

## THE DOMESTIC JURISDICTION CLAUSE IN THE UNITED NATIONS CHARTER: A HISTORICAL VIEW

by KAWSER AHMED\*

Like Article 15(8) of the Covenant of the League of Nations, Article 2(7) was inserted in the United Nations Charter (UN Charter) to limit the authority of the organisation in respect of disputes which are essentially within the domestic jurisdiction of the member states. After 50 years of the establishment of United Nations (UN), today it seems that the importance of the domestic jurisdiction clause has reduced considerably, if it has not already become a misnomer in the context of the UN practice. This essay will try to present a picture of the evolution of the concept of domestic jurisdiction over the period from early nineteenth century to the adoption of the UN Charter. Then it will discuss how the concept has departed from its earlier notion through the practices of the political organs of the UN, particularly due to the influence of new concepts and dimensions of international law.

### I. INTRODUCTION

Today, states rarely think that domestic jurisdiction can provide a shield against UN jurisdiction in relation to any matter falling within its so-called reserve domain.<sup>1</sup> Most of the views departing from the legal notion of domestic jurisdiction tend to move in a direction that is exactly the opposite of what the framers of the Charter wished while drafting Article 2(7).<sup>2</sup> These views seem to posit an objective interpretation of Article 2(7) to justify UN practice which has developed gradually since the early years of the organisation's existence.<sup>3</sup> As often as not, in the early years of the UN there were manifold debates and discussion among diplomats, statesmen and scholars about the principle of domestic jurisdiction stated in the Article 2(7). At times, states have resorted to the plea of domestic jurisdiction before the political organs of the United Nations quite frequently. But it has not proved to be an effective tool which can dissuade the UN from taking steps against offending states. In our opinion, the rapid development of the international legal regime of human rights and a significant change as to the way "threat to peace" is being defined by the Security Council have engendered new approaches about the role of the UN—which has not left untouched the meaning and application of the concept of domestic jurisdiction in the context of UN practices. About human rights it can be said that the increasing involvement of the UN in this area since the seventies shows an inclination of the UN to see that human rights are respected in every country.<sup>4</sup> Alongside human rights, the preconditions to constitute "threat to peace" have changed since the drafting of

\* LL.M. in International Legal Studies (NYU). The author is currently an Associate with Dr. Kamal Hossain & Associates, Dhaka, Bangladesh. The author would like to thank Professor Thomas M. Franck for his helpful suggestions and comments. Errors remain those of the author alone.

<sup>1</sup> G. Nolte, "Article 2(7)" in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> ed. (New York: Oxford University Press, 2002) at 162.

<sup>2</sup> B. Conforti, *The Law and Practice of the United Nations*, 3<sup>rd</sup> ed. (The Netherlands: Martinus Nijhoff Publishers, 2005) at 137.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 140.

the UN Charter. It is evident that at the time of drafting of the UN Charter, what was considered to constitute *threat to peace* was military threat to international peace.<sup>5</sup> But, throughout its practice, the Security Council has shown that it can define a situation emanating from within a country only as constituting a “threat to peace”. The practice of the Security Council seems to indicate that at present *threat to peace* is being defined in a much wider perspective, which was not presumably in the consideration of the drafters of the UN Charter.<sup>6</sup> For instance, we will see that the Security Council has handled the issue of human rights violations both as a threat to peace and as grounds for enforcement action.

In this article, it will be shown that through the practices of the political organs of the UN that the combined effect of the gradual prioritisation of human rights in international law and the move away from the conventional way of defining *threat to peace* have culminated in the increase in the importance of the principle of domestic jurisdiction in the UN context. In the first section, we discuss the historical background of domestic jurisdiction taken from state practice before the League of Nations, during the regime of the League of Nations and after the League of Nations. This section will show that the concept of domestic jurisdiction did not grow overnight in international law, rather it was thought that the concept of domestic jurisdiction had greater utility in maintaining international peace and security. We then discuss the textual meaning and general applicability of the concept of domestic jurisdiction as enshrined in the Article 2(7) of the UN Charter. Finally, we try to sketch out how the concept has undergone changes and modification through the practices of the General Assembly, the Security Council and the Economic and Social Council in relation to human rights and the determination of “threat to peace”. It will be interesting to note that the concept which was once thought to be important for maintaining international peace and stability has come to be regarded as a hindrance to maintaining international peace. This shows nothing but the ironical reality of how ever-shifting international relations among states are reflected in legal notions.

### *Domestic Jurisdiction: A Historical Perspective*

Before any attempt is made to analyse the principle of non-intervention in regard to matters falling within the ambit of the concept of domestic jurisdiction under Article 2(7) of the UN Charter, it is important to discuss some background of this concept as it would help us understand its evolution over time. We will begin by discussing the Congress System and the Concert of Europe. We will see how the concept of reserve domain gradually had become legally significant through state practice in this period. We will then analyse the League of Nations regime. The concept of domestic jurisdiction was first given a definite legal expression in the League Covenant. Finally, we will look at the background of the incorporation of the principle of domestic jurisdiction into the UN Charter.

#### *1. Domestic Jurisdiction: The Congress System and the Concert of Europe*

The general international background shaped by the Vienna settlement in accordance with the Treaty of Chaumont which had been concluded in March 1814 to consider the affairs of Europe as a whole, including issues affecting peace and security of that region, gave rise to the congressional form of international government.<sup>7</sup> To achieve these purposes, various

<sup>5</sup> Hans Kelsen, *The Law of the United Nations*, 2<sup>nd</sup> ed., (New York: F.A. Praeger, 1951) at 930.

<sup>6</sup> Inger Osterdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (Uppsala: Iustus Forlag, 1998) at 33 and 43-84.

<sup>7</sup> David Thomson, *Europe since Napoleon* (London: Penguin Books, 1967) at 135-140.

territorial adjustments were made under the treaty of Vienna in 1815. The Congress system which France joined on terms of equality at the Congress of Aix-la-Chappelle in 1818 was designed to protect the public law of the European states,<sup>8</sup> with the only exception of the Turkish Empire.<sup>9</sup> But Austria, Russia and Prussia were so determined to preserve the monarchical system in Europe that they considered it legitimate to use the Congress system as an instrument for authorising intervention in the domestic affairs of states whose constitutional development displeased them.<sup>10</sup> Strong opposition came from Castlereagh, the British Foreign Secretary, on the ground that “in this Alliance as in all other human Arrangements, nothing is more likely to impair or even destroy its real utility, than any attempt to push its duties and obligations beyond the Sphere which its original conception and principles will warrant”.<sup>11</sup> He said, “It never was however intended as a Union for the Government of the World, or for the Superintendence of the Internal Affairs of the other states”.<sup>12</sup> Castlereagh conceded the legitimacy of right of intervention only in cases “where their own immediate security, or essential interests, are seriously endangered by the internal transactions of another state”. He also warned that this intervention may be applied only in the matter of extreme necessity (Congress of Laibach). Castlereagh’s underlying intention was to oppose the Tsar’s desire to send forces to the aid of the Spanish Royalists and to maintain a Russian fleet in the Mediterranean.<sup>13</sup> He believed that in order to be successful, the Congress system should confine its function to the external policies of states. Thus he called for a policy of non-intervention in matters within the domestic jurisdiction of states in opposition to the policy advocated by the continental powers.<sup>14</sup> However Castlereagh’s view was rejected by the continental power. Canning replaced Castlereagh upon the latter’s death and defined the British position much in the same way as Castlereagh had done excepting the granting of belligerent status to Greek rebels.<sup>15</sup> The Congress system finally broke up by 1925. After the failure of the Congress, the Concert of Europe emerged as the means to achieve peace among various nations in Europe.

The Concert of Europe was intended to maintain the territorial integrity and status quo among the European nations. It also meant that the great powers on the whole should observe the principle of non-intervention in matters within the domestic jurisdiction of states. But differences appeared amongst the great powers in respect of observance of the non-intervention principle. Russia was unwilling to respect the principle of non-intervention in the case of Turkey’s domestic matters. Moreover, that the principle of non-intervention should apply to Turkey’s treatment of her Christian subjects was opposed by Gladstone in 1876, though under the Treaty of Paris (1856), the major European powers expressed their concern about the future treatment of the Sultan’s Christian subjects in Balkans and recognised that there should be no unilateral or collective intervention in Turkey’s domestic

<sup>8</sup> It was thought that the end of Napoleonic era brought about significant advancement in the law of nations by the Congress of Vienna in its Final Act of June 7, 1815. See Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947) at 179-180.

<sup>9</sup> The territorial integrity of the Turkish Empire was not included in the Vienna settlement due to the differences between Russia and Britain. See F. H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (England: Cambridge University Press, 1963) at 199-200.

<sup>10</sup> Goronwy J. Jones, *The United Nations And the Domestic Jurisdiction of States: Interpretations and Applications of the Non-Intervention Principle* (Cardiff: University of Wales Press, 1979) at 1.

<sup>11</sup> H. Temperley & L. M. Pension, eds., *Foundations of British Foreign Policy from Pitt (1792) to Salisbury (1902)* (Cambridge: Cambridge University Press, 1938) at 54.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Supra* note 10 at 2.

