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GAMUT OF HUMANITARIAN INTERVENTIONS UNDER THE AEGIS OF THE UNITED NATIONS: THE PREMISES AND PROSPECTS

***BANDE Gulbert MBAH TARH**

Doctorat/Ph.D. in Law, Senior Lecturer, FSJP, University of Maroua

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****Corresponding author:***
BANDE Gulbert MBAH TARH

ABSTRACT

The paper uses the UN Charter framework as the premises to explore the impact of humanitarian intervention on sovereignty. This is because the legal status of humanitarian interventions remains unresolved despite responsibility to protect. Besides, the UN Security Council also remains inconsistent in preventing potential humanitarian catastrophes. Meanwhile, the collective actions among states have gained rational-legal legitimacy through military alliances or regional organisations, cooperation, and solidarity under international law. In this sense, this paper focuses on the premise of interventions, the parameter of the UN Charter's prohibition of the use of force, and the significant exceptions allowed for self-defence and the UN Security Council authorised use of force. Likewise, it examines the heinous cases where the UN Charter is not accepted as authoritative or controls the States' behaviour. In this regard, the paper vividly explores the relationship between collective action's legitimacy and the legality of collective humanitarian interventions. It especially examines how collective action's legitimacy in some previous humanitarian interventions has influenced its premise and legal reality in this contemporary era.

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INTRODUCTION

Generally, it is worthwhile noting that there is no precise definition of the term 'humanitarian intervention'. However, Steve Mark defines humanitarian intervention as the use of force by a state, beyond its borders, that has a purpose or an effect to protect the human rights of non-citizens or reduce the suffering of the non-citizens.[1] Besides this, some other factors work in limiting humanitarian intervention, such as the anti-intervention norms in international law and international politics. Moreover, even if a state is willing to spend its resources and risk the lives of its citizens, for the sake of foreigners, it might not do so because of the above mentioned norms. However, under the Charter of the United Nations (UN Charter), there are currently two recognized exceptions. On the one hand, we have the general prohibition on the use of force on a sovereign state's territory without its consent. While on the other hand, we have self-defence as per Article 51 of the UN Charter; or with the authority of the U.N. Security Council (UNSC) as per Chapter VII and, in the case of the use of force by regional organizations as per Chapter VIII.[2] From this, it is worth noting in advanced that the concept of a humanitarian intervention lies beyond these two exceptions. Thus, claims a right to intervene based on the use of strictly necessary and proportionate force undertaken as a last resort in the absence of host state's consent to avert an overwhelming and large-scale humanitarian emergency.[3] Meanwhile, the concept has a long heritage, stretching back until at least the nineteenth century, even though it has, however, sat at odds with aspects of international law as there is no specific provision for it in the UN Charter. Therefore, as justification for the use of force, the concept is highly contested although some countries like the UK have relied on it previously to justify international interventions without UNSC approval, as seen in the case of Kosovo in 1999 and Sierra Leone in 2000[4], though there is no consensus as to whether it is an accepted basis for the use of force.

[1]Stein, M. (2004)."Unauthorized humanitarian intervention", *Social Philosophy and Policy* 21 (1):14-38.

[2]Global Centre for the Responsibility to Protect, RTP0003, para 14.
[3]The Foreign and Commonwealth Office (RTP0016), para 15.
[4]Jo Cox Foundation (RTP0013), para 3.3. For accounts, see Teson, F. (1988). *Humanitarian Intervention: An Inquiry Into Law and Morality*. (New York,

In practice, it is worthwhile noting that it was from these deeply divisive arguments that the concept of humanitarian intervention has generated. Particularly, following the 1999 NATO-led intervention in Kosovo, and the international community's failure to intervene in the Rwanda genocide and the conflict in Bosnia, the idea of Responsibility to Protect (R2P) was born. Indeed, the Global Centre for the R2P has described the resulting divergence views as a pair of unpalatable choices. As a result, states could both passively stand by and let mass killing happen to strictly preserve the letter of international law or circumvent the UN Charter and unilaterally carry out an act of war on humanitarian grounds.[5] Thus, to bridge this gap, the principle of R2P was developed and included in the 2005 World Summit Outcome Document, adopted as the basis for the United Nations General Assembly (UNGA) Resolution A/RES/60/1, by Heads of State and Government, presenting the R2P as a set of the following three pillars of responsibility: Pillar One states that "Every State has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing"; Pillar Two provides that "The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility"; and Pillar Three stipulates that "If a country is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner as per the UN Charter".[6]In this connection, it is observed that the R2P focuses on preventing the four mass atrocity crimes of genocide, war crimes, crimes against humanity, and ethnic cleansing, rather than broader humanitarian crises. Nonetheless, it is worth stressing that R2P not only refers to military intervention but readily allows for it under Pillar 3, with the authorization of the UNSC, which also includes a "broad range of preventive, negotiated and other non-coercive measures that are central to R2P".[7] From this, it is noted that R2P confers no legal obligation on States to act in the same manner that a treaty might, but it has created an emerging norm that acknowledges a political commitment to a common approach to preventing atrocities.[8]Despite this, it is noteworthy that any intervention that is authorized by the UNSC has enormous legal and political legitimacy. As a result, the propriety of unauthorized humanitarian intervention is a significant issue of international ethics and international law. In this regard, this paper vividly peruses the legal premises surrounding humanitarian intervention, and then proceeds to examine the legal consequences and impacts of humanitarian intervention with respect to the UNSC, the International Court of Justice (ICJ), and the International Criminal Court (ICC), and wraps up with a conclusion.

