OPERATION UNIFIED PROTECTOR AND HUMANITARIAN INTERVENTION WITH SECURITY COUNCIL AUTHORIZATION: INTRA VIRES?

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Abstract

This article discusses whether authorization for military intervention in civil wars by the United Nations Security Council is ultra vires under the U.N. Charter, with particular reference to Operation Unified Protector carried out in Libya in 2011. Under Article 39 of the U.N. Charter, the Council is entitled to take military measures when there is a threat to, or breach of, international peace. Any definition of threats is lacking in the Charter; the Council is vested with wide discretionary powers. Since the 1990s, the Council has defined civil wars as threats to international peace and applied military measures against some of these on the ground of humanitarian intervention. However, the power of the Council to determine threats is not unrestricted. Article 39, Article 24(2) and the principles of international law impose limitations on Council authority. Under these rules, the Council is not entitled to intervene in civil wars where there are no transboundary effects. Therefore, Council authorization to forcibly intervene in the Libyan conflict is ultra vires. Unlimited power to determine threats and humanitarian operations in this context would render the principle of non-intervention meaningless and might lead to an abuse of power. This article proposes that a separation be made between the concepts of threats to international peace and humanitarian crisis, with a mechanism established as a part of the UN which would intervene in every case of humanitarian crisis.

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Öz


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Anahtar Kelimeler: insani müdahale, Güvenlik Konseyi, Libya, Madde 39, karşışmama.

INTRODUCTION

Popular uprisings for democracy in North Africa and the Middle East, the so-called ‘Arab Spring,’ resulted in the collapse of years-old authoritarian regimes initially in Tunisia and later in Egypt. The third domino was Libya, which was under a forty-one-year dictatorial rule. The revolt spread over the country and the insurgents made rapid progress. Muammar Qadhafi proclaimed his determination to stay in power and resorted to force, causing many civilian deaths and injuries, a violation of jus in bello. Unlike the just fallen dictators, Qadhafi waged war against the rebels and the country was driven into a civil war. Increasing casualties attracted international attention and the United Nations (UN) adopted measures not involving the use of force to stop civilian slaughter.

Noncooperation by Qadhafi led the UN Security Council to authorize UN members to take all necessary measures to protect civilians. A military operation was carried out initially by an international coalition led by the United
States, France and United Kingdom; this was then passed onto the North Atlantic Treaty Organization (NATO) and named Operation Unified Protector. The air operation led to the downfall of the regime and Qadhafi was killed by the insurgents. Humanitarian intervention, one of the much debated topics of international law, came to the fore again following the intervention in Libya.

This article aims to evaluate whether the Security Council authorization for the use of force in humanitarian intervention is intra vires under the UN Charter. In Part I, after examining the power of the Council to take measures to meet threats to international peace, it will be shown that the Council has assumed new functions to address humanitarian crisis and intrastate conflicts, as a result of the changing definition of threats since the end of the Cold War. Part II will briefly describe the concept of humanitarian intervention, examine its validity under the UN Charter and General Assembly resolutions, and then address the main arguments regarding its legality. Part III will describe the main features of the concept of ‘responsibility to protect,’ a new version of humanitarian intervention. In Part IV, the power of the Council under Article 39 of the Charter will be discussed. Under the article, the Council has the authority to take binding measures when it determines the existence of any threat to, or breach of, international peace. This part of the article will analyze whether the Council has unfettered powers to determine the existence of threats or if there are limits on its authority. Particular attention will be paid to the definition of intrastate conflicts as threats to international peace. Part V will discuss the Council measures taken against Libya, with concluding remarks to follow.

I. CIVIL WARS AS NEW THREATS TO INTERNATIONAL PEACE

The Security Council is given “primary responsibility for the maintenance of international peace and security” under the Charter; it is authorized by Chapter VII to take binding measures involving or not involving the use of force. Article 39, the opening of the Chapter, states:

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

1 Charter of the United Nations, 24 October 1945, 1 UNTS 16 [hereinafter ‘UN Charter’].
2 U.N. Charter, art. 24(1).
3 U.N. Charter, art. 4-42.
The binding measures would also apply to the matters that are within the domestic jurisdiction of states under Article 2(7) when the Council is exercising Chapter VII powers:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Article 39 was obviously intended by the drafters to regulate interstate conflicts, where peace was considered to exist in the absence of the interstate use of force. However, the Council assumed new roles as a result of the change in the definition of peace and threat over time.

