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Revisiting the Principle of Non-Interference in Post-Cold War Period: The UN Security Council Resolutions under the Chapter 7 Powers of the UN Charter

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The article addresses the principle of non-interference within the scope of the changes in the post-Cold War period with an emphasis of the break of its close association or even identification with the principle of neutrality. It seeks to find the answers to such questions as What are the matters that are essentially within the domestic jurisdiction of states?, Who decides whether or not an interference is justified in a particular case?, What are the limits of the activities undertaken by the Security Council, In what specific situations can coercion be applied?. The analysis is based on the Security Council resolutions adopted either implicitly or explicitly on the basis of Chapter 7 powers of the UN Charter. The article is particularly focused on the extensive peace operations of the UN, termed international interim administrations. It ends up revealing those situations or problems that, though not explicitly mentioned, trigger gross violations of human rights mostly referred in Security Council Resolutions.

Keywords
non-interference, domestic jurisdiction, UN Charter, Security Council, Chapter 7 powers

Introduction

The principle of non-interference is one of the fundamental principles of international law, enshrined in the UN Charter and underpinned in state practice and in customary international law. Meanwhile, it is one of the hardly defined principles of the international legal system due to the changes in its content as a result of the developments in international relations and international law. The most influential factor causing these changes was the attempt of genocide in several territories in the 1990s (Rwanda, Srebrenica, Somalia), which

revealed the dangers of identification of the principles of non-interference and neutrality. Among other causes were the growing number of self-determination conflicts, the struggle for the formation of a new world order in the 1990s, the shifts in the concept of "peace" (the dichotomy of positive and negative peace) etc.

The ambiguity of the situations constituting threat to international peace and security and, hence, the large discretionary power of the Security Council in determining those situations is open to various controversies and oftentimes becomes the subject of academic debates. Moreover, the Security Council is often blamed for being subject of no legal restrictions referring to its Chapter 7 powers enshrined in the UN Charter.

If in its early practices the Security Council mostly refrained from explicitly referring to Chapter 7, and the principle of non-interference was mostly associated with that of neutrality, since post-Cold war period Chapter 7 powers have been invoked not only for protective ends but for even the establishment of international interim administrations thereby endowing the Security Council with quasi-absolutist powers. Moreover, the majority of international documents as well as academic literature on non-interference address the practice of separate states, while there are few references to international organizations which starting from the 1990s are the major actors in this field.

Thus, the article attempts to address the theoretical framework of the principle of non-interference on the level of international organizations; seeks to narrow down the broad wording with regard to the related concepts, such as "threat to peace", "breach of peace" and "acts of aggression" through the analysis of the Security Council resolutions adopted under Chapter 7. Further it elaborates on three questions that are crucial within the scope of the non-interference principle focusing primarily on their dynamics in post-Cold War period: *What are the matters that fall essentially under the domestic jurisdiction of states?*, *Who decides whether or not an interference is*

justified in a particular case?, In what specific situations can coercion be applied

The Content of the Principle of non-Interference in International Law

The principle of non-interference was first introduced in the Treaty of Westphalia (1648), and further included in the French Constitution (1793 French Constitution, Article 119). Although the first attempts to define the principle of non-intervention were made as early as the 18th century, its content and scope continue to be the subject of debates.

In the first half of the 20th century, one of the most notable documents setting out the principle of non-interference was the Montevideo Convention on the Rights and Duties of States (1933), Article 8 of which states that "No State has the right to interfere in the internal or external affairs of another State"[1]. The principle was later reinforced in the provisions of the UN Charter on the maintenance and restoration of international peace and security.

In addition to the UN Charter, the principle of non-interference is also enshrined in a number of other documents of international law, among which the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (1965), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), and the Helsinki Final Act (1975).

The Declaration of 1965 states that "…armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned… Every State has an inalienable right to choose its political, economic, social and cultural systems, without

[1] Montevideo Convention on the Rights and Duties of States, https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf.

interference in any form by another State"[2]. At the same time, the final provision of the Declaration states that "Nothing in this Declaration shall be construed as affecting in any manner the relevant provisions of the *Charter of the United Nations* relating to the maintenance of international peace and security, in particular those contained in *Chapters VI*, *VII* and *VIII*".

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970) reaffirms the above provisions, incorporating the principle of non-interference in matters within the domestic jurisdiction of the States by the other Member States among the seven principles relating to friendly relations and cooperation between States[3].

The Helsinki Final Act states that "the participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations…They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State"[4].

It is noteworthy that all the above-mentioned documents refer to the principle of non-interference in internal affairs exclusively *at the level of states*, not that of international or regional organizations. The only exception is the UN Charter, Article 2 of which states, among others, that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require

[2] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 21 December 1965, http://www.un-documents.net/a20r2131.htm.
[3] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, http://www.un-documents.net/a25r2625.htm.
[4] Conference on Security and Co-Operation in Europe Final Act, Helsinki 1975, https://www.osce.org/helsinki-final-act.

the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll" (UN Charter, Article 2 (7)).. According to Article 39 of Chapter 7 of the UN Charter, "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" (UN Charter, Article 39). Moreover, all Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security (UN Charter, Article 43 (1)).

