call upon the parties to comply with provisional resolutions. The Council also has the option of implementing measures which do not involve the use of armed force.[439] In extreme cases, the Council has the option of implementing measures involving the use of armed force[440]. However, there is no requirement that directs the Security Council to adopt any of the measures in any particular order'.[441] Instead, the Security Council has wide discretion to not only decide when it will

[435] Paul Kennedy, 'The Parliament of Man: The Past, Present, and the Future of the United Nations' (2006) 33 Journal of International Press 299.
[436] Paul Kennedy, 'The Parliament of Man: The Past, Present, and the Future of the United Nations' (2006) 33 Journal of International Press 317.
[437] Charter of the United Nations 1945, Article 39.
[438] Charter of the United Nations 1945, Article 41
[439] Charter of the United Nations 1945, Article 41.
[440] Charter of the United Nations 1945, Article 42.
[441] David Schweigma, *The Authority of the Security Council under Chapter VII of the UN Charter* (Martinus Njihoff Publishers, Belgium, 2001), p. 202.

act, but also in relation to choosing the measure that it will adopt.[442] The only express limitation imposed by the Charter is by virtue of Article 24(2), which states that the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.

There have been many attempts to limit the powers of the Council under this Article.[443] Regardless, there have been more and more outcries about the lack of a binding legal oversight mechanism on the Security Council. Some actions of the Security Council have been argued to be ultra vires, yet there is no legal authority in place that can call out the Council for such ultra vire acts.[444]

4.3 Security Council's determination of what constitutes a Threat to International Peace and Security

The application of enforcement measures under Chapter VII are exempted from the prohibition of intervention in matters within the domestic jurisdiction of states.[445] It also follows that the process of determining whether there is a threat to peace under Article 39 is similarly exempted from the prohibition, as it is by virtue of Article

[442] David Schweigma, *The Authority of the Security Council under Chapter VII of the UN Charter* (Martinus Njihoff Publishers, Belgium, 2001), p. 206.
[443] David Schweigma, *The Authority of the Security Council under Chapter VII of the UN Charter* (Martinus Njihoff Publishers: Belgium, 2001), p. 234.
[444] Akande Alvarez, 'Judging the Security Council' (1996) 9 American Journal of International Law 6.
[445] Charter of the United Nations 1945, Article 2(7).

39 that enforcement measures are taken. The issue that arises is whether a formal interpretation ought to be applied to Articles 2(7) and 39 of the Charter.[446] The extent of formal interpretation of "threat to peace" depends on whether the association between Article 39, and Article 2(7) is governed by strict law, or legitimacy.[447]

The result of applying a formal or strict view is that a determination of threat to peace, and consequent enforcement, is legal as far as certain important rules of international law are observed.[448] A less formal approach would denote that there are legal limitations which limit the discretion of the Security Council in determining a "threat to peace" and deciding on the enforcement measures that it will take.[449] The relation between Article 2(7) and Article 39 of the Charter is challenged in situations where the Security Council determines that a matter which is otherwise considered to be within the domestic jurisdiction of states, has become a "threat to peace".[450] It is important to analyze how the Security Council, has in the past,

[446] Herbert Jones, 'Domestic Jurisdiction—From the Covenant to the Charter' (2006) 7 Singapore Year Book of International Law 226.

[447] Rosslyn Higgins, *The Legal Limits of the Use of Force by Sovereign States, United Nations Practice* (Oxford University Press, Oxford, 1963), p. 1009.

[448] Rosslyn Higgins, *The Legal Limits of the Use of Force by Sovereign States, United Nations Practice* (Oxford University Press, Oxford, 1963), p. 1011.

[449] Rosslyn Higgins, *The Legal Limits of the Use of Force by Sovereign States, United Nations Practice* (Oxford University Press, Oxford, 1963), p. 1016.

[450] Elberling Björn, 'The ultra vires character of legislative action by the Security Council', (2005) 2, International Organizations Law Review p. 351.

interpreted Article 2(7) and Chapter VII of the Charter. This has been classified by scholars into the easy cases, and the hard cases.[451]

4.4 Security Council practice under Chapter VII of the UN Charter in relation to Article 2 (7) of the UN Charter

There is nothing in the Charter that guides the Security Council in the exercise of its powers as provided in Chapter VII of the Charter.[452] There is no legal formula to be followed by the Security Council in its determination of whether a situation meets the standards of threat to or breach of international peace and security. There is also no define criteria to be followed in the determination of the enforcement measures undertaken by the Security Council where a situation meets any of the ingredients, so as to restore and maintain international peace.[453]

It then follows that the determination and consequent decision making is left to the discretion of the Security Council. This thus leads to a situation where it is the Security Council to decide the fate of the principle of non-intervention in Article 2 (7) of the Charter.[454] It is the Security Council to decide for itself whether the prohibition on non-intervention is applicable, or whether the

[451] Frank Mathews, *Fairness in the International Legal and Institutional System* (Oxford University Press, Oxford, 1998), p. 1247.

[452] Robert Cryer, 'The Security Council and Article 39: A Threat to Coherence?' (2004) 1, Journal of Conflict & Security Law, p. 116.

[453] Robert Cryer, 'The Security Council and Article 39: A Threat to Coherence?' (2004) 1, Journal of Conflict & Security Law, p. 116.

[454] Elberling Björn, 'The ultra vires character of legislative action by the Security Council', (2005) 2, International Organizations Law Review, p. 357.

exemption in the Charter overrides the prohibition. In so doing, the Security Council ultimately becomes the sole determinant of whether or not a matter is falls within the ambit of domestic jurisdiction of a state, albeit without any legal foundation of such power in international law.[455] This section reviews various cases to show the nature, extent and application of the Security Council's enforcement measures as provided for under Chapter VII of the Charter. The aim is to find out whether the Security Council has intervened in matters essentially within the domestic jurisdiction of states, on the basis that they constitute a threat to or a breach of international peace and security.

UN practice is observed through cases, to analyze how the Security Council has exercised its powers conferred by Chapter VII of the UN Charter. These are divided into two; the "easy cases", and the "hard cases". The category referred to as easy refers to matters which do not fall within the ambit of domestic jurisdiction of a state.[456] These are matters relating to international military conflicts.[457] An example of an easy case is the Arab-Israel conflict which erupted after the end of Britain's command in Palestine.[458] Another example is the dispute between South Korea by North

[455] Elberling Björn, 'The ultra vires character of legislative action by the Security Council', (2005) 2, International Organizations Law Review, p. 361.