Leaving the ideological rivalries of the Cold War behind, the Council has been much more active since the 1990s; it has assumed various new functions and taken innovative measures under Chapter VII. Its scope of action broadened with the recognition of new threats to international peace and security. The Council declared in a Presidential Statement in 1992:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.4

Widening the concept of ‘threat’ also meant that more matters that are under the domestic jurisdiction of states would be subject to Council measures. Large-scale violations of human rights and humanitarian law in domestic conflicts,5 overthrow of democratically elected governments,6 non-extradition of suspects of terrorist acts,7 uncooperative behavior or armament by regimes that have

5 See resolutions mentioned infra note 12.
breached the peace have individually or in combination been defined as threats to international peace and security. There has been a considerable increase in the definition of intrastate conflicts as threats to international peace where the Council has applied measures with and without force.


Even after Iraq was forced out of Kuwait, its possession of weapons of mass destruction and uncooperative behavior such as non-ratification of some arms limitation treaties, non-compliance with some bilateral and multilateral treaties, and not allowing international inspection were rendered as contributing factors to constitute a threat to the peace, and further Chapter VII measures were applied. Believing that Iraq would create new threats, the Council declared to remain seized of the matter for more than ten years following the end of the conflict. See U.N. S.C. Res. 687, [Iraq-Kuwait], U.N. Doc. S/RES/687 (3 April 1991); U.N. S.C. Res. 949, [Iraq], U.N. Doc. S/RES/949 (15 October 1994); U.N. S.C. Res. 1137, The Situation between Iraq and Kuwait, U.N. Doc. S/RES/1137 (12 November 1997); U.N. S.C. Res. 1441, The Situation between Iraq and Kuwait, U.N. Doc. S/RES/1441 (8 November 2002); see also Franck, supra note 7, at 97-101; Schweigmann, supra note 7, at 154.

See Karel Wellens, The UN Security Council and New Threats to the Peace: Back to the Future, 8 JOURNAL OF CONFLICT AND SECURITY LAW 15, 34-47 (2003)(reviews Council Resolutions in terms of different kinds of threats, such as failure of compliance with non-binding requests, illegal flow of arms, and exploitation of natural resources to finance a conflict).

Humanitarian considerations have been the most used justification for enforcement measures. As was reflected in the Presidential Statement of 1992, the then-UN Secretary General Boutros Boutros-Ghali stated in the *Agenda for Peace*:

Poverty, disease, famine, oppression and despair abound, joining to produce 17 million refugees, 20 million displaced persons and massive migrations of peoples within and beyond national borders. These are both sources and consequences of conflict that require the ceaseless attention and the highest priority in the efforts of the United Nations. A porous ozone shield could pose a greater threat to an exposed population than a hostile army. Drought and disease can decimate no less mercilessly than the weapons of war. So at this moment of renewed opportunity, the efforts of the Organization to build peace, stability and security must encompass matters beyond military threats in order to break the fetters of strife and warfare that have characterized the past.12

It has also been asserted that large-scale human rights violations in domestic conflicts would not be ignored any more:

Civil wars are no longer civil and the carnage they inflict will not let the world remain indifferent. The narrow nationalism that would oppose or disregard the norms of a stable international order and the micro-nationalism that resists healthy economic or political integration can disrupt a peaceful global existence.13

This meant that humanitarian crises might constitute threats to international peace on their own.14 With the changing definition of threats to include intra-state conflicts, the Council assumed a new role of humanitarian intervention.