At the same time, the content of Article 2 (7) of the UN Charter raises a number of questions that need further elaboration on the basis of the UN practice and the analysis of the Security Council Resolutions, i.e. *What are the matters that are essentially within the domestic jurisdiction of states?*, *Who decides whether or not an interference is justified in a particular case?, In what specific situations can coercion be applied?*

What are the matters that fall essentially within the domestic jurisdiction of states? First, it should be noted that not only the UN, but the UN members and non-members under Article 35 of the Charter could bring any dispute or any situation to the attention of the Security Council or of the General Assembly[5]. But as Gilmour notes, this article in no way enables the Security Council to deal with matters that remain essentially within the domestic jurisdiction of states[6]. If the Security Council, after the investigation provided for in Article 34,

[5] UN Charter, Article 35, https://www.un.org/en/charter-united-nations/

[6] **Gilmour D.,** Article 2(7) of the United nations Charter and the Practice of the Permanent Members of the Security Council, *Australian Yearbook of International Law*, 1967, **153,** 3, 153-210.

comes to the conclusion that the dispute or situation does or is likely to endanger the maintenance of international peace and security, then the matter in question has ceased to be essentially domestic. But if it decides that there is no dispute or that the dispute in question does not endanger the maintenance of international peace and security, then the Council would have to declare itself incompetent. Under Article 36 (1) states that the Security Council may, at any stage of a dispute or a situation of the nature referred to in Article 33, recommend appropriate procedures or methods of adjustment[7]. And again matters which were perceived to be domestic could not be regarded under this article. The Council is given certain powers of recommendation under this article, but they refer to situations which are clearly of an international character.

The term "domestic jurisdiction" is not new to the theory and practice of international law. It dates back to the League of Nations Covenant. The conception signifies an area of internal state authority that is beyond the reach of international law[8]. According to the Resolution of the Institute of International Law of April 30, 1954, domestic jurisdiction embraces all matters falling within a state's competence and not limited by international law[9]. The definition is obviously too broad and does not reflect the shift in customary international law on domestic matters. The UN Charter as well does not clearly define the criteria determining issues or situations within domestic jurisdiction of states. Some scholars, noting that the drafters of the Charter had deliberately refrained from giving a juridical meaning to the expression have pointed out that whether a matter falls within a state's domestic jurisdiction rests on moral and political judgments[10].

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[7] UN Charter, Article 36.

[8] **Bernhardt R. and Bindschedler R.,** Encyclopedia of Public International Law, Netherlands, Elsevier Science Publishers, 1987.

[9] **Verdross A.,** The plea of domestic jurisdiction before an international tribunal and a political organ of the United Nations, *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*, 1968, 28, 33-40.

[10] **Ahmed K.,** The domestic jurisdiction clause in the United Nations Charter: A historical view, *Singapore Yearbook of International Law*, 2006, **1,** 10, 175-197.

There are several approaches as to the boundaries of "domestic jurisdiction of sates". The so-called "essentialist" theory of domestic jurisdiction holds that some matters by their very nature fall within the exclusive jurisdiction of states and they are outside the reach of international law. This view holds that domestic jurisdiction does not depend on the developments in international law; it is not relative, but fixed as long as we continue to live in a world of sovereign states[11]. Thus, here we deal with a classical (Westphalian) approach to sovereignty under which it is an absolute and unchanging characteristic of a state and implies a supreme authority over the territory[12]. An example of this might be to say that the way a government treats its citizens within its territory is a matter of domestic jurisdiction. But currently the proposition that human rights are no longer a matter of exclusive jurisdiction is indisputable[13]. The recent developments in the international law on human rights shows that if a state attempts to commit a genocide against a minority groups of its nationals or torture or enslave any of its nationals even within the boundaries of its territory that is no longer viewed a purely domestic problem. Moreover, the idea of *interference for protective ends* has been conceptualized by the International Commission on Intervention and State Sovereignty (ICISS) in the report "The Responsibility to Protect"[14]. It implies that in instances where the state does not have the capacity or power to meet the principle of "responsibility to protect" international actors may interfere in domestic matters. The principle went so far as to be included in the Outcome document of the high level meeting of the General Assembly and was later explicitly referred to in the UN SC resolution 1674[15] in

[11] **Farer T.,** Beyond Sovereignty: Collectively Defending Democracy in the Americas, US, John Hopkins University Press, 1996.
[12] **Scharf M.,** Earned Sovereignty: Juridical Underpinnings, *Denver Journal of International Law and Policy*, 2004, **3,** 31, 273-287.
[13] **Farer T.,** Op. cit.
[14] Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, International Development Research Centre, 2001.
[15] UN Security Council Resolution 1674 (2006), 'Protection of civilians in armed conflict', 28 April, 2006.

connection with the prevention of armed conflicts and their recurrence.