[456] Robert Bernhardt, 'Domestic Jurisdiction of States and International Human Rights Organs' (1986) 4 Georgia Journal of International Affairs p. 209

[457] Edgar Grande & Louis W. Pauly, *Complex Sovereignty: Reconstituting Political Authority in The Twenty-First Century* (University of Toronto Press, Toronto, 2005), p. 763.

[458] Britannica, The Editors of Encyclopaedia. 'Arab-Israeli wars', 1, Encyclopedia Britannica, p. 2, Available at https://www.britannica.com/event/Arab-Israeli-wars. Accessed 28th September 2020.

Korea.[459] Both of these cases did not raise any issues as regards the legitimacy of UN intervention, as none of the conflicts were considered to be essentially within the state's jurisdiction.[460]

However, in the hard cases, the legality of UN's Security Council intervention, vis a vis the injunction in Article 2(7) of the Charter, has been questioned.[461] The first such instances is the Franco's Fascist regime in Spain, which raised the question whether the situation had caused international conflict which threatened "international peace and security".[462] The Security Council received the matter from Poland. It had been brought as a "situation of the nature referred to in Article 34" of the UN Charter.[463] The case was included in the agenda of the Security Council and General Assembly. In the Security Council, a debate took place among members as to the applicability of the principle of domestic jurisdiction to bar Security Council's action.[464]

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[459] Lo Chih-Cheng, 'Resolving North-South Korean Conflicts: A Structural Approach,' (1996) 20, Asian Perspective Journal, pp. 45–89.

[460] Edgar Grande & Louis W. Pauly, *Complex Sovereignty: Reconstituting Political Authority in The Twenty-First Century* (University of Toronto Press, Toronto, 2005), p. 766.

[461] Henry G. Hodges, *Doctrine of Intervention* (Princeton University Press, New Jersey, 1995), p. 114.

[462] Payne Sydney, *The Franco Regime* (1st ed. University of Wisconsin Press, Wisconsin, 1987), p. 876.

[463] Dale Raymond, 'Investigation of the Spanish question before the United Nations' (1951), 2 Australian International Law Journal 45.

[464] Dale Raymond, 'Investigation of the Spanish question before the United Nations' (1951), 2 Australian International Law Journal 49.

It was in this case that it was argued, for the very first time, that once a matter became of international concern, it could no longer be considered to be within the domestic jurisdiction.[465] The Security Council set up a sub-committee to investigate the matter. It concluded that the Spanish regime failed to meet the criterion of "threat to peace" as provided for by Article 39 of the Charter.[466] However, the sub-committee found that the situation was a "potential menace to international peace" in light of Article 34 of Chapter VI.[467]

The sub-committee strongly argued that a matter which threatened international peace became a concern of international law.[468] Consequently, the dispute could not be considered to be within Spain's domestic jurisdiction.[469] The dispute was placed before the International Court of Justice.[470] Amongst other findings, the court held that the determination of the nature of a mater, that is, whether it is "essentially within the domestic jurisdiction of a state" was a question of fact that could only be answered depending on the special circumstances of the case.[471]

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[465] Dale Raymond, 'Investigation of the Spanish question before the United Nations' (1951), Australian International Law Journal 63.
[466] Dale Raymond, 'Investigation of the Spanish question before the United Nations' (1951), 2 Australian International Law Journal 65.
[467] John Houston, 'The United Nations and Spain' (1952) 14 The Journal of Politics 683.
[468] Dale Raymond, 'Investigation of the Spanish question before the United Nations' (1951), 2 Australian International Law Journal 72.
[469] John Houston, 'The United Nations and Spain' (1952) 14 The Journal of Politics 709.
[470] Dale Raymond, 'Investigation of the Spanish question before the United Nations' (1951), 2 Australian International Law Journal 74.
[471] Paul Preston, *The Spanish Civil War: Reaction, Revolution, and Revenge,* (W. W. Norton & Company, New York, 2007), p. 70.

The case of South Africa is another example of a hard case. The dispute involved how South Africa treated people who had migrated from India and settled within her territory, thus it was a dispute concerning "a state's treatment of its national's".[472] Indian delegates contested that those people had settled in South Africa between 1860 and 1913, under a mutual agreement between the two states. They thus argued that South Africa Unions were obliged to cease ill-treatment of the migrants under the mutual agreement.[473]

In 1946, India brought the dispute the General Assembly.[474] The South African delegates invoked Article 2(7) and argued that the matter was within South Africa's domestic jurisdiction, hence the General Assembly could not intervene. After considering the dispute on merit, the General Assembly established a "Special Committee" through a resolution.[475] It was directed to review South Africa's policies relating to race.[476] The General Assembly rejected South Africa's argument and through the resolution, it directed

[472] Aftab Miriam, 'UN Efforts: Removal of Apartheid in South Africa and Liberation of Namibia' (1991) 44 Pakistan Horizontal Journal 59. Available at http://www.jstor.org/stable/41393912 Assessed 28th September, 2020.

[473] UN General Assembly, *Treatment of people of Indian origin in the Union of South Africa*, 11 November 1953, A/RES/719, Available at :https://www.refworld.org/docid/3b00f0802c.html
Assessed 28th September, 2020.

[474] Lloyd Lorna, 'A Most Auspicious Beginning: The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa' (1990) 2 *Review of International Studies*, p. 135.

[475] Lloyd Lorna, 'A Most Auspicious Beginning: The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa' (1990) 2 *Review of International Studies*, p. 137.

[476] UN General Assembly Res. 1761 (XVII), 6 November 1962 *The Policies of Apartheid of the Government of the Republic of South Africa*; UN GAOR A/5166 17th Session.

UN's member states to immediately stop all diplomatic relations with South Africa. The General Assembly also referred the matter to the Security Council, and recommended that the Council "takes appropriate measures.[477]

The matter was brought before the Security Council in 1946.[478] The South African delegates once again put up the plea of domestic jurisdiction. This defence was rejected for the second time. The Security Council adopted a resolution directing all states to cease trading in arms with South Africa.[479] The Council also formed a committee to keep the issue under check, which provided the Security Counsil with a report. South Africa strongly rejected the report, arguing that it contained matters which were "essentially within the domestic jurisdiction of the Republic of South Africa".[480] Nevertheless, the Security Council adopted Resolution 191 of 1964 wherein it affirmed the findings of the committee.[481]

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[477] UN General Assembly Res. 1761 (XVII), 6 November 1962 *The Policies of Apartheid of the Government of the Republic of South Africa*; UN GAOR A/5166 17th Session.

[478] Lloyd Lorna, 'A Most Auspicious Beginning: The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa' (1990) 2 *Review of International Studies*, p. 135.