II. HUMANITARIAN INTERVENTION

There is no agreed definition of humanitarian intervention. It is a broad concept that may include political, economic or military measures to end human rights violations. The intervener may be a non-governmental organization as well as states and intergovernmental organizations. Under international law, the term is considered to imply military intervention by states or international organizations to end large scale violence in the target state. Massive deaths may have occurred in a civil war between factions, which may also include deaths as a result of mass starvation, an epidemic, or due to the violent suppression of rebels by the local government. Sometimes intervention for the protection of nationals is also defined as humanitarian intervention; however, it is generally considered to be self-defense, based upon the link between the state and its nationals. Peacekeeping forces are deployed with the consent of the state concerned and therefore do not constitute intervention by definition.

The UN Charter calls for respect for human rights and aims to achieve this through international cooperation. However, an enforcement mechanism is lacking, as well as an explicit authorization for humanitarian intervention. Under Article 2(4), states are obliged to refrain from the threat or use of force; Council authorization is required for military measures under Article 42. Regional organizations are also subject to Council authorization for enforcement action under Chapter VIII. Constituent instruments of international organizations might authorize member states to intervene in humanitarian crisis, an example of which is the Constitutive Act of the African Union. Article 4(h) states that the Union is entitled to intervene “pursuant to a decision of the
Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."19

The principle of non-intervention appears in almost every international legal instrument regulating state behavior. UN General Assembly Resolutions assert that it shall not be violated “for any reason whatever.”20 Nevertheless, it is also stated that the principle is without prejudice to the powers of the Council relating to the maintenance of international peace and security.21

The rules and practice have been interpreted by commentators on different terms. Three main opinions have been expressed: (1) humanitarian intervention is lawful, even if there is no Council authorization; (2) humanitarian intervention is lawful only under authorization of the Council, which has wide discretionary power to determine any threat to international peace; and (3) the Council is not entitled to authorize humanitarian intervention, since no such authority appears in the Charter. Each position shall be examined in turn.

Those arguing that intervention is lawful even without authorization emphasize a few points. One is that, since humanitarian intervention does not aim to violate the territorial integrity or political independence of the target state, it is not contrary to Article 2(4).22 For instance Belgium, in a pleading before the International Court of Justice (ICJ) on the NATO bombing in Kosovo, contended that it had aimed to protect jus cogens rights and therefore had not violated the territorial integrity or political independence of Yugoslavia.23 Another argument is that Article 2(4) should be interpreted in line with the main purpose of the Charter: protection of human rights and self-determination. Use of force for these purposes would not violate the Charter.24

24 Michael W. Reisman and Myres S. McDougal, Humanitarian Intervention to Protect the Ibos, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 172 (Richard B. Lillich, ed., University Press of Virginia, Charlottesville, 1973); see also Michael W.
It has also been asserted that the meaning of Article 2(4) has changed over time and humanitarian intervention has come to constitute a legitimate exception to the ban on the use of force, as it is the case with a state’s protection of its nationals. Regarding the unauthorized operations to protect the Kurds in Iraq and the NATO intervention in Kosovo, the United Kingdom argued that an exceptional right of humanitarian intervention exists under compelling circumstances. Another line of justification is based on self-defense: the customary right of self-defense is granted not only to states but also nations, who are entitled to protect themselves from attack and other nations may come to help. Another well-known argument legitimizes humanitarian intervention on different terms; theory being that the cornerstone of international law is the individual rather than the state and it is legitimate to intervene to protect individuals if they ask for help.

The argument that humanitarian intervention has turned into customary law have been mentioned as well by a few commentators. Humanitarian interventions by the Economic Community of West African States (ECOWAS) in Liberia, by France in Central Africa, allied intervention in Northern Iraq, and the NATO action in Kosovo have been mentioned as unilateral interventions which were not condemned by the international community. Some writers

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25 Following the 1991 Iraq-Kuwait conflict, the United Kingdom, France and United States undertook a military operation to protect the Kurds and Shi’ites, who rebelled against Saddam regime and were harshly suppressed; NATO resorted to force in 1999 to protect Albanians in Kosovo, who were repressed by the federal government of Yugoslavia. Neither operations were authorized by the Council.


27 George P. Fletcher and Jens David Ohlin, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 136 (Oxford University Press, 2008).