The second approach can be termed "relative" theory which is predominant in academic debates over the issue. On the core of this theory is that the boundaries of domestic jurisdiction are coextensive with the rules of international law[16]. This approach first appeared in the Covenant of the League of Nations, Article 15 (8) of which stated "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement"[17]. The idea has been elaborated in the advisory opinion of the International Court of Justice on the Nationality Decrees in Tunis and Marocco[18]. It stated that "whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations"[19]. The relativity equally depends on the progressive development of international law. This has been manifested in a number of cases under the review of International Court of Justice. For instance, with regard to the Anglo-Norwegian Fisheries Case, the Court stated, that "although it is true that the act of delimitation [of territorial waters] is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law"[20]. The principle was also noted in the NOTTEBOHM CASE, where the International Court of Justice remarked that while a state may formulate such rules as it wished regarding the acquisition of

[16] **Bernhardt R. and Bindschedler R.,** Op. cit.
[17] The Covenant of the League of Nations, https://avalon.law.yale.edu/20th_century/leagcov.asp.
[18] *Nationality Decrees Issued in Tunis and Marocco (French Zone) on November 8th 1921*, Advisory Opinion, 7 February 1923, https://www.refworld.org/cases,PCIJ,44e5c9fc4.html.
[19] Ibid.
[20] *Anglo-Norwegian Fisheries Case*, Order of November 9, 1949, https://www.icj-cij.org/files/case-related/5/005-19491109-ORD-01-00-EN.pdf.

nationality, the exercise of diplomatic protection upon the basis of nationality was within the purview of international law[21].

The second approach seems more convincing. It can be reformulated as such: *There are no problems that are purely internal in nature. Issues that are subject to the regulation of States by international law may in time become the subject of international regulation as a result of the developments in international law (mostly emergence of new norms of customary international law) and partially of developments in international relations.*

Who decides whether or not an interference is justified in a particular case and what are the limits of the actions undertaken? At the San Francisco conference, a number of states proposed that the International Court of Justice become the body that would decide the matters within domestic jurisdiction of states[22]. However, the proposal was rejected, and currently this function is fully entrusted to the Security Council.

The UN Security Council is a unique institution in several dimensions. It can exercise the legislative, executive and judicial powers, is limited to a narrow range of legally binding checks and balances, has wide powers for the maintenance of international peace and security, is the only body empowered to exercise force, and its decisions are binding on UN member states no matter their direct consent or obligations under other agreements. Drawing upon the large discretionary powers of the Security Council, many researchers have labeled some of its actions as *ultra vires* and pointed to the lack of binding, legal oversight mechanisms[23]. The widespread belief that the measures adopted by the Security Council under Chapter 7 of the UN Charter have no legal restriction is often based on the

[21] **Onyekachi D.,** The Shrinking Scope of the Concept of Domestic Jurisdiction in Contemporary International Law, *SSRN Electronic Journal,* 2011, https://ssrn.com/abstract=2137959 or http://dx.doi.org/10.2139/ssrn.2137959.

[22] **Ahmed K.,** Op. cit., 175-197.

[23] **Whittle D.,** The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter Vii Action, *The European Journal of International Law*, 2015, **26**, 3, 671-698.

interpretation of Articles 25 and 103 of the Charter. According to Article 25 of the UN Charter, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter", while Article 103 states that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

However, the interpretation that the aforementioned articles of the Charter endow the UN with unlimited authority is misleading for the following reasons:

1. According to Article 24 of the UN Charter, all decisions and actions of the UN Security Council shall be consistent with the principles and objectives of the UN as set forth in Articles 1 and 2 of the Charter (Ibid, Article 24). They create significant constraints on the implementation of UN operations, ensuring an effective and peaceful exit from external governance.
2. Respect for jus cogens legal norms (an imperative, peremptory norm). Jus cogens norms are enshrined in Articles 53 and 64 of the Vienna Convention and address those fundamental and inviolable rights and obligations which cannot be circumvented by any agreement. Therefore, the Security Council is also obliged to refrain from violating jus cogens norms when applying coercive measures under Chapter 7 of the UN Charter.

Some researchers exhaust the list with the International Humanitarian Law (IHL)[24] which can be defined as "those international rules, established by treaty or custom, which are intended to solve humanitarian problems directly arising from international and non-international armed conflicts and which for humanitarian reasons, limit the right of the parties to the conflict to use methods and means of warfare of their choice or protect persons and property that are or

[24] **Zwanenburg M.,** Accountability of Peace Support Operations, Leiden and Boston, Martinus Nijhoff Publishers, 2005.

may be affected by the conflict"[25]. However, it should be mentioned that the UN is not a party of either Geneva (1949) or Hague conventions (1907). Therefore, unlike the occupation, the documents of International Humanitarian Law can be applicable to the UNSC actions only when it voluntarily assumes the principles and norms of a particular treaty of International Humanitarian Law. For instance, in the scope of its peacekeeping operations, the UN has undertaken to respect the principles of humanitarian law. This has been officially fixed in the UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law[26], which recognizes that the fundamental principles of humanitarian law are applicable to the UN coercive measures. This has also been reflected in the "Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations"[27]. It stipulates that any UN peacekeeping mission must adhere to and respect the fundamental principles of international conventions relating to military actions, including the four Geneva Conventions of August 12, 1949 and its Additional Protocols (June 8, 1977).

