HUMANITARIAN INTERVENTION, HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW

KATHLEEN HARDIE
BA (UWA) Grad Cert Law, PG Dip Policy Studies, LLB (Hons) (Murdoch)

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DECLARATION

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary institution.

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Kathleen Hardie
ABSTRACT

This thesis will critically examine the status of humanitarian intervention in international law. This will involve an examination of constraints on the use of force both prior to and after the introduction of the Charter of the United Nations, along with the concept of state sovereignty and the prohibition of intervention in the domestic affairs of states.

It will be argued that the failure of the collective security system envisaged by the Charter, along with changing perceptions of state sovereignty and the increased prominence of human rights have focused attention on the need to develop appropriate international responses to egregious abuse such as genocide, war crimes and crimes against humanity. Humanitarian intervention has been promoted by various authors, non-government organisations, human rights activists and at times by states, as a potential solution.

The concept of humanitarian intervention excites considerable controversy not only about its legality, but also about the desirability and efficacy of the use of force to prevent or constrain grave violations of fundamental human rights. It also raises questions about the continuing relevance of international law relating to the use of force and its corollary, non-intervention in the domestic affairs of states. The question of whether an asserted customary international law right of humanitarian intervention survived the introduction of the Charter will be addressed along with the evolution of customary international law and the legal implications of the classification of norms jus cogens and obligations erga omnes.
The legal limits and some of the practical difficulties with humanitarian intervention will be reviewed. Essentially it will be argued that rather than focusing on an asserted or emerging ‘right’ of humanitarian intervention that does not appear to have strong state support, it might be more fruitful to focus on the need to reform the United Nations and strengthen its capacity and commitment to the development of more effective approaches to the promotion of human rights, conflict prevention and conflict resolution. Ideally this would also help to resolve critical questions relating to the legitimacy of international law.
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1. INTRODUCTION

The Charter of the United Nations [the Charter] was intended to radically change the conduct of international relations by requiring constraint on the relatively unfettered sovereign right of states to use force. Prior to the introduction of the Charter the primary constraints on the use of force were moral, rather than legal sanctions. These were informed by traditional religious and philosophical conceptions of what constituted right conduct or a ‘just war’.  

Apart from a right of individual or collective self-defence, the Charter envisaged the establishment of a collective security system that would operate effectively to ‘maintain international peace and security’. The Charter provided for a focus on peaceful means of dispute resolution and failing that, a resort to force only when authorised by the Security Council operating in accordance with its Chapter VII powers relating to ‘threats to the peace, breaches of the peace, and acts of aggression’. Once the Security Council has made a determination of the existence of a ‘threat to the peace’ as required by article 39 of the Charter, it has a broad discretion to pursue a range of options to remedy the situation. These include either non-violent measures under article 41, or ‘such action by air, sea, or land forces as may be necessary to maintain or

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3 Charter of the United Nations, article 1.1. See Brownlie, above n 2, 3.
4 Charter of the United Nations, Chapter VII articles 39-51. See Brownlie, above n 2, 11 – 12.
restore international peace and security’ as authorised under article 42 of the Charter.\(^5\)

However, while the Charter provided for the establishment of a Military Staff Committee that was to be responsible for the strategic direction of ‘armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining peace and security’\(^6\) that were to be placed at the disposal of the Security Council by member states, this did not eventuate. Initial attempts to establish a viable Military Command Structure as provided for in articles 46 and 47 of the Charter were hampered by fundamental disagreements among states on issues such as the size and location of the force, conditions for their use and withdrawal, and the contributions from each permanent member.\(^7\) Article 43 agreements were not concluded in a climate of Cold War distrust.\(^8\) Consequently UN operations involving the use of force can only be undertaken with armed forces supplied on a voluntary basis by member states.

The collective security system envisaged by the Charter is predicated on agreement and co-operation among the five permanent members of the Security Council. The ideological conflict of the Cold War prevented the requisite concurrence of opinion among the permanent members of the Security Council.

\(^5\) Ibid, 11-12.
\(^6\) *Charter of the United Nations*, article 43 – these were to be provided ‘in accordance with a special agreement or agreements’. See Brownlie, above n 2, 12.
\(^8\) Murphy, above n 7, 306.
to enable it to function effectively.9 A direct consequence of the failure of the
collective security system was the evolution of United Nations peacekeeping
operations which are undertaken with the consent of the parties to the conflict,
and where military personnel, provided by member states on a voluntary basis,
can only use force in self-defence.10

However, states have not only demonstrated a reluctance to support the
establishment and maintenance of a United Nations standing force, but they
have also been reluctant to meet their financial contributions.11 This has
contributed to debilitating problems that the United Nations faces in meeting
increasingly complex peacekeeping commitments. Traditional peacekeeping has
been extended beyond the monitoring of cease-fires, assisting troop withdrawal,
and providing a buffer between opposing forces,12 to include multiple ancillary
functions such as the protection of humanitarian relief organisations, the
establishment of ‘safe areas’, the promotion of reconciliation, and re-
establishment of effective government in failed states.13 In the Supplement to An
Agenda for Peace, the UN Secretary General notes that,

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9 Ramesh Thakur, The United Nations, Peace and Security (Cambridge: Cambridge University
10 United Nations, Department of Public Information, The Blue Helmets: A Review of United
Nations Peace-keeping, 2nd ed. 1990, 4-6; See also Rosalyn Higgins, ‘Peace and Security
11 United Nations, Department of Public Information, The Blue Helmets: A Review of United
Nations Peace-keeping, 2nd ed. 1990, 6; UN Doc A/50/60 - S/1995/1 of 3 January 1995,
Supplement to An Agenda for Peace: Position Paper of the Secretary General on the occasion of
the Fiftieth Anniversary of the United Nations, at paras 97-101; Higgins, above n 10, 447-448;
Thakur, above n 9, 14-18; UN Doc A/59/565, A More Secure World: our shared responsibility,
12 United Nations, Department of Public Information, The Blue Helmets: A Review of United
13 UN Doc A/50/60 - S/1995/1 of 3 January 1995, Supplement to An Agenda for Peace: Position
Paper of the Secretary General on the occasion of the Fiftieth Anniversary of the United
Nations, at paras 12-22; UN Doc A/62/659 – S/2008/39, Securing peace and development: the
role of the United Nations in supporting security sector reform, at paras 5-11.
the availability of troops and equipment...has palpably declined as measured against the Organization's requirements. A considerable effort has been made to expand and refine stand-by arrangements, but these provide no guarantee that troops will be provided for a specific operation. For example, when in May 1994 the Security Council decided to expand the United Nations Assistance Mission for Rwanda (UNAMIR), not one of the 19 Governments that at that time had undertaken to have troops on stand-by agreed to contribute.14

What is regarded as the inability of the Security Council to respond appropriately to egregious violations of human rights, along with the reluctance of states to adequately support UN peacekeeping operations has precipitated a credibility crisis where there is a perception that the UN has an extremely limited capacity to operate effectively to maintain international peace and security.15 This is especially significant in an environment characterised by complex and inter-related challenges such as economic and social threats; intra-state conflict, including civil war, genocide and other large scale atrocities; terrorism; trans-national crime, and the ready availability of small arms along with the development of increasingly sophisticated nuclear, radiological, chemical and biological weaponry.16

It is in the context of the failure of the collective security system envisaged by the Charter, along with an increased focus on human rights and changing

14 Ibid, at para 43.
perceptions of state sovereignty, that debate about a ‘right’ of humanitarian intervention has attained more prominence. However, while the term ‘humanitarian intervention’ is widely used, there is no common definition of the term.\textsuperscript{17} This makes meaningful discussion of the topic a little more complicated because the term is often used very broadly, and the actual meaning of its components ‘humanitarian’ and ‘intervention’ are both contested.\textsuperscript{18} In fact the idea that militarised intervention could be conflated with humanitarianism was, and is, still regarded by some authors and humanitarians as an oxymoron.\textsuperscript{19} However, the rise of a more politically charged human rights based activism has stimulated debate about the relevance of classic apolitical humanitarian principles such as humanity, neutrality, impartiality, independence, and universality directed towards alleviating suffering rather than effecting change.\textsuperscript{20} Further, the linkage of human rights with international security facilitated calls for either a new or a rejuvenated ‘right’ of humanitarian

\textsuperscript{17} J.L. Holzgrefe, ‘The humanitarian intervention debate’ in J. L. Holzgrefe and Robert Keohane (eds), \textit{Humanitarian Intervention: Ethical, Legal and Political Dimensions} (Cambridge: Cambridge University Press, 2003) 15, 18; Murphy, above n 7, 8.

\textsuperscript{18} Murphy, above n 7, 8-12; See also Paul Muggleton, ‘The Doctrine of Humanitarian Intervention and the NATO Air Strikes Against the Federal Republic of Yugoslavia’ in Tony Coady and Michael O’Keefe (eds), \textit{Righteous Violence: The Ethics and Politics of Military Intervention} (Melbourne: Melbourne University Press, 2005) 99, 103-104.

\textsuperscript{19} See Maley, above n 15, 193 cites a call by David Reiff for humanitarian action to recover its independence; Robert Keohane, ‘Introduction’ in J. L. Holzgrefe and Robert Keohane (eds), \textit{Humanitarian Intervention: Ethical, Legal and Political Dimensions} (Cambridge: Cambridge University Press, 2003) 1; See also David Chandler, \textit{From Kosovo to Kabul And Beyond: Human Rights and Humanitarian Intervention} (New ed. London: Pluto Press, 2006) 42-47 for a discussion of the move by human rights based NGOs away from neutral humanitarianism in the face of the prospect that the delivery of aid may prolong or exacerbate conflict. The move towards a more political approach to aid politically and support for militarised humanitarian intervention presents complex moral, as well as practical, challenges for humanitarian organisations. Chandler at p 47 cites Oxfam’s Nick Stockton who has criticised the trend towards classification of ‘deserving and undeserving’ victims and withholding aid from undeserving victims as ‘the arbitrary application of punishment before trial and it constitutes cruel, inhuman and degrading treatment on a massive scale’.

\textsuperscript{20} See Chandler, above n 19, 40-52; See also International Committee of the Red Cross, ‘Discover the ICRC’ Ref: 0790 (Geneva: ICRC, September 2005) The International Committee of the Red Cross is the most widely recognised international humanitarian organisation. In 1965 it codified the seven principles that inform its work – humanity, impartiality, neutrality, independence, universality, unity and voluntary service.
intervention that purportedly existed prior to the introduction of the UN Charter.\textsuperscript{21}

For the purposes of this paper the definition advanced by Holzgrefe will be adopted. Holzgrefe defines humanitarian intervention as:

\begin{quote}
The threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.\textsuperscript{22}
\end{quote}

This paper focuses on classic unilateral humanitarian intervention that involves a use of force that has not been authorised by the Security Council. It should not be confused with peacekeeping operations or Chapter VII interventions for ‘humanitarian’ purposes as these are authorised by the UN and represent no legal challenges unless they exceed their mandate.

The concept of humanitarian intervention excites considerable debate about its legality and desirability as a means to address grave violations of fundamental human rights in the absence of Security Council agreement relating to the necessity for forceful intervention. It is recognised that the prohibition of the use of force extends to threats of the use of force, and that in the 1996 Advisory Opinion on \textit{The Legality of the Threat or Use of Nuclear Weapons} the ICJ determined that, ‘The notions of ‘threat’ and ‘use’ of force stand together in the

\textsuperscript{21} Chandler, above n 19, 49; See also Chesterman, above n 1, 3 -20 for a discussion of just war theory. Also at p 3 Chesterman argues that ‘neither the writings of publicists nor state practice establish any coherent meaning of this ‘right’; at best it existed as a lacuna in a period in which international law did not prohibit resort to war’.

\textsuperscript{22} Holzgrefe, above n 17, 18.
sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal'. However, for the purposes of this paper, the primary focus will be on the use of force.

Chapter two will outline the pre and post Charter constraints on the use of force in international law. Consideration will be given to various interpretations of the prohibition of the use of force in article 2(4) of the Charter and the prohibition of intervention in the domestic affairs of states as articulated in article 2(7) of the Charter. The prohibition of the use of force and the principle of non-intervention in the domestic affairs of states, which are also principles of customary international law, are particularly important as they suggest that unless humanitarian intervention is authorised by the Security Council in accordance with its Chapter VII powers, it will be illegal.

The question of whether an asserted customary law right of humanitarian intervention survived the introduction of the Charter will be addressed along with discussion of the evolution of customary international law. Also, the classification of the prohibition of the use of force, along with aggression, genocide and torture as norms *jus cogens* that also give rise to obligations *erga*
Unauthorised humanitarian intervention to prevent or contain serious human rights abuse such as genocide, war crimes and crimes against humanity raises the fundamental question of what is more important – the prohibition of the use of force and its corollary, non-intervention in the domestic affairs of states, or respect for fundamental human rights.

The critical question of the legality of humanitarian intervention relates to the legal implications of the classification of norms *jus cogens* and obligations *erga omnes* and whether the classification of egregious abuses such as genocide, war crimes and crimes against humanity gives rise to a positive obligation on the part of states to prevent or contain such abuse. In discussing this issue, consideration will be given to the *Convention on the Prevention and Punishment of the Crime of Genocide* [*Genocide Convention*] which entered into force on 12 January 1951 and in particular whether the obligation to prevent genocide, which has been described as the ‘crime of crimes’, displaces the prohibitions of the use of force and non-intervention in the domestic affairs of states.

Proponents of a ‘right’ of humanitarian intervention generally reject a strictly positivist interpretation of international law and variously argue that the growing prominence of human rights along with changing conceptions of state

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sovereignty lend support to the notion that humanitarian intervention is either legal,\textsuperscript{31} or that it should be legal;\textsuperscript{32} that human rights rather than the rights of states provide the ethical foundation of international law;\textsuperscript{33} that any technical illegality should be absolved in cases of extreme necessity;\textsuperscript{34} that following the NATO intervention in Kosovo the law relating to humanitarian intervention is uncertain and is open to change.\textsuperscript{35}

These issues will be considered along with changing conceptions of state sovereignty in an increasingly globalised and interdependent world, and the development of the ‘Responsibility to Protect’ [R2P]. As outlined in the Report of the International Commission on Intervention and State Sovereignty [ICISS], R2P was an attempt to change the conceptual boundaries of state sovereignty to embrace the notion that sovereignty implies ‘primary responsibility for the protection of its people lies with the state itself’.\textsuperscript{36} It was also an attempt to refocus debate about humanitarian intervention away from a ‘right’ of intervention which necessarily focuses on the rights of the intervening state or international organisation as opposed to the rights and ongoing needs of the oppressed population whose fundamental human rights are being violated.