28 Teson, supra note 22, at 117-19, 127.


30 See Greenwood, supra note 29; Dino Kritsiotis, The Kosovo Crisis and NATO’s Application of Armed Force Against the Federal Republic of Yugoslavia, 49 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 330 (2000); Sean D. Murphy,
content that the state practice shall not be underestimated, as it may indicate crystallization of a new customary rule. 31 The fact that states do it not under a moral obligation, but believing that it is not contrary to international law, constitutes an important step in this regard. 32 One commentator argues that NATO operation in Kosovo may reflect opinio necessitatis, a sense of obligation rather than legality. 33 However, the majority view is that unilateral humanitarian intervention is illegal under existing law. Council authorization is called for any use of force; neither sufficient state practice nor opinio juris is found to exist to constitute a customary rule on unilateral humanitarian intervention. 34

The argument that the Council is not entitled under the Charter to authorize humanitarian operations has been expressed very rarely. Some commentators hesitate to define intrastate violence as threats to international peace 35 and some assert that the Council is not authorized to intervene in civil wars. 36 Though not

HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 107-8, 163, 194 (University of Pennsylvania Press, 1996).

31 See Kritsiotis, supra note 30.
32 Id. at 358.
36 Mary E. O’Connell, Continuing Limits on UN Intervention in Civil War, 67 INDIANA LAW JOURNAL 903 (1992).
much reflected, the argument raises important considerations regarding the power of the Council. The matter will be examined further in Part IV.

III. THE CONCEPT OF RESPONSIBILITY TO PROTECT

The difficulties in reconciling state sovereignty and the use of force for the protection of human rights, in conjunction with legitimizing unauthorized humanitarian operations, led the then-UN Secretary-General Kofi Annan to ask “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systemic violations of human rights that offend every precept of our common humanity?”37

In response, the International Commission on Intervention and State Sovereignty established by the Canadian Government issued a report, The Responsibility to Protect, in 2001.38 The Commission developed the concept of responsibility to protect to overcome the difficulties posed by humanitarian intervention. By defining sovereignty as responsibility instead of control,39 the Commission proposed an alternative to humanitarian intervention: “…the language of past debates arguing for or against a ‘right to intervene’ by one state on the territory of another state is outdated and unhelpful. We prefer to talk not of a “right to intervene” but of a “responsibility to protect.”40

Under this new approach, the responsibility to protect people against large-scale human rights violations is conferred upon both national governments and the international community as a whole. The primary responsibility rests with the states as sovereign entities.41 However, when the sovereign is unable or unwilling to fulfill its obligation, or is itself the perpetrator, then the responsibility to protect shifts to the international community,42 which is

39 Id., para. 2.14.
40 Id., para. 2.4.
41 Id., para. 2.30.
42 Id., paras. 2.29, 2.31.
entitled to use force if necessary. The Council is held responsible to halt massive human rights atrocities, and it is stated that “the Security Council should be the first port of call on any matter relating to military intervention.” Nevertheless, action through the General Assembly and regional organizations is also propounded, in case the Council cannot act. Unilateral action without any institutional authority is referred to as well, calling for an assessment on “where lies the most harm.” Besides the responsibility to react, the concept is defined to cover the responsibility to prevent and rebuild as well.

This concept met with approval in the report issued in 2004 by the High-Level Panel on Threats, Challenge and Change that was established by Annan:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

In the report, the Council is considered to be entitled to authorize humanitarian operations.

Annan himself released a report in 2005, affirming the norm of collective responsibility, and recognizing military intervention in humanitarian crisis under Council authorization, if peaceful measures prove to be insufficient.

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43 ICISS Report, para. 4.10. The Commission developed five criteria for legitimacy of humanitarian intervention: just cause, right intention, last resort, proportionality, and a reasonable prospect of success. Id., para. 4.18, 4.32-48.
44 Id., paras. 6.28, 6.37.
45 Id., paras. 6.29-31, 6.35.
46 "It is a real question...where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by." Id., para. 6.37.
47 Id., para. 2.32.
49 Id. “...The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has.” Id., para. 198. “[The Security Council] can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a “threat to international peace and security,” not especially difficult when breaches of international law are involved.” Id., para. 202.
The responsibility to protect was also incorporated in the 2005 World Summit Outcome adopted by the General Assembly. Paragraphs 138 and 139 stated:

138. “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity….”