<sup>14</sup> *Ibid.*

<sup>15</sup> In Canning’s opinion, the only justification for a policy of intervention in the internal affairs of other states was that interest of states should have been, in some way or other, affected by their condition or by their proceedings. See H. Temperley, *The Foreign Policy of Canning: 1822-1827* (London: G. Bell and Sons. Ltd., 1925) at 217.

jurisdiction.<sup>16</sup> As regards domestic jurisdiction in this period, the Hague Conference of 1899 deserves special mention as it showed the reluctance of sovereign states to surrender matters of domestic jurisdiction to the control of an international body. Not only did the Hague Conference fail to produce an agreement on the limitation of national armaments, but also the jurisdiction of the Court of Arbitration which it set up was limited by the fact that “disputes involving vital interests of a state were expressly exempted from the Court’s jurisdiction”.<sup>17</sup>

## 2. Article 15(8): Domestic Jurisdiction and The League of Nations

Since the Hague Conference, general arbitration treaties of optional character flourished in the pre-League era.<sup>18</sup> The Commission on the League of Nations presented the first draft of the League Covenant to the plenary session of the Peace Conference on 14 February 1919. 7 of the 21 articles of the first draft were directed towards procedures for peaceful adjustment.<sup>19</sup> Following the release of the draft, a number of changes offered by the American leaders included the guarantee of exclusive state control over domestic subjects. The former President Taft and Senator Hitchcock expressed the view that the inclusion of some provision safeguarding domestic jurisdiction was necessary for Senate approval of the Covenant.<sup>20</sup> When the Commission on the League of Nations reconvened on March 22, President Wilson presented two suggestions for the amendment of Article 15. The first proposal was for the deletion of the phrase authorising the Council to propose measures necessary to give effect to the Council’s recommendations. The second suggestion was in fact a new provision which reads: “if the Council or Assembly should find a difference between the parties to be a question which by international law is solely within the domestic legislative jurisdiction of one of the parties, it should so report, but without offering any recommendation”.<sup>21</sup> Both the proposals were accepted in principle by the Commission. In addition to this a proposal from the Chinese representative persuaded the drafting committee to provide that a party to a dispute must raise the claim of domestic jurisdiction, if the Council’s power were to be checked. The Drafting Committee approved the English text of the Covenant in its final meetings. Article 15(8) of the English text appeared as—“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.”

In order to understand the principle of non-intervention in matters of domestic jurisdiction under the League of Nations system, it is necessary to examine the procedures laid down in its Covenant for the pacific settlement of international disputes and the enforcement of peace.<sup>22</sup> Article 12 of the Covenant stated that if there should arise any disputes between members of the League likely to lead to a rupture, they would be required to submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agreed

<sup>16</sup> In Gladstone’s view, the Concert of Europe was “important in the advance of civilization. Its functions in this respect were to enforce international law, to preserve European peace and to relieve oppressed peoples”. See C. Holbraad, *The Concert of Europe: A Study in German and British International Theory 1815–1914* (London: Longman, 1970) at 167-168.

<sup>17</sup> *Supra* note 9 at 268-269.

<sup>18</sup> H. Wehberg, “Restrictive Clauses in International Arbitration Treaties” (1913) 7 *Am. J. Int. L.* 301.

<sup>19</sup> H. Jones, “Domestic Jurisdiction—From the Covenant to the Charter” (1951-1952) 46 *Illinois L.R.* at 220.

<sup>20</sup> A suggestion from William Howard Taft formed the basis for President Wilson’s Proposal for the amendment of Article 15. Mr. Taft recommended the following provision: “If the difference between the parties shall be found this Executive Council or the Body of Delegates to be a question which by international law is solely within the domestic jurisdiction and policy of one of the parties, it shall so report and not recommend a settlement of the dispute.”; Quoted in H. Jones, *ibid.*

<sup>21</sup> *Supra* note 19 at 222-223.

<sup>22</sup> For detailed analysis, see *supra* note 10 at 8-13.

in no case to resort to war until three months after the award by the arbitrators, or judicial settlement or the report by the Council, which has to be presented within six months after the submission of the dispute. Thus the most difficult disputes were finally to be brought before the council, for if the disputants had failed to settle a dispute through diplomatic negotiations, or had not submitted it to arbitration or judicial process under Article 13 of the Covenant, they were required to submit the matter to the Council under Article 15. If the members of the Council, voting without the parties to the dispute, then succeeded in reaching a unanimous report on the case, no member of the League was permitted to go to war with any party that complied with the recommendations of the report.<sup>23</sup> This should be viewed in light of the fact that before the Covenant was signed every nation had nearly an unlimited right to go to war. State signatories to the Covenant thus agreed to accept significant restrictions on their right to war. But it should be noted that no such restrictions applied if the League Council found a state's claim that a dispute in which it was involved arose out of a matter within its domestic jurisdiction. This was laid down in paragraph 8 of Article 15 of the Covenant. Thus Article 15(8) was viewed as a so-called "gap" in the covenant.

Though the signatories to the Covenant did not accept any compromise in the case of dispute arising out of a matter within a state's domestic jurisdiction, it was recognised in Article 15(8) of the Covenant that the claim by a state that a matter was solely within its domestic jurisdiction had to be tested in accordance with the criteria set by international law. In the practice of the League, this restriction imposed on the Council was vividly discussed on two occasions, namely, in the *Aaland Island case (Finland v. Sweden)*<sup>24</sup> and in the *Nationality Decrees Issued in Tunis and Morocco case (United Kingdom v. France)*.<sup>25</sup> The first and third cases were settled amicably by the contending parties through negotiation.

In the *Aaland Island case*, the dispute was concerned with the island strategically situated between Finland and Sweden in the Gulf of Bothnia, ostensibly a part of Finland which had declared independence from Russia in November 1917.<sup>26</sup> The inhabitants of the island were mainly Swedish descendants and claimed re-union with Sweden shortly before Finland's declaration of independence.<sup>27</sup> Sweden supported the Aaland islander's claim under the principle of self-determination and asked for a referendum which Finland denied. Great Britain exercising its right under Article 11(2) of the Covenant brought the situation to the attention of the Council in June, 1920 as "circumstances affecting international relations and threatening to disturb the good understanding between nations upon which peace depends".<sup>28</sup> Finland objected to the council arguing that its sovereign status had been recognised by Sweden and other powers; therefore, the matter in question was an internal affair of Finland with regard to its treatment of ethnic minorities which fell solely within its domestic jurisdiction. Sweden persisted in its argument of the right to self-determination. The Council took Finland's argument as challenging its jurisdiction under Article 15(8). A committee of three jurists was appointed to give an advisory opinion. The Committee decided that, under Article 15(8), the Council was competent to make recommendations it thought appropriate because the question did not fall exclusively within the domestic jurisdiction of Finland in accordance with international law. The Committee suggested that Article 15(8) was superfluous because the rule embodied therein "might have been left to

<sup>23</sup> *Ibid* at 9.

<sup>24</sup> League of Nations, O.J., Special Supp. 3 (1920).

<sup>25</sup> 1923 PCIJ (ser. B.) No. 4.

<sup>26</sup> Finland and Aaland Island had been part of the Swedish Kingdom until 1809. In 1809 they were first conquered by Russia, and then incorporated by cession into the Russian Empire. Finland declared its independence on the Fall of the Kerensky government.

<sup>27</sup> League of Nations O.J., Special Supp. 1 at 17 (1920).

<sup>28</sup> League of Nations O.J., No. 5 at 250 (1920).

the application of rules of international law".<sup>29</sup> This implies that there are matters not regulated by international law which are not within the exclusive ambit of state jurisdiction.<sup>30</sup> The Council's competence in dealing with the matter was further confirmed by a unanimous vote, with Finland and Sweden abstaining. A Commission of Rapporteurs appointed by the Council awarded the Aaland Island to Finland with certain minority guarantees.<sup>31</sup>

The Tunis-Morocco Nationality Decrees conflict between Britain and France was brought to the Council after France refused to accept arbitration. France responded to the dispute by claiming that the matter was solely within her domestic jurisdiction. On the other hand, Britain relied on treaty commitments between the two states. The matter was referred to the Permanent Court of International Justice (PCIJ).<sup>32</sup> In 1923, the Court rendered an opinion holding that the dispute did not constitute a matter solely falling within the domestic jurisdiction of France. The Council did not declare its competence over the matter since the parties to the dispute resolved it by settlement.<sup>33</sup> In the Nationality Decrees case (1923), the PCIJ said, "The words 'solely within the domestic jurisdiction' seem rather to contemplate matters which, though they may very closely concern the interests of more than one state, are not in principle matters regulated by international law. As regards such matters, each State is sole judge. The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations".<sup>34</sup> The Court added that the invocation of treaties is alone not sufficient to endow a state matter with international character. The Court found that France had reduced her discretion regarding the two protectorates by entering into international engagements which Britain, as a party, was entitled to invoke.

In fact, the influence of Article 15(8) extended beyond the League system in the inter-war period. Matters of domestic jurisdiction were frequently excepted from the scope of arbitration treaties. The Kellogg Treaties concluded by the United States after 1928 exempted disputes regarding subject matters falling "within the domestic jurisdiction of either of the High Contracting Parties". The General Treaty of Inter-American Arbitration of 1929 excepted controversies which were "within domestic jurisdiction of any of the parties to the dispute" and "not controlled by international law".<sup>35</sup> Declarations of states accepting the optional clause of the Statute of the PCIJ frequently excluded disputes classified as falling within domestic jurisdiction.

### 3. *The Drafting History of Article 2(7): The United Nations*

The provision of the Charter with respect to domestic jurisdiction differs in concept and expression from that contained in the League Covenant. The Dumbarton Oaks Proposals offered the first official plan for a general post-war institution. Chapter VIII of the Proposal stipulated the procedure to be followed by the Security Council and members of the organisation in resolving situations which might cause international friction. It was proposed that the Council be endowed with power to investigate a dispute causing or likely to cause international friction, and call upon parties to such dispute to settle by peaceful means. But paragraph 7 stated that "the provisions of paragraphs 1 to 6 of Section A should not apply to situations or disputes arising out of matters which by international law are solely within

<sup>29</sup> *Supra* note 19 at 224.

<sup>30</sup> This view is maintained by H. Jones, *supra* note 19 at 225-226. For an opposing view, see J. L. Brierly, "Matters of Domestic Jurisdiction" (1925) 6 Br. Y.B. Int. L. at 10.

<sup>31</sup> *Supra* note 19 at 226.

<sup>32</sup> League of Nations, O.J. No. 11 at 1206 (1922).

<sup>33</sup> 1923 PCIJ (ser. C) No. 3 at 55.

<sup>34</sup> 1923 PCIJ (ser. B) No. 4.