\textsuperscript{31} Chesterman, above n 1, 36-38.
\textsuperscript{33} Ibid.
\textsuperscript{36} \textit{The Responsibility to Protect}, Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, Canada (December 2001) XI.
The linkage of human security with state sovereignty inevitably leads to questions relating to appropriate responses of the international community in cases where a state either fails to protect its own citizens from serious human rights abuse, or is actually complicit in such abuse. While consistent with traditional conceptions of ‘just war’, the ICISS Report attempted to develop criteria for humanitarian intervention such as right authority, a just cause threshold along with precautionary principles of right intention, last resort, proportional means, and reasonable prospects of success, it also recognised the Security Council as the appropriate authority to authorise any intervention. An approach to the General Assembly under the ‘Uniting for Peace’ procedure or action by regional or sub-regional organisations with subsequent approval from the Security Council can only be considered when the Security Council has failed to respond to massive human rights abuse. However, these are recognised as potentially legitimate as opposed to legal options. Further, the adoption of the R2P principle by the General Assembly and the Security Council was essentially limited to recognition that states have a responsibility to protect their own populations from genocide, war crimes, ethnic cleansing and crimes against humanity. It did not provide support for unauthorised humanitarian intervention.

Intra-state conflict presents particular difficulties especially where it occurs in failed or fragmented states where there are no clear lines of authority, the distinction between combatants and non-combatants becomes blurred, and there

37 Ibid, 31-37 and 54-55.
38 Ibid, 53-54.
40 UN General Assembly World Summit Outcome Document. UN Doc A/60/L.1, para 138.
may be strong religious or ideological opposition to the basic tenets of the Charter. The legal limits and some of the practical difficulties associated with humanitarian intervention are explored in case studies of the situation in Myanmar after Cyclone Nargis and the NATO intervention in Kosovo. There is also a brief review of some of the alternatives to humanitarian intervention – sanctions, judicial proceedings, diplomatic pressure and mediation.

Humanitarian intervention is a bellwether topic in international law. How international society, with its immense diversity in social, cultural, economic and political circumstances, deals with large scale egregious oppression of other human beings is a reflection of the status and efficacy of international law. Undoubtedly, there have been radical changes since the days of the San Francisco conference where the Charter was finalised in 1945 by a mere fifty ‘peace loving’ nations, in a process largely dominated by the United States, the Soviet Union [succeeded by Russia], Great Britain and China.

Assertions of the legality of humanitarian intervention raise fundamental questions of the relevance of international laws relating to the use of force and non-intervention in the domestic affairs of states, and the protection of fundamental human rights enshrined in the Charter and in international human rights treaties. They also raise questions about the role of ‘soft’ law (non-legally

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44 Murphy, above n 7, 66-67; Grewe, above n 43, 2-3.
binding) principles such as the *Universal Declaration of Human Rights*\textsuperscript{45} and the UN General Assembly *World Summit Outcome Document* (which recognised that states have a responsibility to protect their own citizens from ‘genocide, war crimes, ethnic cleansing and crimes against humanity’\textsuperscript{46} in the development of customary international law.\textsuperscript{47} This paper will attempt to address these questions, along with some of the critical deficiencies of the collective security system envisaged by the Charter.

\textsuperscript{45} *The Universal Declaration of Human Rights*. See Brownlie, above n 2, 192-195.

\textsuperscript{46} UN General Assembly *World Summit Outcome Document*. UN Doc A/60/L.1, at para 138. The principle of state responsibility to protect their own citizens from grave abuse was subsequently recognised by the Security Council in SC Res 1674, UNSCOR 61\textsuperscript{st} sess, 5430\textsuperscript{th} mtg, UN Doc S/RES/1674 (2006) at para 4.

2. THE USE OF FORCE IN INTERNATIONAL LAW

2.1. HISTORICAL OVERVIEW PRE UNITED NATIONS CHARTER

Known attempts to order relations between different international societies extend back to the 2100BC treaty between the rulers of Lagash and Uma city states in Mesopotamia. While the just war tradition, which is an attempt to constrain resort to war as well as the conduct of hostilities, is generally accepted as being influenced by early Christian theologians and philosophers such as Saint Augustine, it is notable that concern with the notion of just war is also found in early Persian, Egyptian, Indian and Chinese cultures.

However, it appears that early civilisations had no conception of ‘international’ law and it was the rapidly expanding Roman Empire that progressively developed jus gentium which ‘became the common law of the Roman Empire and was deemed to be of universal application.’ The Romans adopted the concept of Natural Law developed in the third century BC by Greek Stoic philosophers. The Stoic philosophers regarded the ideas and precepts of the ‘law of nature’ as rational, logical, and of universal relevance as they derived from human intelligence.

3 Shaw, above n 1, 15 notes that jus gentium ‘provided simplified rules to govern the relations between foreigners, and between foreigners and citizens.
6 Shaw, above n 1, 15.
In fact, most civilisations attempted to place some limitations on the savagery of armed conflict. Generally this involved the development of customary rules often inspired by religion and respected by people with common cultural and religious backgrounds. However, such rules were usually discarded in dealings with foreigners and infidels.\footnote{Francois Bugnion ‘Just war, wars of aggression and international humanitarian law’ September 2002, (84) No. 847 \textit{International Review of the Red Cross} 523, 523-533. (Originally published in French ).} In the fifth century a Christian theologian, Saint Augustine claimed that war was one of the natural powers of a monarch who has an obligation to defend the nation’s peace, and therefore has a right to make war as ordained by natural law.\footnote{Karoubi, above n 2, 64-65.} However, Saint Augustine rejected war based on ‘the desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust for dominating’.\footnote{Ibid.}

During the Middle Ages, the Catholic Church was dominant in Europe and ecclesiastical law applied to everyone.\footnote{Ibid.} Saint Thomas Aquinas, a Catholic philosopher, who was influenced by the writings of Saint Augustine, defined three conditions as necessary for a just war – lawful authority, just cause and right intention.\footnote{Karoubi, above n 2, 67-68.} Nevertheless, Bugnion notes that ‘during the Wars of Religion and the Thirty Years War appalling crimes (recorded in terrifying detail in the engravings of Jacques Callot) were committed throughout the length and breadth of Europe, yet theologians on either side hastened to justify them in the name of the Gospel’.\footnote{Bugnion, above n 7, 526.}
A secular approach to the concept of just war owes much to philosophers such as Francisco de Vitoria (1480 – 1546), Francisco Suarez (1548 – 1617), and Alberto Gentili (1552 – 1608). Francisco de Vitoria attempted to create restrictions on both *jus ad bellum* and *jus in bello* by arguing for careful examination of justice, causes and reasons before starting a war and rejecting deliberate harm against innocents. However, Hugo Grotius (1583 – 1645) is widely acknowledged as the father of modern international law. Grotius’ work was based largely on a body of principles ‘rooted in the laws of nature’. The *Rights of War and Peace* was an attempt to unify Christian Europe whose nations had been engaged in ongoing and unrestrained religious and political conflict. In this work ‘the pivotal concerns relate to the sovereign, territorially defined state and to the laws of war and peace’. Influenced by the progressive ideas of de Vitoria and Gentili who both recognised that war could be just for both belligerents, Grotius argued that it is not just to wage war against infidels, or people who are mistaken in their interpretation of Christianity. Grotius sought to establish criteria to evaluate situations that might warrant a resort to force – ‘defence in case of actual or imminent injury to the state; proportionality of good over evil; chance of success; declaration of war; declaration of war by right
authority; and, last resort’. Importantly, Grotius argued for some restrictions on the authority of monarchs, and he developed a ‘set of rules for the protection of innocents and prisoners’.

However, prior to the Twentieth Century, while theologians and philosophers articulated moral constraints, there were few legal constraints on resort to force. The Geneva Conventions of 1864, 1906, 1929 and 1949, the 1868 Declaration of St Petersburg and the Hague Conventions of 1899 and 1907 were adopted at a time when resort to force was still legal. They were intended to limit the violence associated with war by developing rules dealing with the conduct of hostilities and the protection of civilians and ‘people who are no longer participating in hostilities’ rather than limit resort to war. The almost unlimited use of force was permissible in international relations up until the Hague Convention II of 1907 where article 1, relating to Limitation of the Employment of Force for the Recovery of Contract Debts, contains a modest conditional limitation on the use of force.

From 1913 onwards the United States concluded a number of ‘Bryan Treaties’ with other states which attempted to restrict resort to force as a means of dispute settlement. However, it was not until the establishment of the League of Nations in 1919, after the devastation of World War One, that there was a significant

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22 Karoubi, above n 2, 73.
23 Ibid, 76.
24 Bugnion, above n 7, 530.
27 Ibid.
attempt at an international level to prevent but not prohibit resort to war.\textsuperscript{28} League members agreed to respect the territorial integrity and political independence of other states; to submit disputes to arbitration, or to the League Council if they could not reach agreement; and, the Council had the authority to apply diplomatic or economic sanctions if a state resorted to war.\textsuperscript{29} Unfortunately, not only was the Covenant of the League of Nations limited in its scope, but it was also crippled by the fact that the United States was not a member, and the Soviet Union, Germany and Italy were only members for a short time.\textsuperscript{30}

The Kellogg-Briand Pact signed on 27 August 1928, to which the majority of existing states subsequently became a party, was the first significant attempt to ‘prohibit recourse to war for the solution of international controversies and renounce it as an instrument of national policy’.\textsuperscript{31} However, it did not prohibit war as an instrument of international policy, and the ‘national policy’ formula gave rise to the interpretation that other wars – in pursuit of religious, ideological and similar (not strictly national) goals – were also permitted.\textsuperscript{32} Some provisions of the Kellogg-Briand Pact are applicable today as part of customary international law.\textsuperscript{33}

The \textit{Charter of the United Nations} [the Charter] essentially grew out of the failure of the League of Nations to prevent World War Two. In 1943 four nations, the United States, the Soviet Union [succeeded by Russia], Great Britain and China

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} Karoubi, above n 2, 93 - 96; See also Randelzhofer, above n 26, 110.
\item \textsuperscript{29} Margaret Karns and Karen Mingst, \textit{International Organisations: The Politics and Processes of Global Governance} (Boulder: Lynne Rienner Publishers, 2004)
\item \textsuperscript{30} See Randelzhofer, above n 26, 110; Shaw, above n 1, 26.
\item \textsuperscript{31} Ibid, 110 citing Article 1 of the \textit{Kellogg-Briand Pact}.
\item \textsuperscript{32} Dinstein, above n 13, 79.
\item \textsuperscript{33} Randelzhofer, above n 26, 111.
\end{itemize}
\end{footnotesize}
signed a Declaration on General Security published on 30 October, 1943, and subsequently met at Dumbarton Oaks, Washington between August and October 1944 to draft proposals to establish an international collective security organisation.34 After prior deliberation among the major states, the founding conference, the United Nations Conference on International Organisation at San Francisco led to the signing of the Charter by representatives of fifty ‘peace-loving’ nations on 26 June, 1945. 35

The prohibition of ‘the threat or use of force’ in article 2(4) of the Charter reflects a deliberate desire to overcome the shortcomings of the Kellogg-Briand Pact by prohibiting the use of force generally, rather than simply prohibiting war. Further, while one of the obvious shortcomings of the Kellogg-Briand Pact was the failure to link it with any sanctions, articles 39-51 of the Charter are intended to overcome this limitation through provision for a system of collective sanctions against offenders. 36

2. 2. 2. POST UNITED NATIONS CHARTER

2. 2. 1. THE PROHIBITION OF THE USE OF FORCE IN THE UN CHARTER

While the Charter attempts to address some of the perennial challenges that confront humanity – peace, security, justice, economic and social advancement,37 it is undoubtedly a product of its times.38 It was drafted by people reeling from

35 Grewe, above n 34, 10; See also Kars and Mingst, above n 29, 98. The Axis powers – Germany, Italy, Japan and Spain were excluded from membership by limiting it to ‘peace-loving’ states.
36 Randelzhofer, above n 26, 110-112; Murphy, above n 14, 70.
38 See Murphy, above n 14, 65-82; Grewe, above n 34, 3-23.
the effects of two disastrous world wars, and it gave significant power and responsibility to a group of states who at that time constituted the major powers – the United States, the United Kingdom, the Soviet Union, China and France. It was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation and entered into force on 24 October 1945. 39

This was a time in history when international relations were state-centric, and the term ‘war’ was generally synonymous with inter-state conflict. One of the primary concerns of the Charter was to avoid the ‘untold sorrow’ endured by people affected by bloody conflicts between states. This is reflected in the initial exhortation by the member states that:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war…to practise tolerance and live together in peace with one another as good neighbours. 40

Accordingly, there is a strong focus in the Charter on the requirement for member states to pursue non-violent, co-operative means to maintain international peace and security,41 and a prohibition of the use of force against the territorial integrity or political independence of any state.

The prohibition of the use of force in international law is articulated in Article 2(4) of the Charter which requires that:

39 Grewe, above n 34, 12.
40 Charter of the United Nations Preface. See Brownlie, above n 37, 2.
41 Brownlie, above n 37, 2-4. See Charter of the United Nations Chapter 1 article 1 and Chapter VI relating to Pacific Settlement of Disputes.
All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.42

The prohibition is reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance With The Charter of The United Nations [the Declaration on Friendly Relations] adopted by the United Nations General Assembly on 24 October 1970. 43 This Declaration reinforces the focus in the Charter on the pacific settlement of disputes and recognises: ‘No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.’44 Further, it imposes duties on states to refrain from the threat or use of force and to co-operate in the maintenance of peace and security.45

Article 2(4) goes beyond the direct or indirect use of force to include threats of force. Discussion of the threat of force is a relatively neglected area of law.46 However, for the purposes of this paper, a consideration of the relevance of the prohibition of the use of force within the broader context of the legality of humanitarian intervention, discussion will be limited primarily to the scope of the prohibition of the actual use of force, while noting that the 1996 Advisory

42 Brownlie, above n 37, 3.
43 Ibid, 27-33. The Declaration on Friendly Relations is contained in Annex to Resolution 2625 (XXV) of the U.N. General Assembly.
45 Ibid.
Opinion on *The Legality of the Threat or Use of Nuclear Weapons* the ICJ holds that, ‘The notions of ‘threat’ and ‘use’ of force stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal.’

2.2.1.(a) *The significance of ‘the territorial integrity and the political independence of States’*

Some authors argue that the prohibition of the use of force in Article 2(4) is qualified by the phrase ‘the territorial integrity and the political independence of States’, so that intervention that does not interfere with either the territorial integrity or the political independence of the targeted State is potentially legal. However, there appears to be general consensus among legal scholars that the reference to ‘territorial integrity and political independence’, which was included in the Charter at the instigation of Australia, was designed to give more specific guarantees to small states, rather than to restrict the application of article 2(4).

This is supported by the *travaux preparatoires*, and also by the International Court of Justice’s [ICJ] implied rejection of this argument by the United Kingdom in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* [Corfu Channel case]. Also, consistent with article 31(1) of *The Vienna Convention on the Law of Treaties*, the phrase needs to be considered with

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49 Ibid.
50 Article 32 of the *Vienna Convention on the Law of Treaties* which entered into force on 27 January 1980 provides that recourse may be had to circumstances of the conclusion of a treaty in order to determine the meaning of a term. See Brownlie, above n 37, 280; Randelzhofer, above n 26, 118.
51 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep 4 at p. 35.
regard to the object and purpose of the treaty,\textsuperscript{52} and in context with the totality of article 2(4) which further states ‘or in any other manner inconsistent with the purposes of the United Nations’. Dinstein notes this last phrase acts as a ‘residual “catch all” provision’ which forms ‘the centre of gravity of article 2(4)’.\textsuperscript{53} In the Charter it is preceded by article 2(3) which articulates the complementary principle relating to the pacific settlement of disputes to ensure that ‘international peace and security, and justice, are not endangered’\.\textsuperscript{54} These principles of non-intervention, the prohibition of the threat or use of force, and the pacific settlement of disputes, along with a commitment to ‘fundamental human rights’ are at the very core of the objects and purposes of the Charter.