Scope of the legal status of Humanitarian Intervention

a) The Milieu of Authorized Intervention

Explicitly, it is worthwhile noting that there is no right to unilateral humanitarian intervention in positive international law even after Kosovo. From this, it is appreciated that during the 1990s, authors like *Sean Murphy and Matthias Pape* proved that the UN Charter has provided no right to unilateral intervention and that State practices also failed to emerge this right even after the end of the cold war. Besides, this point of view was also affirmed by *Gray, Chesterman, and Wheeler*.[9] Therefore, it is noted that for a right to unilateral humanitarian intervention to emerge, it is necessary to have positive assertions from the acting States and its acceptance from the international community.[10] In this regard, to argue for the right to humanitarian intervention in international law, one must rely on *Tsagourias*' 'discursive model of human dignity', whichprovides that the concept of human dignity will help us grip the 'essence' of the problem.[11]Likewise, *Wheeler* argues that in "solidarist conception of international relations, a right to humanitarian interventions is understood, while refusal to do so by pluralist views reflected their moral bankruptcy".[12]Meanwhile, *Tsagourias and Wheeler* claim that morality demands the right to unilateral humanitarian intervention. Therefore, it becomes more critical since humanitarian intervention represents the tension between State's sovereignty and human rights. In this sense, as human rights is based on moral grounds and the country's independence, it still exhibits the following two obstacles. Firstly, States need to satisfy the essential requirement of decency before they qualify for the protection of sovereignty and the principle of non-intervention. This is because it is argued that international law is based on an individual's rights and popular sovereignty, thus, States that ignore these are likely to have forcible intervention by other countries.[13] However, it is observed that this claim seems to be doubtful in contemporary international law as there are no sufficient State practices to prove such significant limitation on State's sovereignty. Since it can be argued that In this regard, the current status international law is not decisive for the moral agreement, thus, further inquiry into the foundations of sovereignty is needed. Equally, it is worth noting that sovereignty gives protection to people's self-determination, though this protection can be set aside in cases of severe human rights violations.At the same time, it is observed that in general the well-being of all individuals is best served by rejecting a right to unilateral humanitarian interventionsince in using such rights, States act based on their moral principles and disturb peaceful and just international order.

Secondly, as the primary tension is between human rights and sovereignty, since the 1990s, the United Nations' power to intervene in the humanitarian crisis is widely accepted, thus indicating that sovereignty is not the primary concern, as every intervention regardless of actor, interferes with sovereignty.[14]From this, it is argued that it is better to locate the conflict between human rights and peace rather than human rights and sovereignty. In this sense, there are strong moral arguments to support both sides. With the opponents of unilateral humanitarian intervention arguing strongly for United Nations authorization because they want to preserve international peace and do not wish to let arbitrary

Transnational Publishers Inc.), pp. 264–265; and Murphy, S. (2008). *Humanitarian Intervention: The United Nations in an Evolving World Order*, (Philadelphia: University of Pennsylvania Pres, pp. 212–213.

[5]United Nations Office on Genocide Prevention and the Responsibility to Protect, R2P, accessed 17 July 2020.

[6]Global Centre for the Responsibility to Protect (RTP0003), para 4.

[7]Ibid.,para 12.

[8]Gerrit Kurtz (RTP0007), para 4, Dr Aidan Hehir (RTP0009), p. 2.

[9]Krisch, N. (2002). "Review Essay, Legality, Morality and Dilemma of Humanitarian Intervention after Kosovo", *EJIL* (2002) Vol. 13, No 1, 323, p. 325.

[10]Ibid., p. 326.

[11]Ibid., p. 327.

[12]Ibid., p. 296.

[13]Ibid., p. 329.