It is noteworthy that the General Assembly has also attempted to use the powers under Chapter 7, which has no much legal grounding. In 1966, the UN General Assembly recognized the South African rule over Namibia as illegitimate and formed the Namibian Council, the main purpose of which was to prepare the territory for the independence, ensuring the highest level of popular participation in that process[28]. However, the Republic of South Africa prevented the

[25] **Gasser H.-P.,** International Humanitarian Law: An Introduction, Berne, Haupt, 1993.
[26] UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law. 6 August 1999. ST/SGB/1999/13, http://www.refworld.org/docid/451bb5724.html.
[27] Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations: Report of the Secretary General, May 23 1991, http://dag.un.org/handle/11176/184843.
[28] **Udogu I.,** *Liberating Namibia: The Long Diplomatic Struggle between the United Nations and South Africa*, North Carolina, Jefferson Mcfarland, 2012.

Namibian Council from carrying out its functions, calling into question the legal basis for its establishment. Only in the 1980s, it became possible to implement the Namibian interim administration on the basis of the Security Council Resolution with a reference to Chapter 7 powers. The scope of the activities of the General Assembly is limited in that it cannot initiate actions under Chapter 7 of the UN Charter, as they are exclusively within the competencies of the Security Council. Article 11 (2) of the UN Charter states that "the General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12…"[29]. The latter stipulates that "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests"[30]. Thus, the General Assembly may advise the Security Council, the State concerned or both on these matters. It is also noted that any matter in regard to which practical measures should be applied by the General Assembly shall refer to the Security Council before or after its discussion. Therefore, it can be stated that the activities of the General Assembly within the framework of international peace and security are limited to the discussion of the issues on agenda and the recommendations on them.

Chapter 7 Powers of the Security Council

Since 1987, the UN Security Council has adopted more than a hundred resolutions legally binding on member states. Most of them have been issued under Chapter 7 of the UN Charter, thereby authorizing the Security Council to counteract the threats to peace,

[29] UN Charter, Article 11 (2).
[30] UN Charter, Article 12 (1).

breaches of peace and acts of aggression[31]. The interference in domestic matters either explicitly or implicitly mostly takes place within the framework of Chapter 7 of the UN Charter. According to Article 39 of Chapter 7, "the Security Council must first 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". But this decision must also be approved by the majority vote of the fifteen members and no negative vote of the five permanent members. This is provided in Article 27 of the UN Charter which reads that "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members"[32]; and that "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting[33]. When the Security Council makes such a determination, it enjoys discretion in the choice of measures it can apply. Under Article 41, it "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations"[34]. In case the non-military means are inadequate, Article 42 empowers the Security Council to use force as may be necessary to maintain or restore international peace[35].

[31] **Ciechanski J.,** Enforcement Measures under Chapter VII of the UN Charter: UN Practice after the Cold War, *International Peacekeeping,* 2007, **3**, 4, 82-104.
[32] UN Charter, Article 27(2).
[33] UN Charter, Article 27 (3).
[34] UN Charter, Art. 41.
[35] UN Charter, Art. 42.

In the early practice of the Security Council, resolutions have never expressly invoked Chapter 7, and it seemed that the Council simply took decisions. Whether it was acting under Chapter 7 became clear from the context and from the wording in the decisions. For instance, resolution 54 (1948) recognized that the situation in Palestine was a threat to international peace and security and ordered a cessation of hostilities using articles 39 and 40. Although the wording "Acting under Chapter VII" was never mentioned, the provisional measures contained in the Chapter have been used. Similarly, in Resolution 83 (1950), the Council authorized the UN force to respond to the attack on South Korea by North Korea, after having determined the existence of a breach of the peace in resolution 82 (1950). Again, there was no explicit reference to Chapter 7, but it was clear that the reference to threat to peace, breach of peace or aggression can only be made under Chapter 7 of the UN Charter[36].

The number of Chapter 7 resolutions significantly increased in the 1990s. Most of post-Cold War authorization resolutions, starting with Resolution 678 (1990) explicitly referred to Chapter 7, either at the end of the preamble or in the relevant paragraph of the resolution. It should be noted that authorization resolutions have mostly been adopting without receiving the consent of "host state", though in some cases the consent has been given by the government in power (Albania) or the government in exile (Haiti)[37]. On 29 November 1990, the Security Council passed Resolution 678 which demanded Iraq's withdrawal from Kuwait until 15 January 1991 and empowered states to use "all necessary means" to force Iraq out of Kuwait after the deadline. The Resolution requested Member States to keep the Council informed on their decisions. This was the legal authorization

[36] Security Council Action under Chapter VII: Myths and Realities, Security Council Report: Special Research Report, 23 June 2008, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Research%20Report%20Chapter%20VII%2023%20June%2008.pdf.