139. “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations…. [W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations.”

The provisions were reaffirmed by Council Resolution 1674 on the protection of civilians in armed conflicts; and by another General Assembly Resolution following Secretary-General Ban Ki-moon’s report on the matter. The concept of responsibility to protect reflects the increasing sensitivity towards massive deaths in internal conflicts, as well as a need to find a way to stop them. Although none of the instruments mentioned are legally binding, the World Summit Outcome reflects international consensus on collective responsibility to protect populations from large-scale human rights violations and on the power of the Council to authorize humanitarian interventions. However, it is also stated that the Council is not bound to intervene; the measures to be taken will be determined on a case-by-case basis. Furthermore,
what will be done in case of Council inaction has not been clarified. The concept seems to be a restyling of the concept of humanitarian intervention with a stronger emphasis on collective responsibility. For now it remains a political commitment without legal force.

IV. THE POWER OF THE SECURITY COUNCIL TO DETERMINE THREATS TO INTERNATIONAL PEACE AND SECURITY

Although the Council is assumed to be empowered to authorize use of force for humanitarian purposes, this is not uncontroversial. One may ask whether it is legitimate to take measures against intrastate violence under Chapter VII, which regulates international conflicts. For enforcement measures to be taken, the Council shall first determine under Article 39 that the situation concerned constitutes either a threat to, or breach of, peace or act of aggression. The Charter does not mention which acts constitute a threat to the peace; it is under the Council’s discretion to decide. Accordingly, it has been asserted that “a threat to the peace seems to be whatever the Security Council says is a threat to the peace.”

Since the 1990s, the Council has defined a number of intra-state conflicts involving large scale violence as threats to the peace, without referring to cross-border effects.

55 The permanent members of the Council are called not to use their veto power for decisions authorizing humanitarian operations, “where their vital state interests are not involved.” See ICISS Report, para. 8.29; High-Level Panel Report, para. 256; Ban Ki-moon Report, para. 61.


The discretionary power of the Council is based on the fact that it is established as a political body. Its main purpose is to maintain or restore international peace and security; therefore it is vested with broad powers under Chapter VII to be able to take effective measures. It is not a judicial body acting under precise rules, but a political body, whose main purpose is to preserve peace. The *travaux préparatoires* of the Charter indicates that the definition of threat was not intended; proposals to set up a mechanism for judicial review of Council decisions were rejected, in order to not “place it in a legal strait-jacket.”

The political character of the Council has led some commentators to argue that it has almost unlimited powers. Kelsen contends that the Council, when acting under Chapter VII, can adopt measures which are not in conformity with existing international law, since its main purpose is to preserve peace. Similarly, some argue that a broad definition of threats conforms to the objects and purposes of the Charter; the fact that the Council is exempt from the obligations of states such as the use of force or the principle of non-intervention is the *raison d’être* of the collective security system. The Council is only


60 Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* 9-13, 19 (Martinus Nijhoff Publishers, 1994) (stating that the Charter system was based on the independence of the bodies, entitled to interpret the matters in which they are specialized.)


62 Stefan Talmon, *The Security Council As World Legislature*, 99 American Journal of International Law 175, 181 (2005); see Niels M. Blokker and Marieke Kleibor, *The Internationalization of Domestic Conflict: The Role of the UN Security Council*, 9 Leiden Journal of International Law 7, 15-16, 34 (1996)(for the view that the distinction between internal and international disputes is flexible and can be redefined by the Council); Cedric E. Evans, *The Concept of “Threat to Peace” and Humanitarian Concerns: Probing the Limits of Chapter VII of the UN Charter*, 5 Transnational Law and Contemporary Problems 213, 224 (1995)(arguing that there is a link between violation of human rights and preservation of international peace, which is stated by Article 55 of the Charter);[Article 55: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations...the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all....”]