<sup>35</sup> *General Treaty of Inter-American Arbitration*, signed at Washington, January 5, 1929.

the domestic jurisdiction of the state concerned”.<sup>36</sup> Thus the domestic jurisdiction clause in Dumbarton Oaks Proposals was designed to limit the authority of the organisation in the pacific settlement of disputes.<sup>37</sup> At the San Francisco Conference of 1945, paragraph 7 of Section A encountered considerable censure. The delegations of Bolivia and Norway unsuccessfully proposed the deletion of paragraph 7.<sup>38</sup> A series of proposals by the delegations of Brazil, Czechoslovakia, Ecuador, Greece, Mexico, Peru, Turkey and Venezuela unsuccessfully supported the view that controversies as to whether a matter fell within the domestic jurisdiction of a state should ultimately be decided by the International Court of Justice.<sup>39</sup> The United States also wanted changes to the text of the domestic jurisdiction reservation. After consultation, the Four Powers proposed the following draft:

Nothing contained in this Charter shall authorize the Organization to interfere with matters which (by international law) are essentially within the domestic jurisdiction of the State or shall require the members to submit such matters to settlement under this Charter. Should, however, a situation or dispute arising out of such a matter assume an international character and constitute threat to peace occur in consequence of such a situation or dispute, it shall be open to the Security Council, acting in accordance with Chapter VIII, Section B, to take such action as it may deem necessary.<sup>40</sup>

At the discussion of Committee I/I of the Conference on 17 May 1945, the Norwegian delegate reiterated that the provision regarding the non-intervention principle should be deleted.<sup>41</sup> On the other hand, the Australian delegate Dr Evatt contended that the first part of this Sponsoring Power’s amendment—“Nothing contained in this Charter shall authorize the Organization to intervene in matters essentially within the domestic jurisdiction of any state or shall require members to submit such matters to settlement under this Charter”—was undone by the second part—“but this principle shall not prejudice the application of Chapter VIII, Section B”.<sup>42</sup> Dr Evatt stated the position of Australia in the following term:

Such a provision is almost an invitation to use or threaten force, in any dispute arising out of a matter of domestic jurisdiction, in the hope of inducing the Security Council to extort concessions from the state that is threatened. Broadly, the exception cancels out of the rule, whenever an aggressor threatens to use force. This freedom of action which international law has always recognized in matters of domestic jurisdiction becomes subject in effect to the full jurisdiction of Security Council.<sup>43</sup>

Dr. Evatt proposed that the clause, “but this principle shall not prejudice the application of Chapter VIII, Section B” should be amended to “but this principle shall not prejudice the application of enforcement measures under Chapter VIII, Section B” so that the Security Council would be prohibited from recommending terms for the settlement of a dispute arising out of domestic jurisdiction of a state, even though it may have determined the existence of a threat to peace. The Australian amendment was approved by 31 votes to 3,

<sup>36</sup> Goodrich, Hambro and Simons, *Charter of the United Nations: Commentary and Documents*, 3<sup>rd</sup> ed. (New York: Columbia University Press, 1969) at 665-674.

<sup>37</sup> H. Jones suggested that Paragraph 7, Section A of Chapter VIII not only inferred that the Council was barred from all conciliatory effort in disputes falling within its coverage but also suggested that disputants were absolved from the obligation to seek peaceful adjustment of such controversies. See *supra* note 19 at 237.

<sup>38</sup> *United Nations Conference on International Organisations* (UNCIO), Doc. 2-G/7 (n) (1), 4 May 1945, Vol. 3 at 371.

<sup>39</sup> UNCIO Doc. 207-III/2/A/3, 10 May 1945, Vol. 12 at 190-192.

<sup>40</sup> Quoted in G. Jones, *supra* note 10 at 21.

<sup>41</sup> Verbatim Minutes of Eighth Meeting, Committee I/I, UNCIO Documents (17 May 1945).

<sup>42</sup> Paragraph 2 of Section B stated: “in general the Security Council should determine the existence of any threat to peace, breach of peace or act of aggression and should make recommendations or decide upon measures to be taken to maintain or restore peace and security”.

<sup>43</sup> UNCIO Vol. 6 at 436-440.

with 5 delegates abstaining and 11 making no responses. The approval of the Australian amendment by Committee I/I resulted in the following text:

Nothing contained in this Charter shall authorize the Organization to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under this Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VIII, Section B.

An amendment submitted by the Greek delegate in the final meeting of Committee I/I that “it should be left to the International Court of Justice at the request of a party to decide whether or not such situation or dispute arises out of matters that, under international law, fall within the domestic jurisdiction of the State concerned”<sup>44</sup> failed to get the required two-third majority and thereby was not adopted.<sup>45</sup> The Belgian delegate also put forward an amendment to the text. His proposed provision was: “Nothing contained in this Charter shall authorise the Organisation to intervene in matters which in the judgment of the Organisation are according to international law exclusively (or solely) within the domestic jurisdiction of any State or shall require the members to submit such matters under this Charter”.<sup>46</sup> This Belgian proposal was opposed by Dr Evatt on the ground that it made the organisation “the judge of its own activities”<sup>47</sup> and was subsequently not approved when put to vote.<sup>48</sup> After all, the proposal of the four sponsoring governments prevailed for the most part, and the present provision was finally approved and adopted on 14 June 1945 with 33 votes in favour and 4 opposing. In the next section, we will discuss the general textual meaning of Article 2(7) in the context of the UN Charter.

## II. ARTICLE 2(7) OF THE UN CHARTER: A TEXTUAL INTERPRETATION

Article 2(7) embodies one of the basic principles of the UN and not a mere “technical and legalistic formula”.<sup>49</sup> It applies to all organs of the United Nations in relation to their functions except the specialised agencies. In this part of the paper, we will discuss the textual meaning of Article 2(7) of the UN Charter in general. Article 2(7) of the UN Charter states:

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 the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under chapter VII.

The text of Article 2(7) as it appears above makes it clear that the task of interpreting Article 2(7) normally involves issues<sup>50</sup> such as—What is meant by the phrase “to intervene”? What is understood by a state’s “domestic affairs”? What is the scope of exception provision in the last sentence? Who decides whether objection to the competence of the organisation in a given case is valid or otherwise? A probe into these issues will help to shed light on the textual meaning of Article 2(7) of the UN Charter.

<sup>44</sup> UNCIO, Vol. 6 at 509.

<sup>45</sup> *Ibid.* at 28.

<sup>46</sup> UNCIO, Vol. 6 at 510.

<sup>47</sup> *Ibid.* at 511.

<sup>48</sup> *Ibid.* at 512.

<sup>49</sup> UNCIO, Vol. 6 at 507-508.

<sup>50</sup> *Supra* note 2 at 132.

A. *Nothing...Shall Authorise the United Nations to Intervene*

In the context of the UN Charter, Article 2(7) has been regarded as embodying the principle of non-intervention. The relation between the concept of domestic jurisdiction and the non-intervention principle has been aptly described as: “Clearly, domestic jurisdiction refers to the right of each state to freely—independent of other states and international organisations—exercise its own legislative, executive and judicial jurisdiction. Its exercise is consequence of state sovereignty and the rights of the nations to self-determinations”.<sup>51</sup> It is believed that the principle of non-intervention had its beginnings as an abstract principle but with the advent of the League of Nations and the UN, the pressure for its precise articulation as a legal norm was felt. The practice of the League could bring one aspect of the principle into clear focus. That is, if States were obliged to refrain from non-intervention in the affairs of other states in the conduct of their foreign policies, it is equally sensible not to give international organisations the authority to intervene in the domestic affairs of member-states. The principle of non-intervention has subsequently, in the post-colonial era, become more dominant in the thinking of states.

The controversy regarding the correct interpretation of the word “intervene” has existed since the beginning of the UN. The delegations at San Francisco indicated that they understood the term “intervene” to refer to any action by any organ of the United Nations concerning a matter which was within the domestic jurisdiction of particular states. This would mean that any discussion, recommendation, inquiry or study concerning the domestic affairs of a state would amount to intervention.<sup>52</sup> The intention of the drafters of the Charter was the formulation of a rule which would ensure that the organisation would not go beyond acceptable limits and enlarge its scope of function, especially in the economic, social and cultural fields. Over the years, the phrase “Nothing ... shall authorize the United Nations to intervene” has been interpreted from various points of view.

Yet throughout the history of the UN there has been controversy over the types of actions the UN has performed with reference to the domestic affairs of a state. Some have argued that the term “intervention” has commonly been defined as “dictatorial interference” with imperative pressure as defined under classical international law.<sup>53</sup> The followers of this view have heavily relied on the work of Sir Hersch Lauterpacht. Others have argued on the contrary that the meaning of “intervention” within Article 2(7) should be understood as “interference pure and simple”. But the early debate about intervention has lost much of its importance in the context of Article 2(7). UN General Assembly Resolution 2131(XX) of December 21, 1965 contains the first detailed formulation of the principle of non-intervention.<sup>54</sup> Both armed interference and interference by other means were declared illegal. One of the reasons is that the general concept of intervention has undergone change. The principle stated in UN General Assembly Resolution 2625 (XXV) of October 24, 1970 is as follows:

No state or group of states has the right to intervene, intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any state. Consequently, armed intervention and all other forms of interference or attempted threats against

<sup>51</sup> G. Shinkaretskaya, “Content and Limits of ‘Domestic Reservee’” in G. Tunkin & R. Wulfrum, eds., *International Law and Municipal Law* (Berlin: Duncker & Humboldt, 1988) at 123.

<sup>52</sup> For detail, see D. R. Gilmour, “The Meaning of ‘Intervention’ within Article 2(7) of the United Nations Charter—An Historical Perspective” (1967) 16 *Int. Comp. L.Q.* at 333.

<sup>53</sup> H. Lauterpacht, “The International Protection of Human Rights” (1947-I) 70 *Recueil des Cours de l’Académie de Droit International de La Haye* 1 at 19.

<sup>54</sup> In its operative part, the resolution states: “No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threat against the personality of the State or against its political, economic and cultural elements are condemned.”

the personality of state or against its political, economic and cultural elements, are in violation of international law.