[14]Ibid., p. 332.

interventions prosper, as confirmed by the UNGA to ensure the right of the people to national and global peace. In this perspective, it is worthwhile noting that the UNSC has the authority, under Chapter VII of the UN Charter, to conduct or authorize humanitarian intervention.[15] Indeed, the keystone of the UNSC's authority as per Article 39 of the UN Charter provides that "the UNSC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken under Articles 41 and 42, to maintain or restore international peace and security". From this, it is worth highlighting that when authorizing humanitarian intervention, the UNSC typically determines that a 'humanitarian crisis'[16]poses a threat to the peace. Nevertheless, as per Article 39, it is observed that "the UNSC shall determine the existence of a threat to the peace", but it did not explicitly provide that "in the event of a threat to the peace", the UNSC shall take action. From this, it is worth noting that the language of Article 39 of the UN Charter, expressly gives the UNSC the authority to determine a threat to the peace but not the action to be taken.

In a similar manner, it is also observed that Article 2(7) of the UN Charter provides that the Charter does not authorize the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any State". From this, it could be technically deduced that this has ruled out any authorized humanitarian intervention. However, it is noteworthy that Article 2(7) has a clause stating that "this principle of non-intervention shall not prejudice the application of enforcement measures under Chapter VII". In fact, because of this clause, it is essential to note that Article 2(7) is generally not a limitation to the UNSC's authority under Chapter VII of the UN Charter. Nonetheless, it is questionable whether human rights violations can be considered a matter principally within the States' domestic jurisdiction. Since the advent of the United Nations, there has been a progressive development of human rights law, starting with the Universal Declaration of Human Rights of 1948[17]and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948[18], unfolding through the International Covenant on Civil and Political Rights of 1966[19], the International Covenant on Economic, Social, and Cultural Rights of 1966[20], and other multilateral conventions. Consequently, it is stressing that human rights law arguably takes humanitarian intervention outside the prohibition of Article 2(7), thus, unimpairing and enhancing the UNSC's authority under Chapter VII of the UN Charter.

The Context of Unauthorized Intervention

Conversely, it is interesting to note that if the UNSC does not authorize humanitarian intervention, then its status under the UN Charter is considerably more dubious. In this regard, considerable attention is placed on Article 2(4) of the UN Charter, which states that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations. From this, it is observed that Article 2(4), in the context of the UN Charter as a whole, prohibits all use of force in international relations, with only two exceptions, that is, those authorized by the UNSC, and those in exercise of the right of self-defence recognized in Article 51 of the UN Charter.[21] However, some prominent scholars like *D'Amato* disagree with this broad interpretation, as they point out that the language of Article 2(4) imposes not a general prohibition, but three specific prohibitions.[22]Indeed, they argue that unauthorized humanitarian intervention is permitted under the UN Charter if: (i) it does not constitute the use of force against territorial integrity, (ii) it does not constitute the use of force against political independence, and (iii) it is not otherwise inconsistent with the purposes of the United Nations. Similarly, with regard to the specific terms of Article 2(4), some have interpreted the term 'territorial integrity' broadly, to mean that every territorial incursion is a violation of territorial integrity. From this, it is observed that this interpretation of 'territorial integrity' would once again turn Article 2(4) into a general prohibition. Likewise, under a narrower interpretation of 'territorial integrity', it is also observed that a State violates another State's territorial integrity only if it seizes part of the second State's territory.Equally, the term 'political independence' in Article 2(4) is also contested, particularly in the context of pro-democratic intervention. Thus, under a broad interpretation of the term 'political independence', it is observed that intervenors violate the political independence of a state when they change its political path in any way—for example, from dictatorship to democracy.[23]However, some prominent scholars like *Michael Reisman*disagree, claiming that the restoration or installation of democracy, respects and indeed increases the political independence of a state.[24]

Meanwhile, the import of the third prohibition in Article 2(4) (proscribing force otherwise inconsistent with the purposes of the United Nations) is also highly contested. As Article 1(1) of the UN Charter provides that the prime purpose of the United Nations isto maintain international peace and security. This is considered the overriding purpose, as corroborated with Article 2(4) prohibiting all non-defensive forces not authorized by the UNSC. In a similar manner, Article 1(3) of the UN Charter also provides that another purpose of the United Nations is to promote the respect of human rights and fundamental freedom for all without distinction as to sex, race, language, or religion. In this regard, the UN Secretary-General

[15]Henkin, L. (1999). "Kosovo and the Law of 'Humanitarian Intervention'", *American Journal of International Law 93*, no. 4: 824–28 (humanitarian intervention is lawful if authorized by the Security Council).

[16]With humanitarian crises being those that usually have international consequences—in particular, the flow of refugees across borders—but in general such crises do not pose the threat of armed conflict across borders.

[17]UNGA Res. 217 (1948), available on-line at http://193.194.138.190/udhr/lang/eng.

[18]UNGA Res. 260 (1948), entered into force 1951, http://193.194.138.190/html/menu3/b/p_genoci.htm.

[19]UNGA Res. 2200 (1966), entered into force 1976, http://193.194.138.190/html/menu3/b/a_ccpr.htm.

[20]UNGA Res. 2200 (1966), entered into force 1976, http://193.194.138.190/html/menu3/b/a_cescr.htm.