limited by the obligation to not “impose a particular means or terms of settlement of a dispute…upon a State, or permanently allocate rights or divest it of rights it might enjoy,” such as territorial integrity, self-determination, and respect to human rights and humanitarian law. Frowein and Krisch argue that the Council is limited by the Charter only on procedural matters but not substantive ones, due to the fact that the measures employed under Chapter VII are considered to be temporary. They contend that the Council is not limited by any principles when making a decision, but only when applying those decisions and during the peaceful settlement of the dispute, when the crisis is over. The Council is bound to obey the law of human rights and humanitarian law when applying the decisions and should comply with the principles of international law concerning the peaceful settlement of disputes. For Wellens, the Council has made an authoritative interpretation of the concept of threat that may have initiated or established a consensus giving rise to obligation erga omnes.

Despite the proposals of unfettered powers, the majority view is that discretionary authority must be exercised within Charter limits and determinations under Article 39 are not exempt. As the ICJ stated in an advisory.

64 Id. at 73, 74-90.
65 Jochen A. Frowein and Nico Krisch, Introduction to Chapter VII, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, Vol I 712-719 (Bruna Simma, 2nd. ed., Oxford University Press, 2002). The writers state that the enlarged definition of threat leads to the conclusion that “a threat to the peace exists when…a danger of the use of force on a considerable scale arises. This definition would encompass internal conflicts, but would exclude situations of concern that are either unconnected to a particular crisis or do not involve the danger of forcible action.” Id. at 726.
66 Wellens, supra note 11, at 69; Robert Cryer, The Security Council and Article 39: A Threat to Coherence?, 1 JOURNAL OF CONFLICT AND SECURITY LAW 161 (1996)(arguing that the Charter has been re-interpreted in time and the requirement that threats be international is being eroded).
Concerning the power of the Council to invoke Chapter VII, the Appeals Chamber in the Tadic case stated:

It is clear...that the Security Council...exercises a very wide discretion under [Article 39.] But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large....[N]either the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law).

[T]hreat to the peace is more of a political concept. But [that] the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the Purposes and Principles of the Charter.69

Obviously, an organ can only exercise the authority granted to it by the constituent instrument; therefore actions of the Council are subject to limitations under the Charter. The first limitation related to this subject is that the Council is entitled to deal with international threats. As mentioned above, Article 24(1) states that the Council is given primary responsibility for the maintenance of international peace and security; under Article 39, the Council is entitled to decide measures with respect to international threats. This is also reflected in some other articles in Chapter VII and in Article 1(1) as one of the purposes of the organization. Literal interpretation implies that the Council is not entitled to intervene in domestic conflicts unless the state concerned gives consent or an intrastate situation has transboundary effects disturbing international/regional peace and security. Chapter VII measures which rule out the principle of nonintervention can only be applied in case of events with international repercussions.

68 Admission of a State to the United Nations (Charter Art. 4), Advisory Opinion, 1948 ICJ Reports 64 (1948).
69 Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Appeals Chamber, IT-94-1-AR72 (2 October 1995), para. 28-29.
The second limitation on Council action is contained in Article 24(2), which states “the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” Chapter I of the Charter, Purposes and Principles, is composed of Articles 1 and 2, stating that the sovereign equality of members, non-intervention, the peaceful settlement of disputes, the non-use of force, self-determination, the promotion of human rights, and good faith are among the purposes and principles of the organization. Although some of the paragraphs address individual members or the organization specifically, it would be factitious to think that these principles are either just for individual members or just for the organization. The rule of treaty law to interpret treaty terms in good faith and in line with the object and purpose of a treaty would suggest that, under Chapter I, the Council is bound to act in good faith, respect the sovereign equality of all members, to not intervene in domestic matters without a genuine threat to international peace, to prefer peaceful measures as much as possible, and to not attempt measures that would violate human rights and the principle of self-determination. The opposite interpretation would release the Council from all these and would mean that the Council has arbitrary powers.