[479] Security Council Res. 182, October- December 1963 *Question Relating to the Policies of Apartheid of the Government of the Republic of South Africa*; UN Doc. S/5471.

[480] Aftab Miriam, 'UN Efforts: Removal of Apartheid in South Africa and Liberation of Namibia' (1991) 44 Pakistan Horizontal Journal 61 Available at http://www.jstor.org/stable/41393912 Assessed 28th September, 2020.

[481] Security Council Res. 191, 18th June 1964 *Question Relating to the Policies of Apartheid of the Government of the Republic of South Africa;* UN Doc. S/5773.

The case of South African acts as evidence that the UN has changed its approach in the construction and application of Article 2(7) of the UN Charter. Trindade argues that the Security Council's approach and determination in the matter is evidence that Article 2 (7) cannot be effectively invoked to stop UN action in a matter, and thus lacks practical usefulness.[482] He continues to argue that Article 2(7) ought not to be interpreted singularly. That other Charter provisions must be considered, more-so the purposes and principles of the UN, and the ultimate goal of "maintaining international peace and security".[483]

UN's position in the South Africa case hints to the fact that a rejection of UN's *locus* in a matter in lieu of the prohibition in Article 2(7) is still unsettled. It is doubtful whether a state can successfully plead "domestic jurisdiction", as other considerations will be applied.[484] These considerations are not always based on law. Other considerations such as political interests and protection of human rights also come into play. This practice contributes to the diminishing scope of international law, for instance, in the South

[482] Cancado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations', (1976) 4 International Comparative Law Quarterly 725.

[483] Cancado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations', (1976) 4 International Comparative Law Quarterly 737.

[484] Kaswer Ahmed. 'The Domestic Jurisdiction Clause in The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law and Contributors 195.

African dispute, a state's treatment of its own nationals was taken out of the ambit of a state's domestic jurisdiction.[485]

Another example of a hard case was the "UN's peace-keeping mission in Congo".[486] This operation raised controversial issues. The war in Congo related to the attempted secession of the province of Katanga from the Congo territory.[487] Belgium involved itself in the dispute, causing Congo's president to seek UN's military aid to bring an end to Belgium's "acts of aggression" in Congo.[488] The Security Council authorized the military assistance.[489] It directed UN forces to enter Katanga, but maintained that the UN did not intend to intervene or take part in the dispute between the government of Congo and its secessionist province, Katanga.[490]

However, the Prime Minsiter of Congo, Patrice Lumumba, was murdered, causing the Security Council to re-evaluate its previous

[485] Jack Donnelly 'State Sovereignty and Human Rights' (2014) 28 Ethics and International Affairs 216.

[486] Leo Gross, 'Domestic Jurisdiction, Enforcement Measures and the Congo' (1965) 22 Australian Year Book of International Law 137.

[487] Leo Gross, 'Domestic Jurisdiction, Enforcement Measures and the Congo' (1965) 22 Australian Year Book of International Law 137.

[488] 'Questions Relating to the Situation in the Congo' (1960) Leopoldville p. 127 Available at http://documents-dds-ny.un.org- Accessed 28th September, 2020
See also SC. Res. 143 14th July, 1960 *The Congo Question;* UN Doc. S/4382.

[489] United Nations, 'Questions Relating to the Situation in the Congo' (1960) Leopoldville pg. 127 Available at http://documents-dds-ny.un.org- Accessed 28th September, 2020
See also SC Res. 143, 13th July, 1960 *The Congo Question;* UN Doc. S/4387

[490] United Nations, 'Questions Relating to the Situation in the Congo' (1960) Leopoldville pg. 127 Available at http://documents-dds-ny.un.org- Accessed 28th September, 2020
See also SC Res. 146, 9th August, 1960 *The Congo Question;* UN Doc. S/4426

determination.[491] It thus found that the situation had aggravated so much that it posed as a "threat to international peace and security". It was on this finding that the Council allowed the entry of 23,000 UN soldiers to Congo. The Council also authorized used of force if necessary.[492] From 28 August, 1960, the UN troops started operation. After the Secretary-General, Dag Hammarskjold, had died in a plane accident, the Security Council adopted a resolution stating the purpose of the Congo operation.[493] The Security Council, through its resolution, explained its decision to avail military assistance to the government on Congo on grounds that it was necessary for purposes of "maintaining national integrity.[494]

The situation in the Congo triggered critics to question the Council's authorization of intervention in domestic affairs, which went outside the mandate of is peace-keeping mission.[495] There are arguments that the UN did not in any way consider the prohibition against it as provided by Article 2(7) of the Charter. It was also argued that the Council's action, though taken by dint of Article 39,

[491] Gordon McDonald, 'The U.S. Army Handbook for the Republic of the Congo' (1962) 6 Foreign Area Studies Division of American University 620.
See also SC Res. 161, 21st February, 1961 *The Congo Question;* UN Doc. S/4741
[492] Gordon McDonald, 'The U.S. Army Handbook for the Republic of the Congo' (1962) 6 Foreign Area Studies Division of American University 623.
See also SC Res. 161, 21st February, 1961 *The Congo Question;* UN Doc. S/4741
[493] Jane Boulden, 'Peace Enforcement: The United Nations Experience in Congo, Somalia, and Bosnia' (2001) 3 Greenwood Publishing Group 973.
See also SC Res. 169, 24th November, 1961 *The Congo Question;* UN Doc. S/5002 (1961)
[494] Jane Boulden, *Peace Enforcement: The United Nations Experience in Congo, Somalia, and Bosnia* (Greenwood Publishing Group, Portsmouth, 2001), p. 1000.
[495] Leo Gross, 'Domestic Jurisdiction, Enforcement Measures and the Congo' (1965) 22 Australian Year Book of International Law 137.

was not an enforcement action.[496] The manner in which the situation in Congo was dealt with set a precedent for the UN.[497] The Congo situation set a precedent for the UN. Civil wars were taken out of the scope of domestic jurisdiction, and are now a subject of UN action under Chapter VII of the Charter.[498]

The case of South Rhodesia also demonstrates how UN action has contributed to the erosion of the principle of domestic jurisdiction. The case involved a unilateral declaration of self-governance by minority white settlers South Rhodesia.[499] The dispute dated back to 1923 when Britain annexed Southern Rhodesia in 1923, causing Nyasiland, Southern Rhodesia and Northern Rhodesia to jointly create a federation in 1953.[500] The federation broke ten years later. It was this event that led the white minority settlers to the demand for independence from Britain. In 1963 after the Federation had broken up, the white minority of the European settlers in Southern Rhodesia sought independence from the UK.[501] These minority group had founded a government with discriminative policies

[496] Leo Gross, 'Domestic Jurisdiction, Enforcement Measures and the Congo' (1965) 22 Australian Year Book of International Law 143.