[21]Simma, B. (1999). "NATO, the UN, and the Use of Force: Legal Aspects", *European Journal of International Law* 10, no. 1; available on-line at http://www.ejil.org/journal/Vol10/No1/ab1.html; and Schachter, O. (1991).*International Law in Theory and Practice,* (Dordrecht, The Netherlands: Kluwer), pp. 128–129.

[22]D'Amato, A. (1995). *International Law: Process and Prospect,* (Irvington, NY: Trans-national), pp. 56–72.

[23]This is the considered position of the International Court of Justice

[24]This position is particularly identified with Michael Reisman. See Reisman, W. (1995). "Haiti and the Validity of International Action", *American Journal of International Law 89*, no. 1: 82–84; Reisman, W. (1990)."Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law 84*, no. 4: 866–76.

- *Kofi Annan*, stresses that as the threat of wide-ranging interstate war has receded, human rights promotion should arguably take on greater importance. Equally, Article 2(3) of the UN Charter is also relevant to the legality of humanitarian intervention as it states that "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered". Indeed, this requirement that disputes be settled so that 'justice' is not endangered may leave some room for unauthorized humanitarian intervention under Article 2(3). Despite this, at the very least, it is observed that force could not be the first resort. Since there could be a genuine attempt to achieve a peaceful resolution in order to comply with Article 2(3). In this sense, it can be argued that the Kosovo intervention readily violated even this minimal requirement, as NATO presented rather extreme demands to Yugoslavia, on a 'take it or leave it' basis, in the run-up to war. Likewise, it is worth stressing that NATO's ultimatum would have required Yugoslavia to agree to allow NATO troops to operate anywhere in Yugoslavia, not only Kosovo, andalso set the stage for a referendum on independence by the Kosovars, to be held within three years. It is observedthat but both demands were dropped in the settlement that ended the NATO's campaign.[25]

In addition to Charter law, it is noteworthy that humanitarian intervention's legal status may be affected by the somewhat mysterious body of law known as customary international law. Although it is generally but not universally agreed that international custom could rise to the level of law if it is sufficiently widespread, and is regarded as binding by States. Despite this, Article 38 of the Statute of the ICJ lists several sources of international law, amongst the first of which is the 'international conventions' (including, of course, the UN Charter), the second being the 'international custom, as evidence of a general practice accepted as law'.However, like others, *Anthea Elizabeth*postulates that there is considerable controversy over the content of customary international law in humanitarian intervention in other areas.[26]With some (for instance, the ICJ in the Nicaragua case) finding a strong prohibition against intervention in customary international law, while others find no prohibition against intervention. Besides, a number of commentators like *Henkin*believe that the UN Charter can, in effect, be amended through the processes of customary international law.[27] Likewise, in theory, it is observed that repeated humanitarian intervention without the authorization of the UNSC could establish a right to humanitarian intervention or even a general permission to use force in international relations. This is corroborated by *Michael Glennon* who suggests that Article 2(4)'s prohibition on the use of force has already been abrogated through the processes of customary international law.[28]However, notwithstanding, there are many opinions as to the meaning of the UN Charter and the content of customary international law. In this regard, it is paramount to proceedand peruse the possible legal consequences of humanitarian intervention, in relation to the role of the UNSC and other organs of the United Nations.

Premises of the United Nations and other viable organs in humanitarian intervention

UN Security Council on Intervention: As aforementioned, under Article 24(1) of the UN Charter, the UNSC has the principal role and responsibility to 'maintain international peace and security' as enshrined in Article 2(4) of the UN Charter. Thus, a target of unauthorized humanitarian intervention might theoretically appeal to the UNSC, requesting it to take action against intervening States.But it is worth noting that an appeal to the UNSC would fail if, as is likely these days, one or more of the intervening States was a veto-bearing permanent member of the UNSC or one or more of the intervening states is protected by a permanent member[29]. From this, it is worth noting, for instance, that during the Kosovo intervention, the UNSC was presented with a draft resolution that would have condemned the NATO bombing campaign against Yugoslavia.[30] Nonetheless, the resolution was defeated by 12–3, as two permanent members (Russia and China) voted in favour of the resolution, while the three other permanent members (the United States (U.S.), the United Kingdom (U.K.), and France), voted against. Paradoxically, in this Kosovo case, it is noteworthy that the three permanent members' veto power defeated the proposed resolution condemning intervention. Besides, things were different in the case of Nicaragua in 1984. The U.S. was then seeking to overthrow the Sandinista regime in Nicaragua, with a geopolitical motive rather than directly humanitarian.However, it could be emphasized that the geopolitical goal of containing Communism was indirectly humanitarian in that Communism causes suffering. Thus, in seeking to overthrow Nicaragua's government, the U.S. mined Nicaraguan ports and conducted several naval attacks on Nicaraguan ports, oil installations, and a naval base by the CIA. Equally, the U.S. armed and trained the Nicaraguan 'Contra' rebels who were seeking to overthrow the government of Nicaragua.[31]Indeed, Nicaragua challenged against the U.S. intervention as a violation of international law, and its efforts still hold lessons for any target of intervention, humanitarian or otherwise. As Nicaragua first sought relief from the UNSC against the U.S. military intervention, all the members of the UNSC except the U.S. voted for (or abstained on) the mild resolution in favour of Nicaragua. However, the U.S. exercised its veto and the resolution was not passed. This prompted Nicaragua to seek relief from the ICJ, where it achieved somewhat better results there.[32]

