Striking a Delicate Balance: Humanitarian Intervention and the Prohibition on the Use of Force under Article 2 (4) of the United Nations Charter

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ABSTRACT

This paper seeks to critically assess whether humanitarian intervention has become an exception to the prohibition on the use of force under Article 2 (4) of the United Nations Charter. The paper adopts a two pronged approach to the question. First, it examines whether or not Article 2 (4) of the UN Charter can be interpreted in a manner that would justify humanitarian intervention being an exception thereto. The paper moreover assesses the approach adopted by the United Nations Security Council in authorizing the use of force in interventions for humanitarian purposes. The second prong of the paper addresses the position of humanitarian intervention and the use of force under customary international law. The paper appraises instances in which where humanitarian intervention was conducted without authorization of the Security Council. The paper evaluates justifications advanced by intervening states and, more importantly, reactions of other members of the international community to such interventions.

1. THE PROHIBITION UNDER ARTICLE 2 (4) OF THE UN CHARTER

Use of force at international law is expressly prohibited by of Article 2 (4) of the UN Charter, which provides as follows:

> 'All members shall refrain in their international relations from the threat of use of any force against the territorial integrity or political independence of any state, or any manner in consistent with the purpose of the United Nations.'

The paper adopts the definition of humanitarian intervention used by J. L. Holzgrefe, who defined it as:

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> 'The threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the government of the state within whose territory force is applied.'[1]

The prohibition against the use of force occupies an esteemed place in international law. In 1966, the International Law Commission noted that the prohibition had acquired the status of *jus cogens*.[2] Subsequently, the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and around Nicaragua (Nicaragua v. United States of America)*[3] confirmed that the prohibition had attained the status of customary international law. Moreover, in the case of *Armed Activities in the Territory of Congo* (*Democratic Republic of Congo v. Uganda)*[4] the ICJ noted that the provision on the prohibition of the use of force was 'a cornerstone in the United Nation Charter'.[5]

The UN Charter provides for two exceptions under which force may be utilized. Firstly, the Charter recognizes the use of force in accordance with the 'inherent right of individual or collective self defence'[6] in the face of an armed attack. Secondly, use of force is permitted if it is authorized by the Security Council as being 'necessary to maintain or restore international peace and security'.[7]

It has been argued by some authors that the phrase 'against the territorial integrity or political independence of any state' used in Article 2 (4) of the UN Charter is an indication that the prohibition on the use of force may be qualified.[8] Further, that the use of force could be permissible if it is employed in a manner that is consistent with the purpose of the United

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[1] JL Holzgrefe 'The Humanitarian Intervention Debate', in JL Holzgrefe & RO Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 15, 18. See also N.J Wheeler and J Morris 'Humanitarian Intervention and State Practice at the end of the Cold War' in R Fawn and J Laruins (eds.), *International Society After the Cold War: Anarchy and Order Reconsidered* (Basingstoke Macmillan Press 1996) 135, 135-136, wherein humanitarian intervention is defined as 'unsolicited military intervention in another state's internal affairs with the primary intention of alleviating the suffering of some or all within its borders'.

[2] *Yearbook of International Law Commission* Vol 2 1966 247

[3] 1986 ICJ Report 14

[4] 2005 ICJ Reports 201

[5] Ibid para 148

[6] Article 51 of the UN Charter

[7] Article 39 and Article 42 of the UN Charter

[8] J Stone *Aggression and World Order. A Critique of United Nations Theories of Aggression* (Stevens and Sons London 1958) 95; A D'amato 'Israel's Airstrike Upon the Iraqi Nuclear Reactor, (1983) 77 *American Journal of International Law* 585

Nations.[9]' Utilising the interpretation justification to make a case as to why humanitarian intervention is an exception to Article 2 (4), Reisman summed up the argument as follows:

> 'Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved it is not only not inconsistent with the purpose of the Charter but is rather in conformity with the most fundamental norms of the Charter, it is a distortion to argue that it is precluded by Article 2 (4).'[10]

Moreover, it has been contended that to the extent that humanitarian intervention is undertaken to protect the fundamental human rights of the people, such is not inconsistent with the purposes of the United Nations and, therefore, not incompatible with Article 2 (4) of the UN Charter.[11]