[497] Frank Thomas, 'The United Nations Law in Africa: The Congo Operation as a Case Study: Law and Contemporary Problems' (1962) 27 Canadian Defence Quartely 635.

[498] John Stephen, 'UN intervention in Civil Wars: Imperatives of Choice and Strategy' in Daniel Hayes (eds) *'Beyond Traditional Peacekeeping'* (Palgrave Macmillan, Boston, 2004), p. 329.

[499] Anglin Douglas, 'Unilateral Independence in Southern Rhodesia', (1964) 19, International Journal, p. 551.

[500] Anglin Douglas, 'Unilateral Independence in Southern Rhodesia', (1964) 19, International Journal, p. 553.

[501] George Shephard, 'The Failure of the Sanctions Against Rhodesia and the Effect on African States: A Growing Racial Crisis' (1968) 15 Africa Today 7.

against the native citizens.[502] Britain had set out several conditions to be met for it to grant the independence. These conditions favored native majority rule, and were unacceptable to the white settlers.[503]

The UN General Assembly addressed the situation by referring the issue to a "Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples".[504] Britain claimed that the matter was squarely within its domestic jurisdiction. The General Assembly did not consider this claim, instead, it requested the committee to determine whether Southern Rhodesia could be recognized as a self-governing territory.[505] The committee submitted its finding to the General Assembly, which affirmed the council's finding.[506] It thus passed a declaration that Southern Rhodesia was a non-self-governing territory under Article 73 of the Charter.[507]

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[502] George Shephard, 'The failure of the Sanctions against Rhodesia and the Effect on African States: A Growing Racial Crisis', (1968) 15 Africa Today 11.

[503] Anglin Douglas, 'Unilateral Independence in Southern Rhodesia', (1964) 19, International Journal, p. 551.

[504] George Shephard, 'The failure of the Sanctions against Rhodesia and the Effect on African States: A Growing Racial Crisis', (1968) 15 Africa Today 12.

[505] Olivier Michele, 'Intervention In Africa; Conflicts By The United Nations Security Council' (2009) 31 Strategic Review for Southern Africa Journal 316.

See also GA Res. 1745 (XVI), 20th December, 1962 *General Questions Relating to the Transmission and Examination of Information from Non-Self-Governing Territories*; UNGA, 16th Sess., 1106th meeting 51.

[506] Červenka Zdenek, 'Rhodesia Five Years after the Unilateral Declaration of Independence', (1971) 4, Law and Politics in Africa, Asia and Latin America, p. 17.

[507] David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter* (Kluwer Law International Press, Netherlands, 2001), p. 59.

Despite the General Assembly's declaration, the white settlers unilaterally declared independence on 11 November 1965.[508] The Security Council condemned the declaration and considered the matter to be a "threat to international peace and security". The Council prohibited UN member states from offering any assistance to the racist regime despite Britain's plea of domestic jurisdiction before the Security Council.[509] Not only is the Southern Rhodesian case evidence of the non-effectiveness of the plea of domestic before UN organs, it also demonstrates UN's narrow interpretation of Article 2(7) of the Charter.[510]

The situation in Iraq after "Gulf War 1" is another important case with regard to the practice of the Security Council in its application of its powers under Article 39.[511] "Gulf War 1" erupted following Iraq's invasion of Kuwait in blatant breach of principles of international law, including sovereignty and the prohibition against use of force.[512] The Security Council adopted a series of

[508] Červenka Zdenek, 'Rhodesia Five Years after the Unilateral Declaration of Independence', (1971) 4, Law and Politics in Africa, Asia and Latin America, p. 19.

[509] George Shephard, 'The failure of the Sanctions against Rhodesia And The Effect On African States: A Growing Racial Crisis' (1968) 15 Africa Today 12.

[510] Kaswer Ahmed. 'The Domestic Jurisdiction Clause in The United Nations Charter: A Historical View' (2006) 10 Singapore Year Book of International Law and Contributors 195.

[511] Tarik Kafala, 'The Veto and How to Use It' (2003) 5 Singapore Year Book of International Law 113.

[512] Raymond Hinnebusch, 'The US Invasion of Iraq: Explanations and Implications' (2007) 16 Critical Middle Eastern Studies, p.99.

resolutions.[513] These resolutions, amongst other action, declared the invasion illegal, demanded the immediate release of all imprisoned foreigners held by Iraq, and prohibited all trade and financial assistance to Iraq by the member states. Iraq disregarded the resolutions, causing the Security Council to authorize use of force to which successfully ended the invasion on 28th February, 1991.[514]

""Gulf War 1"" is considered an easy case as the Security Council's intervention was legitimate, and did not breach the provisions of Article 2(7) of the Charter. However, "Gulf War 1" was more controversial.[515] After the end of "Gulf War 1", the Security Council adopted Resolution 687 on 3rd April, 1991 also known as the "ceasefire resolution".[516] Iraq was mandated to give up its weapons of mass resolution as one of the conditions for a ceasefire on its territory.[517] Iraq was also requested to approve the "International Atomic Energy Agency" to scrutinize suspected activities.[518]

[513] Raymond Hinnebusch, 'The US Invasion of Iraq: Explanations and Implications' (2007) 16 Critical Middle Eastern Studies, p. 102.
[514] United Nations Security Council *Iraq-Kuwait (2 August)* 2nd August, 1990 SC/RES/660/90 Available at http://unscr.com/en/resolutions/660 Assessed 28th September 2020.

[515] Raymond Hinnebusch, 'The US Invasion of Iraq: Explanations and Implications' (2007) 16 Critical Middle Eastern Studies, p. 102.
[516] United Nations Security Council *Iraq-Kuwait (29 November)* 29th November 1990 SC/RES/678/90 Available at http://unscr.com/en/resolutions/678 Assessed 28th September 2020.
[517] United Nations Security Council *Iraq-Kuwait (29 November)* 29th November 1990 SC/RES/678/90 Available at http://unscr.com/en/resolutions/678 Assessed 28th September 2020.
[518] Sarah Anderson, 'Coalition of the Willing or Coalition of the Coerced?' (2003) 16 Institute of Policy Studies 62.