International Court of Justice on Intervention: In point of law, it is worth highlighting that the ICJ is the prime judicial organ of the United Nations, with its statute embedded as part of Article 92 of the UN Charter.On the one hand, auspiciously for intervenees, the ICJ has shown that it is willing to enforce or attempt to enforce, prohibitions on the use of force contained in the UN Charter, and customary international law. While on the other hand, unfortunately for intervenees, the ICJ will not exercise jurisdiction over every claim that one State seeks to bring against another, that is, the ICJ will only

[25]"Messy War, Messy Peace", *The Economist,* June 12, 1999, 15–16.
[26]Anthea, E. (2001). "Traditional and Modern Approaches to Customary International Law: A Reconciliation", American Journal of International Law 95, no. 4: 757–91.
[27]Henkin (n.d.)."Kosovo and the Law of 'Humanitarian Intervention'", 828; and Glennon, M. (2001).*Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, (New York: Palgrave), 37–65.
[28]Glennon, M. (2002). "How War Left the Law Behind", *New York Times*, November 21, sec. A, p. 37, col. 2.
[29]The permanent members of the UNSC are the U.S., the U.K., France, Russia, and China
[30]Belarus, India, and Russian Federation: Draft Resolution, U.N. Doc. S/1999/328 (Mar. 26, 1999)
[31]See the Nicaragua case: Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ 14.
[32]Ibid.

exercise jurisdiction over a State if that State has consented to its jurisdiction in some way. This consent may be expressed in a treaty, for instance, the Genocide Convention, gives the ICJ jurisdiction over claims arising under that treaty. Besides, the other significant way in which a state can consent to the ICJ's jurisdiction is to issue a declaration as per Article 36 (2) of the ICJ Statute (the 'optional clause'). By stating that it recognizes the jurisdiction of the court over future claims by another State that has accepted the same obligation under the optional clause. In addition, Article 96 of the UN Charter provides that the UNGA or the UNSC may request an 'advisory opinion' from the ICJ on 'any legal question'. Conceivably, even if the ICJ could not exercise jurisdiction over a case against the Intervenor State, the intervenee could persuade the UNGA to request an advisory opinion on legal questions relating to the intervention. Despite this, it is still unclear whether the ICJ would agree to deliver such an opinion. Since the ICJ will ever brand as illegal, there is very little likelihood that a humanitarian intervention authorised by the UNSC. Nonetheless, it is observed that there is a substantial likelihood that the ICJ will brand as illegal any humanitarian intervention not authorised by the UNSC if the ICJ ever squarely addresses the legality of such an intervention. For example, in the Kosovo dispute, Yugoslavia sought relief from the ICJ against ten of the NATO countries, including a provisional measure ordering the NATO countries to cease their attacks, but surprisingly the ICJ refused to order the NATO countries to stop bombing. Since the NATO countries had raised jurisdictional objections, and the ICJ deciding that it was not sufficiently persuaded that it had jurisdiction over any of the cases brought by Yugoslavia.[33]In this sense, it is noteworthy that the ICJ did throw something of a bone to Yugoslavia in its decisions by stating that "The Court is profoundly concerned with the use of force in Yugoslavia ... Under the present circumstances such use raises very serious issues of international law ...".[34] Thus, the ICJ also retained all but two of the cases on its docket but dismissed the ones against the U.S. and Spain. Therefore, leaving open the possibility that Yugoslavia could ultimately prevail on the merits after convincing the ICJ that it had jurisdiction. In the interim, of course, the NATO campaign was successfully ousted Yugoslavia from Kosovo, and there was a change of government in Yugoslavia. In this regard, as of March 2003, the eight remaining cases filed by Yugoslavia were in a kind of limbo or withdrawn.[35]Conversely, in the Nicaragua case that began in 1984, the ICJ did issue a preliminary injunction and then a final judgment against the U.S.[36]Meanwhile, for complicated jurisdictional reasons, as seen in the Nicaragua case; the ICJ did not apply the prohibition on the use of force in Article 2(4) of the UN Charter. Instead, it applied the customary international law on the use of force that is found to be substantially identical to the Charter law. Therefore, in its 1986 decision on the merits, the ICJ held that the U.S. had violated customary international law by using force against Nicaragua and had also violated customary international law by intervening in Nicaragua through military assistance to the Contra rebels. In fact, the ICJ's 1986 decision on the merits of the Nicaragua case contains several passages that are hostile to the concept of humanitarian intervention. From this, it is worth noting that in any event, while the U.S. might form its appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. Since with regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming, and equipping of the contras.[37]Nevertheless, it is worth noting that under the ICJ statute, its decisions are theoretically non-precedential, that is, a decision "has no binding force except between the parties and in respect of that particular case".[38]But in practice, it is observed that the ICJ follows precedent rather closely, perhaps more closely than does the U.S. Supreme Court. With the Nicaragua case, in particular, cited and followed numerous times and has even become the leading case on the use of force under the UN Charter, although strictly speaking, the Court did not apply Charter law. Despite the Nicaragua decision, it is noted that advocates of unauthorized humanitarian intervention are still entertaining some hope that the ICJ might someday drop or moderate its opposition to such intervention. From this, it is observed that possibly a truly repellent regime would receive less sympathy from the ICJ.