2.2.1. (b) Interpretation of the scope of the prohibition of the use of force

In trying to determine the scope of the use of force in international law it needs to be considered in the context of the Charter as a whole, and with particular reference to articles 39, 51 and 53 which deal with related concepts such as ‘use or threat of force’, ‘threat to the peace’, ‘breach of the peace’, ‘act of aggression’, ‘armed attack’, and ‘aggressive policy’.\textsuperscript{55} The use of different terminology with different meanings contributes to confusion as to the nature and level of force required to constitute a breach of article 2(4).

\textsuperscript{52} The Vienna Convention on the Law of Treaties entered into force on 27 January 1980. See Brownlie, above n 37, 280.
\textsuperscript{53} Dinstein, above n 13, 82.
\textsuperscript{54} Charter of the United Nations article 2(3). See Brownlie, above n 37, 3.
\textsuperscript{55} Randelzhofer, above n 26, 111.
The Definition of Aggression adopted by the General Assembly in Resolution 3314 (XXIX) on 14 December 1974 was an attempt to strengthen international peace and security, in the face of ‘the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences’. Other than the statement ‘Aggression is the use of armed force’, article 1 of the Definition of Aggression uses similar terminology to article 2(4). While article 3 contains a non-exhaustive list of acts which qualify as an act of aggression, it does not clarify issues relating to the scope of article 2(4) and the relationship between an ‘act of aggression’ and the ‘use of force’. The Preamble to the Definition of Aggression states that: ‘aggression is the most serious and dangerous form of the illegal use of force’. There is a widely held opinion that the term ‘force’ in article 2(4) refers to an ‘armed attack’. This is supported by the travaux preparatoires which indicate that military force was the primary concern of the prohibition of the use of force. Further, an attempt by Brazil to extend the scope of the prohibition beyond military force to include economic coercion within the ambit of the use of force in article 2(4) was rejected by the San Francisco Conference in May 1945.

In Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [Nicaragua case] one of the seminal cases dealing with the use of force in international law, the Court stated that ‘there appears now

57 Ibid. Preamble to the Definition of Aggression.
58 Ibid. Article 4 of the Definition of Aggression explicitly states that ‘[t]he acts enumerated above are not exhaustive’.
59 Ibid. Preamble to the Definition of Aggression.
60 Randelzhofer, above n 26, 112; Dinstein, above n 13, 81; Sturchler, above n 46, 2.
61 Ibid.
62 Randelzhofer, above n 26, 112.
to be general agreement on the nature of acts which can be treated as constituting armed attacks.\textsuperscript{63} In fact this is an area of continuing controversy, and even in the \textit{Nicaragua case} itself, Judges Schwebel and Jennings in their Dissenting Opinions offer different interpretations of what could constitute an armed attack.\textsuperscript{64}

2.2.1. (c) The principle of non-intervention

In the \textit{Nicaragua case} the Court sought to distinguish different forms of force in terms of their gravity, and in its judgement concluded that the financial support, supply of weapons, intelligence and logistical support given to the military and paramilitary activities of the Contras in Nicaragua by the United States, up to the end of September 1984, constituted a clear breach of the principle of non-intervention,\textsuperscript{65} as opposed to a breach of the prohibition of the use of force. Referring to the content of the principle of non-intervention the ICJ relates it to the principle of state sovereignty, and declares that:

\begin{quote}
A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of state sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.\textsuperscript{66}
\end{quote}

Article 2(4) deals with inter-state conflict; it does not cover civil wars and insurrection within a state. However, support for freedom fighters or terrorists who foment insurrection is an issue that has always resonated deeply with states.

\textsuperscript{63} \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)} [1986] ICJ Rep 14, at para 195 hereafter referred to as \textit{Nicaragua case}.
\textsuperscript{64} \textit{Nicaragua case (Merits)} [1986] ICJ Rep 14 Dissenting Opinion of Judge Schwebel 259 at 346, para 171 and Dissenting Opinion of Judge Jennings 528 at page 543.
\textsuperscript{66} Ibid at para 202.
The focus in the Charter on state sovereignty, non-intervention, and a prohibition of the use of force, is reinforced by a number of attempts by the General Assembly, such as the 1949 resolution on The Rights and Duties of States,\(^67\) the 1963 resolution on The Inadmissability of Intervention,\(^68\) the 1970 Declaration on Friendly Relations,\(^69\) the 1974 Definition of Aggression,\(^70\) and the 1987 Declaration on the Non-use of Force,\(^71\) to further elaborate on the duty to refrain from intervention in the internal affairs of states.\(^72\) Nevertheless, the decades following the end of World War Two spawned numerous proxy wars in Africa, Latin America and Asia during the Cold War years;\(^73\) a rise in violent intra-state conflict which often involved either direct or indirect intervention by other states;\(^74\) and, a ‘new’ age of terrorism post September 11, 2001.\(^75\)

The notion that intervention that involves substantial military operations directed and controlled by a state and carried out by mercenaries, volunteers or other irregulars can constitute a violation of article 2(4) has strong support among legal


\(^{69}\) The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970) [Declaration on Friendly Relations] annexed to GA Res 2625 (XXV), UN Doc A/8018 (1970), UN GAOR, 25\(^{th}\) sess, 1883\(^{rd}\) plen mtg, adopted without a vote on 24 October 1970; See Brownlie, above n 37, 27-33.

\(^{70}\) The Definition of Aggression (1974) GA Resolution 3314 (XXIX) Above n 42.


\(^{72}\) See Gray, above n 48, 59-60

\(^{73}\) Ibid, 60.


authorities. However, for the majority in the Nicaragua case, a deciding factor was a high degree of direction or control exercised by the offending state so that the actions that constitute direct or indirect intervention can be imputed to that state. This approach appears to be consistent with article 8 of the draft articles on ‘Responsibility of States for Internationally Wrongful Acts 2001’ adopted by the International Law Commission [ILC] at its 53rd session in 2001 and submitted to the General Assembly for consideration. Article 8 states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

2.2.1. (d) The changing nature of armed conflict.

The nature of armed conflict has changed dramatically post World War Two. This is due to many complex and often inter-related factors. In particular, recent decades have seen a dramatic increase in internal armed conflict and in the numbers of non-combatants either directly or indirectly affected by armed conflict. This has significant implications for regional peace and security, and along with the increasing interdependence of states in a globalised world, it has forced a rethink of issues that appropriately fall within domestic and international

spheres. Refugee flows alone can have a destabilising effect on neighbouring states because of additional economic and social burdens, along with potential political and security risks posed by a large influx of refugees. ⁸⁰ Also, the development of advanced technology such as networked intelligence, surveillance and reconnaissance functions; seismic, acoustic, electromagnetic, radiological, laser, and chemical sensors; advanced information technologies; and nuclear weapons, has the capacity to extend battlefields with increasing risk to non-combatants. ⁸¹ Such technology is often prohibitively expensive, and the ready availability of small arms can be equally devastating in its consequences as evidenced by numerous conflicts in Africa ⁸² – the weapons of choice in the Rwanda massacre were ‘machetes, pangas (machete-like weapons), and sharpened sticks’. ⁸³

Regardless of their behaviour, states generally profess their fidelity to article 2(4). ⁸⁴ It would appear that the prospect of unbridled inter-state war has limited appeal in an age of weapons of mass destruction and increasingly sophisticated technology where great attention has been paid to perfecting the art of instant annihilation. In recent decades, the abolition of war has simply eradicated declarations of war, ⁸⁵ as states pursue their interests by other means. ⁸⁶ As Janzekovic notes, the legality of conflict is always contentious. ‘Liberators

⁸⁰ See Stedman, above n 74, 245-249.
⁸² Stedman, above n 74, 237 notes that since the 1970s…seven wars – in Angola, Ethiopia, Mozambique, Rwanda, Somalia, Sudan, and Uganda – took between 500,000 and 1,000,000 lives each, either directly through battlefield casualties or indirectly through war induced famine and disease.
⁸³ Murphy, above n 14, 244.
⁸⁵ Dinstein, above n 13, 283; See also Randelzhofer, above n 26, 115 - 117.
⁸⁶ See Randelzhofer, above n 26, 113-117.
become invaders, saviours become oppressors, and freedom fighters become terrorists depending on which side you choose or are compelled to support.”

2. 2.1. (e) Status of the prohibition of the use of force in international law

In the *Nicaragua case* the ICJ confirmed the status of the prohibition of the use of force in article 2(4) of the Charter, as a principle of customary international law and cited the view of the ILC that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule of international law having the character of *jus cogens*’ (paragraph (1) of the commentary of the commission to article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p.247). The Court also recognised the complementary principle ‘that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means’. This principle is not only enshrined in the Charter, it is also a principle of customary international law.

The special status of the prohibition of the use of force was again affirmed by the ICJ in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [Democratic Republic of the Congo v Uganda] when it declared that the ‘prohibition against the use of force is a cornerstone of the UN

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89 Ibid at para 290.
90 Ibid para 290.
Charter’.92 The prohibition of the use of force is undoubtedly recognised as a norm *jus cogens*.93 As Bassiouni notes, ‘The term *jus cogens* means “the compelling law” and as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles’.94 However, there is ongoing debate not only about the actual scope of the prohibition of the use of force,95 but also, of the value and practical implications of the evolution of a hierarchical system of norms of international law.96 In the absence of clear guidelines from either the ICJ or the ILC relating to an authoritative identification of *jus cogens* norms;97 the creation and modification of such norms;98 the relationship between *jus cogens* norms and obligations *erga omnes*, along with procedural rules commensurate with the status of obligations *erga omnes*;99 and, continuing disagreement among scholars about these issues,100 the practical significance in international law of the identification as a norm *jus cogens* is likely to remain contested. This becomes particularly pertinent in relation to humanitarian intervention where the fundamental principle of non-use of force is potentially in

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92 Ibid at para 148.
95 See Gray, above n 48, 28.
100 See Bassiouni, above n 94, 63- 74.
conflict with other *jus cogens* norms such as the prohibition of torture and genocide.

2.2.1. (f) State responsibility and the requirement for ‘effective control’

It is noteworthy that in the *Prosecutor v Tadic [Tadic case]* judgement of 15 July 1999, a case dealing with individual criminal responsibility and the application of international humanitarian law, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991[ICTY] argued that the *Nicaragua case* test of ‘effective control’ as the standard for attribution of state responsibility was not consonant with ‘the logic of the law of state responsibility’ as enunciated in the ILC draft articles on *Responsibility of States for Internationally Wrongful Acts* 2001.\(^{101}\) It further argued that the requirement for effective control ‘is at variance with international judicial and State practice’.\(^{102}\) In support of this claim it cited cases from the Mexico - United States Claims Tribunal,\(^{103}\) the Iran – United States Claims Tribunal,\(^{104}\) and the European Court of Human Rights.\(^{105}\) Effectively the Appeals Chamber argued that the

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\(^{101}\) *Prosecutor v Tadic (Judgement)* ICTY Case No IT-94-1-A (Appeals Chamber) 15 July 1999, at paras 116-123. [*Tadic case*]

\(^{102}\) Ibid, at para 124.

\(^{103}\) *United States v. Mexico (Stephens Case), Reports of International Arbitral Awards*, vol. IV, pp. 266-267. See *Tadic case (Judgement)* ICTY Case No IT-94-A (Appeals Chamber) at para 125

\(^{104}\) *Kenneth P. Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV,p. 92). See *Tadic case (Judgement)* ICTY Case No IT-94-A Appeals Chamber, at para 126 held that the wrongful acts of local Komitehs were attributable to Iran because they acted as *de facto* state organs. The Claims Tribunal did not inquire whether specific instructions had been issued.

\(^{105}\) *Loizidou v. Turkey (Merits)*, Eur. Court of H. R., Judgement of 18 December 1996 (40/1993/435/514) – in this case the Court held that “It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the “TRNC”. It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control
The Appeals Chamber in the *Tadic case* created a conflict in international law that has generated two different conclusions – majority support among academics for its criticism of the *Nicaragua* standard of ‘effective control’, and a rejection of
this approach by a minority who generally claim that, as the issues under consideration in the Nicaragua case and the Tadic case were quite different, the distinction was unnecessary. In the Nicaragua case the ICJ was asked to determine a foreign state’s (the United States of America) responsibility for the acts of non-state actors (Contras) acting in Nicaragua, whereas the prosecution in the Tadic case sought to establish that Tadic was responsible for grave breaches of the Geneva Conventions ‘which required a determination that the conflict was international in character’. The ILC addresses this difference of opinion in its commentary on the Draft articles on Responsibility of States. It notes that ‘the issues and factual situation in the Tadic case were different from those facing the Court in that [Nicaragua case] case,’ and suggests that ultimately a determination relating to State responsibility ‘is a matter for appreciation in each case’.

However, in the interests of ensuring continuing relevance and respect for international law, perhaps it is time for further clarification of the prohibition of the use of force, particularly with regard to the direct or indirect support by states for subversive activities and civil war; the ‘effective control’ test for attribution of state responsibility; and, thresholds for an ‘armed attack’. As Judge Kooijmans notes in his Separate Opinion in Democratic Republic of the Congo v Uganda:

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108 Davis Tyner, ‘Internationalisation of War Crimes Prosecutions’ (2006) (18) Florida Journal of International Law 843,885. See also Tadic case (Judgement) ICTY case No IT-94-1-A (Appeals Chamber) 15 July 1999, Separate Opinion of Judge Shahabuddeen argues that the distinction is unnecessary - at para 18 ‘under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an “armed conflict” had arisen between BH and the FRY acting through the VRS, not that the FRY committed breaches of international humanitarian law through the VRS.’ At para 19 ‘In this case, the test of effective control, flexibly applied (as I believe the Court intended it to be), shows that the FRY was using force through the VRS against BH, even if such control did not rise to the level required to fix the FRY with state responsibility for any breaches of international humanitarian law committed by the VRS.

109 Ibid, 872.


111 Ibid.

112 Ibid.
the Court refrains from taking a position with regard to the question whether the threshold set out in the Nicaragua Judgement is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986. The Court thus has missed a chance to fine-tune the position it took 20 years ago. 113

Despite challenges presented by the changing nature of armed conflict, the ICJ has demonstrated a reluctance to clarify controversial issues related to the use of force in international law. In Democratic Republic of the Congo v Uganda Judge Simma, in his Separate Opinion, concurs with Judge Kooijmans that the Court missed an opportunity to clarify the law on a ‘highly controversial matter which is marked by great controversy and confusion, not the least because it was the Court itself that has substantially contributed to this confusion by its Nicaragua Judgment of two decades ago’. 114 Judge Elarby’s Separate Opinion also notes that despite recognition in the judgement that, ‘The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter’ 115 the Court chose not to address the question of whether it also constituted aggression 116 - a determination that was explicitly requested by the Democratic Republic of the Congo, and one which undoubtedly

could have helped to clarify the relationship between aggression and the use of force.