The resolution goes on to encompass all state activities that may amount to coercion by economic, political and other means which may have the effect of subduing another state's sovereignty within the meaning of intervention.<sup>55</sup> The resolution does not confine intervention to military intervention. A more detailed elaboration of the concept was adopted in 1981, as the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.<sup>56</sup> According to the Declaration, it is the duty of the state not to use its external economic assistance programme or to adopt any multilateral or unilateral economic reprisal or blockade, and to prevent the use of transnational and multinational corporations and control its political pressures as instruments of coercion against another state. The principle of non-intervention has also arisen in international litigation. The most notable contribution on this subject is the judgment in the *Nicaragua Case*.<sup>57</sup>

It is apparent from the text that Article 2(7) purports only to protect the member states against acts of the UN and not against the acts of a state against another state. During the discussion in the Security Council of the bombing in the Federal Republic of Yugoslavia by NATO, India argued that the bombing committed a violation of Article 2(7). Since the bombing was not authorised by the UN, it was not responsible for this. Nevertheless, Article 2(7) has been interpreted as an embodiment of the general principle of non-intervention which can be inferred from Article 2(1) and 2(4) of the Charter as well as the principles of international law.

#### B. *Matters Essentially Within the Domestic Jurisdiction*

The organs of the UN have not been very consistent or clear as to what they regard as a matter essentially within the domestic jurisdiction of a state. However it appears that they have accepted in substance the opinion of the PCIJ in the *Tunis-Morocco Nationality Case* that whether a certain matter is characterised as domestic or otherwise is essentially relative and depends upon the development of international law.<sup>58</sup> This means that the concept of domestic jurisdiction does not denote specific areas which are clearly defined. The development of international law after the Second World War has led to the rules of international law governing or affecting many fields. It is the basis for the widespread assumption that the area of domestic jurisdiction is constantly being reduced.<sup>59</sup> This observation is basically correct but does not solve the problem of how to ascertain when and how a matter is to be defined as falling within the domestic sphere of a state by the UN. 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 judgment.<sup>60</sup> For example, the Spanish case showed that any domestic matter, once it becomes an international concern, no longer remains within the domestic jurisdiction of the state. The earlier traditional view has been that there is no restraint on a state with regard to its nature and form of government, treatment of citizens or

<sup>55</sup> For detail, see V. Lowe, "The Principle of Non-Intervention: Use of Force" in V. Lowe & C. Warbrick, eds., *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst*, (New York: Routledge, 1994) at 66-81.

<sup>56</sup> UN GA, 1981, UN Doc. A/Res/36/103. Adopted by 120 votes to 22, with 6 abstentions.

<sup>57</sup> [1986] I.C.J. Rep. 14.

<sup>58</sup> *Supra* note 35.

<sup>59</sup> *Supra* note 1 at 157.

<sup>60</sup> This is not a unanimous view. *E.g.*, J. S. Watson has offered *teleological versus strict construction* approach to interpret Article 2(7). See J. S. Watson, "Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter" (1977) 71 *Am. J. Int. L.* 60 at 66-71.

use of its territory.<sup>61</sup> But we will see in the following sections of this paper that the principle of domestic jurisdiction has constantly failed to provide shield to these reserve areas of state competence from intrusion of the UN on different occasions.

Now let us turn to the word “essentially” of the Article 2(7). It was proposed particularly against the word ‘solely’ which was used in the League Covenant. At San Francisco, John Foster Dulles of the United States defended the word “essentially” on the ground that if the term solely were retained, the whole effect on the limitation on the authority of the United Nations would be destroyed. His argument was that though in the modern world matters of domestic jurisdiction were always bound to have some international repercussion or international concern, this was no justification for saying that such matters should be regarded as outside domestic jurisdiction of states.<sup>62</sup> Through the use of the term “essentially”, the United States delegation hoped to make domestic jurisdiction clause apply to a much wider field of domestic matters.<sup>63</sup>

### *C. But... Shall Not Prejudice the Application of Enforcement Measures*

The second sentence of the Article 2(7) provides for an exception to the general rule of non-intervention by the organs of the UN into the domestic jurisdiction of the member states. Though it is the opinion of a distinguished scholar that Article 2(7) substantially limits the Council’s power, the wording of the second sentence nevertheless ensures that the application of enforcement measures under chapter VII is not subject to the plea of domestic jurisdiction.<sup>64</sup> Article 2(7) refers not only to the measures of military nature under Article 42, but also to the measures not involving the use of force contemplated by Article 41.<sup>65</sup> At the San Francisco Conference, it was proposed that all chapter VII actions taken by the Security Council should be immune from the operation of the domestic jurisdiction clause. However, after accepting an Australian amendment, the application of the exception clause of Article 2(7) was restricted to “enforcement measures”.<sup>66</sup> The main purpose of the Australian amendment was to avoid the possibility that the domestic jurisdiction clause could be dropped with regard to recommendations that the Security Council may issue under Article 39. These recommendations are not enforcement measures. Australia’s concern was that if a stronger state threatened a weaker state with the aim of changing its domestic policies, the Security Council might issue recommendations to both the stronger and weaker states, instead of only acting against the peace-threatening stronger states.<sup>67</sup>

This exception clause was to enable the Security Council to tackle the roots of a conflict before it reaches dimensions which are harder or impossible to manage.<sup>68</sup> All enforcement decisions taken by the Security Council under Articles 41 and 42 are excluded from the ambit of the principle of non interference. It also follows logically that not only the enforcement measures but also those resolutions which are necessary or fundamental for an effective

<sup>61</sup> *Supra* note 2 at 133.

<sup>62</sup> Verbatim Minutes of Eighth Meeting, Committee *II*, UNCIO Documents, (14 June, 1945) Nos. 15-16, quoted in G. Jones, *supra* note 10 at 26.

<sup>63</sup> *Supra* note 10 at 20.

<sup>64</sup> Quoting Professor T. M. Franck on Article 2(7), “The ‘Greenwich foot’ by which the actions taken by the Security Council in the name of ‘collective’ security are judged is Article 2(7) of the Charter.” See T. M. Franck, “Fairness in the International Legal and Institutional System”, *Academy of International Law: General Course on Public International Law* (offprint from (1993-III) 240 *Recueil des Cours de l’Académie de Droit International de La Haye* at 219).

<sup>65</sup> *Supra* note 2 at 147.

<sup>66</sup> See UNCIO, Vol. 6 at 439.

<sup>67</sup> *Ibid.*

<sup>68</sup> L. Preuss, “Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction” (1949-I) 74 *Recueil des Cours de l’Académie de Droit International de La Haye* 547 at 588.

enforcement also falls outside Article 2(7).<sup>69</sup> But recommendations made with reference to Article 39 do not come within the exception contemplated in Article 2(7).<sup>70</sup> Evidence of this can be given from the preparatory works since the reference in the last part of Article 2(7) to “enforcement measures” (rather than to the entire Chapter VII, as was first opposed) was wanted in order not to subject recommendations under Article 39 to the limit of domestic jurisdiction.<sup>71</sup> Further evidence can be adduced from a contextual approach that the recommendations under Article 39 are closely functional to those provided by chapter VI, particularly Articles 36 and 37—for which the domestic jurisdiction clause was especially conceived.<sup>72</sup> Here it should be kept in mind that enforcement actions are not limited to military measures only. While the term enforcement measures in Article 53 of the Charter is mostly understood to exclude non-military sanctions, it is agreed that the same term in Article 2(7) includes all binding decisions which the Security Council makes under chapter VII.<sup>73</sup>

#### D. *Who Decides the Competence of the Organisation*

At San Francisco, the proposal made by a number of States that whether a matter fell within the domestic jurisdiction of a state should be decided by the ICJ did not succeed.<sup>74</sup> However this does not mean that the state which raises the domestic jurisdiction plea is the judge of its own cause. Rather, it is assumed that the question of interpretation is not specific to the domestic jurisdiction clause only, but a general issue of the interpretation of the whole Charter.<sup>75</sup> It is by now accepted that the general rule of Charter interpretation applies to Article 2(7) too.<sup>76</sup> The resultant effect is that each of the organs of the UN has the power to make a *prima facie* assessment of the applicability of a particular norm. The fact that political organs have taken responsibility for interpreting and applying the domestic jurisdiction principle in so far as their particular actions are concerned has had important consequences. It is believed that it has resulted in a more liberal interpretation of power of United Nations. There is a tendency on the part of individual member states to play down the domestic jurisdiction principle in those instances where they wish for UN action and to stress its importance and inviolability where it is to their interest not to have the United Nations take any action. As a result, it is not unlikely that the tendency of UN organs on the application of the principle of domestic jurisdiction should be determined by block alignment and assessment of advantages. And whether this assessment is correct is to be seen in the following parts of this paper in the light of previous practice of the state parties and UN organs.

### III. THE PLEA OF DOMESTIC JURISDICTION AND THE GENERAL ASSEMBLY

The history of the drafting of Article 10 of the UN Charter clearly shows that there was an intention prevailing in the minds of the drafters to prevent the General Assembly from exercising any function in connection with matters which were regarded as within the domestic jurisdiction of a particular state.<sup>77</sup> But later, the practice of the General Assembly, especially

<sup>69</sup> *Supra* note 2 at 149.

<sup>70</sup> *Ibid.* at 150.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Supra* note 1 at 169.

<sup>74</sup> See UNCIO, Vol. 3 at 371.

<sup>75</sup> For a different approach see J. S. Watson's view, *supra* note 60 at 60-83.

<sup>76</sup> See the argument of Mr. Dulles in this regard in L. M. Goodrich, “The United Nations and Domestic Jurisdiction” (1949) 3(1) *International Organization* at 18.

<sup>77</sup> *Supra* note 52 at 335-346.

in respect of human rights has affected both legal concepts and procedures including that of domestic jurisdiction. In normative terms, the General Assembly has based its approach towards human rights on the Charter and the Universal Declaration of Human Rights. In General Assembly Resolution A/Res/34/175 (17 December 1979), it has been reaffirmed that mass and flagrant violation of human rights are of special concern to the UN.<sup>78</sup> Since 1979, General Assembly resolutions have begun to refer to various international instruments.<sup>79</sup> The criterion General Assembly has invented is “large scale”, “gross” or “massive and flagrant violation” of human rights. Generally the General Assembly does not deal with individual cases of human rights violation.<sup>80</sup> A few case studies will be helpful to understand how the General Assembly became increasingly involved in human rights issues which finally resulted in the decrease in importance of the principle of domestic jurisdiction.