The Security Council acted under Chapter VII of the Charter, without the express consent of Iraq.[519] More-over, the Counsel did not seize its intervention despite the elimination of the threat to international peace, and successful restoration of peace in Iraq and Kuwait.[520] It was that continued intervention that was controversial. Indeed, USA, had a personal agenda which was unrelated to restoration and maintenance of peace.[521] USA was determined to remove the Iraq's serving president, Saddam Hussein. For this reason, its delegates insisted that Iraq was not complying with the cease-fire conditions, and that's its military was still dealing with banned weapons.[522]The Security Council thus passed resolution 1441 which asserted that Iraq would face harsh repercussions if it contravened the "cease-fire resolution."[523] It was on the basis of this resolution that the Council, led by USA, invaded Iraq in 2003.[524] Much as the war was disguised as a mission to destroy the banned weapons in Iraq, the forces focused on the detainment or assassination of Iraq's president.[525] Saddam Hussein was finally assassinated. Interestingly, the alleged banned weapons were never found, and it was clear that USA had abused the powers of the

[519] Ninan Koshy, 'The United Nations and the Gulf Crisis' Economic and Political Weekly (1997) 32 Australian Law Journal 3011.

[520] Hans Koechler, 'The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law' (2004) 18 International Progress Organization 218.

[521] Hans Koechler, 'The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law' (2004) 18 International Progress Organization 220.

[522] John Quigley, 'The United States and the United Nations in the Persian Gulf War: New Order or Disorder' (1992) 25 Cornell International Law Journal 301.

[523] John Quigley, 'The United States and the United Nations in the Persian Gulf War: New Order or Disorder' (1992) 25 Cornell International Law Journal 324.

[524] Ninan Koshy, 'The United Nations and the Gulf Crisis' Economic and Political Weekly (1997) 32 Australian Law Journal 3015.

[525] Bryan Gibson, *Covert Relationship: American Foreign Policy, Intelligence, and the Iran-Iraq War* (Rowman & Littlefield Publishers: New York, 2010), p. 31.

Security Council under Chapter VII to wage an act of aggression against Iraq, to realize its own political interests.[526]

Thomas M. Franck argues that this is yet another interpretation of the limits of Articles 2(7) and Chapter VII of the UN Charter.[527] According to him, this interpretation has considerable effects, more-so in cases where a UN organ determines that there is existence of a "threat to the peace", based on a state's policies, despite lack of real ongoing aggressive conduct.[528] In as much as the situation was baffling, the international community did not take any action against USA. In fact, Britain openly supported the invasion. The Iraq case in "Gulf War 11" continues to be one of the greatest instance of breach of Article 2(7) of the Charter on non-intervention, and indeed, Article 2(4) of the Charter which prohibits the use of force on one state against another.

The Kurdish crisis in post-war Iraq is also relevant, more so in examining UN Security Council's response in instance where there is breach of human rights in a state.[529] In determining that there existed a "threat to international peace", the Council considered the

[526] Hans Koechler, 'The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law' (2004) International Progress Organization 526.
[527] Bryan Gibson, *Covert Relationship: American Foreign Policy, Intelligence, and the Iran-Iraq War* (Rowman & Littlefield Publishers: New York, 2010), p. 37.
[528] Tarik Kafala, 'The Veto and How to Use It' (2003) Vol 5 No 2 Singapore Year Book of International Law and Contributors 113.
[529] Anthony Cordesman, 'Looking Beyond the Kurdish Crisis to Long Term Instability and a Near Certain Future of Civil Violence' (2019) Center for Strategic & International Studies 12.

fact that members of the Kurdish civilian population were been oppressed in various regions in Iraq.[530] In doing so, it took out of the scope of domestic jurisdiction matters concerning the "repression of the civilian population by its own government." The Security Council also appreciated the gravity of the situation which had led to the huge flow of refugees to escape Iraq's repression of the Kurds.

It thus determined that such an issue was not within Iraq's jurisdiction, and thus justified it's intervention.[531] This is an example where UN action was not based on Chapter VII. The Council considered humanitarian factors, and in doing so, narrowed the scope of matters considered to be within the domestic jurisdiction of states.[532] Consequently, the Kurdish crisis gives a pointer on the interpretation and application of the Security Council's powers under the Charter. It also gives a glimpse of the future of UN action with regard to its response in cases involving "extreme civil oppression by a government of its own citizens".[533]

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[530] See SC Res. 688, 5th April 1991, UN Doc. S/RES/688 Available at http://documents-dds-ny.un.org- Accessed 28th September, 2020.

[531] Anthony Cordesman, 'Looking Beyond the Kurdish Crisis to Long Term Instability and a Near Certain Future of Civil Violence' (2019) Center for Strategic & International Studies 14.

[532] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 538

[533] Anthony Cordesman, 'Looking Beyond the Kurdish Crisis to Long Term Instability and a Near Certain Future of Civil Violence' (2019) 21 Center for Strategic & International Studies 17. Available at https://www.csis.org/analysis/syria-looking-beyond-kurdish-crisis-long-term-instability-and-near-certain-future-civil - Accessed 28th September 2020.

The "Kosovo crisis" similarly shows that there are emerging rules of practice in relation to the UN's role in cases where government oppresses its nationals, as well as their human rights.[534] The Kosovo case relates to the oppressive tendencies practiced by the Serbian government, leading to a public outcry by the nationals in 1998.[535] The Security Council reacted by adopting resolution 1160 (1998).[536] The Council condemned the Serbian police force for using excessive force against its nationals who had participated in the demonstrations.[537] The Security Council banned the use of arms in Kosovo, and recommended solutions which would protect its territorial integrity.[538]

The Council also adopted resolution 1119 (1998) which among other things directed the Federal Republic of Yugoslavia to enable the resettlement of refuges who had fled, and also called for the state to identify political solutions that would stop the unrest and oppression.[539] Yugoslavia declined to cooperate, causing the Council to adopt more stringent measures to maintain peace.[540] The

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[534] Albrecht Schnabel, 'Kosovo and the Challenge of Humanitarian Intervention' (1999) 36 Peace and Governance Programme, United Nations University 991.

[535] Marie Janine, *Kosovo in the Twentieth Century: A Historical Account* (Greenwood Publishing Group, Portsmouth, 2001), p. 34.

[536] Security Council Res. 1160 (1998) *Kosovo* 31st March 1998 SC/RES/1160/98 Available https://www.nato.int/kosovo/docu/u980331a.htm- Accessed 28th September 2020.

[537] UN Resolution 1160 31 March 1998 S/RES/1160

[538] Tom Keating, 'The United Nations and NATO's War: The Fallout from Kosovo' (1998) 19 Global Issues 189.