It seems that the drafters intended to leave the articles ambiguous in order to be able to meet a wide variety of situations. However, since Article 24(2) aims to restrict the actions of the Council, it is unreasonable to assert that Articles 1 and 2 do not apply to the Council decisions made under Chapter VII, including the determination of threats to peace. The fact that a judicial review mechanism was not established meant that a great deal depends on the Council’s good faith. However, the non-existence of a control mechanism does not release the Council from Charter obligations.

As a third limitation, the Council is bound to respect principles of international law. Article 1(1) notes that one of the aims of the organization is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace

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70 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969), art. 31(1).
Although one commentator has claimed that the requirement to respect international law is for peaceful measures only,\(^{71}\) it would be unwise to state that the Council actions under Chapter VII are not subject to the principles of international law. These principles refer to the basic tenets of international law, some of which were stated as the purposes and principles of the organization. They have been reflected in several international instruments, and most of them have turned into customary law.\(^{72}\) General principles of law, such as good will, may also be included.

The above analysis indicates that the Council is not entitled to determine intrastate conflicts to be international threats unless there are transboundary effects. Although the definition of peace and threat may change over time, reinterpretation of articles shall be compatible with the object and purpose of the treaty. The UN Charter regulates interstate relations; it includes nothing calling for use of force for the protection of human rights. The intervention practice of the Council so far cannot also be considered to be subsequent practice allowing reinterpretation of the Charter. Besides the questionable position of the interventions made under Charter law, Council resolutions on leading cases has made it clear that military intervention should not constitute precedents. Resolutions authorizing military intervention in Somalia, Rwanda and Haiti underlined the ‘unique character of the situation…requiring an exceptional response.’\(^{73}\)

Some commentators contend that unfettered powers to determine threats might lead to the abuse of power. Franck states that the Council shall act only when there is a “bona fide threat” to international peace and security;\(^{74}\) for Brownlie, “a determination of a threat to the peace…cannot be used as a basis for action which…is for collateral and independent purposes, such as the

\(^{71}\) Frowein and Krisch, \textit{supra} note 59, at 710.


\(^{74}\) Thomas Franck, \textit{FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS} 221 (Oxford University Press, 1995).
overthrow of a Government or the partition of a State.” Judge Gerald Fitzmaurice, in his dissenting opinion in the Namibia Advisory Opinion said:

[The] limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended…[such as where there] was no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes…

Some writers hesitate to define intrastate violence as threats to international peace; the broad definition of threats has been criticized on some cases. From a different standpoint, Murphy states that “the effects of an expanded role for the Security Council in addressing threats to the peace may not easily be limited to actions by that organ” and enlarge the scope of action of states for


77 See Østerdahl, supra note 35; Ayoob, supra note 35, O’Connell, supra note 36.

78 For criticisms related to Rhodesia, see Charles G. Fenwick, When Is There a Threat to the Peace? Rhodesia, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 753 (1967); Rosalyn Higgins, International Law, Rhodesia and the UN, 23 THE WORLD TODAY 94 (1967); for the measures against Libya related to non-extradition of alleged terrorists, see Brownlie, supra note 67, at 225; for Libya and Iraq in Gulf crisis, see Franck, supra note 29, at 231-37 and 241-42, respectively.
unilateral intervention and self-defense.\textsuperscript{79} He also points out the possible revival of the era of the ‘just war’, based on loose normative principles.\textsuperscript{80}

It is clear that unfettered powers to determine threats would render the principle of non-intervention meaningless. Council members may find threats, even if there is none, when they are determined to apply measures against a certain state.\textsuperscript{81} Humanitarian intervention could be an easy way to overthrow governments by inciting the rebels, or creating rebels, and causing civil strife. It might lead to serious abuse of power on the plea of humanitarian intentions. This would create a slippery slope on which it would be difficult to sustain the purposes and principles of the Charter. The fact that the Council has not responded consistently to humanitarian crises warrants the conclusion that humanitarian considerations are not always at stake.\textsuperscript{82}