The first incident which may be cited as a case in point of the General Assembly’s dealing with the plea of domestic jurisdiction was the situation concerning Algeria (1955-1962). In a letter of 26 July 1955, the representatives of fourteen member states brought the case before the UN Secretary-General advocating Algeria’s right of self-determination.<sup>81</sup> When the matter came before the General Committee in September 1955, the delegates of Egypt, Iraq and India supported the right of Algeria to self-determination. But the French representative, with the support of the UK and USA, objected on the ground of Article 2(7) of the UN Charter.<sup>82</sup> The General Committee decided by 8 votes to 5 (with 2 abstentions), not to recommend the inclusion of the item in agenda. But one week later, the matter came before the plenary meeting of the General Assembly. Debate ensued again on the ground of domestic jurisdiction. The Indian delegate insisted on inclusion of the item in the agenda.<sup>83</sup> At the end of the debate, the matter was placed on the agenda following a close vote of 28 to 27, with 5 abstentions and French protest. The outcome of the debates on the Algerian case marked the beginning of the recognition by the General Assembly of the principle that no state could be the sole judge of its own cause.<sup>84</sup> It was observed by Quincy Wright on the occasion that the interpretation and application of the obligations of states under international law were by definition international, and not domestic, issues.<sup>85</sup> The Algerian case also affords a good illustration of the gradual consolidation of a new principle of contemporary international law, namely, the right to self-determination.

In the Tibetan incident<sup>86</sup> (1959-1965) the debate came before the General Assembly whether the Article 55 of UN Charter provided the General Assembly with competence over Tibet regardless of its status of statehood.<sup>87</sup> Despite objections on the ground of Article 2(7), the matter was repeatedly placed on the agenda of the General Assembly which, in a resolution, affirmed the right to the civil and religious liberty of the Tibetan People.<sup>88</sup>

With regard to the domestic jurisdiction, the role of the General Assembly in the South African case affords the most notable example. At first, the General Assembly successively

<sup>78</sup> The resolution has emphasised the importance of the Secretary General’s role in the case of flagrant violations of human rights.

<sup>79</sup> Dominick McGoldrick, “The Principle of Non-Intervention: Human Rights” in V. Lowe and C. Warbrick, eds., *supra* note 55 at 101.

<sup>80</sup> *Ibid.*

<sup>81</sup> UN GAOR, UN Doc. A/2924 (1955).

<sup>82</sup> UN GAOR (1955), General Committee, 103rd meeting, at 8.

<sup>83</sup> The Indian delegate said, “If discussion in the United Nations were intervention, it would be governed by Article 2(7) and this would reduce the Charter to an absurdity.” See 87 GAOR (1955), Plenary Meetings, 530th meeting at 190.

<sup>84</sup> A.A. Cancado Trindade, “The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations” (1976) 25 Int. Comp. L.Q. 713 at 731.

<sup>85</sup> Q. Wright, “Is Discussion Intervention” (1956) Am. J. Int’l L. at 105.

<sup>86</sup> The first resolution on this incident was Resolution 1353 (XIV) (Question of Tibet), UN GAOR, 14<sup>th</sup> Sess., Supp. No. 16, UN Doc. A/4354 (1959). See *supra* note 84 at 724.

<sup>87</sup> *Ibid.*

<sup>88</sup> GA Res. 1353 (XIV), *supra* note 86.

included in its agenda the question of the treatment of the people of Indian origin in South Africa despite its objection on the ground of domestic jurisdiction.<sup>89</sup> The General Assembly later established a commission to study the racial situation in South Africa.<sup>90</sup> In a report the Commission stated: "The exercise of functions and powers conferred on the Assembly and its subsidiary organs by the Charter does not constitute an intervention prohibited by Article 2(7) of the charter".<sup>91</sup> The matter was referred to the ad hoc political committee which rejected the South African contention on the ground of domestic jurisdiction.<sup>92</sup> In accordance with the recommendation of the Committee, the General Assembly adopted a resolution which, without making any mention of competence, requested South Africa's co-operation with the Commission.<sup>93</sup> The resolution also made no mention of the objection raised on the ground of Article 2(7). Following a second report by the Commission, the General Assembly adopted a resolution condemning the policy of apartheid.<sup>94</sup> In the next report (1955), the Commission was of the view:

The policy of apartheid is a seriously disturbing factor in international relations, and the least that can be said of it is that it is likely to impair the general welfare or friendly relations among nations. This, then, is one of those situations which, under Article 14 of the Charter, may form the subject of recommendations by the General Assembly.<sup>95</sup>

At the initiative of the ad hoc Political Committee, the General Assembly upheld the conclusions of the Commission's report in a resolution.<sup>96</sup> Since then, the General Assembly repeatedly asserted its competence to deal with the cases in several resolutions.<sup>97</sup>

The question of observance of human rights in Bulgaria, Hungary and Romania provides another good illustration of the General Assembly's simultaneous dealing with the issues of human rights and domestic jurisdiction. The episode began with the trial of church leaders in Bulgaria and Hungary. Romania was later also accused of similar human rights violations. Notwithstanding the opposition that the inclusion of the item in the agenda constituted interference in the domestic jurisdiction of two states which were not members of the UN, the matter was referred to the Ad Hoc Political Committee.<sup>98</sup> Later as per the approval of the Ad Hoc Political Committee and in the face of opposition by USSR the General Assembly passed a resolution alleging that Bulgaria and Hungary had acted contrary to the purpose of the UN and Peace Treaties.<sup>99</sup> All the states denied these charges. By the General Assembly Resolution 294(IV), 22 October 1949, the matter was referred to ICJ. In the advisory opinion, the ICJ in other word affirmed the General Assembly Resolution 272(III), 30 April, 1949. On the face of the advisory opinion, Rosalyn Higgins was of the

<sup>89</sup> *Repertory of Practice of United Nations Organs (1945-1954)*, Vol. I, Art. 2(7) at para. 42-75.

<sup>90</sup> *Ibid.* at para. 171-186.

<sup>91</sup> GA (VIII), Suppl. No. 16, para. 893; Quoted in A.A. Cancado Trindade, *supra* note 84 at 735.

<sup>92</sup> *Ibid.* at para. 192-198.

<sup>93</sup> The United Nations Commission on the Racial Situation in the Union of South Africa was established by GA Res. 616 A (VII), UN GAOR, 7<sup>th</sup> Sess., UN Doc. A/2183 (1952).

<sup>94</sup> GA Res. 820 (IX), *The Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa*, 511<sup>th</sup> meeting (1954).

<sup>95</sup> GA (X), Suppl. n. 14, (UN Doc. A/2953), Para. 309. *Third report of the United Nations Commission on the Racial situation in the Union of South Africa*, GAOR, 10<sup>th</sup> Sess., Supplement, (14) 1955: 85-86 U.N. Doc. A/2953.

<sup>96</sup> *The Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa*, GA Res. 917 (X), 551<sup>st</sup> meeting (1955).

<sup>97</sup> *Supra* note 84 at 735.

<sup>98</sup> *Supra* note 10 at 48.

<sup>99</sup> *Observance in Bulgaria and Hungary of Human Rights and Fundamental Freedoms*, GA Res. 272(III), 203<sup>rd</sup> meeting (1948).

opinion that no objection could be raised to the passing resolutions of the Assembly on the ground of Article 2(7).<sup>100</sup>

#### IV. EXCEPTION TO ARTICLE 2(7): THREAT TO PEACE AND THE SECURITY COUNCIL

According to Article 2(7), the application of enforcement measures under Chapter VII was excepted from the prohibition of interference in domestic affairs. So is the determination of the existence of a “threat to peace” as such under Article 39, since it is by way of that article that enforcement measures are ultimately taken. The question then is whether a formal or a substitutive interpretation should apply to Article 2(7) and 39 respectively.<sup>101</sup> It follows that depending on how formal a view one adopts to the interpretation of “threat to peace” the issue of the relationship between Article 39 and Article 2(7) will either be one of strict law or one of legitimacy, to the extent that the two can be separated.<sup>102</sup> If the formal view is applied, a determination of “threat to peace” and consequent enforcement will always be legal provided that certain fundamental rules of international law are observed.<sup>103</sup> On the other hand, if a less formal view of interpretation is applied to Article 39 in combination with Article 2(7), it can be argued that there must be some implicit substantive legal limitations to the freedom of judgment of the Security Council in determining a “threat to peace” and choosing enforcement measures. The point where the notion of threat to peace meets the prohibition of interference in the domestic jurisdiction of states is in the cases where the Security Council determines that what are arguably essentially domestic phenomena constitute a “threat to peace”.

Let us now take a look at the approach of the Security Council towards Article 2(7) and chapter VII of the UN Charter. Professor Thomas M. Franck has classified the Security Council’s invocation of Chapter VII power into two categories, namely “the easy cases” and “the hard cases”. The easy cases are those which cannot be said to fall essentially within the domestic jurisdiction of a state—they are actually international military conflicts against which the Security Council has invoked Chapter VII power.<sup>104</sup> The Arab-Israel conflict following the demise of Britain’s mandate in Palestine and the attack on South Korea by North Korea are instances of “easy cases”. As these incidents do not create any dispute as to the legitimacy of UN intervention, we will turn our attention to “hard cases” to ascertain the legality of UN intervention by the principle of the domestic jurisdiction.

The earliest situation which we can cite as one of the “hard cases” is whether Franco’s Fascist regime in Spain had led to international friction and endangered international peace and security. Poland brought the matter before the Security Council as a “situation of the nature referred to in Article 34” of the Charter.<sup>105</sup> The case was included in the agenda of the Security Council and General Assembly. In the Security Council, a debate took place among members as to the applicability of the principle of domestic jurisdiction to bar Security Council’s action. During the course of the debate, several delegations expressed, for the first time, the opinion that a matter no longer falls within the domestic jurisdiction of a state if it has become an international concern.<sup>106</sup> A sub-committee of five members was established by the Security Council to collect documents and testimonies about Franco’s

<sup>100</sup> R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (New York: Oxford University Press, 1963) at 128, footnote 49.