[539] UNSC Resolution 1199/1998 23 September 1998 SC/Res/1199

[540] Minh. Miller, 'Shouldered aside in Kosovo: UN Rethinks Global Role' (1999) 91 Christian Science Monitor 7.

Council thus authorized NATO to intervene and use force. This decision was objected by several states, including Russia, China, Belarus and India, on the basis that such intervention was in breach of Charter provisions.[541]

The Indian delegates argued that Kosovo was part of Yugoslavia, hence the UN was prohibited from intervening and attempting to have a role in solution finding, whereas the dispute was within Yugoslavia's domestic jurisdiction, and was indeed political in nature.[542] On the other hand, UN supporters such as Slovenia opined that the situation in Kosovo met the threshold of a "threat to peace, and was thus a matter of international concern.[543] It further argued that there was gross abuse of human rights in Kosovo, such that even if the Security Council did not determine the existence of a "threat to peace", the matter could still not be within Yugoslavia's domestic jurisdiction.[544]

What is inferred from these cases is that the Security Council has not uniformly applied its authority under Chapter VII of the UN Charter. It is also observed that the Council broadly interprets and

[541] Marie Janine, *Kosovo in the Twentieth Century: A Historical Account* (Greenwood Publishing Group, Portsmouth, 2001), p. 41.
[542] Marie Janine, *Kosovo in the Twentieth Century: A Historical Account* (Greenwood Publishing Group, Portsmouth, 2001), p. 43.
[543] Minh. Miller, 'Shouldered aside in Kosovo: UN Rethinks Global Role' (1999) 91 Christian Science Monitor 9.
[544] Marie Janine, *Kosovo in the Twentieth Century: A Historical Account* (Greenwood Publishing Group, Portsmouth, 2001), p. 47.

applies those powers. In so doing, the Security Council has taken out many matters from the ambit of domestic jurisdiction.[545] The Council has acted even in cases where violence erupts within the territorial jurisdiction of a state, to wit, civil war. Matters which were conventionally considered as being essentially "within the domestic jurisdiction of states", for instance, a state's treatment of its own nationals, are no longer within the scope of domestic jurisdiction, and are now a concern of international law.[546] The consequence is that such practice has ultimately reduced the scope of "matters which are essentially within the domestic jurisdiction of states". Ultimately, the purpose of the prohibition in Article 2(7) of the Charter becomes less tenable in modern day practice of the UN and its organs.[547]

The Security Council has not stopped taking action despite a plea of domestic jurisdiction.[548] The Security Council has determined that there exists a threat to international peace and security even where there is no ongoing aggressive behavior.[549] It has made such determination and intervened in matters such as a state's national

[545] Marie Janine, *Kosovo in the Twentieth Century: A Historical Account* (Greenwood Publishing Group, Portsmouth, 2001), p. 49.
[546] Marie Janine, *Kosovo in the Twentieth Century: A Historical Account* (Greenwood Publishing Group, Portsmouth, 2001), p. 50.
[547] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 491.
[548] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 62.
[549] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 500.

armaments, and gross abuse of human rights by a state.[550] This is despite the fact that states do not cede their sovereignty and jurisdiction to the UN. Ultimately, the Security Council's broad interpretation and application of its powers under Chapter VII has greatly contributed to the ever reducing scope of sovereignty and domestic jurisdiction.[551] The relevance of the prohibition under Article 2(7) of the Charter has now been questioned, and the plea of domestic jurisdiction no longer serves the purpose of protecting a state's sovereignty.[552]

4.5 The Case of Libya: Security Council's unjustified intervention

There are arguments that the Security Council is unbound by law, as it operates with few legally binding oversights functions.[553] Often, the Council has invoked powers conferred to it under Chapter VII the Charter to conspicuously justify action which violates fundamental principles of international law.[554] The inconsistency of the interpretation and application of those powers, together with abuse of the Council's discretionary powers, has constrained the growth of a thriving international system, with

[550] J.S. Bains, 'Domestic Jurisdiction and the World Court' (1965) 5 Indian Journal of International Law 507.

[551] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 64.

[552] Martin Loughlin, 'The erosion of sovereignty' (2016) 2 Netherlands Journal of Legal Philosophy 69.

[553] Gabriel Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council Is Unbound by Law', (1999) 12 Leiden Journal of International Law 129.

[554] Elberling Björn, 'The ultra vires character of legislative action by the Security Council', (2005) 2, International Organizations Law Review p. 351.

clear legal, customary and normative principles capable of being applied uniformly.[555]

The next segment analyses the case of Libya, where it was argued that the Security Council, while invoking Chapter VII of the Charter, acted in excess of its powers to authorize humanitarian intervention in Libya, a concept that is only political, without any basis in UN Charter Law. It is also argued that the dispute in Libya was not a "threat to international peace" as the war was civil in nature, and was contained within the territorial jurisdiction of Libya. It is thus argued that the subject matter of the dispute was "essentially within the domestic jurisdiction" of Libya. Indeed, the Security Council was faulted for authorizing humanitarian intervention, when in real sense, the war in Libya was purposed to push for a political rather than humanitarian agenda.[556]

The violence in Libya ensued after demonstrations broke out on 15th February, 2011 in the city of Benghazi, demanding for the exit of Muammar al-Gaddafi.[557] The Libyan government brutally

[555] Martin Redish and Elizabeth Cisar, 'If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory' (1991) 41 Duke Law Journal, Constitutional Perspectives 449.

[556] Martin Redish and Elizabeth Cisar, 'If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory' (1991) 41 Duke Law Journal, Constitutional Perspectives 476.

[557] Mark Vlasic, 'Assassination and Targeted Killing: A Historical and Posy-Bin Laden Legal Analysis' (2012) 12 Georgetown Journal of International Law 261.

suppressed the demonstrations.[558] The violent situation worsened, leading the Council to adopt two resolutions.[559] These resolutions authorized a military intervention in Libya to "protect the civilian population".[560]

The resolutions contained several actions. For instance, the Council demanded instant cease-fire, and directed the Libyan government to refrain from taking any violent action against its people. UN member states were also authorized to intervene for purposes of protecting the civilians, though there were clear prohibitions against occupation.[561]. The implementation of the two resolutions caused international disagreement. Indeed, during the deliberations of the Security Council, some states abstained from voting, while others communicated their doubts as regards the forceful intervention to protect civilians.[562] At the very beginning of the mission, there was friction regarding what Resolution 1973 specifically authorized. Observing from how the implementation was enforced in Libya, it appeared that what was initially meant to be civilian protection, was extended beyond the provision of the

[558] Jane Croft, 'Murder and Torture Carried Out by Both Sides of Uprising Against Libyan Regime' *The Guardian* (London, 12 September 2011).