[37] **Blokker N.,** Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions the Able and Willing', *European Journal of International Law (EJIL),* 2000, **11,** 3, 541-568.

for the Gulf War, as Iraq did not withdraw by the deadline[38]. Thirteen years later another unprecedented case of the use of Chapter 7 powers also took place with regard to the same territory. In 2003, the UN Security Council adopted Resolution 1483 on the situation between Iraq and Kuwait, recognizing the specific responsibilities and obligations of the US and the UK as occupying powers. Paragraph 4 of the resolution called upon the Authority (the US and the UK) to "promote the welfare of the Iraqi people *through the effective administration of the territory*, including in particular "working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future''[39]. The case was unprecedented in the fact that no previous Security Council resolution endowed a separate state or a group of states with an authoritative function over the other state under Chapter 7. The administration of territories under Chapter 7 powers has been under the exclusive competence of the Special Representative of the UN Secretary-General, by the request of the Security Council addressed to Secretary-General in respective resolutions (e.g. SC Res. 1037 (1996), SC Res. 1244 (1999), SC Res. 1272 (1999)).

Thus, Chapter 7 powers have been also invoked by the Security Council for policing and administrative purposes: to authorize UN missions to perform police functions within a sovereign state; to provide effective protection for UN and diplomatic missions in countries where they are stationed; and to establish transitional administrations in war-torn territories[40]. The latter is of particular importance within this study given the scope of powers vested in the Security Council, which was exceptional in its nature in post-Cold War period. In its Resolution 1037 (1996), the Security Council established the UN Transitional administration for Eastern Slavonia (UNTAES) under Chapter 7 of the Charter in order to provide the

[38] UN Security Council Resolution 678 (1990).
[39] UN Security Council Resolution 1483 (2003).
[40] **Nasu H.,** Chapter VII Powers and the Rule of Law: The Jurisdictional Limits, *Australian Year Book of International Law,* 2007, **26,** 1, 87-117.

peaceful reintegration of Eastern Slavonia into Croatia and thus "to contribute to the achievement of peace in the region as a whole"[41]. This was the first time the Security Council invoked Chapter 7 for the establishment of a direct UN administration of territory. Further missions of this kind have been carried out in Kosovo and East Timor. The cases have long been the subject of international discussions given the fact that using the Chapter 7 powers the Security Council endowed a Special Representative of the Secretary-General with the overall authority of the territories. In its Resolution 1244 (1999), the Security Council *acting for the purposes under Chapter 7* affirmed "the need for the rapid early deployment of effective international civil and security presences to Kosovo"[42]. Similarly, with regard to the crisis in East Timor and following its vote for independence, *acting under Chapter 7 of the Charter,* decided to establish a United Nations Transitional Administration in East Timor, which "will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice"[43].

The Revision of Threat to Peace, Breach of Peace and Acts of Aggression

Another problem with Chapter 7 powers is that, as in case with the matters under domestic jurisdiction of states, no article contained in the Charter defines the cases that fall under the threat to peace, breach to peace or acts of aggression. During the San Francisco conference, the question of the limits of the Council's discretion in determining the breach of peace and taking preventive measures was the subject of considerable discussion. The statement made by the Reporter of the Committee of the San Francisco Conference sums up the outcome of the Conference with regard to the scope of the Council's discretion in

[41] UN Security Council Resolution 1037 (1996).
[42] UN Security Council Resolution 1244 (1999).
[43] UN Security Council Resolution 1272 (1999).

determining the breach of or threat to peace: "Wide freedom of judgment is left [to the Council] as regards the moment it may choose to intervene and the means to be applied, with the sole reserve that it should act "in accordance with the purposes of the Organization". It is for the Council to determine the danger of aggression or the act of aggression . . . following which it has its recourse to recommendations, or coercive measures"[44].

Meanwhile some attempts of clarifying what constitutes threat to peace, act of aggression or how the notion of peace has evolved over the years have been made within the academic literature on this issue[45] or within the reports of the UN Secretary-Generals (An Agenda for Peace; An Agenda for Democratization)[46]. During the last two decades the notion of peace has undergone significant contextual shifts, and the non-military sources of instability came to be regarded within the Security Council's competences.

A broad notion of peace can imply the exercise of the Security Council's powers in the restoration of peace if a situation has the potential to spark international armed hostilities in the short or medium term[47]. For a situation to be regarded as a threat to peace requires at least some violence. As Weiß rightly argues, a broad understanding of the Security Council Chapter 7 powers enables the Council to deal with long-term, structural causes of threats to peace in order to restore peace in a given situation once the scope of application of its powers is opened[48]. Thus, the functions of the

[44] **Gill T.,** Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, *Netherlands Yearbook of International Law*, 1995, 26, 33-138.
[45] **Weiß W.,** Security Council Powers and the Exigencies of Justice after War', *Max Planck Yearbook of United Nations Law*, 2008, **12,** 1, 45-111; **Serna Galván M. L.,** Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council. Is the Security Council a Legislator for the Entire International Community?, *Anuario Mexicano de Derecho Internacional,* 2011, **11,** 1, 147-185.
[46] *An Agenda for Peace: Preventive Diplomacy and Related Matters*, December 18, 1992, http://www.un.org/documents/ga/res/47/a47r120.htm;
[47] **De Wet E.,** The Chapter VII Powers of the United Nations Security Council, Oxford, Hart Publishing, 2004.
[48] **Weiß W.,** Op. cit., 45-111.