If one is to interpret Article 2 (4) of the UN Charter in isolation, this argument would appear to have some credibility. However, the provision is not to be considered in isolation. It has been established that Article 2 (4) of the UN Charter was intended to be a comprehensive ban on the use of force.[12] This intention is clearly indicated by the *travaux preparatoires* of the Charter.[13] Moreover, as accurately pointed out by Hovell, the *travaux preparatoires* indicate that the phrase 'against the territorial integrity or political independence of any state' was 'not to be intended to be restrictive, but on the contrary, was merely included to give more specific guarantees to smaller states'.[14] If this creative interpretation that humanitarian intervention is permissible since it does not seek territorial change nor challenge political independence was to be given effect, it would render Article 2(4) of the UN Charter ineffectual and would deprive it of the purpose it was intended to serve. In this regard, the argument that humanitarian intervention could be an exception in circumstances where it is neither against territorial integrity nor political interdependence of the state is unsustainable.

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[9] FR Teson *Humanitarian Intervention: An Enquiry into Law and Morality* (2nd ed Brill Nijhoff 1997) 150

[10] W M Reisman and M. DcDougal Humanitarian Intervention to Protect the Ibos' in R B Lillich (ed) *Humanitarian Intervention and the United Nations* (Charlottesville University Press of Virginia 1973) 167 at 177

[11] J Gulati and I Khosa 'Humanitarian intervention: To Protect State Sovereignty' *Denver Journal of International law and Policy* 41 3 (2013) 397-416 available at http://djilp.org/wp-content/uploads/2014/04/Gulati_PDFUpdated_6.19.13.pdf (Accessed on 5th March 2019)

[12] B Simma 'NATO, the UN and the Use of Force: Legal Aspects' *European Journal of International Law* 10, 1 (1999) 1-22, 2 ; I Brownlie 'Thoughts on Kind-Hearted Gunman' in R.B Lillich (n 10) 139

[13] I Brownlie *International Law and the Use of Force by States* (OUP 1963) 267; H Lauterpatch, *Oppenheims International LawVol 2* (7th ed Longman London 1952) 152

[14] D Hovell 'Chinks in the Armour: International Law, Terrorism and the Use of Force', *University of New South Wales Law Journal* 27, 2 (2004) 400

It is undeniable that a delicate balance has to be struck between the respect for sovereignty and the protection of human rights. Two decades ago, the then UN Secretary General, Koffi Annan, posed the following critical question:

> 'To those for whom the greatest threat to the future of international order is the use of force in the absence of Security Council mandate, one might say, leave Kosovo aside for a moment, and think about Rwanda. Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defence of the Tutsi population, but the Security Council had refused or delayed in giving the green light. Should such a coalition then have stood idly by while the horror unfolded?'[15]

2 HUMANITARIAN INTERVENTION AND THE SECURITY COUNCIL: ENFORCEMENT OF ACTION UNDER CHAPTER VII

The question therefore becomes whether humanitarian intervention can be legally utilized under the UN Charter system at all. This calls for an assessment of the manner in which the Security Council has approached humanitarian intervention. An overview of the Charter makes it apparent that its drafters had not envisaged humanitarian intervention as an exception.[16] This is because although the Security Council is given the primary responsibility of the maintenance of peace and security[17], the *travaux preparatoires* do not indicate that humanitarian intervention was to fall within the purview of threat to peace.[18] However, as noted by Higgins, 'the Charter is an extraordinary instrument, and … a huge variety of possibilities are possible under it'.[19] Consequently, the Security Council has interpreted humanitarian situations as

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[15] Kofi Annan 'Two Concepts of Sovereignty' Address to the 54th Session of the General Assembly, reprinted in *The Question of Intervention: Statements of the Secretary General.* (1999) 39
[16] C Gray *International Law and the Use of Force* (3rd ed OUP 2008) 49
[17] UN Charter Article 24
[18] T Fraer 'An Enquiry into the Legitimacy of Humanitarian Intervention' in L F Damrosch and D J Scheffers ed. *Law and Force in the New International Order* (Westview Press 1991) 185 at 190
[19] R Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press Oxford 1994) 184

constituting a threat to international peace and security. Acting under Chapter VII[20], which is an exception to both Article 2 (4) and 2 (7) of the UN Charter, the Security Council has authorised the use of force for humanitarian purposes. This was done in Somalia[21], Liberia, Haiti[22], Rwanda[23], East Timor, [24] Ivory Coast[25] and in Libya.[26]

Based on the foregoing, it is apparent that humanitarian intervention can be justified under the Charter with the prior authorisation of the Security Council acting under Chapter VII.[27] However, there has been a creative argument to the effect that since the Security Council has the primary responsibility for the maintenance of peace and security then states, by implication, have the secondary responsibility. Consequently that, 'if the Security Council in its own right can authorise use of force for humanitarian purposes under Chapter VII, states should be able to do the same if and when the Security Council is paralyzed'.[28] The circumstances of the possibility of state intervention in the event of inability of the Security Council to act will be discussed later in the paper.