[559] UNSC, *Situation in Libya,* 17th March 2011 S/RES/1970 Available at https://en.wikipedia.org/wiki/United_Nations_Security_Council_Resolution_1970 Assessed 28th September, 2020.

[560] Tom Keating, 'The UN Security Council on Libya: Legitimation or Dissimulation?' (2013) 4 Australian Journal of International Affairs 113.

[561] Bruno Pommier, 'The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya And Beyond' (2011) 93 International Review of the Red Cross 1064.

[562] Paul Williams and Popken Colleen, 'Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity' (2011) 11 Case Western Reserve Journal of International Law 2228.

resolution. There were military and political agendas which were only indirectly linked to threats to the civilian population.

It appeared that the military operations were aimed at supporting the forces that opposed the Libyan government.[563] The military forces supported the Libyan opposition. The main purpose here was to collapse the ruling government.[564] Despite that the "threat of a massacre" had been contained in Benghazi, NATO opeartions continued. It was evident that in as much as the intervention was originally aimed at protecting the civilians, it had changed formed. The focus was to eject the central government.[565] The Security Council finally admitted that it was necessary to end the Gaddafi government, as it was a "necessary measures to protect civilians and civilian populated areas under threat of attack".[566]

The Libyan case is a testimony that the Security Council has broadly interpreted and applied its powers under Chapter VII of the Charter, to the effect that it has greatly reduced the scope of

[563] Paul Williams and Popken Colleen, 'Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity' (2011) 11 Case Western Reserve Journal of International Law 2230.

[564] Paul Williams and Popken Colleen, 'Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity' (2011) 11 Case Western Reserve Journal of International Law 2230.

[565] Paul Williams and Popken Colleen, 'Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity' (2011) 11 Case Western Reserve Journal of International Law 2241.

[566] Robert Fisk, *'First it was Saddam, Then Gaddafi. Now there's a vacancy for the West's favourite crackpot tyrant'* (Otago Press, New Zealand, 2011), p. 717.

matters taken to be "essentially within the domestic jurisdiction of states". The violent acts in Libya were only experienced within the territorial jurisdiction of Libya. The war was civil in nature and did not involve any other state, yet the Security Council intervened citing Chapter VII of the Charter. The intervention was guised as an enforcement measure to protect the Libyan civilians, but eventually the intervention was used as an opportunity to push for political interest, and change the form of government in Libya.[567]

The Security Council authorized this intervention by invoking the provisions of Chapter VII of the Charter. However, there is no provision for intervention based on humanitarian grounds in the Charter. There is also no provision that empowers the Security Council to intervene in the "matters essentially within the domestic jurisdiction of states", for purposes of protecting civilians from their state.[568] In any case, the Libyan case was evidence that even in such ultra vires interventions, the Security Council had a greater political agenda, hence the notion of humanitarian intervention, or the responsibility to protect civilians, was only used as a guise to justify otherwise illegal intervention in a matter within the domestic jurisdiction of Libya.[569]

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[567] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 538

[568] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 538

[569] James Siebens, 'The Libyan Civil War: Context and Consequences' (2012) 2 International and Human Security 399.

4.6 Concluding remarks

The principle of non-intervention is well founded in international law.[570] The underlying rule is that the UN and its organs is prohibited from intervening in "matters essentially within the domestic jurisdiction of another state."[571] Nevertheless, this principle is not absolute and in exceptional cases intervention is permitted.[572] Noteably, intervention may be direct, meaning "military intervention", or indirect which includes diplomatic and economic intervention.[573]

For intervention by the UN to be deemed legal, the Security Council must establish that there is a threat to or breach of international peace and security, as provided for under Article 39 of the Charter.[574] The Security Council must authorize any collective action deemed necessary for the maintenance of international peace.[575]

[570] Percy Henry Winfield, *The History of International Law* (Cambridge University Press, Cambridge, 1923), p. 130.
[571] Charter of the United Nations; 1945, Article 2(7).
[572] Charter of the United Nations 1945, Article 2(7) and Article 39.
[573] Hersh Lauterpatch, *International Law and Human Rights* (Stevens and Sons Ltd, Minnesota, 1950), p. 168.
[574] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales, Wales 1994), p. 102.
[575] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales, Wales, 1994), p. 106.

Recently, discourse on legality of unilateral interventions has become paramount due to the expanding reach of international law into matters initially considered to be within the domestic jurisdiction of states.[576] The scope of domestic jurisdiction continues to shrink as that of international expands. This is owing to factors such as increased globalization and international cooperation.[577] Further, matters initially considered to be within the domestic jurisdiction have since extended into the reach of international law. For instance, the concept of human rights has become a concern of international law.[578] The prohibition on non-intervention appears to be losing its significance in contemporary international law. The question of the lawfulness of intervention, more so one that is unsupported by the Charter, needs further deliberations in order to be answered.[579]

A legal question persists. The question is whether the Article 2(7) of the Charter has become outdated necessitating an amendment, or whether strict interpretation of the Charter must persist.[580]

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[576] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 538

[577] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales, Wales, 1994) pg. 107.

[578] Welsh Jennifer, 'The Security Council and the humanitarian intervention', in Lowe Vaughan, Roberts Adam, et al., (eds.), *The United Nations Security Council and war* (New York, Oxford University Press, 2008), p. 538

[579] David McGoldrick, *The Principle of Non-Intervention: Human Rights in The United Nations and the Principles of International Law* (University of Wales, Wales, 1994), p. 102.

[580] Ramesh Chandra, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics'* (Routledge Publishers, New York, 2011), p. 60.

4.6.1 Conclusion

This chapter discusses the exemption in Article 2(7) and it was found that this exemption gives broad and unlimited powers to the Security Council. It was found that there is no limitation on the applicability of the powers of the Security Council under Chapter 39 of the Charter. It was also found that there was no body or authority to keep the Security Council in check. Consequently, it was found that the open cheque and broad powers conferred to the Security Council have paved way for the liberal application and abuse of Article 2(7) of the Charter.

This chapter also examines the application of the Security Council's determination of a threat to peace. It was found that the concept of threat to international peace and security was broad. It was further found that the Security Council does not have any set of conditions or guidelines to follow in making a determination whether a threat to peace had occurred. Consequently, the determination of threat to international peace has been un-uniform. Security Council practice also revealed that threat to peace did not only involve violent situations.