<sup>101</sup> *Supra* note 6 at 31.

<sup>102</sup> *Ibid.*

<sup>103</sup> For an analysis of the limits of the power of the Security Council, see T. D. Gill, “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter” (1995) 26 *Neth. Y.B. Int.L.* at 30-138.

<sup>104</sup> *Supra* note 64 at 194.

<sup>105</sup> (1946) 25 *Journal of the Security Council* 490.

<sup>106</sup> *Supra* note 84 at 723.

regime and report on it. In its report, the sub-committee reached the conclusion that while the Spanish regime did not constitute an existing threat to peace within the meaning of Article 39 of Chapter VII, it was a "potential menace to international peace" within the meaning of Article 34 of Chapter VI. The sub-committee also asserted that the situation was of international concern and by no means a domestic concern of Spain.<sup>107</sup> In the Spanish Case, Mr. Evatt's explained that whether a matter falls within the reserve domain of a state is a question of fact and depends upon the circumstances of the particular state.<sup>108</sup>

We will next briefly discuss the South Africa Case. The case concerned the treatment of people of Indian origin in South Africa. The Indian statement was that these people had migrated to South Africa during 1860 to 1913 under an arrangement between two governments. The Indian government contended that as much as the Indians were then nationals of South Africa, the Union was under obligation to refrain from such treatment.<sup>109</sup> Though India first raised this issue before the General Assembly in 1946, it was brought before the Security Council in 1960. In the course of dealing with the South African case, the General Assembly passed a resolution establishing a Special Committee to review the racial policies of the South African government and to report to the General Assembly and the Security Council.<sup>110</sup> The very same resolution also asked the member states to cut off diplomatic ties with South Africa and requested the Security Council to take appropriate measures.<sup>111</sup> Before the Security Council, the South African Government raised the plea of domestic jurisdiction as it did before the General assembly. Notwithstanding the Security Council adopted a resolution which directed all states to stop selling equipment for the manufacture and maintenance of arms in South Africa.<sup>112</sup> The Secretary General was assigned to establish a group of experts to keep the matter under review. When the group submitted its report, the South Africa contended that the report contained matters which are "essentially within the domestic jurisdiction of the Republic of South Africa".<sup>113</sup> But in Resolution 191 of 1964 the Security Council affirmed the conclusion of the Group of Experts. The South African case has evidenced the change of demeanor of the UN organs in their task of interpreting Article 2(7). According to Trindade, "the position taken by the United Nations on the South African cases shows that Article 2(7) is seen as having no absolute meaning in itself. It should rather be interpreted in combination with other provisions of the UN Charter taken as a whole, including its purposes and principles".<sup>114</sup> It is also observed in the South African cases that the question of competence by the UN organs in the face of a plea of domestic jurisdiction is an unsolved issue wherein debates about competence always get mingled with substantive issues. More important is that a state's treatment of its own nationals has lost its defense as an essentially domestic matter before international political organs.

The peace-keeping operation of the UN in the Congo has from the beginning provoked a live controversy over the relevance of the principle of domestic jurisdiction in Article 2(7) of the UN Charter.<sup>115</sup> The controversy began on 11 July 1960 when the province of Katanga proclaimed secession. On 12 July, the President and the Prime Minister of the Congo asked

<sup>107</sup> U. N. Doc. S/75 and S/76 of May 31, 1946.

<sup>108</sup> (1946) 37 Journal of Security Council 728. Also see *supra* note 19 at 250.

<sup>109</sup> The Cape Town Agreement of 1927. Also see *supra* note 19 at 253.

<sup>110</sup> *The Policies of Apartheid of the Government of the Republic of South Africa*, GA Res. 1761 (XVII), UN GAOR, 17<sup>th</sup> Sess. (1962).

<sup>111</sup> *Ibid.*

<sup>112</sup> *Question Relating to the Policies of Apartheid of the Government of the Republic of South Africa*, SC Res. 182, 18<sup>th</sup> yr, Supp. Oct – Dec, UN Doc. S/5471 (1963).

<sup>113</sup> *Repertory of Practice of United Nations Organs (1945–1954)*, Vol. I, Art. 2(7), Supp. III at 83.

<sup>114</sup> *Supra* note 84 at 737.

<sup>115</sup> For a detail analysis of this issue, see Leo Gross, "Domestic Jurisdiction, Enforcement Measures and the Congo" (1965) *Aust. Y.B. Int.L.* 137.

the UN Secretary-General for military assistance to end a Belgian act of aggression.<sup>116</sup> Consequently, the Security Council passed its first resolution authorising the Secretary General to take the necessary steps in consultation with the Government of the Republic of the Congo to provide such military assistance as may be necessary.<sup>117</sup> On 9 August 1960, the Security Council authorised the entry of the UN forces into Katanga with the condition that it will not be a party to or in any way intervene between the secessionists and the central authorities.<sup>118</sup> Following the murder of the Prime Minister Patrice Lumumba, the Security Council acknowledged the situation as threat to international peace and security and authorised the deployment of 23, 000 UN soldiers with the mandate of “use of force, if necessary, in the last resort”.<sup>119</sup> From 28 August, the UN troops started operation. After the Secretary-General, Hammarskjold had died in a plane accident the Security Council passed a resolution stating the purpose of the Congo operation.<sup>120</sup> In this resolution, the Security Council highlighted the reasons for rendering UN’s assistance to assist the central government to maintain national integrity. The secession of Katanga halted after extensive military campaign. In relation to the situation in the Congo, the question raised by the critics was whether the several Security Council resolutions conferred such authority on the peace-keeping mission to go beyond self-defence so as to “intervene” in domestic affairs.<sup>121</sup> But it has been argued that the UN action in the Congo does not involve any discussion of Article 2(7) because, although the measure was taken under Article 39, it did not purport to be either enforcement action or intervention.<sup>122</sup> It has been further argued that the military assistance was on behalf of and at the request of the government of a member state, not against it.<sup>123</sup> Since the Congo incident, it has been confirmed that civil wars can make way for UN action under Chapter VII.

Southern Rhodesia was annexed by the UK in 1923. Southern Rhodesia, Northern Rhodesia and Nyasiland created a federation in 1953. In 1963 after the Federation had broken up, the white minority of the European Settlers in Southern Rhodesia sought independence from the UK. The Settlers had established a racist government which secured dominance over black citizens who formed the majority of the population.<sup>124</sup> It was quite clear that the racist policy would continue after independence was accorded to Southern Rhodesia. The situation of Southern Rhodesia had caught the attention of the General Assembly which asked its “Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples” to establish whether or not Southern Rhodesia was to be considered a self-governing territory.<sup>125</sup> Meanwhile Britain set forth some conditions to grant independence which also included majority rule in Southern Rhodesia. It was apparent that the conditions would not be accepted by the white regime. Pursuant to the Committee’s advice, the Assembly declared Southern Rhodesia a non-self governing territory under Article 73 of the Charter without recognising Britain’s claim that the situation falls within the scope

<sup>116</sup> UN SCOR, 15<sup>th</sup> yr, Supp. Jul – Sep, UN Doc. S/4382 (1960).

<sup>117</sup> *The Congo Question*, SC Res. 143, UN SCOR, 873<sup>rd</sup> meeting, UN Doc. S/4387 (1960). It is important to note that the Resolution does not make any finding under Chapter VII but calls upon the Belgian Government to withdraw troops.

<sup>118</sup> *The Congo Question*, SC Res. 146, UN SCOR, 886<sup>th</sup> meeting, UN Doc. S/4426(1960).

<sup>119</sup> *The Congo Question*, SC Res. 161, UN SCOR, 942<sup>nd</sup> meeting, UN Doc. S/4741 (1961).

<sup>120</sup> SC Res. 169, UN SCOR, 982<sup>nd</sup> meeting, UN Doc. S/5002 (1961).

<sup>121</sup> *Supra* note 115 at 137.

<sup>122</sup> *Supra* note 64 at 201.

<sup>123</sup> *Ibid.*

<sup>124</sup> David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter* (Boston, Massachusetts: Kluwer Law International, 2001) at 57.

<sup>125</sup> *General Questions Relating to the Transmission and Examination of Information from Non-Self-Governing Territories*, GA Res. 1745 (XVI), UN GAOR, 16<sup>th</sup> Sess., 1106<sup>th</sup> meeting (1962).

of Britain's domestic jurisdiction. Likewise the General Assembly and the Security Council did not accept Britain's claim that the Southern Rhodesia situation falls within British domestic jurisdiction.<sup>126</sup> On 11 November 1965, when the settlers unilaterally declared their independence<sup>127</sup>, the Council called an emergency session and condemned the unilateral declaration of independence.<sup>128</sup> States were also requested to refrain from assisting the racist regime of Southern Rhodesia<sup>129</sup> and the Council determined the situation as "a threat to international peace and security".<sup>130</sup> The matter of interest here is UK's unsuccessful invocation of the principle of domestic jurisdiction before the Security Council which seized and acted upon the situation in Southern Rhodesia and eventually adopted enforcement measures to deal with the situation. Southern Rhodesia became an example of how the plea of domestic jurisdiction is not sufficient to bar the Security Council from judging a government's treatment in light of Article 39 of the Charter.<sup>131</sup>

Another significant case in point to highlight the practice of the Security Council regarding domestic jurisdiction is the situation of Iraq after the Gulf war.<sup>132</sup> The Security Council prescribed a cease-fire agreement with measures to the effect of limiting the domestic sovereignty of its government which would invite an Article 2(7) argument if not within the sphere of Chapter VII.<sup>133</sup> The conditions of the cease-fire entailed destruction of Iraq's chemical and biological weapons, renouncing its nuclear development programme,<sup>134</sup> authorising the International Atomic Energy Agency to inspect suspected activities,<sup>135</sup> permitting the International Commission<sup>136</sup> to conduct searches by land and air to destroy prohibited weapons and establishing an observer force to monitor a demilitarised zone. Although Iraq agreed to these conditions they were in fact imposed under Chapter VII, without the explicit consent of Iraq.<sup>137</sup> The Security Council had continued its intervention in matters considered domestic affairs of a state even after the acts of aggression had ended because the Security Council wanted to make sure that the threat should not recur.<sup>138</sup> According to Professor Thomas M. Franck, this "constitutes a significant interpretation of the scope of Article 2(7), 39 and 41, one with considerable implications in other situations where a 'threat to the peace' might also be deduced from collateral evidence of a Government's 'tendencies' even in the absence of actual ongoing aggressive behaviour".<sup>139</sup> Another important instance of the Security Council's response to threats to peace, human rights and domestic jurisdiction was that to the Kurdish crisis in post-war Iraq. In a resolution the Security Council stated, "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in this region".<sup>140</sup> In this resolution, in the absence of a Council decision to take collective measures, it is still noteworthy that a purely civil war and the repression of the civilian population by its own government were thought to be outside the domestic

<sup>126</sup> *Supra* note 124 at 59.