3 HUMANITARIAN INTERVENTION AND CUSTOMARY INTERNATIONAL LAW

In the *Nicaragua* case, the International Court of Justice noted that 'the UN Charter by no means covers the whole area of the regulation of the use of force in international relations'.[29] Therefore, the mere fact that the Charter or any other treaty covers an aspect of the law does not exclude the existence of customary international law alongside it and does not prevent customary international law from developing differently.[30] Article 38 of the ICJ Statute also refers to customary international law as a source of international law.

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[20] UN Charter Article 42
[21] UN Doc SC Res 794(1992)
[22] UN Doc SC Res 940 (1994)
[23] UN Doc SC Res 929(1994)
[24] UN Doc SC Res 1264(1999)
[25] UN Doc SC Res 1933 (2011)
[26] UN Doc SC Res 1973 (2011)
[27] P Malanczuk *Akenhurst's Modern Introduction to International Law* (7th ed. Routledge 1997) 221
[28] F Harhoff 'Unauthorised Humanitarian Interventions- Armed Violence in the Name of Humanity?' 70 (2001) *Nordic Journal of International Law* 65 at 82-83
[29] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* ICJ Reports (1986) 14 para 176.
[30] Ibid para 114; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 226 at 257-258

In order to appreciate the context within which the question whether humanitarian intervention has crystallized into an exception under customary law is addressed, it is worthy to briefly examine how customary international law is formed. Customary international law has been defined as, '…practice which is followed by those concerned because they feel legally obliged to behave in such a manner'.[31] Consequently, in assessing the existence of a rule of customary international law, one has to examine the existence of state practice accompanied by the belief that such practice is required by law and accepted as such.[32]

The constituent elements of customary international law have been emphasized by the International Court of Justice in numerous cases. In *Continental Shelf (Libya v. Malta)* the court noted:

> It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states…[33]

The requisite standard in relation to state practice is uniformity and consistency. As was noted in the *Asylum Case (Colombia v Peru)*[34], there has to be a 'constant and uniform usage'. Moreover, in the *North Sea Continental Shelf* cases, the court opined that 'state practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform'.[35] Absence of general state practice negates the existence of a rule of customary law.[36]

The requirement of *opinio juris* on the other hand seeks to distinguish between legal rules and 'mere courtesy, convenience or tradition'.[37] It is therefore significant that the states concerned must hold a belief that their conduct is required by law or permitted thereby. This was confirmed in the *Nicaragua* case where the International Court of Justice authoritatively stated that:

> '… [E]ither the states taking such action or other states in a position to react to it must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring

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[31] RMM Wallace and O Martin-Ortega *International Law (6th* ed. Sweet & Maxwell Thomson Reuters London 2009) 9
[32] R Higgins (n 19) 18
[33] ICJ Reports (1985) 29-30
[34] ICJ Reports (1950) 226 at 277
[35] *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark and* v. *Netherlands)* ICJ Reports, 1969 3 at 4
[36] *Fisheries Case (UK* v. *Norway)* ICJ Reports (1951) 131.
[37] R Wallace and O Martin-Ortega (n 26) 9

it.'[38]

The approach of the International Court of Justice to the formation of customary law indicates that the weight to be given to each of these elements depends on the context of the specific case.[39] The absence of objections from other states may also be a factor to take into account in deciding whether a rule of customary law exists or not.[40]

It is apposite at this stage to consider the existence of state practice and *opinio juris* in relation to the legality or otherwise of humanitarian intervention. This is adjudged in light of instance where states purported to intervene for humanitarian purposes without the authorisation of the Security Council, the justification they rendered and the reaction of other states.