The earlier Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*\textsuperscript{117} also excited considerable criticism as a missed opportunity because of the Court’s curt and somewhat controversial dismissal of Israel’s claim that the construction of the wall constituted an exercise of its right to self-defence.\textsuperscript{118}

Ultimately it may be state practice and *opinio juris* rather than judicial pronouncements that we need to look at to gauge the continuing relevance of the *Nicaragua* case.

2. 3. EXCEPTIONS TO THE PROHIBITION OF THE USE OF FORCE

The Charter explicitly recognises only two exceptions to the prohibition of the use of force in article 2(4). These exceptions are:

(1) (a) individual or (b) collective self-defence as provided for in article 51, and

(2) action authorised by the Security Council under Chapter VII of the Charter.

2. 3. 1. *ARTICLE 51 OF THE UN CHARTER*

Article 51 of the Charter provides that:


Nothing in the present Charter shall impair the inherent right of individual or collective
self-defence if an armed attack occurs against a Member of the United Nations, until the
Security Council has taken measures necessary to maintain international peace and security.
Measures taken by Members in the exercise of this right of self-defence shall be
immediately reported to the Security Council and shall not in any way affect the authority
and responsibility of the Security Council under the present Charter to take at any time such
action as it deems necessary in order to maintain or restore international peace and security.

2.3.1. (a) Relationship between article 51 and customary international law

Article 51 of the Charter refers to ‘the inherent right of individual or collective
self-defence’. In the *Nicaragua case* the ICJ recognised that while article 51
reflected the ‘inherent’ right of self-defence in customary law it ‘does not …regulate directly all aspects of its content’. The ICJ accepted that Article 51
does not subsume or supervene customary international law, rather they exist
alongside one another, and they do not have exactly the same content. It cites the
requirement for self-defence to be both necessary and proportional to the armed
attack as deriving from customary international law.

The correspondence relating to the 1837 *Caroline* incident, which involved the destruction of the
steamer *Caroline* by British forces, is generally regarded as confirming the
requirement in customary international law for a state claiming the right of self-
defence:

to show a necessity of self-defence, instant, overwhelming, leaving no choice of means,
and no moment for deliberation [and that the state] … did nothing unreasonable or

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119 Brownlie, n 37, 13.
120 Brownlie, above n 37, 13.
122 Ibid at para 176.
excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. 123

2.3.1. (b) Limited use of force

Article 51 also envisages a limited use of force. The use of force in self-defence is obviously intended to be of a subsidiary nature, as the Charter provides that any use of force will ultimately be regulated by the Security Council in accordance with the Charter. The Charter accords the Security Council a privileged position as the principal decision maker of the United Nations, and it provides in article 25 that member states are required to ‘accept and carry out the decisions of the Security Council in accordance with the present Charter’.124 The status of the five permanent members of the Security Council - constituted by the five major powers in 1945 - the United States, the Soviet Union, the UK, China and France, who have an effective right of veto on any substantive matters before the Security Council is, as noted by Patil, ‘irreconcilable with the principle of equality before the law’.125

However, in negotiations at the San Francisco conference relating to the adoption of a United Nations [UN] Charter, the five major powers defeated opposition to their privileged status by adopting a ‘no veto – no charter’ position.126 The status of the permanent members is also protected by article 108 ‘from any unacceptable

123See Hunter Miller (ed), Treaties and Other International Acts of the United States of America Documents 80-121 : 1836-1846 4 (1934) Letter - Webster to Ashburton - Extract from of a letter from this Department to Mr Fox, of the 24th of April, 1841 included as Enclosure 1 in Correspondence from Mr Webster Department of State, Washington, 27th July, 1842 to Lord Ashburton reproduced in The Avalon Project. <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> at 9/4/2008; Shaw, above n 1, 787.
124 Ibid, 9.
126 Ibid, 13 and 11-16.
tampering with this privilege’ because it requires the concurrence of all five permanent members of the Security Council to secure any amendment of the Charter.127 Nevertheless, the Cold War shattered any illusions that the Security Council would, as envisaged by the Charter, work co-operatively to secure international peace and security.128 An examination of the use of the veto during the period 1946 – 1990 reveals that the permanent members ‘exercised this right both to protect their national policies as well as to defend the interests of other nations linked to them.’129 Consequently, during the Cold War period, a number of attempts were made to achieve the primary purpose of maintaining international peace and security through either assigning some power to the General Assembly, or delegating Chapter VII power to UN member states.130

2.3.1. (c) Requirement for an ‘armed attack’

A literal reading of article 51 suggests that individual or collective self-defence involving the use of force is predicated on an armed attack. In the Nicaragua case the ICJ states that: ‘a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not provided in the Charter, and is not part of treaty law’.131 The requirement for the commission of an armed attack raises a number of issues relating to what actually constitutes an armed attack; when an attack starts; and, whether there is any scope for anticipatory self-defence.

127 Patil, above n 125, 16; Brownlie, above n 37, 25.
128 See Sturchler, above n 46, 24.
129 Patil, above n 125, 457.
The question of what actually constitutes an armed attack has generated controversy, particularly with regard to the formulation put forward by the majority in the *Nicaragua case*. The Court attempted to distinguish different forms of force in terms of their gravity, determining that the supply of arms, financial, or logistical support offends the principle of non-intervention rather than meeting the article 51 threshold of ‘armed attack’ necessary to justify self-defence.\textsuperscript{132} The Dissenting Opinions of Judges Schwebel and Jennings offer a broader interpretation of armed attack. Judge Schwebel argues that financial and logistical support for armed bands could constitute an armed attack.\textsuperscript{133} Judge Jennings states that:

> It may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may nevertheless be an important element in what might be thought to amount to an armed attack where it is coupled with other kinds of involvement. Accordingly, it seems to me that to say that the provision of arms, coupled with "logistical or other support" is not armed attack is going much too far.\textsuperscript{134}

However, state practice does not support this position. While the Security Council has often called for an end to the supply of arms or other outside support to opposition forces in situations such as Afghanistan, Yugoslavia, and Rwanda, it has never identified such interventions as an armed attack.\textsuperscript{135}
Other proponents of a broad view of the right of self-defence argue that there is an enduring customary law right that permits self-defence in response to forms of aggression that don’t necessarily meet the threshold of an ‘armed attack’. Prior to the Charter customary international law had accepted reprisal, retaliation, and retribution as legitimate responses by states to the use of force. However, although the Court in the Nicaragua case did not clarify exactly what counter measures a state may take to interventions falling short of an armed attack, their general remarks suggest that these would not extend to embrace the full scope of pre Charter customary international law. In the Corfu Channel case the ICJ rejected the use of force in reprisal. Further, the Declaration on Friendly Relations also explicitly states that ‘States have a duty to refrain from acts of reprisal involving the use of force,’ and the Security Council in response to a British attack on Yemen condemned reprisals as incompatible with the UN Charter.

Dinstein notes that while states may not categorise their actions as reprisals the post charter ‘record is replete with measures of defensive armed reprisals implemented by many countries (including permanent members of the Security Council), and that an examination of Security Council deliberations suggests that the Council may be moving ‘towards partial acceptance of ‘reasonable reprisals’. In any case, it appears that if aggression against a state does not meet

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136 See Gill, above n 76, 237-239. Shaw, above n 1, 788.
137 Shaw, above n 1, 777-791.
140 Brownlie, above n 37, 29.
141 UN Doc S/RES/188 (1964), UN SCOR, 19th sess, 1186th mtg; See Gray, above n 48, 121-122.
142 Dinstein, above n 13, 201.
143 Ibid.
the threshold required for forceful self defence then, consistent with customary law requirements of necessity and proportionality, appropriate responses would also fall short of the use of force. The Nicaragua case confirms this.  

Nevertheless, as Murphy notes, ‘restrictive interpretations of Articles 2(4) and 51 … have not withstood the test of time’. Prior to the Charter the use of force to protect nationals or property abroad was considered lawful, subject to the Caroline principles of necessity, proportionality and imminence. Although articles 2(4) and 51 don’t appear to support it, states have often used force in unilateral interventions to protect their own nationals from danger abroad in situations where the resident state may not have the capacity or the inclination to prevent harm to foreign nationals. This is an issue that has generated some controversy.

Interventions in Suez (1956), Lebanon (1958), Congo (1960), Dominican Republic (1976), Entebbe (1976), Iran (1980), Grenada (1983) and Panama (1989) are instances where states sought to justify their actions in terms of self-defence, generally relying on either a broad interpretation of article 51, or an enduring customary international law right to self-defence. However, most of these interventions could not be justified as legitimate protection of nationals as they were not necessary or proportionate and were more a pretext for intervention

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144 Nicaragua case (Merits) [1986] ICJ Rep 14 at para 176.
145 Murphy, above n 14, 359.
146 Shaw, above n 1, 791.
147 Randelzhofer, above n 138, 672 argues that forcible rescue operations for nationals endangered in another country are no longer lawful under the UN Charter.
148 Gray, above n 48, 126-129.
149 See Gray, above n 48, 126-127; Murphy, above n 14, 359-361.
than a genuine rescue. Gray argues that the fact that recent interventions undertaken during civil conflicts or domestic strife in Liberia (1990), Sierra Leone (1997), Rwanda (1990, 1993, 1994) Cote d’Ivoire (2002-2003) and Liberia (2002-2003) have not excited condemnation from these or other states, may be seen as supporting a limited right of intervention purely to rescue nationals where there is no express or implied objection from the territorial state.

The requirement for an armed attack also raises the question as to whether this has to be one single attack of sufficient gravity to give rise to a right of self-defence, or whether a series of incidents, which on their own don’t reach the requisite level of gravity, could cumulatively constitute an armed attack. The notion that a series of incidents can constitute an armed attack receives some support from the Nicaragua case where the ICJ referred to assessing whether incursions ‘may be treated for legal purposes as amounting, singly or collectively, to an “armed attack” by Nicaragua’. Israel and the United States are both strong proponents of a cumulative approach and in Oil Platforms (Islamic Republic of Iran v. United States of America) [1996] [Oil Platforms case] the United States argued that self-defence could be justified on the basis that a series of incidents involving US flagged or US owned vessels and aircraft over a period of time ‘added to the gravity of the specific attacks …and helped to shape the appropriate response’. While reserving the question of whether all incidents were attributable to Iran, the ICJ determined that: ‘Even taken cumulatively … these incidents do not seem to

150 Gray, above n 48, 129; Murphy, above n 14, 16 - cites interventions by Belgian forces in the Congo (1964) and by US forces in Dominican Republic (1965), Grenada (1983), and Panama (1989) as being criticised as unlawful because they went beyond the scope of rescue missions.
151 Gray, above n 48, 129.
153 Gray, above n 48, 119.
the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a ‘most grave’ form of the use of force.\(^{154}\) This decision affirms the notion that a series of incidents can constitute armed attack provided that on a cumulative basis they reach the high threshold of gravity required to give rise to a right of self-defence. This has particular implications with the purported widening of the scope of self-defence in response to the terrorist attacks in the United States of America on 11 September 2001, to potentially bring the acts of terrorists, previously regarded solely as criminal acts subject to penal sanctions,\(^{155}\) within the ambit of article 51.

In the *Nicaragua case* the Court distinguished ‘mere frontier incidents’ from an ‘armed attack’. It determined that

> the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such operation, because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed forces.\(^{156}\)

While Gray recognises that this distinction has been the subject of much criticism, she argues that the Court was speaking in the context of collective security, and that this distinction was one of degree rather than kind, and as such was intended to discourage the involvement of third states.\(^{157}\) Dinstein notes that the distinction

\(^{154}\) *Oil Platforms (Islamic Republic of Iran v. United States of America) (Judgment)* [2003] ICJ Rep 161 at para 64 hereafter referred to as the *Oil Platforms case*.


\(^{156}\) *Nicaragua case (Merits)* [1986] ICJ Rep 14 at para 195 - emphasis added.

\(^{157}\) Gray, above n 48, 148-151.
is ‘particularly bothersome’ as not all frontier incidents are necessarily small scale. 158 Further, given the prevalence and at times incendiary consequences of frontier incidents 159 which on a cumulative basis could reach the requisite level of gravity to constitute an armed attack, the distinction appears to contribute little to an understanding of the legal limits of the use of force in international law.

2.3.1. (d) Anticipatory self-defence

Although the question of anticipatory self-defence was left open by the ICJ in the Nicaragua case, proponents of a broad interpretation of article 51 tend to rely on the customary international law Caroline principles to support a right of anticipatory self-defence when an attack is imminent and the necessity for self-defence is ‘instant, overwhelming’.160 The development of sophisticated weapons and technology presents particular challenges as it not only has the capacity to dramatically extend areas of conflict with devastating effects, but also creates greater difficulty in determining when attacks actually commence. Gray notes that ‘the concept of armed attack by modern missiles and naval mines has given rise to special questions’ which challenge traditional notions relating to self-defence.161 Further, new technology such as the use of unmanned aerial vehicles that have the capacity to perform surveillance, reconnaissance, target acquisition, and attack functions162 present some difficulty in determining precisely when an attack, which gives rise to a right of self-defence, actually starts. The

158 Dinstein, above n 13, 175 – 176.
160 See Randelzhofer, above n 138, 675-676; Gray, above n 48, 129-133; Sturchler, above n 46, 55-57.
161 Gray, above n 48, 108 at footnote 49 notes that difficulty of fitting naval mines into conceptions of self-defence became apparent in the Iran/Iraq war.
162 Schmitt above n 81, 27.
requirements of necessity, imminence and proportionality suggest that states can only use forceful self defence where there is clear, unequivocal intelligence that a devastating attack is literally about to commence. Even then, the question of anticipatory self-defence remains controversial, and Gray notes that the majority of states reject both anticipatory self defence and also the use of force to protect nationals abroad.163

Dinstein distinguishes between ‘interceptive’ and ‘anticipatory’ self-defence and argues that while anticipatory self-defence counters an attack that is merely ‘foreseeable’, interceptive self-defence is legitimate under article 51 as it counters an attack that is ‘imminent’ and practically ‘unavoidable’.164 This approach has shades of the Caroline principles. Ultimately, the decision that an armed attack is imminent involves a judgement call that may or may not be correct, and it appears that states are reluctant to support a right of anticipatory self-defence for fear of abuse.165 However, given modern weapons capabilities, expecting states to wait for the commission of an armed attack may be untenable. Ultimately customary law principles of necessity, imminence and proportionality, along with a requirement for a high level of proof should help to inhibit abuse.

2.3.1. (e) Pre-emptive self-defence

A right of pre-emptive self-defence as suggested by George Bush in the 2002 National Security Strategy of the United States of America is even more

163 Gray, above n 48, 129-130.
164 Dinstein, above n 13, 172.
165 Sturchler, above n 46, 272.
controversial.\textsuperscript{166} In this document it was suggested that, ‘We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.’\textsuperscript{167} In fact, it appears that there is little support for the Bush doctrine of pre-emptive self-defence. The ICJ rejected pre-emptive self-defence in \textit{Democratic Republic of the Congo v Uganda}.\textsuperscript{168} Further, the majority of states at the 2005 UN World Summit confirmed their commitment to multilateral approaches to conflict resolution, along with the obligation to ‘refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter’.\textsuperscript{169} Gray notes that generally states prefer to argue for an extended interpretation of armed attack, rather than become embroiled in doctrinal debates.\textsuperscript{170} Further, she argues that the lesson states took from the \textit{Nicaragua case} was that they should pay lip service to the need to act in self-defence in order to give their actions a veneer of legal respectability.\textsuperscript{171}

With \textit{Operation Iraqi Freedom} only the United States raised any suggestion of pre-emptive self-defence, other states such as the United Kingdom and Australia focused more on Security Council Resolutions as authorisation for the invasion of Iraq in 2003.\textsuperscript{172} The United States claimed that, ‘The actions that the coalition forces are undertaking are an appropriate response. They are necessary steps to


\textsuperscript{167} Ibid, 559.