It was further found that the Security Council has taken advantage of the ambiguities in Article 2 (7) of the Charter, and it has made

itself the determinant of what matters are "essentially within the domestic jurisdiction of states." It was also found that the Security Council has acted outside the scope of Article 2(7) and intervened on the ground of humanitarian intervention. It was however found that Security Council action is influenced by political and social interests, and the Council has often acted outside the scope of its powers, and in contravention of Article 2(7) of the Charter.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This part is divided into two sections namely the conclusion and the recommendation sections. The first part entails the conclusions of the study, and the second part entails the recommendations based on the findings of this study.

5.2. Conclusion

Despite that the principle of non-intervention is clearly provided for under Article 2(7) of the Charter of the United Nations, development in international law has shed doubt on the place and relevance of the principle of domestic jurisdiction. This is in light of state practice through adoption of conventional international law, evolution of rules of customary international law, and UN's General Assembly and Security Council's practice which has expanded the scope of international law. Consequently, the scope of matters within the domestic jurisdiction has contracted.

When the United Nations was established in 1945, matters such as "a state's form of government", the "treatment of a state's own subjects", including questions of human rights, internal conflicts within a state's territory, the "size of its armaments and armed forces", immigration policies, issues of nationality and economic policies, were within the domestic jurisdiction of states. Now, these matters are the concern of international law. Consequently, international law has greatly expanded.

At the inception of the United Nations, international law was mainly concerned with relations between sovereign states. As it expands, international law is now concerned with the nationals within states, to the extent that the realm of domestic jurisdiction has shrunk so much, hence Article 2(7) of the Charter becomes irrelevant or absolute.

Emerging concepts in contemporary international law such as "humanitarian intervention" and the "responsibility to protect", have contributed to the diminishing scope of domestic jurisdiction. States have, through practice, entered into multi-lateral conventions recognizing these new concepts in international law. Consequently, concepts which were originally under the realm of international law, have been availed to the reach of international through state practice. Gradually, these emerging concepts are being accepted by states as part of customary international law, further reducing the scope of domestic jurisdiction.

The ambiguities in Article 2(7) of the Charter leading to the narrow interpretation and application of the principle of non-intervention by the UN and its organs, more so the Security Council, have also contributed to the shrinking scope of domestic jurisdiction. In contrast, the broad and discretionary powers of the Security Council under Article 39 have led to abuse of Article 2(7) of the Charter, owing to the fact that there is no international organ empowered to create checks and balances over the Security Council's action under chapter VII of the Charter. The Security Council has overtime invoked Chapter VII of the Charter, and in many cases, it has intervened in matters within the domestic jurisdiction of a state on the guise of humanitarian intervention. In reality, the Security Council has invoked its powers to realize political and self-interest of its members.

The result is that Article 2(7) can no longer act to stop the United Nations, through the Security Council, from intervening in a matter which would otherwise considered to be within the domestic jurisdiction of a state. The plea of domestic jurisdiction is no longer tenable. Article 2(7) of the Charter is no longer able to serve its purpose; the protection of a state's sovereignty and domestic jurisdiction. There is no valid relevance Article 2(7) of the Charter in contemporary international law. The UN Security Council killed Article 2(7) of the Charter.

5.3 Recommendations

Based on the above findings, the study establishes several recommendations that can be considered.

5.4 Amendment of Article 2(7) of the Charter

This study found that there is a major interpretation problem in Article 2(7) of the UN Charter. Expressions such as "intervention" and "matters essentially within the domestic jurisdiction of states" have not been clarified, leading to un-uniformed interpretation, and abuse of Article 2(7) of the UN Charter.

However, this study acknowledges that an amendment of so fundamental an Article of the Charter is probably too difficult to be attempted at the present moment. This is because international relations are not purely about law. The relationships are also established along political interests, probably more than law. Consequently, even if majority of states were able to amend the law, this would not automatically mean that such a law would be observed by the minority, especially if such minority wielded economic and military might.

Nevertheless, going by the findings of this study, the draft "amended" Article 2(7) would significantly reduce the confusion and uncertainty inherent in this Article. The proposed amendment thus reads: "Nothing contained in the present Charter

shall authorize the United Nations or any of its members to intervene in matters which by contemporary international law and the conduct of international relations, 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:

Provided that for the purpose of this Article any organ of the United Nations before which an objection is raised that a matter is essentially within the domestic jurisdiction of a State, or before which a complaint is made that an intervention contrary to this Article has occurred or is about to occur, is competent to give a determination on that objection or on such complaint, and such determination shall not itself be construed to constitute intervention."

5.5 Review of the law on intervention

The findings in this study have revealed that there are many factors that have affected the interpretation and application of the law on intervention. These factors include emerging concepts in international law such as "humanitarian intervention" and the "responsibility to protect". Recent practice indicates that there is a need to re-define the international law on intervention, in order to ensure that it acknowledges the developments in international law. This would lead to the introduction of a broader and more applicable law on non-intervention which does not limit inter-state practice.

5.6 Re-definition of domestic jurisdiction

The scope of domestic jurisdiction has reduced, with more and more matters being taken out of the ambit of domestic jurisdiction. However, the principle of domestic jurisdiction remains relevant, and important, despite the recent developments in international law. Consequently, there is need to redefine domestic jurisdiction, in order to take formal cognizance of the matters that have remained within the ambit of domestic jurisdiction. In so doing, there will be a formal stand on the status of human rights in the international arena.

5.7 Further discussion on the concept of humanitarian intervention and responsibility to protect

Among the most notable developments in contemporary international law is the emergence of the concepts of humanitarian intervention, and the responsibility to protect. It is on the basis of these concepts that matters of human rights have been taken out of the scope of domestic jurisdiction of states. There is need for further deliberations on these concepts to analyze their relevance and place in contemporary international law. The findings therein would determine whether this concepts have met the standards of international law customs, and whether there is need to redefine the principles of domestic jurisdiction and state sovereignty to effectively address contemporary issues in international law.

5.8 Establishment of an "early warning system" to prevent occurrence of gross human rights violations.

It is this study's finding that the primary purpose of the UN is the maintenance of international peace and security. This study takes cognizance of the catastrophe that follows a situation where international peace is threatened or breached. Consequently, there is need for establishment and formalization of an early warning system in the UN. This would enable the Security Council to handle a situation capable of leading to breach of peace at the early stages, without necessarily contravening the international law on intervention.

The above findings answered the legal question in this work. I found that the Security Council has had an active role in the undermining of the principle envisioned in Article 2(7) of the Charter, to a point where the relevance of the article has been questioned. The recommendations proposed in this work would re-establish the relevance of Article 2(7) of the Charter and secure the future and validity of the principle of non-intervention and domestic jurisdiction.

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