3.1 Opting for Self Defence Over Humanitarian Intervention

The three interventions below are discussed primarily for the reason that, in their nature, they mirrored intervention for humanitarian purposes but the intervening states steered clear of the humanitarian intervention justification and opted rather for the self defence justification. This choice of justification advanced by the states is critical in that, as was stated in the *Nicaragua* case, no one has the authority to ascribe to states legal views which they do not themselves advance.[41] To this end, although one may argue that they were humanitarian interventions, if the States themselves advance some other reason other than humanitarian intervention, then humanitarian intervention cannot be ascribed to them.

3.1.1 India in East Pakistan (1971)

Due to atrocities occasioned by the West Pakistani army in East Pakistan, which entailed the indiscriminate murder of civilians and destruction of their property, on 3 December 3 1971, India intervened. At the outset India advanced humanitarian intervention as a justification. Its representative at the UN stated that they had 'nothing but the purest of motives and the purest

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[38] ICJ Reports (1986) 14 at 108-109
[39] *North Sea Continental Shelf Case* (n 25)
[40] F Harhoff (n 28)
[41] *Nicaragua Case*(n 29) para 207

of intentions: to rescue the people of East Bengal from what they are suffering'.[42] This indicated intervention for humanitarian purposes. Be that as it may, India subsequently reneged from this justification and instead claimed they were acting in self defence.[43]

3.1.2 Tanzania in Uganda (1979)

In 1979 Tanzania intervened in Uganda and toppled Idi Amin's regime which had been engaged in human rights violations ranging from executions to rape. There had also been altercations between Ugandan and Tanzanian troops as well as an invasion by Ugandan troops into Tanzania territory.[44] Such intervention by Tanzania brought an end to human rights violations and fell within the purview of humanitarian intervention. However, Tanzania advanced the justification of self defence and did not claim to have acted for humanitarian purposes.

3.1.3 Vietnam in Cambodia (1978)

In 1978, Vietnam intervened in Cambodia in circumstance that could have been justified under humanitarian intervention. However, Vietnam also opted to justify its actions as self defence rather than humanitarian intervention.

The above three instances indicate a reluctance by states to advance humanitarian intervention as a justification even where such could have been the more appropriate justification. This has a probative value. It suggests that the concerned states did not regard 'humanitarian intervention' as an accepted or acceptable exception. Summing up on those instances, Wheeler observed that 'their reluctance to advance humanitarian justifications for their actions essentially reflected the fact that none of them acted primarily for such reason'.[45]

The case of India is particularly telling in the sense that at some point they mentioned humanitarian grounds, but their final official reason was that of self defence.[46] The same

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[42] UN Doc s/PV 1606 (1971)
[43] NJ Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 62
[44] F R Teson (n 9) 179.
[45] NJ Wheeler 'Humanitarian Intervention and State Practice at the End of the Cold War' in R Fawn and J Laruins, J (eds) *International Society After the Cold War* (1996) 143
[46] TM Franck and N.S. Rodley 'After Bangladesh: The Law of Humanitarian Intervention by Military Forces', *American Journal of International Law*, (1973) 275 at 276

applies to the case of Tanzania where express mention had been made of Idi Amin's dictatorial regime but self defence was ultimately advanced as the justification.

Furthermore, Gray submits that the fact that states did not rely on humanitarian intervention in Operation Enduring Freedom in Afghanistan in 2001 and Operation Iraqi Freedom in 2003 is a further indication of the controversial nature of humanitarian intervention.[47]

3.2 Advancing Humanitarian Intervention as a Justification

The instances discussed here are instances where the intervening state(s) expressly advanced humanitarian intervention as a justification. These instances are crucial to the extent that they presented a platform for intervening states to make a case for the legality of humanitarian intervention and also a valuable platform for other states to specifically react to such advancements.

3.2.1 Invasion of Iraq by the UK, USA and France (1991)

In 1991 the UK, USA and France intervened in Iraq in order to assist the Kurdish minority who were being wiped out by Saddam Hussein's regime. Prior to the invasion, the Security Council had adopted a resolution that condemned the actions of the Iraqi government and also made a determination that the situation constituted a threat to international peace and security.[48] Although the resolution called upon member states to contribute humanitarian relief efforts, it did not authorize military intervention.[49] In this regard, 'Operation Provide Comfort' whose primary purpose was the establishment of safe havens and no fly zone in Northern Iraq was not authorized by the Security Council. Alive to this fact, Douglas Hurd, the then British Foreign Minister, had the following to put forth as a justification:

> 'We operate under international law. Not every action that a British government or an American government or a French government takes has to be underwritten by a specific provision in a UN resolution provided we