\textsuperscript{169} UN General Assembly 2005 \textit{World Summit Outcome Document} 15 September 2005 UN Doc A/Res/60/1, 60th sess, at ‘Use of force under the Charter of the United Nations’ para 77 – 78.

\textsuperscript{170} Gray, above n 48, 133.


\textsuperscript{172} See Gray, n 166, 560; Schmitt, above n 84, 83-86.
defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. In actual fact, the rush to war appears to have been motivated by the belief of many leaders in the United States national security establishment that it would be a relatively inexpensive and painless option for the United States. The devastating consequences for the Iraqi people and for everyone else implicated in this debacle serves as a warning of the dangers of the Bush doctrine of pre-emptive self-defence, and particularly of its use as an attempt to validate the use of force to secure the geopolitical interests of states.

2.3.1. (f) The use of force in an age of terrorism

Terrorism is not a new phenomenon. One of the problems with the war on terror rhetoric is the lack of international consensus relating to what the term ‘terror’ actually means, and the fact that such rhetoric is generally used in a political rather than a legal sense. However, it appears that despite the lack of agreement on an actual definition of terror there is a general understanding that the goal of terrorism is to instil fear in a population by means of violence.  

174 Joseph J Collins, ‘Choosing War: The Decision to Invade Iraq and Its Aftermath’ Institute for National Strategic Studies, National Defense University Washington DC Occasional Paper Series 5 April 2008 < www.ndu.edu/inss/occasional_papers/op5.pdf> at 2/06/2008 at p.17 notes ’The core assumption held by many leaders in the national security establishment was that the war would be difficult, the peace relatively easy, and the occupation short and inexpensive.’ Footnote 36 notes that this assumption was reflected in numerous statements by Cheney, Rumsfield and Wolfowitz…also reflected in actions taken by various members of the national security team.
175 See Brownlie, above n  76, 713; Janzekovic, above n 87, 104. Maogoto, above n 155, 129 notes that the term ‘terrorism’ is of French origin and was coined during the Jacobin Reign of Terror.
176 See Maogoto, above n 155, 408-413; Jean-Marc Sorel, ‘Some Questions About the Definition of Terrorism and the Fight Against its Financing’ (2003) 14 (3) European Journal of International Law, 365, 366-370; Ramesh Thakur, The United Nations, Peace and Security : From Collective Security to the Responsibility to Protect (Cambridge: Cambridge University Press, 2006) 182 - 189. At p 182 Thakur notes that the rhetoric of ‘war’ on terror is misleading as ‘No state is the target of military defeat, there are no uniformed soldiers to fight, no territory to invade and conquer, no clear defining point that will mark victory.’
177 Maogoto, above n 155, 133; Thakur, above n 176, 200; Karns and Mingst, above n  29, 344 - 346.
History attests that international society has always been confronted by individual, group, organisational, and state acts of terrorism. Prior to the attacks on the World Trade Centre and the Pentagon in the United States on 11 September 2001 [September 11] there were numerous attempts to suppress terrorism in international and regional treaties, instruments and declarations directed towards the safety and security of civil aviation and maritime navigation; the taking of hostages; crimes against protected persons; the use of nuclear and chemical materials; bombings, and financing terrorism. Before September 11 terrorism was generally regarded as a criminal matter subject to penal sanctions. Garwood-Gowers attributes this in part to the fact that prior to September 11 terrorist attacks were often sporadic incidents on foreign soil that would not, considered as isolated incidents, meet the Nicaragua case ‘armed attack’ threshold, and could also present problems with regard to the requirement of imputability to a specific state.

However, the sheer scale, audacity and destructiveness of the September 11 attacks conducted on the territory of a hegemonic world power that enjoyed unparalleled military superiority, guaranteed that there would be wide discussion about appropriate responses and the relevance of international law. The opinion of legal scholars is varied. Gray states that the September 11 attacks ‘led to a

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178 International Instruments related to the Prevention and Suppression of International Terrorism. United Nations, New York 2001. This collection dates back to the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft and focuses on terrorism as distinct from other forms of international criminality such as drug trafficking, money laundering, illegal arms trade etc which are often associated with international terrorism.


fundamental reappraisal of the law on self-defence’. 181 Maogoto claims that ‘11 September marked a turning point in the international regime on the use of force. The world community came to understand terrorism as an act of war – a new manifestation of the changing nature of armed conflict.’ 182 Garwood-Gowers argues that the response of the international community to the attacks gave rise to an instant customary law principle that ‘permits the use of force in self-defence in response to ‘armed attacks’ committed by non-state terrorist organisations’. However, the assertion that it creates an ‘instant’ customary law principle is not supported by conventional understandings of the creation of customary international law which requires that a customary rule must be ‘in accordance with a constant and uniform usage practised by the states in question’ (Asylum case 1950), and also requires evidence of opinio juris - how the state views its own behaviour – does it believe that the act is legally obligatory? 183 In a similar vein, Schmitt claims that ‘the terrorist attacks of 11 September 2001 crystallised the applicability of the law of self-defence to acts of terrorism’. 184

Antony Anghie offers a different, somewhat controversial approach. He cites the Lockerbie incident as pivotal in ‘the gradual subordination of the UN system and its emergency Chapter VII powers in responding to terrorism, to the unilateral use of force ostensibly in self-defence’. 185 He argues that the ‘war on terror’ creates a new jurisprudence of ‘national security’ whose defining characteristic is fear and whose modus operandi is the manipulation of the United Nations and of

181 Gray, above n 48, 159.
182 Maogoto, above n 155, 193.
184 Schmitt, above n 84, 86.
185 Anghie, above n 75, 300.
international law, particularly law relating to self-defence, in pursuit of a new imperialism.\textsuperscript{186}

Prior to the September 11 terrorist attacks on the World Trade Centre and the Pentagon in the United States, the generally accepted position in international law was that the right of self-defence is predicated on the commission of an ‘armed attack’ that can be imputed to a state.\textsuperscript{187} This is consistent with the Nicaragua case, and also state practice. As noted previously, regardless of their behaviour, ‘states involved in armed conflicts uniformly profess their fidelity to article 2(4)’.\textsuperscript{188} However, responses by both the Security Council and the United States to the September 11 give rise to a number of questions relating to issues of state responsibility and the scope of the right to self-defence - particularly the legality of a pre-emptive right of self-defence and self-defence against non-state actors.

In response to the September 11 attacks in the United States, the Security Council passed two resolutions which appear to condone a broad power for states to ‘take the necessary steps to prevent the commission of terrorist acts’.\textsuperscript{189} These resolutions are significant in that they appear to support a previously unrecognised right of self-defence by the United States in response to terrorist attacks by non-state actors. As noted previously, there is significant agreement that support by states for armed bands or irregulars involved in the commission of an armed attack, could breach the article 2(4) prohibition of the use of force and give rise to a right of self-defence against the offending state. However, this is the

\textsuperscript{186} Ibid, 298-309.
\textsuperscript{187} See Gill, above n 76, 238-239.
\textsuperscript{188} Dinstein, above n 13, 89.
\textsuperscript{189} UN Doc S/RES/1368(2001), UN SCOR, 56th sess, 4370 mtg; UN Doc S/RES/ 1373 (2001), UN SCOR, 56th sess, 4385 mtg; Gray, above n 48, 164.
first instance where there is a suggestion that a right of self-defence can be invoked against non-state actors.

Prior to Security Council Resolution 1373 harbouring terrorists was not regarded as sufficient to impute responsibility for their actions to the state harbouring them,\textsuperscript{190} or to constitute the armed attack required to give rise to a right of self-defence under article 51. However, in its initial response in the ‘war on terror’\textsuperscript{191} the United States appeared to justify its attacks on Afghanistan on the basis that self-defence permitted the use of force against states ‘which actively support or willingly harbour terrorist groups who have already attacked the responding State’.\textsuperscript{192} Further, there was almost unanimous support by states for the initial United States attacks on Afghanistan.\textsuperscript{193} Brownlie offers a note of warning in his assessment that the attacks were partly a response to an armed attack, for which responsibility could be imputed to the Afghanistan de facto government, and partly anticipatory self-defence ‘to occlude sources of terror for the future’.\textsuperscript{194} He cautions that ‘It is difficult to bring forcible regime change within the concept of self-defence or the principle of self-determination.’\textsuperscript{195}

2.3.1. (g) Forcible regime change

Post September 11 there has been increased rhetoric not only about the threat of ‘rogue states’ supporting terrorism and possessing weapons of mass destruction,

\textsuperscript{190} See Anghie, above n 75, 300.
\textsuperscript{191} In an address to a Joint Session of Congress and the American People on 20 September 2001 President George Bush stated that ‘Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.’ <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> at 22/05/2008.
\textsuperscript{192} Michael Byers cited in Anghie, above n 75, 300.
\textsuperscript{193} See Garwood-Gowers, above n 179, 177.
\textsuperscript{194} Brownlie, above n 76, 714.
\textsuperscript{195} Ibid.
but also about regime change as an element of an up-scaled ‘war on terror’. The concept of forcible regime change is antithetical to the very foundations of international law. Historically intervening states have not invoked a right to effect regime change, and instances in Grenada and Panama where the United States or other commentators sought to justify intervention as pro-democratic were condemned by the international community. The Reagan doctrine of pro-democratic intervention was not accepted by ‘even a significant minority of states’ and it was rejected by the ICJ in the Nicaragua case. In that case, the Court citing the Corfu Channel case, states that:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference …. "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (I.C.J. Reports 1949, p. 35), and international law requires political integrity also to be respected.

One instance where the Security Council invoked its Chapter VII powers in ‘unique and exceptional circumstances’ to intervene in the domestic affairs of a state in order to reinstate a democratically elected leader who had been deposed by a military coup, was in Haiti. Security Council Resolution 940 of 31 July 1994, adopted after the perceived failure of economic sanctions and other peaceful means to resolve the situation in Haiti, authorised the formation of a multinational

force ‘to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President, Jean Bertrand Aristide’. 201 Importantly this was done with the support of Aristide, 202 and most of the local population. 203 Further, this was not the first instance where the Security Council intervened in the internal affairs of a state. 204 However, Chesterman notes that unlike earlier United States interventions in Grenada and Panama, it was ‘the first time the United States sought the imprimatur of the United Nations to use force within its own hemisphere’. 205

While the United States overtly stated its intention to effect regime change in Iraq, the United Kingdom was much more guarded in its approach and it ‘has not accepted a legal doctrine of regime change’. 206 In Democratic Republic of the Congo v Uganda the Court stated that the provision in the Declaration on Friendly Relations that ‘no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State’ is ‘declaratory of customary international law’. 207 In fact, there is no basis in international law for regime change in the absence of express Security Council authorisation under its Chapter

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202 Chesterman, above n 17, 154.
203 Sarooshi, above n 130, 243-244.
204 The stalemate of the Cold War led to the emergence of UN peacekeeping and peace enforcement designed to stabilise and contain conflicts. Prior to 1992 all UN peacekeeping forces were authorised under Chapter VI of the Charter. Since the end of the Cold War the Security Council has increasingly authorised intervention under Chapter VII of the Charter, See Chesterman, above n 17, 112 - 120; See also Thakur, above n 176, 34-48 reviews the evolution of UN peacekeeping from first generation supervisory/observer roles in the 1940s in the Balkans, Greece, Kashmir, Korea, Indonesia and Palestine to sixth generation intervention in East Timor.
205 Chesterman, above n 17, 152.
206 Gray, above n 166, 569.
VII powers. The legality of the use of force in ‘humanitarian intervention’ which may effect regime change remains controversial.

The NATO intervention in Kosovo, directed at the Milosevic regime and conducted without UN authorisation, on the grounds of saving Kosovars from Serbian atrocities, was widely regarded as illegal, but potentially legitimate. Meron notes that although the majority of commentators agree that the NATO intervention was contrary to article 2(4) of the UN Charter, there is considerable disagreement about the gravity of the violation. A draft Security Council resolution to condemn the intervention was defeated; it has been argued that UN Security Council Resolution 1244 of 10 June 1999 could be taken to imply post facto approval of the military action in Kosovo, and, NATO forces sought to portray their actions as an exceptional exercise of force that was justified by humanitarian necessity in an attempt to minimise any effect as a precedent for further unauthorised ‘humanitarian’ intervention. In fact Simma argues that ‘only a thin red line’ separates NATO’s action from international legality.

Nevertheless, if we are to have meaningful constraints on the use of force in international law, as Michael Glennon notes: ‘Justice…requires legitimacy;

208 See Schmitt, above n 84, 102; Gray, above n 48, 190-194.
210 Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 (1) European Journal of International Law 1, 1; Thakur, above n 176, 215; Meron, above n 209, 521; Anghie, above n 75, 297.
211 Meron, above n 209, 521.
212 Draft SC Resolution UN Doc S/1999/328 drafted by Belarus, Russian Federation and India was defeated as it failed to get majority support – see UN SCOR, 54th sess, 3989 mtg, UN Doc S/PV/3989.
213 UN Security Council Resolution 1244 of 10 June 1999 authorised ‘Member States and relevant international organisations to establish the international security presence in Kosovo’ to exercise ‘all necessary means’ to fulfill its responsibilities.
214 Meron, above n 209, 521-522; Chesterman, above n 17, 216-217.
215 Simma, above n 210, 1-22.
without widespread acceptance of intervention as part of a formal justice system, the new interventionism will appear to be built on neither law nor justice, but on power alone.216 But, is legitimacy sufficient to maintain international peace and security, and more importantly, who decides?

Franck argues that legitimacy is ‘the capacity of a rule to pull those to whom it is addressed toward consensual compliance’.217 It could be that for the majority who supported the NATO intervention, moral or ‘humanitarian’ considerations trumped a strictly positivist interpretation of international law relating to the use of force, or possibly it involved a confluence of morality with the geopolitical interests of NATO states.218 Obviously the abject failure of the UN designated safe haven in Srebrenica to afford protection to ‘at least 8,000 Muslim males’ who were allegedly killed by Bosnian Serbs in 1995,219 and ongoing violence towards not only Muslim males, but also women, children and the elderly could not be ignored.220 Further, the contempt for the UN demonstrated by Bosnian Serbs,221 the failure of the UN and of the international community in Rwanda in 1994,222 and increased media coverage of the atrocities, posed a significant challenge to the integrity and credibility of the UN and the broader international

216 Michael J Glennon cited in Thakur, above n 176, 209.
218 Thakur, above n 176, 232 notes the selective morality of the international community who [citing Rabkin] ‘found little difficulty in restraining themselves when mass murder was perpetrated in Cambodia in the 1970s and in Rwanda in the 1990s …the ethnic conflicts in the Balkans were not on this scale.’
219 Janzekovic, above n 87, 172 – these figures are based on estimates by the Red Cross. A study by Helge Brunborg, Torkild Hovde Lyngstad and Henrik Urdal ‘Accounting for Genocide: How Many Were Killed in Srebrenica?’ in (2003) (19) European Journal of Population/Revue Européenne de Démographie 229, 229 suggests a number of 7,475; See also Robertson, above n 6, 73 who claims that ‘NATO’s attack on Serbia may be seen as a belated answer to its failure in Srebrenica’.
220 Janzekovic, above n 87, 172.
221 Thakur, above n 176 , 207.
222 Chesterman, above n 17, 224.
community. Ultimately there were numerous factors that could have influenced the NATO decision to undertake forceful intervention in Kosovo including the legality/legitimacy conundrum.