\section*{V. MEASURES AGAINST LIBYA}

The Council successively adopted two resolutions at the beginning of the Libyan conflict. In Resolution 1970, the Council applied Article 41 measures without making an explicit determination that the situation in Libya constituted a threat to international peace and security.\textsuperscript{83} Concerned with heavy civilian casualties and violations of humanitarian law, the resolution imposed an arms embargo, along with a travel ban and asset freeze on some state officials.\textsuperscript{84} It also referred the situation to the International Criminal Court for the prosecution of violations of humanitarian law.\textsuperscript{85} Resolution 1973 stated that the situation in Libya “continues to constitute a threat to international peace” due to the failure of the Libyan authorities to cooperate and authorized member states to take all necessary measures to protect civilians.\textsuperscript{86} Although concern for the plight of refugees was expressed in the preamble, the Council did not mention any

\begin{itemize}
\item \textsuperscript{79} Murphy, supra note 30, at 294.
\item \textsuperscript{80} Id. at 293.
\item \textsuperscript{81} For example, defining non-extradition of suspects of terrorist acts by Libya as a threat to international peace raises serious legitimacy concerns.
\item \textsuperscript{82} Though the Council assumed the role of humanitarian intervention, it has not applied military measures in some violent domestic conflicts such as Sierra Leone and Chechnya; and did not take effective measures in Bosnia, East Timor and Sudan.
\item \textsuperscript{84} Id., paras. 9, 15 and 17.
\item \textsuperscript{85} Id., para. 4. There has been discussion as to where this early referral to the ICC may have create more problems.
\end{itemize}
transboundary effects as justification for the sanctions. Following Operation Unified Protector carried out by NATO forces led to the downfall of the Qadhafi regime.

In the Libyan conflict, large-scale civilian killing and violations of humanitarian law were considered to be threats to international peace, so the Council authorized the use of force even in the absence of serious cross-border effects. The above analysis has indicated that the Council is bound by the nonintervention principle where there are no threats to or breaches of international peace. Therefore, the Council authorization to use force to intervene in the Libyan conflict is *ultra vires* under current Charter law.

**CONCLUSION**

In general, the international community has acquiesced to the use of force authorized by the Council to end large-scale human rights violations and, to some extent, even the unauthorized ones. Massive deaths and severe human suffering have justified these interventions. Defining humanitarian crises as among the threats to international peace was a reflection of the increased concern on human rights violations. Likewise, the consensus on the responsibility to protect is an indication of the feeling of collective responsibility to halt human rights atrocities. However, the use of force against a sovereign state where there are no international repercussions has raised claims of *ultra vires* action on the part of the Council.

Despite the views of unfettered discretionary power for the sake of efficiency, the majority view believes that the Council is not unlimited when discharging its duties under Chapter VII. There are three limitations imposed by the UN Charter: first, the Council is entitled to deal with threats to international peace; second, it is bound to respect purposes and principles of the Charter; and third, it shall comply with the principles of international law. All indicate that the Council is not entitled to intervene in domestic conflicts when there are no transboundary effects. In light of this analysis, the Council authorization to use force to intervene in the Libyan conflict is *ultra vires*. Unlimited Council powers to determine threats would render the principle of non-intervention irrelevant altogether. Humanitarian intervention as a response to civil wars would create a loose normative stand, where it is difficult to preserve the true purposes and principles as stated in the Charter.

However, this is not to say that international community should ignore mass killing. Developments in communications technology and the interdependence in international relations have compelled the international community to be more responsive to domestic events. Thousands of civilian deaths and displaced
persons are no longer a thing that the international community should bear. Prohibition of war crimes and the right to life have already achieved the status of *jus cogens*. Since the founding of UN, more people have died in intrastate conflicts than in interstate wars;87 violence by governments against rebels is one of the most important causes of massive deaths, as has been observed in the conflicts of the Arab Spring.

In light of the above analysis, it seems that there is a need to make a conceptional distinction between threats to international peace and humanitarian crisis, as well as to establish a mechanism as part of the UN to intervene in every case where massive deaths are taking place. Such a mechanism would greatly reduce the possibility of an abuse of power and would prevent leaving humanitarian crises to the mercy of the Council, a political body. Although some human rights have achieved the status of *jus cogens*, rights without remedies are not rights at all. The new mechanism would mean a step further in the centralization of the international community, which seems inevitable to enforce human rights.

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