[47] C Gray (n 16) 51

[48] UN Doc SC Res. 668 (1991)

[49] P Malanczuk *Humanitarian Intervention and the Legitimacy of the Use of Force* (Het Spinhuis Armsterdam 1993) at p18

comply with international law. International law recognizes extreme humanitarian need'.[50]

The American government also noted that the intervention was premised on 'humanitarian concerns'.[51] These statements clearly indicate that the intervening states believed that humanitarian intervention was an exception to the use of force and could be so employed without Security Council authorization. Be that as it may, the UN was able to obtain the consent of the Iraqi government and as such other states did not subsequently react to the instance in the proper context that it initially occurred. Although this diminishes the probative value of the instance, the fact still remains that humanitarian intervention was advanced as a justification.[52] Moreover the Security Council did not condemn the intervention. It has been submitted, however, that the fact that in the subsequent NATO invasion of Kosovo only the UK invoked this instance as a precedent is indicative of the doubtful nature of its legality.[53]

3.2.2 Intervention by ECOWAS in Liberia (1990)

The Economic Community of West African States (ECOWAS) intervened in Liberia in 1990 due to atrocities committed by the Charles Taylor government. This intervention was done without the authorization of the Security Council and clearly in violation of Article 53 of the Charter which specifically requires the authorization by the Security Council before any enforcement measure is taken. In this regard, this instance has been hailed by some as 'an excellent model' of humanitarian intervention.[54] The significance of this instance is to be found in the subsequent reaction of states. It is essential to note that although the Security Council had not authorized the intervention, it did not condemn its illegality. Quite to the contrary, the Security Council commended ECOWAS.[55] Moreover, states in the international community at large did not condemn the intervention by ECOWAS as being illegal as a violation of the prohibition on the use of force.

[50] Quoted in N.J. Wheeler *ibid.* at p154
[51] Ibid.
[52] Ibid 169
[53] C Gray 'From Unity to Polarisation: International Law and the Use of Force Against Iraq' 13 *European Journal of International Law* (2002) 1
[54] D Wippman *The Evolution of the Doctrine and Practice of Humanitarian Intervention (*1992) 179
[55] UN Doc S/22133 and S/23886

3.2.3 NATO's Invasion of Kosovo (1999)

A humanitarian crisis arose in Kosovo in light of the mistreatment of the Kosovars at the hands of President Slobodan Milosevic. This was constituted by military attacks by the Federal Republic of Yugoslavia army. The Security Council passed a resolution condemning such actions and calling for a resolution of the crisis by way of dialogue.[56] When the situation did not improve in Kosovo, the Security Council passed a resolution to the effect that the situation constituted a threat to peace and security and recognized it as an 'impending humanitarian catastrophe.'[57] The Security Council did not, however, authorize use of military force. Be that as it may, when the situation did not improve, and in the face of an ethnic cleansing of the Kosovars, NATO intervened. The justifications even among NATO member states were diverse. The UK representative to the Security Council claimed that their action was

> '…justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. … In these circumstances, and as an exceptional measure on ground of overwhelming humanitarian necessity, military intervention is legally justifiable.'[58]

The German representative cautioned, on the other hand, that 'the action must not become precedent'. The US Secretary of State classified the act as '*sui generis*' and also cautioned against its precedential value.[59] Moreover, continued reference to the implied authorisation by the Security Council by most NATO members is an indication that they considered such authorisation an integral aspect of humanitarian intervention.

A draft resolution to condemn the NATO action was defeated by 12-3-0.[60] The International Commission on Kosovo noted that the states that supported NATO action did so on the basis that it was 'legitimate though not legal'.[61]

Some states, particularly Russia, China and the G77 Group expressed strong dissent against humanitarian intervention without Security Council authorisation. By way of Ministerial Declaration of the Meeting of the Foreign Ministers of the Group of 77, Ministers rejected 'the so called right to humanitarian intervention,' noting that it had no basis in the

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56 UN Doc SC Res. 1160 (1998)

57 UN Doc S/PV 3989 (1999)

58 *Legality on the Use of Force (Yugoslavia* v. *UK)* (Oral Pleadings) ICJ Doc CR/99/23

59 http://secretary.state.gov/www/statements/1999/990276b.html.> (Accessed on 19 April 2019)