Security Council under Chapter 7 are currently viewed within the dichotomy of positive peace (inclusive of justice, equity and democratic governance) and negative peace (absence of military clashes)[49]. Thus, the Security Council is responsible for the exercise of a twofold function; first, a peace enforcing function which ends the military phase of armed conflicts, and second, a peace and stability building and organizing function which directs reconstruction and reconciliation[50]. In particular, since the 1990s democratic governance began to be seen as a decisive factor in ensuring the durability of post-conflict peace. Even its theoretical underpinnings - *democratic peace theory*[51]– have been formed, according to which the likelihood of wars and large-scale violence is much lower in societies led by democratic culture and values. The idea has further been elaborated in two pivotal reports of the UN Secretary General - "An Agenda for Peace"[52] and "An Agenda for Democratization[53]". The first stresses the need of expanding the UN's powers and functions in engaging in armed conflict meanwhile stressing that "respect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States". An Agenda for Democratization highlights that "democratic institutions and processes channel competing interests into arenas of discourse and provide means of compromise which can be respected by all participants in debates, thereby minimizing the risk that differences or disputes will erupt into armed conflict or confrontation". The report also highlights the growing role of the UN in democratization processes, in particular in supporting electoral processes and building democratic institutions.

What about the aggression, the preamble of Resolution 3314 (1974) on the definition of "aggression" states that "aggression is the

[49] **Carati A.,** Sharing Sovereignty: Building Democracy by External Intervention, *ISPI Analysis*, 2012, 142, 1-6.
[50] **Weiß W.,** Op. cit., 45-111.
[51] **Danilovic V. and Clare J.,** The Kantian Liberal Peace (Revisited), *American Journal of Political Science,* 2007*,* **21**, 2, 2007, 397-414.
[52] An Agenda for Peace, Op. cit.
[53] Boutros-Ghali, An Agenda for Democratization, New York, United Nations, 1996.

most serious and dangerous form of the illegal use of force". Aggression is defined as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Article 3 of the resolution lists possible forms of aggression, but does not exclude other forms of it[54]. This is confirmed by Article 4, which emphasizes that the list of aggression actions listed in Article 3 is not exhaustive and that the Security Council may determine its existence under the provisions of the UN Charter. However, the Security Council has rarely referred to aggression in its resolutions and has not even referred to Resolution 3314 in such cases[55]. Meanwhile, the legitimacy of any resolution cannot be measured by the number of references to its content on the side of the Security Council. The permanent members of the Security Council, as members of the General Assembly, have consented to the adoption of the resolution. It should be mentioned that although the Security Council may act when it considers that an act of aggression takes place, it has never chosen to do so. First of all, the Council has been unwilling to take sides in a dispute by labeling a state as an aggressor as this could thwart its attempts to reestablish peace by diplomatic means. But, most importantly, as Allain argues "aggression" entails not only state responsibility, but also individual criminal responsibility, and that is why the Council found it more reasonable to describe events as either a threat to or breach of peace[56].

The Root Causes of Extensive Peace Operations and Security Council's Resolutions as 'Key Indicators of its Intent'

In the absence of a common definition of a threat to peace, a breach of peace, or the absence of aggression, it is particularly important to examine the resolutions adopted by the Security Council, which are "key indicators of the Council's intent and, by way of voting, a

[54] UN Security Council Resolution 3314 (1974).
[55] **O'Connell M., and Niyazmatov M.,** What is Agression?: Comparing the Jus ad Bellum and the ICC Statute, *Journal of International Criminal Justice,* 2012, **10,** 1, 2012, 189-207.
[56] **Allain J., '**The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union', *Max Planck United Nations Yearbook*, 2004, 8, 237-289.

reflection of the level of political support this decision enjoys"[57]. Based on their examination, Serna Galván distinguishes three situations or cases having been regarded by the Security Council as a threat to peace. Those are[58]

- Serious violations of human rights (Iraq, Somalia, Yugoslavia, Rwanda, etc.),
- Lack of democracy (Haiti, Angola, etc.),
- Antiterrorist interventions (Sudan, Afghanistan, etc.).