2.3.1. (h) Self-defence against non-state actors

The question of self-defence against terrorist attacks was considered by the ICJ in *Advisory Opinion on the Israeli Wall.* The Court dismissed Israel’s attempt to characterise the construction of the wall as an exercise of its inherent right to self-defence under article 51 of the UN Charter. It distinguished the case on its facts from situations contemplated by Security Council resolutions 1368 (2001) and 1373 (2001) and determined that Israel could not invoke these resolutions in its defence. It further determined that article 51 was inapplicable because it relates to ‘an armed attack by one State against another State’, whereas Israel claimed that the threat justifying the construction of the wall originated within the Occupied Palestinian Territory. Obviously this suggests that self-defence is restricted to armed attacks by states. However, the Declaration of Judge Buergenthal and the Separate Opinion of Judges Higgins both note that article 51 does not explicitly require that the armed attack that gives rise to a right of self-defence is an attack by one state against another state. As Judge Higgins states this requirement results from the Court’s interpretation in the *Nicaragua case* that:

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223 Ibid, 223-224; Janzekov, above n 87, 173 -174; Thakur, above n 176 , 207; Robertson, above n 25, 72.  
225 Ibid at para 139.  
226 Ibid at para 139.  
military action by irregulars could constitute an armed attack if these were sent by or on behalf of the state and if the activity ‘because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces.\textsuperscript{228}

The \textit{Advisory Opinion on the Israeli Wall} has also excited criticism on the basis that not only does article 51 not explicitly require that the armed attack must be imputed to a state, \textsuperscript{229} but also, as Judge Kooijmans noted in his Separate Opinion, Security Council Resolutions 1368 and 1373 make no reference to an armed attack by a state. He went on to point out that:

This new element is not excluded by the terms of Article 51 since [Article 51] conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.\textsuperscript{230}

The \textit{Advisory Opinion on the Israeli Wall} deals with complex fact scenarios and inter-related issues.\textsuperscript{231} Even if we focus narrowly on questions relevant to the right of self-defence, such as judicial competence;\textsuperscript{232} the imputation of responsibility;\textsuperscript{233} whether the construction of the wall would appropriately fall within the ambit of self-defence under article 51;\textsuperscript{234} and importantly, whether the

\textsuperscript{229} Sean D Murphy, ‘Self-defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?’ (2005) 99 \textit{American Journal of International Law}, 62, 64.  
\textsuperscript{232} Ibid paras1-65; Separate Opinion of Judge Owada paras 9-20.  
\textsuperscript{233} \textit{Advisory Opinion on the Israeli Wall} [2004] ICJ Rep 136 at para 139.  
Court had access to all appropriate information in order to make a reasoned determination, as Judge Higgins notes: 'the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained'.

In its decision the Court determined that Israel could not invoke a state of necessity which could preclude the wrongfulness of the act. In doing so, it cited its decision in Gabčíkovo-Nagymaros Project (Hungary/Slovakia) that a state of necessity can only be invoked in exceptional circumstances, and ‘under certain strictly defined conditions which must be cumulatively satisfied’. One of those conditions is, as articulated in article 33.1 (a) of the Draft Articles on the Responsibility of States, that: ‘the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril’. This

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235 See Advisory Opinion on the Israeli Wall [2004] ICJ Rep 136. Declaration of Judge Buergenthal at para 5 ‘As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific segments of the wall, their defensive needs and related topographical considerations. … these facts are not before the Court’; also Separate Opinion of Judge Owada at para 22.

236 Ibid. See also Beit Sourik Village Council v 1. The Government of Israel 2. The Commander of IDF forces in the West Bank [HCJ 2056/04] at para 85 where the Israeli Supreme Court sitting as the High Court of Justice held that ‘Only a separation fence built on a base of law will grant security to the state and its citizens’ …[and it accepted] ‘the petition against orders Tav/104/03, Tav/103/03, Tav/84/03 (western part), Tav/107/03, Tav/108/03, Tav/109/03, and Tav/110/03 (to the extent that it applies to the lands of Beit Daku), meaning that these orders are nullified, since their injury to the local inhabitants is disproportionate.’


238 Ibid at para. 50.

239 Advisory Opinion on the Israeli Wall [2004] ICJ Rep 136 at para 140: ‘the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.’ Further as noted in the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgement) [1997] Rep 7 at para 50 ‘the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States’ which provides that a state would have to satisfy the following conditions:
(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
highlights the fact that any action against state or non-state actors, taken under the rubric of self-defence, must always comply with basic customary law requirements of necessity and proportionality. Further, Gray notes that the principles of necessity and proportionality are a critical factor in ‘rejection by states of the legality of prolonged occupation of territory in the name of self-defence’.\textsuperscript{240} Israel’s occupation of Southern Lebanon from 1978 – 2000, and South Africa’s occupation of part of Angola from 1981-1988 were universally condemned as disproportionate and unnecessary self-defence.\textsuperscript{241}

The fundamental question really is whether it is essential that the armed attack carried out by terrorists is imputable to a specific state, and if so, what degree of control or involvement by the non-territorial state is required? Extending self-defence to encompass situations where other states are simply harbouring terrorists would appear to be problematical – what exactly would necessity, imminence and proportionality require? A cross-border incident by the terrorist organization Hezbollah, involving the capture of two Israeli soldiers in July 2006, saw Israel launch a full scale attack on Lebanon. Israel’s attack resulted in the devastation of Southern Lebanon by an intensive bombing campaign; the deliberate targeting of civilian infrastructure; an air and sea blockade of the Lebanese coastline; nearly 900,000 Lebanese displaced from their homes;

\textsuperscript{240} Gray, above n 48, 126.

\textsuperscript{241} Ibid.
approximately 1,000 civilians killed in Lebanon, and, extensive long-term environmental damage because of Israel’s deliberate attack on the Jiyyeh power plant. In a briefing to the UN Security Council at its 5492nd meeting, the UN Secretary General said that ‘Israel had confirmed that its operation in Lebanon had wider and more far-reaching goals than the return of its captured soldiers, and that its aim was to end the threat posed by Hezbollah.’ As Judge Higgins notes, the Nicaragua case establishes that the ‘concept of proportionality in self-defence limits a response to what is needed to reply to an attack’. Reprisals and punitive action are not consistent with international law relating to self-defence, and the doctrine of pre-emptive self-defence remains controversial.

The use of ‘war on terror’ rhetoric to attempt to justify breaches of international law relating to the use of force, along with breaches of international humanitarian and human rights law, highlights the need to constantly review and affirm the

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245 Advisory Opinion on the Israeli Wall [2004] ICJ Rep 136. Dissenting Opinion of Judge Higgins at para 5. See also Case Concerning Oil Platforms (Iran v. United States) (Judgement) [2003] ICJ Rep 161 at paragraph 77 where the ICJ said that it ‘cannot close its eyes to the scale of the whole operation, which involved, inter alia, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither ‘Operation Praying Mantis’ as a whole, nor even that part of it that destroyed the . . . platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.’
246 Gray, above n 166, 577.
247 Steven Erlanger ‘Israel Vowing to Rout Hezbollah’ New York Times 15 July 2006. ‘The Israeli chief of staff, Lt. Gen. Dan Halutz, said the airstrikes would continue until the Israeli soldiers were returned and the Lebanese government took responsibility for Hezbollah’s actions. Israel, he said, also wanted to deliver “a clear message to both greater Beirut and Lebanon that they’ve swallowed a cancer and have to vomit it up, because if they don’t their country will pay a very high price.”’ <http://www.nytimes.com/2006/07/15/world/middleeast/15mideast.html?pagewanted=2> at 28/05/2008; UN General Assembly Press Release GA/SHC/3830 of 26/10/2005 relating to the Sixtieth General Assembly Third Committee 24th & 25th Meetings (AM & PM) ‘In War on Terror, Many Countries Violating Human Rights Standards. Committee Hears Reports Concerning Torture, Human
relevance of international law. Ultimately we need to develop a better appreciation of the root causes of terrorism, and to strengthen support by states for multi-faceted co-operative measures to combat terrorism. The United Nations has significant powers under the Charter to combat terrorism, and it has, for example, attempted to develop mechanisms to deal with the challenges presented by the multitude of actors and instruments available for money-laundering and financing terrorism. Under Security Council Resolution 1373 of 2001 states are required to prevent, freeze, criminalise, and suppress terrorist financing; as well as to prevent and refrain from supporting terrorist acts; prevent the movement of, and deny safe haven to terrorists; and, bring anyone implicated in supporting terrorism to justice.

However, as demonstrated by the decision in *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of Rights Defenders, Countering Terrorism, Freedom of Religion, Judicial Independence, Violence Against Women.*


248 See *Charter of the United Nations* articles 25 and 103. See Brownlie, above n 37, 9 and 24. *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* Case T-306/01. See para 231 “From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.” See also para 234 "That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the Members of the United Nations agree to accept and carry out the decisions of the Security Council. According to the International Court of Justice, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement (Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Janahiriya v United States of America), *ICJ Reports*, 1992, p. 16, paragraph 42, and Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Janahiriya v United Kingdom), *ICJ Reports*, 1992, p. 113, paragraph 39)."


251 Ibid para 2.
the European Communities [Al Barakaat case],\textsuperscript{252} and subsequent responses to this decision, the implementation of mechanisms such as targeted sanctions may need to be reviewed and refined to ensure that they do not compromise basic principles of the rule of law such as due process and transparency in the listing of terrorist targets.\textsuperscript{253}

Likewise, Regina (Al –Jedda) v Secretary of State for Defence [Regina (Al-Jedda) case], a case which deals with the detention without trial by the British Armed forces in Iraq, who were part of a multinational force acting under the authority of Security Council Resolution 1546, of a person with dual Iraqi and British citizenship raises some important issues. In this case the House of Lords held that the claimant’s rights under ‘article 5(1) of the Convention for the Protection for Human Rights and Fundamental Freedoms, scheduled to the Human Rights Act 1998…were qualified by United Nations Security Council Resolution 1546’. In reaching this decision it cited the requirement in article 25 of the UN Charter that member states agree to accept and carry out the decisions of the Security Council in accordance with the UN Charter, and the primacy provision in article 103 of the UN Charter.\textsuperscript{254} The finding in the Al Barakaat case and the Regina (Al-Jedda) case of the primacy of Security Council resolutions over obligations under Human Rights Conventions raise questions about how we can reconcile security concerns with respect for human rights.


\textsuperscript{253} The European Interlaken, Bonn-Berlin and Stockholm Processes were designed to improve the operation of targeted sanctions. See William Vleck ‘Hitting the right target: EU and Security Council pursuit of terrorist financing’ (Paper presented at the European Union Studies Association Biennial Conference Montreal, Quebec, 17-19 May 2007).

\textsuperscript{254} Regina (Al-Jedda) v Secretary of State for Defence CA Civ [2006] 3WLR 954
While there has been much conjecture about potential changes to the law relating to self-defence post September 11, it is worthwhile considering that subsequent Security Council responses to terrorist actions – the bombing of a Bali night club in 2002;\(^{255}\) the terrorist bomb attack in Kenya and an attempted missile attack on an airline departing Mombasa, Kenya in 2002;\(^{256}\) the bomb attack in Bogota, Columbia in 2003;\(^{257}\) bomb attacks in Madrid in 2004; \(^{258}\) terrorist attacks in London, UK in 2005\(^{259}\) to name a few, and numerous resolutions directed at establishing co-operative international mechanisms to fight terrorism, consistently recognise the principles and purposes of the Charter, and reaffirm a commitment to international law and the relevance of the Security Council’s Chapter VI and Chapter VII powers.\(^{260}\) Such resolutions also serve as a reminder to states of the necessity to ‘ensure that any measures taken to combat terrorism comply with all their obligations under international law, and [they] should adopt such measures, in accordance with international law, in particular, international human rights, refugee, and humanitarian law’.\(^{261}\)


\(^{256}\) UN Doc S/RES/1450(2002), UN SCOR, 57\(^{th}\) sess, 4667\(^{th}\) mtg.


\(^{261}\) UN Doc S/RES/ 1805 (2008),UN SCOR, 63\(^{rd}\) sess, 5856\(^{th}\) mtg.
While the terrorist attacks considered above were not on the same scale as the September 11 attacks, the response by the Security Council suggests that in the climate of a ‘war’ on terror, while the law of self-defence may now encompass a right of self-defence against non-state actors, fundamental aspects of the law relating to the use of force have not changed. The existing requirements of an armed attack of sufficient gravity to trigger a right of self-defence, which must comply with requirements of article 51 of the Charter, and customary law requirements of necessity, proportionality and imminence still apply. Further, despite recognition of a sense of overwhelming gravity and urgency that ‘war’ on terror in an age of weapons of mass destruction implies, it does not displace all existing obligations under international law. In the General Assembly 2005 World Summit Outcome Document heads of state recognised the need to work cooperatively in an interdependent world to combat threats to international peace and security, and affirmed their belief that ‘relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security’.262

2.3.1. (i) Collective self-defence

In the Nicaragua case the ICJ held that the right of collective self-defence is established in both article 51 of the Charter and also in customary international law.263 Numerous states have entered into regional alliances and treaties relating to collective security. However, as with individual self-defence, collective self-defence is subject to the requirement for an armed attack, and any response must meet the requirements of necessity, proportionality and imminence. The

262 World Summit Outcome Document, UN Doc A/Res/60/1 (2005), UN GAOR, 60th sess, high level plen mtg, para 59.
Nicaragua case confirms that states cannot exercise a right of collective self-defence based on their own assessment of the situation. The state that is the victim of an armed attack must declare this, and as evidence of the *bona fides* of an assertion by a state that it was exercising a right of collective self-defence, there should be evidence of a request by the affected state. The absence of a genuine request for assistance was regarded as undermining a claim to act in collective self-defence during the Hungary crisis in 1956, the US and the UK intervention in Lebanon in 1958, US military action against North Vietnam in 1965, USSR intervention in Czechoslovakia in 1968, and in Afghanistan in 1979 and Tajikistan in 1993-1995.