60 UN Doc S/328 (1999)

61 Independent International Commission of Kosovo, "The Kosovo Report", (2001)

United Nations Charter or in international law.[62] Such dissent is an indication that the doctrine of humanitarian intervention is 'far from being firmly established international law'.[63] Brownlie notes that this Ministerial Declaration of the Meeting of the Foreign Ministers of the Group of 77, expressing the illegality of humanitarian intervention,
cannot be ignored in light of the fact that it represents the reaction of 132 states representing Africa, Asia, Latin America and Arab states.[64]

Furthermore, academics who commented subsequent to the NATO intervention noted mainly that humanitarian intervention had not attained the status of customary international law, although some were of the view that such a custom was emerging.[65]

As has been seen above, in most instances the Security Council has avoided condemning interventions. This has been viewed by some as endorsement.[66] Be that as it may, others have cautioned that absence of condemnation is not necessarily endorsement of legality due to the fact that this could be motivated by other reasons.[67] Such reasons may be premised on moral or political considerations.[68] I am inclined towards the cautionary view and humbly submit that whereas the stance of the Security Council as regards use of force for humanitarian intervention is a factor to be taken into account, the probative value thereof is diminished by the reasons that usually motivate its failure to condemn.

It is also significant to note that the ICJ in *Corfu Channel*[69] and *Nicaragua cases* ejected the humanitarian intervention justification, noting that the 'use of force could not be the appropriate method to monitor or ensure respect for human rights.[70] Moreover, the General Assembly *Friendly Relations Declaration* did not recognise that force could be legally used

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[62] http://www.g77.org/Docs/decl1999.html at paragraph 69 (Accessed on 20th December 2018)
[63] C Gray (n 47)
[64] I Brownlie *International Law and the Use of Force by States Revisited* A Europaeum Lecture Delivered at the Graduate Institute of International Studies, Geneva, on 1 February 2001
[65] Chinkin 'The Legality of NATO's Action in the Former Republic of Yugoslavia(FRY) Under International Law', 49 *International and Comparative Law Quarterly* (2000) 910 at 920; Lowe 'International Legal Issues Arising in the Kosovo Crisis' 49 *International and Comparative Law Quarterly* (2000) 934 at 941
[66] AC Arend and RJ Beck *International Law and the Use of Force* (Psychology Press 1993); Franck 'Interpretation and Change in the Law of Humanitarian Intervention', in Holzgrefe and Keohane (eds.) *Humanitarian Intervention: Ethical Political and Legal Dilemmas* (CUP 2003) 204; C Greenwood 'International Law and the NATO Intervention in Kosovo', 49 *International and Comparative Law Quarterly* (2000) 924, at 932
[67] Barsotti 'Armed Reprisals', in Cassese (ed.), *Current Legal Regulation on the Use of Force* (1986) at 79; Corten 'The Controversies Over the Customary Prohibition on the Use of Force' 16 *European Journal of International Law* (2005) 803.
[68] C Gray,(n 16) 21
[69] *United Kingdom* v. *Albania* ICJ Reports (1949) 4 at 34
[70] At para 268

for humanitarian intervention.

3.2.4 Invasion of Syria by the UK, USA and France (2018)

In April 2018, following indications of the use of chemical weapons on civilians in Syria, with victims including children, there was an outcry. Consequently, the UK, the USA and France launched coordinated and targeted strikes in Syria. This was undertaken without the authorization of the Security Council. Commenting thereafter, the British Prime Minister, Theresa May, said that 'it was not just morally right but also legally right to take military action to alleviate further humanitarian suffering'. The Prime Minister proceeded to set a guideline on the conditions to be met before humanitarian intervention is undertaken. She said:

> 'First, there must be convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief.
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> Second, it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved.
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> And third, the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim.[71]

Furthermore, Theresa May reiterated the position of the United Kingdom that the invasion of Iraq in 1992, as discussed above, was justifiable on the basis of humanitarian intervention.

4 THE *JUS COGENS* HURDLE

Though it may be arguable that such a custom is emerging, another fundamental obstacle is that the prohibition on the use of force has attained the status of *jus cogens* and as such it 'can be modified only by a subsequent norm of general international law having the same

[71] https://www.gov.uk/government/speeches/pm-statement-on-syria-16-april-2018 (Accessed on 19 August 2019)

character'.[72] This essentially means that the development of an exception to the use of force prohibition based on humanitarian purposes is subjected to a higher threshold. Given the current polarity of states, it is doubtful that an overwhelming endorsement of the legality of humanitarian intervention as an exception to the use of force could be attained to a point where it acquires the *jus cogens* status.