Territorial integrity and political independence: As mentioned above, a major issue bearing on the legality of unauthorised humanitarian intervention is the proper interpretation of the terms 'territorial integrity' and 'political independence' as enshrined in Article 2(4) of the UN Charter. In this regard, in the Nicaragua decision, the ICJ held that the U.S. had violated a customary-law obligation that was essentially identical to Article 2(4), even though it did not clearly specify whether the U.S. had violated Nicaragua's 'territorial integrity', or 'political independence', or both. However, it is observed that in its opinions onthe provisional measures and merits, it did twice admonish the U.S. by stating that, "The right to sovereignty and political independence possessed by Nicaragua, like any other State of the region or the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities, which are prohibited by the principles of international law".[39] Indeed, the foregoing passage suggests that the U.S. had used force against Nicaragua's 'political independence', but not necessarily force against Nicaragua's 'territorial integrity'. Thus, in the Nicaragua case, the ICJ did not endorse the expansive definition of 'territorial integrity' as earlier mentioned, according to which every territorial incursion is a violation of 'territorial integrity'.Conversely, in 1996, the ICJ issued a closely divided advisory opinion on the legality of using or threatening to use nuclear weapons.[40] In that opinion, in the course of expounding on the meaning of Article 2(4) of the UN Charter, the ICJ states that, "It would be illegal for a State to threaten force to secure territory from another State or to cause it to follow or not follow certain political or economic

[33]Bekker, P. and Borgen, C. (1999). "World Court Rejects Yugoslav Requests to Enjoin Ten NATO Members from Bombing Yugoslavia", *American Society of International Law*, ASIL Insights (June); available on-line at http://www.asil.org/ insights/insigh36.htm.

[34]Yugoslavia v. Belgium, Order of June 2, 1999, para.17; available on-line at http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm.

[35]See http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-10_yugo_20020322.htm.

[36]Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Request for Provisional Measures, 1984 ICJ 169 (Order of 10 May), and Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ 14.

[37]See Nicaragua (merits), 1986 ICJ at paras. 263, 268

[38]See Article 59 of the ICJ Statute

[39]See Nicaragua (provisional measures), 1984 ICJ 169, Order B (2), and Nicaragua (merits), 1986 ICJ, para. 288

[40]Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226

paths".[41] Indeed, it is observed that this suggests a broad interpretation of 'political independence' and a possibly narrow interpretation of 'territorial integrity'. Thus, it is envisaged that although the Kosovo campaign is considered as a clear situation of violation of 'territorial integrity' than 'political independence'. In this sense, if the ICJ could potentially rely on the 'political independence' prong of Article 2(4) of the UN Charter, it could have ultimately declared the Kosovo campaign unlawful.

Enforcing the decision of the ICJ: The UN Charter provides that a State that obtains a favourable decision from the ICJ can appeal to the UNSC for enforcement.[42]For instance, in the Nicaragua dispute, Nicaragua appealed to the UNSC to enforce the ICJ's decision against the U.S., with the U.S., of course, vetoing the enforcement of the decision. However, despite the U.S. attitude, it is worth noting that the ICJ decisions have a political effect even if a veto in the UNS blocks enforcement. This is because States may comply with ICJ decisions even if they can block enforcement. Conversely, the U.S. vetoed enforcement in the Nicaragua case is sometimes seen as illustrating the problem of enforcing the ICJ's decisions, and more generally, the problem of enforcing international law. Despite this, it is observed that there is substantial evidence that the ICJ proceedings did affect the policy of the U.S. toward Nicaragua. As the ICJ issued a preliminary injunction against the U.S. in the Nicaragua case and ordered the U.S. to stop mining Nicaragua's ports. In response to this preliminary measure, the U.S. State Department announced that the U.S. had stopped its naval attacks on Nicaragua the previous month (after Nicaragua's application with the ICJ had been filed), and that the attacks would not resume.[43]Nonetheless, the ICJ proceedings figured in Congress's decision to cut off aid to the Nicaraguan 'Contra' rebels in October 1984. This was reinforced by a subsequent ruling of the ICJ calling for a halt in the mining by stating that Nicaragua's independence "should not be jeopardized by any military or paramilitary activities".[44]