<sup>127</sup> (1966) 35 I.L.M. 230.

<sup>128</sup> SC Res. 216, UN SCOR, 20<sup>th</sup> Sess., UN Doc. S/RES/216 (1965).

<sup>129</sup> *Ibid.*

<sup>130</sup> SC Res. 217, UN SCOR, 20<sup>th</sup> Sess., UN Doc. S/RES/217 (1965).

<sup>131</sup> *Supra* note 64 at 204.

<sup>132</sup> *Ibid* at 204–207.

<sup>133</sup> SC Res. 687, UN SCOR, 46<sup>th</sup> Sess., 2981<sup>st</sup> meeting, UN Doc. S/RES/687 (1991). Professor Thomas M. Franck referring to Oscar Schachter, has pointed out that the Council imposed intrusive conditions on Iraq comparable to those of Treaty of Versailles. See *ibid* at 205.

<sup>134</sup> SC Res. 687, *ibid.* at para. 7.

<sup>135</sup> *Ibid.* at para. 9(iii).

<sup>136</sup> *Ibid.* at para. 9(i).

<sup>137</sup> *Supra* note 64 at 205.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid* at 206.

<sup>140</sup> SC Res. 688, UN SCOR, 46<sup>th</sup> Sess., 2981<sup>nd</sup> meeting, UN Doc. S/RES/688 (1991) at para. 1.

jurisdiction of Iraq and within the purview of the UN.<sup>141</sup> The Security Council Resolution pointed out that “a massive flow of refugees” caused Iraq’s repression of the Kurds to constitute a threat to peace and security in that region.<sup>142</sup> Though it was pointed out that the resolution was not adopted under Chapter VII, the wording of the resolution located itself within the precinct of “threats to the peace”. The Kurdish crisis surely gave an indication of the role the UN might perform in the future in regard to a situation of extremely civil oppression by a government of its own citizens.

Similar to the Kurdish crisis, the Kosovo situation presents a picture of emerging rules about the UN’s role with regard to government oppression of civilians and human rights. In Kosovo, unrest escalated in February and March 1998 with repressive action by the Serb police.<sup>143</sup> On 31 March 1998, the Security Council adopted Resolution 1160 (1998) in which the use of excessive force by the Serbian police and terrorist action by the Kosovo Liberation Army (KLA) was condemned, an armed embargo was imposed and support for a solution based on territorial integrity was expressed.<sup>144</sup> On 23 September 1998, the Security Council adopted another resolution<sup>145</sup> demanding the Federal Republic of Yugoslavia to take the following actions—(a) to enable effective monitoring by the EC Monitoring Mission; (b) to facilitate the return of refugees and displaced persons; and (c) to make rapid progress towards finding a political solution. Finally the Council decided to consider further action to maintain peace in that region if concrete measures were not taken.<sup>146</sup> After the Federal Republic of Yugoslavia failed to cooperate and the situation continued to escalate, NATO commenced strikes on 24 March 1999. In an emergency situation, Russia, China, Belarus and India opposed the action as a violation of the Charter.<sup>147</sup> India took the position that since Kosovo was a recognised part of Yugoslavia, the UN had, under Article 2(7), no role to play in the settlement of the country’s domestic political problems. The counter-argument was given by Slovenia that the situation in Kosovo constituted a threat to peace, and that is why it should no longer be regarded as falling within the domestic affairs of Yugoslavia. More to the point, it argued that even if the Security Council failed to determine the situation as constituting a threat to peace, the domestic jurisdiction prohibition would not apply due to massive violation of human rights.<sup>148</sup>

The situations in Liberia and Somalia reflect the current position of the principle of domestic jurisdiction in relation to peacekeeping operations and conflict prevention. In Liberia the National Patriotic Front of Liberia (NPFL) headed by Charles Taylor launched an insurgency movement against Master-Sergeant Samuel Doe, the chief of a dictatorial military regime. The insurgency movement became bifurcated when Prince Johnson, a former commander of Charles Taylor, formed the Independent National Patriotic Front of Liberia (NPFL). In response to the deteriorating situation in Liberia, the Economic Community of West African States (ECOWAS) in August 1990 sent a cease-fire monitoring group (ECOMOG) which was welcomed by Doe and Johnson, but not by NPFL. Hostility ensued between ECOMOG and NPFL on several occasions and on an intermittent basis. In 1992, the Security Council determined the situation as constituting a threat to international security and recognised

<sup>141</sup> *Supra* note 64 at 210.

<sup>142</sup> *Supra* note 140 at preamble.

<sup>143</sup> For background event, see S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (New York: Oxford University Press, 2002) at 206-217.

<sup>144</sup> The resolution was adopted under Chapter VII, without an explicit determination of a threat to international peace and security.

<sup>145</sup> SC Res. 1199, UN SCOR, 53<sup>rd</sup> Sess., 3930<sup>th</sup> meeting, UN Doc. S/RES/1199 (1998).

<sup>146</sup> *Ibid.* at para. 16.

<sup>147</sup> Security Council Verbatim Record, UN SCOR, 3988<sup>th</sup> meeting, UN Doc. S/PV.3988 (1999).

<sup>148</sup> *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, UN SCOR, UN Doc. S/1999/293 (1999).

the need for increased humanitarian assistance in Liberia.<sup>149</sup> The Security Council also established the UN Observer Mission in Liberia (UNOMIL) to coordinate with ECOMOG without participating in the peacekeeping operations.<sup>150</sup> The mandate of the UNOMIL was subsequently extended on various occasions. The Council's involvement in Liberia is twofold. First, it established a weapon embargo which did not produce desired effect. Second, it endorsed the regional peacekeeping mission present in Liberia since 1990. The novelty of the situation is that, strictly speaking, the UN peacekeeping mission in Liberia gradually assumed the characteristics of enforcement action.<sup>151</sup> Similar to the Liberian situation, the involvement of the UN in Somalia initially commenced as peacekeeping and later evolved into a peace-enforcement mechanism. From the UN involvement in these situations, it has been generally accepted that even a situation which causes no physical repercussion abroad may nevertheless constitute a threat to peace.<sup>152</sup> From these facts it is evident that the domestic jurisdiction or sovereignty of a country may be limited by the power of the Security Council although the Special Committee of the General Assembly on Peacekeeping Operations regularly stresses that peacekeeping operations should strictly observe the principles and purposes embodied in the Charter, in particular, the respect for principles of sovereignty, territorial integrity, political independence and non-intervention in matters essentially within the domestic jurisdiction of any state.<sup>153</sup>

The Libya and Lockerbie incident has added a new dimension to the Security Council's exercise of power under Chapter VII.<sup>154</sup> In 1992, the Security Council prompted the Libyan government to extradite its nationals who were allegedly responsible for the explosion of the Pan Am Flight.<sup>155</sup> Libya refused to comply with the Security Council resolution on the ground of Montreal Convention 1973.<sup>156</sup> The case is important because under the Montreal Convention 1973, Libya was obliged to either bring the accused to trial or to extradite the alleged offenders.<sup>157</sup> It was Libya's contention that by taking the initiative to bring the alleged offenders to trial; it had complied with the obligations assumed under the Montreal Convention. And as there was no extradition treaty between Libya and other requesting states, Libya was not bound by the Security Council's request for extradition. Libya also instituted proceedings in the ICJ and, in addition, requested for interim measures to prevent defendant states from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside Libya. What is important here is the determining by the Security Council that a state action constituted a threat to peace even though the action was warranted by a universal treaty.

## V. THE UN ECONOMIC AND SOCIAL COUNCIL

As much as in the General Assembly and the Security Council, the issue of domestic jurisdiction has come before the Economic and Social Council (ECOSOC) several times. But it can be argued that in relation to the violation of human rights by states, the earlier attitude

<sup>149</sup> *Supra* note 124 at 87-93.

<sup>150</sup> SC Res. 866, UN SCOR, 48th Sess., 3281<sup>st</sup> meeting, UN Doc. S/RES/866 (1993).

<sup>151</sup> *Supra* note 124 at 87-93.

<sup>152</sup> *Ibid* at 117-125.

<sup>153</sup> *Ibid*.

<sup>154</sup> On the 21 December 1988 the Pan Am Flight exploded over Lockerbie, Scotland causing death of all the passengers.

<sup>155</sup> SC Res. 731, UN SCOR, 3033<sup>rd</sup> meeting, UN Doc. S/Res/731 (1992).

<sup>156</sup> L. Henkin, R. C. Pugh, O. Schachter & H. Smit, *International Law. Cases and Materials*, 3d ed. (St. Paul, Minnesota: West Publishing Co., 1993) at 987-988. See also *Libyan Arab Jamahiriya (21 Jan)*, SC Res. Res. 731, UN SCOR, 3033<sup>rd</sup> meeting, UN Doc. S/RES/731 (1992) and *Libyan Arab Jamahiriya (31 Mar)*, SC. Res. 748, UN SCOR, 3063<sup>rd</sup> meeting, UN Doc. S/RES/748 (1992).