5 THE WAY FORWARD

Despite the uncertainties that attend to the legality of humanitarian intervention and the use of force, it is undeniable that such interventions have proved helpful in alleviating gross human rights violations as well as saving lives. It is for that reason that it has been contended that it is 'desirable' to allow the emergence of the exception at customary international law.[73]

To merely establish that humanitarian intervention is not lawful should not be the end of the argument. The reality is that there are instances which, if not attended to by way of humanitarian intervention, escalate to undesirable levels. Inasmuch as it is necessary to observe and respect the territorial integrity of states, it must be acknowledged that the international world cannot just standby and fold arms while unimaginable atrocities are committed within borders. Reiff notes as follows:

> 'The fact that it is so easy for us to poke holes in the doctrine should give us pause, not lead us to pat ourselves on the back. It should, at the very least, make us wonder where humanitarian intervention fits in...'[74]

Wheeler observes that, as an alternative to the use of force, non-violent strategies of humanitarian intervention should be implemented. He contends that such strategies will be effective if there are implemented in the early stages of a conflict. However, he admits that non-violent strategies will be rendered nugatory in instances of mass killings such as in Cambodia in 1975-78 and in Rwanda in 1994.[75] Moreover, the effectiveness of non violent

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[72] Article 53 of the Vienna Convention on the Law of Treaties; M Byers and S Chesterman 'Changing the Rules About the Rules? Unilateral Humanitarian Intervention and the Future of International Law', in Holzgrefe and Keohane (n 1) 183

[73] Lowe, 'International Legal Issues Arising in the Kosovo Crisis', 49 *International and Comparative Law Quarterly* (2000) 934 at 941

[74] D Reiff, 'Round Three Concluding Remarks: Picking a Good Fight', Quoted in D Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (2002) at p87

[75] N J Wheeler, Legitimating Humanitarian Intervention: Principles and Procedures, *Melbourne Journal of International Law* Vol 21 (2001) 550

strategies will be premised on the willingness of the State in question to engage and dialogue on a solution. If the State is not willing and it ignores calls for such alternative engagements then the only option will be to escalate to intervention.

It should be noted that a majority of oppositions to unilateral humanitarian intervention are motivated by the fear that such an exception will be susceptible to abuse. To that end, if such a custom is to be permitted to develop there has to be a proper framework which seeks to curtail possibilities of abuse. Consequently, some authors have argued that instead of dwelling on the legality or otherwise of humanitarian intervention, focus has to be shifted to creating a framework within which such actions can be justified.[76] This position is best reflected by Harhoff who notes:

> 'If humanitarian interventions can neither be dismissed right away as plainly *unlawful*, nor be upheld as clearly *legal* focus should be directed instead at identifying the *legal conditions under which such intervention might possibly become generally accepted as a new emerging doctrine in international law*.[77] (Original emphasis)

Harhoff notes that the Security Council may be 'disabled by internal political discord' and recommends that in situations where Security Council authorisation cannot be attained due to a veto, the Security Council should vote (by simple majority) on whether to hand over the matter to the General Assembly to act in accordance with the Uniting for Peace Resolution of 1950.[78] As is to be gleaned from the above discussion, there have been instances where the Security Council is crippled by exercise of the veto. Rather regrettably, in most instances, the exercise of the veto is invoked for selfish reasons in total ignorance of the necessity for intervention.

As regards the conditions Harnoff suggests that such intervention must be adopted as a measure of last resort where the state in question is 'unwilling and unable to prevent the atrocities and every realistic attempt to invoke the Security Council or achieve peaceful means must be exhausted'.[79] In order to prevent humanitarian interventions being abused, he

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[76] A Cassese, '*Ex Injuria ius Oritur:* Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community', *European Journal of International Law* (1999) Vol 10 No.1 23

[77] F Harhoff 'Unauthorised Humanitarian Interventions- Armed Violence in the Name of Humanity?', 70 *Nordic Journal of International Law* (2001) 65 at 108

[78] Ibid 109

[79] Ibid 115

recommends that 'intervention should at all costs be kept within the strict humanitarian purpose for which it is carried out'.[80] It has also been submitted that the intervention must adhere to the principles of necessity and proportionality.[81] Moreover, in 2000 the UK Foreign Secretary formulated guidelines along the same lines adding that intervention must be conducted as a collective measure and not by individual states on their own.[82]