While many states have signed security treaties, article 103 of the Charter provides that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The primacy of UN Charter obligations was confirmed by the ICJ in the Nicaragua case (Jurisdiction and Admissability) (Judgement) [1984]. Effectively this means that states cannot use any other treaty obligations to override their obligations as members of the United Nations. As Simma notes in his discussion of legal issues relating to a potential transformation of NATO:

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265 Ibid.
266 Ibid, at para 232.
267 Karoubi, above n 2, 149-150.
268 *Charter of the United Nations* article 103. See Brownlie, above n 37, 24.
No unanimity of NATO member states can do away with the limits to which these states are subject under peremptory international law (jus cogens) outside the organisation. In particular the higher law (cf. Article 103) of the UN Charter on the threat or use of armed force.\textsuperscript{270}

The primacy of obligations under the UN Charter is reinforced by the requirement in article 25 of the UN Charter that ‘Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.\textsuperscript{271}

2.3.2. \textit{CHAPTER VII OF THE UN CHARTER}

2.3.2. (a) \textit{Article 42 of the UN Charter}

Article 42 of the Charter provides that:

\textit{Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.}\textsuperscript{272}

The Charter was intended to establish a collective security system with primary responsibility for determining appropriate responses to perceived threats or use of force falling on the Security Council.\textsuperscript{273} Consistent with the aims and purposes of

\textsuperscript{270} Simma, above n 210, 19. Further, as noted previously in section 3.1(h) in \textit{Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities} Case T-306/01 and also in the House of Lords decision in \textit{Regina (Al-Jedda v Secretary of State for Defence)} CA Civ [2006] 3WLR 954 held that as provided in article 103 of the UN Charter, Security Council resolutions took primacy over obligations under Human Rights Conventions.

\textsuperscript{271} See \textit{Charter of the United Nations} article 25, Brownlie, above n 37, 9.

\textsuperscript{272} \textit{Charter of the United Nations} article 42. See Brownlie, above n 37, 12.

\textsuperscript{273} \textit{Charter of the United Nations} article 39 provides that ‘the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make
the Charter, Chapter VI of the Charter deals with ‘Pacific Settlement of Disputes’, while Chapter VII focuses on ‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.’ Article 24 of the Charter confers on the Security Council the right to act on behalf of all member states in ‘carrying out its duties under this responsibility’.  

The Security Council has five permanent members – United States, United Kingdom, France, China and Russia (successor to the Soviet Union), and ten non-permanent members who are elected for two year terms. The non-permanent members are chosen on the basis of achieving equitable regional representation, with five seats allocated to Africa and Asia, two seats to both Latin America and Europe, and the remaining seat to Eastern Europe. The non-permanent members participate fully in the Security Council’s work, but, as noted previously, the permanent members enjoy a privileged status in that they have the right of veto; this comes from the requirement that substantive matters require nine votes, including the votes of all five permanent members.  

2.3.2. (b) Article 39 of the UN Charter 

Article 39 of the Charter gives the Security Council a broad discretion to determine the existence of a ‘threat to the peace, breach of the peace, or act of recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain international peace and security.’ See Brownlie, above n 37, 11. 

Charter of the United Nations Chapter VI and Chapter VII. See Brownlie, above n 37, 10-13. 

Charter of the United Nations art 24. See Brownlie above n 37, 8. 

See Kars and Mingst, above n 29, 110-111. 


Ibid, 7.
aggression’. 279 It is notable that the Charter’s fundamental principle of non-intervention in the domestic affairs of states, which is predicated on the notion of the sovereign equality of states, is limited by the provision in article 2(7) that it ‘shall not prejudice the application of enforcement measures under Chapter VII’. 280 Before the Security Council can authorise the use of force under its Chapter VII powers, it must first make a determination that existing measures to secure compliance through non-violent means such as negotiation, arbitration or sanctions ‘would be inadequate or have proved to be inadequate’. 281 One of the obvious limitations with regard to securing peaceful resolution of disputes under Chapter VI of the Charter is ‘the retention of the principle of voluntarism’ which means that the UN Security Council cannot compel member states to implement resolutions adopted under Chapter V1 measures dealing with ‘Pacific Settlement of Disputes’. 282

2.3.2. (c) Competence of the Security Council to authorise the use of force


281 Charter of the United Nations article 42. See Brownlie, above n 37, 12.

282 Thakur, above n 176, 31. See Brownlie, above n 37, 10-11 Charter of the United Nations Chapter VI. However, if the Security Council decides that the continuing dispute constitutes a threat to ‘international peace and security’ it can decide appropriate non-violent action under article 41 or the use of force under article 42.
There is no express provision in the Charter for the Security Council to delegate its Chapter VII powers to member states,\textsuperscript{283} as the drafters of the Charter envisaged that the UN would have access to its own UN designated forces to maintain international peace and security. However, owing to fundamental disagreement on General principles governing the organisation of the armed forces made available to the Security Council by Member Nations of the United Nations,\textsuperscript{284} agreements under article 43 of the Charter could not be finalised, and effectively military operations under article 42 of the Charter can only be carried out with troops provided on an ad hoc voluntary basis.\textsuperscript{285}

Suggestions that, in the absence of agreements under articles 43 to 47 of the Charter, the Security Council was not empowered to take measures involving the use of force were rejected by the ICJ in the Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) of 20 July 1962. The Court held that, ‘When the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that it is not ultra vires the Organisation.’\textsuperscript{286}

2.3.2. (d) UN Military Operations

\textsuperscript{283} Sarooshi, above n 130, 143.
\textsuperscript{284} This was a report prepared by the Military Staff Committee which was created under article 47 of the Charter, however only half of the basic principles had been accepted by all five permanent members. See Jochen Abr Frowein, ‘Article 43’ in Bruno Simma et al (eds), The Charter of the United Nations (Oxford: Oxford University Press, 1994) 636, 639. See also Hilaire McCoubrey and Nigel White, The Blue Helmets: Legal Regulation of United Nations Military Operations (Dartmouth: Aldershot,1996) 12 notes that apart from the Cold War ideological conflict that shattered the unity of the wartime allies, there was disagreement on ‘issues such as the size of the force, and the contributions from each permanent member, with the Soviet Union preferring a small force with equal contributions.’
\textsuperscript{285} Ibid, 638-639.
\textsuperscript{286} Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) [1962] ICJ Rep 151, p. 168.
Rising tensions among the permanent members of the Security Council during the Cold War prevented the concurrence necessary to authorise military responses to threats to international peace and security. The first military intervention authorised by the UN was in Korea in 1950 to secure the withdrawal of North Korean forces from South Korea.\textsuperscript{287} It was only possible at that time because the Soviet Union was boycotting the Security Council, and China’s seat was occupied by Taiwan.\textsuperscript{288} Effectively the operation was undertaken under the command of the United States with fifteen other states contributing forces.\textsuperscript{289}

It was not until 1990 that the Security Council again authorised a significant use of force. Iraq’s invasion of Kuwait saw unprecedented unity among the five permanent members of the Security Council and following numerous resolutions dating back to 2 August 1990\textsuperscript{290} UN Security Council Resolution 678 of 29 November 1990 gave Iraq a final opportunity to withdraw from Kuwait by 15 January 1991 and also authorized members of the United Nations in cooperation with the Government of Kuwait to use ‘all necessary means to uphold and implement Security Council Resolution 660’ [which demanded that Iraq withdraw its forces unconditionally to the positions in which they were located prior to the invasion of Kuwait] ‘and all subsequent relevant resolutions and to restore international peace and security in the area’.\textsuperscript{291} The multi-national military operation to secure the withdrawal of Iraq from Kuwait was led by the United

\textsuperscript{287} UN Doc S/RES/ 82(1850), UN SCOR, 5\textsuperscript{th} sess, 473\textsuperscript{rd} plen mtg.
\textsuperscript{288} See Murphy, above n 14, 116-117 footnote 99 The Soviet Union was boycotting the Security council in protest over the council’s refusal to seat representatives from the newly established People’s Republic of China. See also Karns and Mingst, above n 29, 298.
\textsuperscript{289} Karns and Mingst, above n 29, 298.
\textsuperscript{290} UN Doc S/RES/660 (1990), UN SCOR, 45\textsuperscript{th} sess, 2932 mtg.
\textsuperscript{291} UN Doc S/RES/ 678 (1990), UN SCOR, 45\textsuperscript{th} sess, 2963 mtg.
States with little oversight or decision-making by the United Nations.\footnote{Karns and Mingst, above n 29, 298-299.} This intervention is regarded as a high water mark for the United Nations. Higgins refers to its importance in terms of demonstrating a commitment to long-term economic sanctions to ensure that stipulated conditions at the conclusion of hostilities are met, and for the ‘first manifestations of the need to deal also with the humanitarian aspects of the problem’.\footnote{Higgins, above n 171, 449.} However, attempts by the United States, the United Kingdom and France to justify the establishment of safe havens and no-fly zones over Iraq to protect the Kurds and Shi’ites, on the basis of implied Security Council authorisation were controversial,\footnote{Gray, above n 48, 264.} and they were a precursor to the use of an argument of implied authorisation in the NATO intervention in Kosovo and again in \textit{Operation Iraqi Freedom}.\footnote{Chesterman, above n 17, 206-207 notes that ‘Security council Resolutions provided political (if not legal) support for increasingly militant rhetoric and, later, action that was determined outside its sessions’; Gray, above n 48, 273-274 notes that with \textit{Operation Iraqi Freedom} Australia and the UK both argued a similar position. The UK argued that ‘Authority to use force against Iraq exists from the combined effects of resolutions 678, 687 and 1441. All these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security.’ The US also argued that the use of force was justified under these resolutions. See Gray, above n 48, 270 -279.}

The NATO intervention in Kosovo and \textit{Operation Iraqi Freedom} both highlight limitations of the United Nations collective security system. For a start the collective security system established by the Charter is limited by the requirement for the concurrence of all five permanent members of the Security Council, and the reality that decisions of the Security Council are inevitably influenced by the geopolitical interests of the these members. Problems relating to Security Council decision-making appear to be almost endemic.\footnote{See Patil above n 125.} As von Freiesleben notes, ‘By the late 1940s the Security Council had turned into a political battleground
between the East and West, serving mainly as a highly publicized forum where appeals for justice could be proclaimed, antagonists demonized, and the virtue of one’s own cause declared.’ If anything, the changing dynamics of world politics in an increasingly interdependent world where the line between matters of ‘internal’ and ‘international’ concern has increasingly become blurred, suggests that the political battleground has become more fluid and complex.

2.3.2. (e) Changing conceptions of ‘threat to the peace’

While renewed optimism about the Security Council’s ability to work cooperatively to maintain international peace and security was relatively short-lived, changing conceptions of what could constitute ‘threat to the peace’ appear to have been more enduring. In *Prosecutor v Tadic* (1995) the Appeals Chamber confirmed that ‘threats to the peace’ under article 39 of the UN Charter may include internal armed conflicts. It stated that ‘the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a ‘threat to the peace’ and dealt with under Chapter VII… such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia’. In 1992 the President of the Security Council stated that ‘The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.’ Challenges such as weapons of mass destruction, terrorism, financial markets, HIV/AIDS, human rights abuse, climate change and food shortages have all taken on global dimensions, while at the same


298 *Tadic case (Appeal on Jurisdiction)* ICTY Case No IT-94-1-AR72 (Appeals Chamber) 2 October 1995 at para 30.

time there is increased focus on the importance of regional inter-governmental organisations partly as a response to the negative impacts of globalisation, \(^{300}\) and perceived failures of the UN collective security system.\(^{301}\)

### 2.3.2. (f) NATO intervention in Kosovo

In September 1998 the Security Council determined that the situation in Kosovo constituted a threat to peace and security in the region.\(^{302}\) It expressed concern at ‘acts of violence and terrorism…the rapid deterioration in the humanitarian situation throughout Kosovo …the impending humanitarian catastrophe …increasing violations of human rights and of international humanitarian law’.\(^{303}\) Further, it decided that if the Federal Republic of Yugoslavia [FRY] did not comply with demands for a cessation of hostilities; improve the humanitarian situation; and, meet other demands aimed at resolving the situation, it would ‘consider further action and additional measures to maintain or restore peace and stability in the region’.\(^{304}\)

NATO had previously expressed concern about the deteriorating situation in Kosovo in the North Atlantic Statement on the Situation in Kosovo on 5 March 1998, and a subsequent Statement on 30 April 1998.\(^{305}\) A stalemate developed as it became evident that Russia would veto a resolution authorising the use of force against the FRY, and the demands in resolution 1199 on their own would not not

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\(^{300}\) See Karns and Mingst, above n 29, 145-209. See also UN Doc A/47/277 - S/24111 ‘An Agenda for Peace: Preventive diplomacy, peace making and peace keeping’ which outlines the challenges facing the United Nations in a changing world.


\(^{302}\) UN Doc S/RES/1199 (1998), UNSCOR, 53rd sess, 3930th mtg.

\(^{303}\) Ibid.

\(^{304}\) Ibid, page 5.

\(^{305}\) Karoubi, above n 2, 183.
secure compliance from the FRY. Ultimately NATO stepped in. At the Security Council emergency session on 24 March 1999 Russia argued for a negotiated solution, while Germany argued strongly in favour of intervention, stating that ‘On the threshold of the 21st century, Europe cannot tolerate a humanitarian catastrophe in its midst.’ There was also strong support from the United States, the Netherlands, Canada and the United Kingdom, of the necessity to use force to avert a humanitarian catastrophe. As Thakur notes ‘NATO’s resort to force was a critical comment on the institutional hurdles to effective and timely action by the United Nations.’

While it has been argued that UN Security Council Resolution 1244 of 10 June 1999 which authorised ‘Member States and relevant international organisations to establish the international security presence in Kosovo’ to exercise ‘all necessary means’ to fulfill its responsibilities, could be taken to imply post facto approval of the military action in Kosovo, the intervention is widely regarded as illegal, but potentially legitimate. Simma argues that ‘the NATO threat of force continued and backed the thrust of SC Resolutions 1160 and 1199 and can with all due caution be regarded as legitimately, if not legally following the direction of these decisions’. He rejects suggestion that it can be categorised as a ‘humanitarian intervention’ and prefers the German perspective that NATO acted out of

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306 Simma, above n 210, 7.
308 Thakur, above n 176, 207.
311 Simma, above n 210, 12; See also Chesterman, above n 17, 206-217.
‘overwhelming humanitarian necessity’ and that the intervention should be regarded as exceptional rather than as establishing a precedent for further ‘humanitarian intervention’. The NATO intervention stimulated debate about the status of the doctrine of humanitarian intervention in international law, and its relationship to fundamental international law principles of state sovereignty, non-intervention, the prohibition of the use of force, and the protection of human rights.

2.3.2. (g) Operation Iraqi Freedom

With Operation Iraqi Freedom, the United States, the United Kingdom and Australia all sought to rely on Security Council Resolutions as authorisation for the invasion of Iraq. However, the assertion that the use of force was justified by Security Council resolutions loses credibility when you consider the history of attempts to get a further Security Council resolution authorising ‘all necessary means’ to secure compliance by Iraq with existing resolutions, and the declaration by President Bush that, ‘The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.’ Further, the use of force without

313 See for example United Kingdom House of Commons Session 1999-2000 Select Committee on Foreign Affairs Fourth Report ‘International Law’ para 139-144 deals with development of international law relating to humanitarian intervention; Ryan Goodman ‘Humanitarian Intervention and Pretexts for War’ 100 (2006) American Journal of International Law 107-141; Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law (2003) 4-9; Chesterman, above n 17; Gray, above n 47, 45-49; Janzekovic, above n 87, 159-190; Karoubi, above n 2, 189-193; Meron, above n 209, 520-525; Simma, above n 210, 1-22; Thakur, above n 176, 215-221.
314 See Schmitt, above n 84, 83-86.
315 Ibid, 86. France and Russia threatened to use their veto if a draft resolution authorising force was brought to a vote. See Kars and Mingst, above n 29, 249. Sarooshi, above n 130, 182 also notes that under resolution 678 the delegation by the Security Council of its Chapter VII powers to Member States to use force until ‘international peace and security has been restored in the region’ was terminated by the conclusion of the ceasefire and the acceptance by Iraq of the terms of Security Council resolution 687.
express Security Council authorisation was rejected by Russia, China, France and other NATO and European states.  