International Criminal Court on Intervention: In this contemporary era, the target of intervention might also seek relief from the International Criminal Court (ICC), which came into existence in July 2002, despite opposition from the U.S.[45]While the ICJ can only hear cases against States, and the ICC hears cases against individuals, some of whom may be States leaders. Indeed, under its constitutive treaty, the Rome Statute, the ICC is supposed to exercise jurisdiction over four kinds of international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[46]In this regard, the crime of aggression is relevant in this paper's context, as it paves the way for legitimate intervention. It is worthwhile noting that fortunately for intervenees, the ICC is now exercising jurisdiction over the crime of aggression[47], which is a crime under the Rome Statute of the ICC. This is illuminating with the adoption by consensus of the definitions and conditions to exercise the jurisdiction over the crime at the Kampala Review Conference by the States Parties to the ICC.[48]Indeed, the adopted amendments to the Rome Statute included, inter alia, the deletion of Article 5(2) of the Rome Statute that formerly provides that:The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision shall be consistent with the relevant provisions of theUN Charter.[49] Concretely, the additions of Article 8 *bis* and Article 15 *bis/ter*of the Rome Statue defines the 'crime of aggression' and lays down the conditions for the exercise of the jurisdiction over the 'crime of aggression'. With Resolution R.C./Res.6 stating clearly that the amendments shall enter into force in accordance with Article 121(5) of the Rome Statute, that is, one year after each ratifying State has individually deposited its instrument of ratification or acceptance. Nevertheless, it is essential to note that for the Court to exercise jurisdiction over the crime of aggression actively, the amendments have equally provided additional conditions that the amendments need to be ratified or accepted by at least thirty States Parties. Who must 'activate' the Court's jurisdiction through an additional decision to be taken on or after 1 January 2017 by a two-thirds majority.

Moreover, it is worth noting that before the aforementioned amendments, the crucial issue was how to define the crime of aggression. With most definitions proposed for inclusion in the Rome Statute based on the UNGA's 1974 'Definition of Aggression' resolution, which in turn is based on Article 2(4) of the UN Charter's prohibition on the threat or use of force.[50]Thus, from this, the 'crime of aggression' is defined in the amended provisions of the Rome Statute, in line with the violation of Article 2(4). However, an outstanding issue regarding the crime of aggression is the precondition to its prosecution, which is bestowed to the UNSC, to determine whether an act of aggression has occurred or not. This is enshrined in Article 39 of the UN Charter,which states that the UNSC "Shall determine the existence of any threat to the peace, breach of the peace, or act of aggression". Succinctly, it is worth noting that if the UNSC determines the existence of aggression, then arguably no other body may determine the existence of aggression. Nonetheless, it can be strongly argued that the UNSC's power to determine the existence of aggression is not exclusive, at least in the context of international criminal proceedings.In this connection, it isobserved that if there can be no prosecution for the crime of aggression until the UNSC has determined the existence of an act of aggression, then the ICC will not be of much help to targets of intervention. Thus, there is great resistance among parties to the Rome Statute in allowing the veto of one

[41]See the Nuclear Weapons case, 1996 ICJ at para. 47.
[42]See Article 94 of the UN Charter
[43]"Court's Ruling Acceptable, State Department Declares", New York Times, 11 May 1984, sec.A, p. 8, col. 1.
[44]Moynihan, D. (1990). *On the Law of Nations*, (Cambridge, MA: Harvard University Press), 141–47; Hendrick, S. (1984). "Reagan Fighting to Win Aid for Anti-Sandinistas", *The New York Times*, May 7, sec. 1, p. 12, col. 1.
[45]Bradley, C. (2002). "U.S. Announces Intent Not to Ratify International Criminal Court Treaty", *American Society of International Law, ASIL Insights* (May); http://www.asil.org/insights/insigh87.htm.
[46] See Article 5 (1) of the Rome Statute of the International Criminal Court.
[47]A crime of aggression is a specific type of crime where a person plans, initiates or executes an act of aggression using state military force that violates the UN Charter. The act is judged as a violation based on its character, gravity, and scale. See "Resolution R.C./Res.6: The crime of aggression", International Criminal Court. 2010-06-10.
[48]See 2010 Review Conference of the Rome Statute concluded in Kampala.
[49]See Part 2. Article 5 of the Rome Statute of the ICC on Jurisdiction, admissibility and applicable law
[50]For recent proposals, see "Discussion Paper on the Definition and Elements of the Crime of Aggression, prepared by the Coordinator of the Working Group on the Crime of Aggression", in Report of the Preparatory Commission for the International Criminal Court, 10th Session, U.N. Doc. PCNICC/2002/2/Add.2 (July 24, 2002); http://www.un.org/law/icc/prepcomm/jul2002/english/.doc.