<sup>157</sup> *Supra* note 64 at 217.

of the ECOSOC was relatively dormant in comparison to its later practice.<sup>158</sup> The view that human rights violation constituted matters falling within the domestic jurisdiction of states prevailed in the ECOSOC and the Commission on Human Rights for more than a decade up to 1967.<sup>159</sup> This attitude was first modified when the Commission on Human Rights decided to give consideration to human rights violations by states.<sup>160</sup> The first case that the Commission dealt with concerned South Africa.<sup>161</sup> The Commission established a procedure called “the 1235 Procedure” to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practiced in the Republic of South Africa and other states.<sup>162</sup> Acting upon the findings of the *ad hoc* working group, the Commission recommended the government of South Africa to abide by the International Standard Minimum Rules for Treatment of Prisoners.<sup>163</sup> The provisions of Resolution 1235 provide an account how the mandate of the Council has evolved over time.<sup>164</sup> In the following years, the ECOSOC demonstrated greater concern about human rights violation. In 1970, it developed a mechanism known as “the 1503 Procedure”, named after Economic and Social Council Resolution 1503 (XLVIII) of 1970. During the Council’s preparatory work, objections were raised on the ground of Article 2(7). It was argued that the procedures for dealing with those communications violated the principles of sovereignty of member states and domestic jurisdiction.<sup>165</sup> The opposing argument was that the violation of human rights no longer constitutes internal affairs and hence, no longer falls within the domestic jurisdiction of states.<sup>166</sup>

At the time of drafting the Covenants on Human Rights, the plea of domestic jurisdiction came before the ECOSOC. The General Assembly in 1950 urged the ECOSOC to request the Commission on Human Rights to give priority to completing the draft Covenants and finding measures for its implementations. In this regard, the USSR’s objection that Articles 19 and 41 of the draft International Covenant on Civil and Political Rights<sup>167</sup> should be deleted as they constituted an attempt to intervene in the domestic affairs of states was rejected by the Commission.<sup>168</sup> Next, the objection on the ground of domestic jurisdiction was raised in relation to the right of all peoples to self-determination including those in non-self governing territories.<sup>169</sup> In the face of objections as to whether a matter governed by the Charter provisions on self-determination could easily fall within domestic jurisdiction, Article 1 which asserted the right of all peoples to self-determination in both Covenants was adopted by the Committee of General Assembly, to which the two draft Covenants had

<sup>158</sup> In ESC Res. 75 (V), UN ESCOR, UN Doc. E/573 (1947), it was stated that the Economic and Social Council had no competence to take action in regard to human rights violation.

<sup>159</sup> For example ESC Res. 75 (V), *ibid.*, was endorsed in ESC Res. 728 F (XXVIII), UN ESCOR, 28<sup>th</sup> Sess., Supp. No. 1, UN Doc. E/3290 (1959).

<sup>160</sup> *Supra* note 10 at 61.

<sup>161</sup> The Commission established an *ad hoc* working group of experts to investigate charges of torture, ill treatment of prisoners in police custody in South Africa. See *ibid.* at 61.

<sup>162</sup> ESC Res. 1235 (XLII), UN ESCOR, 42<sup>th</sup> Sess., Supp. No. 1, UN Doc. E/4393 (1967).

<sup>163</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955. See *Human Rights: A Compilation of International Instruments* (New York: United Nations, 2002); section J. Approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>164</sup> Henry J. Steiner & Philip Alston, *International Human Rights In Context* (New York: Oxford University Press, 2000) at 620.

<sup>165</sup> The 1503 Procedure authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to deal with consistent pattern of human rights violations by states.

<sup>166</sup> *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, Res 1 (XXIV), UN ESCOR, UN Doc. E/CN.4/1070 (1971) at 7-33, 50-53. See also, Rosalyn Higgins, *Problems and Process. International Law and How We Use It* (New York: Oxford University Press, 1994) at 254.

<sup>167</sup> ICCPR, 999 UNTS 171 (entered into force 23 March 1976).

<sup>168</sup> *Supra* note 89 at 101-103.

<sup>169</sup> *Ibid.* at 103-104.

been referred.<sup>170</sup> This issue became more distinct in relation to the implementation system of the draft Covenant on Civil and Political Rights. It was contended that “any procedure under which a State Party or an individual could complain before an international organ that another State Party had violated the rights recognised in the Covenant would inevitably lead to the intervention in the domestic affairs of member States, in violation of the Charter”.<sup>171</sup> The reply of the Commission was

The adoption of a system of international control in the field of civil and political rights would not be contrary to the Charter by accepting the Covenants in the full exercise of their sovereignty, States Parties would undertake obligations of an international character, and it could hardly be claimed that the provisions of those instruments were matters falling exclusively within domestic jurisdiction.<sup>172</sup>

The General Assembly adopted the two Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights by Resolution 2200 (XXI) on 16 December 1966.<sup>173</sup> The objection of domestic jurisdiction was also raised when recommendations concerning international respect for self-determination of peoples were being considered. In this regard, there should be particular mention of the right of self-determination of the peoples of non-self governing and trust territories, which the Commission supported despite a number of objections.<sup>174</sup> In December 1958, the General Assembly adopted Resolution 1314(XIII) on Recommendations concerning international respect for the Right of the Peoples and Nations to Self-determination.<sup>175</sup>

## VI. CONCLUDING REMARKS

It is evident from the intention of those who drafted Article 2(7) that the Charter should contain articles affirming the promotion of human rights and fundamental freedom and consequently Articles 1(3) and 55(c) were included in the Charter.<sup>176</sup> Further, nothing in Chapter IX and X of the Charter should be regarded as giving authority to the Organisation to intervene in the domestic affairs of states.<sup>177</sup> The fact is that the UN was not conceived as an instrument for the enforcement of human rights. The mass internationalisation of human rights has contributed to the reshaping and rethinking of legal concepts, including the domestic jurisdiction of states, because it is quite obvious that matters which were once thought to be the internal affairs of states are no longer regarded as so in many respects. Accordingly, we have seen several instances in which the General Assembly, the Security Council and the Economic and Social Council have taken human rights situations to trigger action by the UN. Notable is also the tenuous sustainability of the domestic jurisdiction plea by oppressive regimes before political organs of the UN, including the Security Council. We have seen the UN organs have begun to identify human rights violations as constituting *threats to peace* and have demanded government action to rectify such situations.<sup>178</sup> Related to the issue of the growing importance of human rights is the issue of liberal democracy as a possibly existing or emerging rule of general international law.<sup>179</sup> These developments

<sup>170</sup> *Ibid.* at 104-106.

<sup>171</sup> *Ibid.* at 98.

<sup>172</sup> *Ibid.*

<sup>173</sup> *The Covenant on Economic, Social and Cultural Rights*, (1966) 933 UNTS 3, came into force on the January 3, 1976. *The Covenant on Civil and Political Rights*, (1966) 999 UNTS 171, and the *Optional Protocol*, (1966) 999 UNTS 302, came into force on 23 March 1976.

<sup>174</sup> *Supra* note 84 at 757.

<sup>175</sup> GA Res. 1314 (XIII), UN GAOR, 13<sup>th</sup> Sess., 788<sup>th</sup> Mtg. (1958).

<sup>176</sup> *Supra* note 10 at 33.

<sup>177</sup> UNCIO, Vol. 10 at 271-272.

<sup>178</sup> *Supra* note 1 at 161.

<sup>179</sup> Thomas M. Franck, “The Emerging Right to Democratic Governance” (1992) 86 Am. J.Int. L. at 46-91.

have led to comments such as that the domestic jurisdiction exception has lost its political and legal weight to the extent that it is no more than an unsuitable residual value,<sup>180</sup> or that human rights no longer belong to the domestic jurisdiction of states.<sup>181</sup> Such statements are not wholly groundless in the sense that states have vastly reduced their sphere of unfettered decision-making by agreeing to a large number of human rights declaration and treaties. But such developments do not lead to the outright conclusion that Article 2(7) is wholly obsolete now. Statements regarding respect for a state's domestic jurisdiction and sovereignty are still regularly made in resolutions passed by the General Assembly and other UN organs.<sup>182</sup> The mandate of the UN High Commissioner for Human Rights (UNHCR) contains a reference to the domestic jurisdiction clause.<sup>183</sup> The UNHCR still referred to domestic jurisdiction clause when it defined the mandate of Human Rights Commission.<sup>184</sup> The UN Secretary General has opined that Article 2(7) is still relevant as it was in 1945.<sup>185</sup>

<sup>180</sup> *United Nations Strategies to Combat Racism and Racial Discrimination: Past Experiences and Present Perspectives*, UN ESCOR, 55<sup>th</sup> Sess., UN Doc. E/CN.4/1999/WG.1/BP.7 (1999), online: UNHCHR <<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/f5361232f18f18a3802567a600353646?Opendocument>>

<sup>181</sup> E/CN.4/Sub2/1999/29 of June 15, 1999, para. 15.

<sup>182</sup> *Declaration and Programme of Action on a Culture of Peace*, UN GAOR, 53<sup>rd</sup> Sess., UN Doc. A/RES/53/243(1999). Another is *Commission on Human Rights Resolution 2000/3*, UN HCHROR, UN Doc. E/CN.4/RES/2000/3 (2000).

<sup>183</sup> *High Commissioner for the Promotion and Protection of all Human Rights*, UN GAOR, 85<sup>th</sup> meeting, UN Doc. A/Res/48/141 (1994) at para. 3(a).

<sup>184</sup> *Summary Record of the 1061st Meeting: Burundi* UN CERD, 45<sup>th</sup> Sess., UN Doc. CERD/C/SR.1061 (1994) at para. 60.

<sup>185</sup> "Secretary-General Reflects on 'Intervention' in Thirty-Fifth Annual Ditchley Foundation Lecture", UN Press Release SG/SM/6613 (26 June 1998), online: UN <<http://www.un.org/news/Press/docs/1998/19980626.sgs6613.html>>.