Of special interest are the observations on human rights that are being cited more frequently in Security Council resolutions. A group of researchers and international experts considers that the human rights issues are not under the exclusive jurisdiction of states. The main argument is that if any issue is addressed in the provisions of the UN Charter, it therefore becomes a matter of "international concern". "Any issue, in essence, is within the domestic jurisdiction of the State only if it is not regulated by international law or is not subject to such regulation… Most of the issues of economic and political interdependence that seem to be domestic at first glance gained international importance over time"[59]. The opponents of this approach note that "the references to human rights in the UN Charter do not indicate its mandatory nature. They include only principles, but not legal norms ... According to the UN Charter, the parties have only agreed to promote international cooperation in these matters"[60]. In the context of external intervention, gross violations of human rights have often been presented as an argument for legitimizing those missions (for example, NATO's military intervention in Kosovo).

In recent years, the resolutions of the Security Council invoking Chapter 7 powers have been mostly used within the scope of

[57] **Manusama K.,** The United Nations Security Council in the Post-Cold War Era, Leiden, Nijhoff Publishers, 2006.
[58] **Serna Galván M. L.,** Op. cit., 147-185.
[59] **Lauterpacht H.,** *International Law and Human Rights*, London, Stevens and Sons, 1950.
[60] **Abdulrahim V.,** The Question of Domestic Jurisdiction and the Evolution of United Nations Law of Human Rights', *International Studies*, 2010, **47,** 1, 247-265.

so-called fourth generation of peace operations (peacebuilding)[61], the extreme form of which is termed international interim administrations. Under these operations, the exercise of sovereignty over a given territory is transferred to a UN peace operation and all executive, legislative, and judicial authority temporarily rests with the head of the UN mission[62]. Although as mentioned above, the Security Council mostly mentions mass violations of human rights in its resolutions, the article claims that such kind of large-scale interference of the UN, are a logical consequence of the three situations listed below, rather than an immediate cause of it. Those are

- Impediment to people's right to self-determination,
- State failure,
- Internal situations capable of threatening regional stability.

First, it should be stated that all three scenarios are closely interrelated. Although self-determination conflicts seem to pertain to a particular territory, they are closely linked to regional and international dynamics. The same is true for the second and third cases.

Impediment to people's right to self-determination: Since 1990, almost half of the world's conflicts have been related to self-determination movements that seek greater autonomy or statehood[63]. In most of these cases, claims for self-determination have been severely confronted by the metropolis through human rights abuses, including the attempts of genocide. East Timor and South Sudan are illustrative in this respect.

The establishment of the UN interim administration (UNTAET) in East Timor under the SC resolution 1272 was not triggered by the systematic massive violations of human rights in the

[61] The author identifies five generations of peace operations based on their historical progression, **Kenkel K.,** Five Generations of Peace Operations: From the "Thin Blue Line" to "Painting a country Blue"', *The Revista Brasileira de Política Internacional,* 2013, **56,** 1, 122-143.
[62] Ibid.
[63] **Toft M.,** Self-Determination, Secession, and Civil War, *Terrorism and Political Violence*, 2012, **24**, 40, 581-600.

course of two decades of occupation, but its more or less predictable outcome - the attempt of genocide initiated by the Indonesian government. Indonesia's consent to the UN administration was reached only after the UN warned it would officially label the 1999 mass atrocities in Timor as genocide[64]. Similarly, the 20-year war of separation between North and South Sudan caused more than 2 million deaths and resulted in a millions of displaced persons ('Sudan (North-South Ethnic War'). Although the civilian and military international presence both in East Timor and South Sudan stopped human rights violations and triggered the emergence of a new state, it did not in itself reduce the potential risk of destabilization. As Williams and Pecci argue, the destabilization risks within ITA practices may arise in two contexts: when a state even after a long period of institution building remains still incapable of exercising effective authority and when the new state's existence in and of itself creates a destabilizing political dynamics[65]. The first is the case for both East Timor and South Sudan – former colonies which following the withdrawal of colonizing powers were occupied and annexed by the neighboring countries. Hence, the UN was faced with the absence of any self-organizing and self-government practice where it had to deal not only with the status questions and the issues of governance and local capacity building but, what is more, "transformation of social consciousness"[66] – the immediate effect of colonial past. The status question has been effectively resolved giving birth to Democratic Republic of Timor-Leste (2002) and the Republic of South Sudan (2011). However, the lack of "preparation for independence" found its expression in the 2006 crisis of East Timor, and the ethnic violence broken in South Sudan a month following its 2011 independence.

[64] **Torosyan T.,** The Settlement of Nagorno-Karabakh Conflict within the Framework of International Law, Yerevan, Tigran Mets, 2008.
[65] **Williams P. and Pecci F.,** Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination, *Stanford Journal of International Law,* 2004, **40**, 1, 347-386.
[66] **Torosyan T.,** Post-Soviet Transformation of Social System, Yerevan, Tigran Mets, 2006.

State failure: International administration is also applied to failed states, referring to the existence of elements threatening international peace and security in those states. The "failed state" is a relatively new concept in international affairs. It gained considerable prominence in the early 1990s, in part due to Helman and Ratner's article "Saving the Failed States" (1993)[67] and Kaplan's article "The Coming Anarchy"[68]. Since then, the idea has been widely used to characterize states that do not have sufficient potential to stand as full members of the international community. As states are key actors of the international legal system, their failure is considered a threat to the existence and continuity of the entire system. Although there is no clear definition of a "failed state", the general characteristic concerns the state's internal disintegration and collapse as well as the inability to deliver the necessary public services to the population[69].