Furthermore, Wheeler proposes an extensive list of six substantive principles that must be adhered to in assessing whether humanitarian intervention should be undertaken. Firstly, that there more be just cause. That is to say, the situation must be one of 'supreme humanitarian emergency'. This requires that the conditions must constitute exceptional circumstances that are so dire that intervention would be a justifiable cause. Secondly, that the humanitarian intervention must be undertaken as a measure of last resort. To this end, all peaceful means must have been exhausted before humanitarian intervention can be sanctioned. Thirdly, that a value judgment has to be made that humanitarian intervention will bring more good than harm. For this principle, Wheeler draws inspiration from the Independent International Commission on Kosovo which stated that 'the method of intervention must be reasonably calculated to end the humanitarian catastrophe as rapidly as possible'.[83] Fourthly, the intervention should bear proportionality to the humanitarian crisis being responded to. Consequently, the response of the intervening state must not be excessive. Fifthly, the intervening state(s) must have the 'right intention' for the intervention. This requires that the intervening state(s) must divest themselves of self-interest and must have 'humanitarian impulse' as the overriding motivation for intervention. Lastly, Wheeler proposes the principle of 'reasonable prospect' in terms of which the requirement is that an intervention must have reasonable prospects of bringing the humanitarian crisis and human rights abuses to an end. Having formulated the six principles, Wheeler accepts that there will be challenges that arise in relation to implementation. He proposes an increased role of the General Assembly in order to give the humanitarian intervention 'international legitimacy' and circumvent potential abuse of the veto power in the Security Council. [84]

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[80] Ibid 116

[81] O Spiermann 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens'* 71 *Nordic Journal of International Law* (2002) 523 at 529

[82] 71 *British Yearbook of International Law* (2000) 646

[83] Independent International Commission on Kosovo *Kosovo Report* (2000) 194

[84] N J Wheeler 'Legitimating Humanitarian Intervention: Principles and Procedures,' *Melbourne Journal of International Law* Vol 21 (2001) 550

A process that involves the General Assembly will enjoy a greater measure of legitimacy not least because it reflects the aspirations of a larger, and more representative, outlook of the international community than a Security Council process. The input of all States in the General Assembly is given equal due considerations without enabling one of a few to hold the rest at ransom and disintegrate a decision which all other States agree on. Looking at the gravity of the circumstances that necessitate humanitarian intervention, it is unfortunate that the alleviation of gross human rights violations can be put off on the basis of the objection of a single state wielding veto power. The involvement of the General Assembly will go a long way in creating a much needed balance.

6 CONCLUSION

In summation, the following sentiments by Aust are instructive:

> A state contemplating the use of force needs to be satisfied that it would be lawful, not merely that a plausible or colourable case could be made to justify it...When a state decides to use force, without either clear authorisation from the Security Council or a firm basis in customary international law, and with serious doubts being expressed by other states about its legality, it is possible that the policy itself may be wrong.[85]

The above discussion indicates that humanitarian intervention, unless with prior authorisation of the Security Council, is not an exception to Article 2(4). Moreover, that such an exception has not crystallised into customary international law. This is due to the fact that it has not attracted enough support and the current state practice and *opinio juris* is insufficient to justify a conclusion that such a custom has developed. Quite to the contrary, whenever there is an intervention that is premised on humanitarian purposes, without authorization of the Security Council, many States have come out to condemn such intervention and question the legality thereof. It has as well been shown that, at times, even the intervening States themselves have purposefully shied away from advancing humanitarian reasons as a justification for intervention. Consequently, the Security Council therefore remains the only organ that can authorise humanitarian intervention. One can only hope that the Security Council will be more

[85] A Aust *Handbook of International Law* (CUP 2005) at p223

proactive in order to arrest humanitarian crises. Alternatively, in order to address the challenges presented by exercise of the veto power, it would be more desirable to have resolutions relating to interventions being dealt with by the General Assembly.

In the meantime, in the words of Chesterman, ‘humanitarian intervention will remain at most in a legal penumbra-sometimes given legitimacy by the Security Council, sometimes merely tolerated by states’.[86] A total rejection of humanitarian intervention is the equivalent of throwing away the proverbial baby with the bath water. In an ideal world, it would be desirable to have humanitarian intervention seamlessly authorized for those situations that call for it.

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[86] S Chesterman *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2001) 87