permanent member of the UNSC to preclude prosecution for the crime of aggression. In this sense, it is observed that several proposals now give the UNSC the first opportunity to determine the existence of aggression, while in case of a veto, it is appropriate to allow the final determination to be made by the ICC, or the ICJ, or the UNGA.[51]From this, it is realised that there is great task for the ICC to exercise its jurisdiction over the crime of aggression. As the resistance is persisting and the possibility of being prosecuted for aggression may deter some unauthorized humanitarian interventions, for good or ill.[52]

Conclusion

In line with the discussion above, it is noted that the UN Charter's prohibitions on the use of force could be repealed through customary international law processes. This is because the UN Charter's flexible view has widely different normative implications, depending on whether the prohibitions of force are assumed to be vulnerable but not abolished, or already abrogated. On the one hand, it is noted that if the ban of force is considered vulnerable but not yet abrogated. Then the UN Charter's flexibility could be the additional reason to avoid humanitarian interventions or ease they lead to a general abrogation of prohibitions on the use of force between states. On the other hand, it is noted that if the ban of force is assumed to be already abrogated, then the UN Charter's flexibility could remove international-law impediments to humanitarian intervention. From these, it is essential to note that in either case, neither version of the UN Charter's flexible view is realistic concerning its institutional framework. Therefore, it is worth stressing that no matter what, the ICJ will never rule that the UN Charter's prohibitions on the use of force are void. Meanwhile, since the Nicaragua case, the ICJ has issued several decisions demonstrating its narrow view of the permissibility of the use of power under the UN Charter, without the tiniest cloud hanging over Article 2(4) of the Charter in the ICJ's decisions. It is worth noting that the UNSC will never give up its role in enforcing Article 2(4) of the UN Charter.In practice, it is also noted that while the veto of the permanent members prevents enforcement against them and their allies, it is observed that the UNSC will never agree that Article 2(4) be nullified, to allow states free to use force in international relations. Similarly, since the crime of aggression is defined as part of the Rome Statute, the ICC can determine that the Rome Statute provisions as to the crime of aggression are operational. As noted above, the definition of the crime of aggression is based on Article 2(4) of the Charter.

Besides, the idea that Charter law can be modified in a way that would never be accepted by the ICJ or the UNSC reflects an anachronistic, pre-Charter view of international law. Thus, it is noted that if states' behaviour is more regulated, then the Charter law on the use of force will be alive and well, as it will considerably weigh as a political norm. From this, it is worthwhile noting that there can hardly be any more significant proof of the viability of an international standard than if the most powerful State in the world prepares to violate that norm and then draws back, even temporarily, in opposition from other countries. In this light, it is noted that since the founding of the United Nations, there have been times when permanent members of the UNSC launched non-defensive military interventions with far less concern for the approval of the UNSC.In a nutshell, it is noted that the UN Charter prohibition of the use of threat of force downplays the self-help dimension of sovereignty. Since self-help and non-intervention are both aspects of sovereignty and are in tension. Despite this, it should be noted that increasing acceptance of the principle of justifiable humanitarian intervention would not be equivalent to a diminution of sovereignty. But it leads to a shift in emphases about expected and permitted State behaviour.

In this sense, it is noted that while recourse to interventions with at least a partial humanitarian justification arguably has altered and may further alter the doctrine of sovereignty, it does not destroy sovereignty. Contrariwise, it should be noted that humanitarian interventions modify the doctrine and practice of sovereignty by deemphasizing non-interference and reviving self-help competencies.Finally, it should be noted that humanitarian intervention has played a subordinate role in whatever transformation has taken place in the doctrine of sovereignty since the adoption of the UN Charter. Affirmatively, it is worthwhile noting that as long as the United Nations lasts, international law will never again permit the free use of force by States. Except in cases of heinous violation of *jus cogens* norms, unauthorized humanitarian intervention can be an appreciated doctrine forming part of international law. Indeed, such an exception is possible because there are plausible interpretations of Article 2(4) of the UN Charter that permit it. However, given the ICJ's decisions on the use of force, it seems unlikely that the ICJ will smile on unauthorized humanitarian intervention in the foreseeable future. Nonetheless, the contour is gradually changing with the ICC's emergence to protect humanity from heinous crimes.

[51]See Coordinator's Discussion Paper, available on-line at http://www.un.org/law/icc/ prepcomm.

[52]Stein, M. (2002). "The Role of the Security Council in Prosecutions for the Crime of Aggression", Accountability: *Newsletter of the American Society of International Law*, International Criminal Law Interest Group 1, no. 1: 8–10.

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