The roots of the "failed state" idea lie at the core of decolonization process and the exercise of peoples' right to self-determination. As a result of it, especially in a short while after the end of the Cold War, a considerable number of states were formed, which for a long time have been unable to carry out the functions of a sovereign state. At the domestic level, failed states constitute a real threat to the well-being of the population, and especially with regard to the respect for human rights. However, as Brabandere points out, the label of a "failed state" in terms of the use of coercive measures by the Security Council with regard to threats to international peace and security cannot be limited only to the domestic aspect. The mere fact that the state carries out ineffective domestic governance is not enough to think that it cannot justify itself as a member of the international community. Only when there are sufficient grounds to believe that a State truly constitutes a threat to international peace and

[67] **Helman G. and Ratner S.,** Saving Failed States, *Foreign Policy,* 1993, **3**, 89, 3-20.
[68] **Kaplan R.,** The Coming Anarchy, *Atlantic Monthly,* 1994, **273**, 2, 44-65.
[69] **De Brabandere E.,** The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept, *Vanderbilt Journal of Transnational Law*, 2010, **43**, 119, 119-149.

security can the Security Council intervene in the internal affairs of that State[70]. However, as already mentioned, the UN Charter does not clearly define these situations, which significantly complicates the process of their determination. UN missions in Namibia (1989) and Cambodia (1991) were among the first in terms of support to failed states outside the UN Trusteeship system. These were followed by the extended mandate of Bosnia and Herzegovina (1995) and the all-encompassing administration of Kosovo and East Timor.

Internal situations capable of threatening regional stability: The notion of "peace" in the sense of Chapter 7 is far more than the absence of war between states. For instance, in case of Iraq (1991) the Security Council was gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region[71].

Likewise, the establishment of international administration in Kosovo largely stemmed from regional security considerations clearly wrapped in internal destabilization. Since 1998, the Kosovo conflict turned from the civil war fought mainly along ethnic lines into a regionally confined cross-border conflict which did not only include Kosovo Liberation Army, the Serbian security forces and special police of the Ministry of Interior but also contingents of many NATO member states. Although the war did not spill over into Albania and Macedonia it had massive effects in regard to a deteriorating refugee situation[72]. According to 1999 OSCE report, the military clashes and ethnic-cleansing operations caused mass displacement and expulsion of over 450.000 people who became internally displaced or refugees to neighboring states. Thus, following the failure of The Rambouillet negotiations and NATO's intervention the UN

[70] Ibid.
[71] UN Security Council Resolution 688 (1991).
[72] **Zuercher Ch., et al.,** External Democracy Promotion in Post-Conflict Zones: Evidence from Case Studies, *Taiwan Journal of Democracy*, 2009, **5,** 1, 241-259.

established interim administration in Kosovo (UNMIK) to advance the regional stability in the Western Balkans affected by the Kosovo crisis. Moreover, in its 1244 (1999) resolution the Security Council welcomed the initiative of international organizations towards the implementation of Stability Pact for South Eastern Europe in order to further the promotion of democracy, economic prosperity, stability and regional cooperation[73].

Conclusion

Thus, the principle of non-interference is one of the hardly defined principles of the international legal system due to the changes in international law and international relations and due to vagueness of the terms in its core, namely the domestic jurisdiction of states, the concept of peace, etc. Among the essentialist and relative theories on domestic jurisdiction the latter seems to reflect more accurately the current realities. Today, no problem can be labeled as purely internal in its nature. The issues that are subject to the regulation of states by international law may in time become the subject of international regulation as a result of the emergence of new norms of customary international law or the developments in the system of international relations.

The wording of peace has also experienced significant changes in the post-Cold war period in its turn greatly affecting the principle of non-interference, particularly breaking its close association or even identification with the principle of neutrality. If in early practices of the Security Council, resolutions never expressly invoked Chapter 7, and it seemed that the Council simply took decisions, the number of Chapter 7 resolutions highly increased in the 1990s. The Security Council started to refer to Chapter 7 not only for protective ends but also for administrative purposes thereby proving the new approach adopted by the Security Council which can be summarized as follows: *the absence of military clashes is not an absolute guarantee of peace*

[73] UN Security Council Resolution 1244 (1999).

and security; the non-military sources of instability are equally important. Thus, the Security Council is currently responsible for a twofold function - a peace enforcing function and a peace and stability building and organizing function. The latest UN missions, termed international interim administrations, are a vivid manifestation of the growing role of the Security Council in which it acted as a surrogate state in conflict zones. Meanwhile the idea of an absolute power of the Security Council based on the interpretation of Articles 25 and 103 of the UN Charter is misleading first due to the self-restricting mechanisms at the core of the UN Charter, namely its principles and objectives, second *jus cogens* norms that cannot be circumvented by any agreement, and third the international mandate itself.