The unauthorised NATO intervention in Kosovo and *Operation Iraqi Freedom* were steps in eroding respect for international law, and for the role of the Security Council as the legitimate arbiter of threats to international peace and security. In the 2005 report *In larger freedom: towards development, security and human rights for all*, Kofi Annan states that ‘both sides of the debate on the Iraq war feel let down by the Organization — for failing, as one side saw it, to enforce its own resolutions, or as the other side saw it, for not being able to prevent a premature or unnecessary war’.  

Some commentators argue that there is an emerging trend among the United States administration, and a relatively small number of legal practitioners and academics, to regard international law as a ‘disposable tool of diplomacy, its system of rules merely one of many considerations to be taken into account by government when deciding, transaction by transaction, what strategy is most likely to advance the national interest’. However, perceptions of the ‘unparalleled military strength and great economic and political influence’ enjoyed by the United States prior to the Iraq war have been battered by a bloody, 

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318 Franck, above n 217, 88 – 106; Gray, above n 166, 563 notes that there is no mention of international law on the use of force, but almost no reference to the UN in the 2006 US National Security Strategy.

protracted and expensive war that has yielded few tangible benefits for anyone.\textsuperscript{320} In a climate of continuing criticism of the legality, execution, and costs of the Iraq war, it is probable that a change of administration will see a less bellicose approach by the United States to the pursuit of its national interest.\textsuperscript{321} In his 2009 inauguration speech, President Obama signalled a new approach when he stated that, ‘our power grows through its prudent use; our security emanates from the justness of our cause, the force of our example, the tempering qualities of humility and restraint’.\textsuperscript{322} If anything, the intervention in Kosovo and \textit{Operation Iraqi Freedom} point to the fact that reform of the Security Council, in terms of its composition, and the efficiency, transparency and accountability of its working methods, is critical to ensure respect for its legitimacy.\textsuperscript{323} This is no easy task.\textsuperscript{324}

\section*{2.4. CONCLUSION}

The adoption of the Charter of the United Nations in 1945 was an ambitious attempt to prohibit the use of force in international relations. While, as with most law at both a domestic and international level, there have been challenges relating

to the interpretation, implementation and effectiveness of the prohibition of the use of force in international law, it has endured as a constraint on the use of force at an inter state level. Despite occasional lapses in compliance, states generally support the validity of the prohibition, and seek to justify lapses in terms of the two legitimate exceptions – self-defence and collective security authorised by the UN Security Council. While there may be an element of cynicism in this approach, it probably also reflects recognition that if states completely abandon the prohibition of the use of force, they invite chaos and descent into a *Hobbesian* world of ‘war of every man against every man’.325

Undoubtedly changes such as the development of new technologies;326 the changing nature of conflict; 327 recognition that non-military factors such as social, economic, humanitarian and ecological factors can constitute ‘a threat to the peace’;328 and, the changing dynamics of world politics in an increasingly inter-dependent world,329 all present challenges in terms of perceptions of the appropriate application and continuing relevance of article 2(4), and of the exceptions of self-defence and collective security authorised by the Security Council. This simply reflects the need for rigorous review and affirmation of the validity of international law in a constantly changing world. Further, such challenges suggest that we need to pursue reform of the United Nations, and

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325 In Chapter 13 of *Leviathon* (1651) Thomas Hobbes speaks of ‘the state of men without civil society (which state may be called the state of nature) is nothing but a war of all against all, and that in that war, all have a right to all things.’ [http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXIII](http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXIII) at 10/06/2008.

326 See Schmitt, above n 81, 32-54.

327 UN Doc A/47/277 - S/24111 ‘An Agenda for Peace: Preventive diplomacy, peace making and peace keeping’ which outlines the challenges facing the United Nations in a changing world; Brown, above n 78, 571-601; Stedman, above n 63, 245-249.


329 Karns and Mingst, above n 29, 145-209.
particularly of the Security Council to ensure that it has the legitimacy and the
capacity to function effectively in its primary role ‘to maintain or restore
international peace and security’.330

Nevertheless, even in a climate of overheated rhetoric about a ‘war on terror’,
while the law of self-defence may now encompass a right of self-defence against
non-state actors,331 fundamental aspects of the law relating to the use of force
have not changed. The existing requirements of an armed attack of sufficient
gravity to trigger a right of self-defence, which must comply with requirements of
article 51 of the Charter, and customary law requirements of necessity,
proportionality and imminence still apply. Further, while interventions in Kosovo
and Iraq have excited much debate about the relevance of international law, the
unauthorised use of force by states, even for humanitarian purposes, is still illegal.
The prohibition of the use of force in international law remains a ‘cornerstone of
the UN Charter’.332

Also, we should be wary of the trend by the Security Council to usurp the
authority of states in taking on a legislative role in recent resolutions on terrorism,
especially given that the power of the Security Council is ‘presently subject to no
countervailing check or judicial review’.333 If international law is to remain true
to the spirit and intent of the Charter, we need to be mindful of the fact that the

330 Charter of the United Nations, Chapter VII, article 39. See Brownlie, above n 37, 11.
331 UN Doc S/RES/1368(2001), UN SCOR,56th sess, 4370 mtg; UN Doc S/RES/ 1373 (2001), UN
SCOR, 56th sess, 4385 mtg; Gray, above n 48, 164.
332 Democratic Republic of the Congo v Uganda (Judgement) ICJ General List No 116, 2005 at para
333 Thakur, above n 176, 306.
‘war on terror’ can not displace all other international obligations, including international human rights and humanitarian law.

While the prohibition of the use of force in international law has endured as a constraint on resort on the use of force at an inter state level, the growing prominence of human rights in an increasingly globalised and inter-dependent world presents challenges to conventional understandings of state sovereignty. The UN General Assembly 2005 World Summit Outcome recognised that states have a ‘responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.334 This suggests that the traditional association of state sovereignty with absolute authority at a domestic level, as enshrined in article 2(7) of the Charter,335 needs to be reappraised.

334 2005 World Summit Outcome Document. UN Doc A/60/L.1, para 138.
335 See Charter of the United Nations article 2 (7). See Brownlie, above n 37, 4.
3. STATE SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT

3.1. INTRODUCTION

Intervention which involves the use of force to protect populations at risk of serious abuse such as genocide, war crimes and crimes against humanity, is, unless authorised by the Security Council under Chapter VII of the UN Charter, not only contrary to the prohibition of the use of force in international law, but also contrary to traditional conceptions of state sovereignty as sacrosanct, and the corresponding prohibition of intervention in the internal affairs of states.

Crimes such as genocide, war crimes and crimes against humanity are recognised as so serious that the prohibition of such crimes has the status of *jus cogens* norms, which are hierarchically superior to ordinary norms of customary international law that do not enjoy the same status. ¹ These are norms ‘accepted and recognised by the international community of States as a whole from which no derogation is permitted’. ² Aggression, genocide, racial discrimination, slavery, apartheid and self-determination ³ also create obligations *erga omnes*. ⁴ As identified in the *Barcelona Traction case*, obligations *erga omnes* are rights which are ‘by their very nature…the concern of all States. In view of the

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³ *East Timor (Portugal v Australia)* (1995) ICJ Rep 90 at para 102. [*East Timor case*]
importance of the rights involved, all States can be held to have a legal interest in their protection’.\(^5\)

Traditional conceptions of state sovereignty imply that states enjoy absolute authority at an internal level. This means that any intervention for humanitarian purposes requires the consent of the receiving state. However, it also raises questions about the legality of intervention where a state is unable or unwilling to protect their own citizens from serious abuse.

This chapter will consider ongoing challenges to the notion of state sovereignty as absolute authority at an internal level, and the development of the responsibility to protect [R2P] doctrine which is an attempt to bring traditional conceptions of state sovereignty in line with accepted international recognition of individual and collective human rights. Essentially, the R2P doctrine attempts to move the conceptual boundaries of sovereignty away from absolute authority at an internal level, to encompass the, not entirely novel idea,\(^6\) that the exercise of state authority implies responsibilities by states to populations that they govern.

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\(^5\) Case Concerning the Barcelona Traction, Power and Light and Power Co Ltd (Merits) (1970) ICJ Rep 3 at para 32. [Barcelona Traction case]

3.2. STATE SOVEREIGNTY

3.2.1. HISTORICAL CONCEPTIONS OF STATE SOVEREIGNTY

Sovereignty is a contested concept that has generated much debate among legal and political scholars about its scope, significance, and stability in the face of globalisation and the increasing interdependence of states.\(^7\) This paper adopts the position that the concept of sovereignty is essentially a scheme of interpretation that is ‘used to organise and structure our understanding of political life … to attribute a status (the status of sovereign and independent statehood) and to endow entities with this status with certain basic rights and powers (their sovereign rights)’.\(^8\) As such, conceptions of sovereignty tend to be socially conditioned and historically fluid rather than static.\(^9\)

During the Middle Ages, which is regarded as the time between the fall of the Roman Empire and the Modern era, the Catholic Church was dominant in Europe and ecclesiastical law applied to everyone regardless of tribal or regional affiliations.\(^10\) The Middle Ages in Europe also saw the emergence of a substantive doctrine of ‘just war’, which had already been partly developed by scholastic theologians and philosophers such as Vitoria (1480 – 1546), Suarez (1548 – 1617), and Thomas Aquinas (1225-1274), but received more

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\(^8\) Werner, above n 7, 155.


prominence with the writings of the Protestant Hugo Grotius (1583 – 1645)\(^\text{11}\). The 16\(^{th}\) and 17\(^{th}\) centuries in Europe were characterised by savage holy wars based on religious differences, where the belligerents who were loudest in asserting the sanctity of their cause, were often guilty of the worst excesses.\(^\text{12}\)

The brutal Thirty Year War between European Catholics and Protestants concluded with the *Treaty of Westphalia*, which came into force in 1648. This treaty is often cited as the genesis of the ‘Westphalian’ state system, and the notion of state sovereignty that is a foundational principle of modern international law.\(^\text{13}\)

The actual significance of the *Treaty of Westphalia* is disputed, especially as there is no reference in the treaty to either sovereignty or to sovereign states.\(^\text{14}\)

In fact the concept of sovereignty was analysed systematically in 1576 in Jean Bodin’s book on the state, *De Republica Libra Six*, and also dealt with in the works of scholars such as Vitoria, Suarez, Gentili (1552 – 1608), and Grotius.\(^\text{15}\)

Further, the principle of internal sovereignty was recognised in state practice during the 13\(^{th}\) century and in particular since the 16\(^{th}\) century.\(^\text{16}\)

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significance of the *Treaty of Westphalia*, which was essentially a peace agreement, lies in a separation of religious and temporal authority. The removal of the higher authority of the Church from political relations facilitated the dissolution of vertically structured hierarchies under the Holy Roman Emperor and the evolution of a horizontally organised system of sovereign states.\textsuperscript{17}

The concentration of power in the hands of a secular sovereign authority also helped to restrain the violent civil conflict and religious schisms that plagued much of Europe during the Middle Ages.\textsuperscript{18} War was no longer regarded as a means of pursuing the triumph of particular religious or ideological agendas; rather it became the prerogative of sovereign monarchs.\textsuperscript{19} The acceptance of state, as opposed to religious sovereign authority, was influenced not only by the demise of the authority of the Church, but also, by the focus on scientific empirical method during the Renaissance, and the rise of positivist philosophy. Positivist philosophy asserted that legality is distinct from questions of morality or merit. It focused on state practice rather than theoretical principles derived from the law of nature. Grotius (1583 – 1645), widely regarded as the father of modern international law, excised theology from law, and in true Renaissance tradition emphasised rationality or human reason as the foundation of the law of nature.\textsuperscript{20} The separation of morality from law is also exemplified in John Austin’s (1790-1859) assertion that ‘existence of law is one thing; its merit and

\textsuperscript{17} Chesterman, above n 12, 11 and 17.  
\textsuperscript{18} See Bleckmann, above n 16, 79; See also Chesterman, above n 12, 11-12.  
\textsuperscript{19} Bugnion, above n 12, 528.  
\textsuperscript{20} Shaw, above n 10, 21.
demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.21

Further, the advance of cartography and a growing bureaucracy after the 17th century allowed for more precise identification of territorial borders. This was important for the development of modern international law. As citizenship is defined by residence within territorial borders, delimited borders facilitated the exercise of greater control over citizens, and monopolisation of the use of force within those borders.22 The emergence of sovereign and discrete territorial states also meant that the requisite structures were created for the articulation of the principle of external sovereignty which is central to the international legal order.23

By the 18th century growing industrialisation and technological advances in Europe ensured that Europe became a dominant influence in the development of international law.24 The fundamental concepts of sovereignty and legality were based on the European State,25 and through concepts such as terra nullius26 and the acquisition of territory by effective occupation and conquest, international

22 See Werner, above n 7, 136-137.
23 Ibid.
24 See Triggs, above n 4, 10.
26 terra nullius provides that territory that is uninhabited or unoccupied can be acquired by a state through effective occupation and a claim of sovereignty over the territory. See Shaw, above n 10, 342.
law provided the tools for the colonisation of less developed and less powerful communities in Asia, Latin America and Africa.  

Positivist legal theory dominated the 19th century and ultimately led to acceptance of the abstract nature of the state.  

With the decline of natural law, ideas of sovereignty, the nation-state and imperialism reinforced each other in what has been referred to as an ‘anarchy of sovereignty’.  

During this period, states fought over political, economic and military power, and absolute sovereignty became closely associated with arbitrary power and power politics.  

Consistent with positivist theory, there was also a focus on state practice as a critical element in the development of international law.  

However, the association of sovereignty with absolute authority and unrestrained power became unpopular during the excesses of the two World Wars and the adoption of the UN Charter represented a move towards a more co-operative approach to international relations.

3.2.2 ATTRIBUTES OF A STATE

Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States provides that ‘The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c)
Undoubtedly state sovereignty has several dimensions which relate to the rights and duties of states both within their own territorial borders and in their relations within other states. Traditionally, state sovereignty came to be associated with territorial integrity; ultimate political authority and monopolisation of the use of force within its own territory; sovereign immunity and ‘consequential immunity for various purposes of the officials of a nation-state’; and, recognition of the state as an independent political entity, theoretically entitled to freedom from external intervention.

### 3.2.3. SOVEREIGNTY AND TERRITORIAL INTEGRITY

As outlined in the *Montevideo Convention on the Rights and Duties of States*, possession of territory is integral to international recognition of a state as a legal person with attendant rights and duties. The principle of the territorial integrity of states is well established in international law. In the *North Atlantic Coast Fisheries Arbitration* the Permanent Court of International Justice [PCIJ] stated that ‘one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminus with the Sovereignty’.

There is inevitably a degree of overlap between territorial sovereignty, and the principles of non-intervention and the prohibition of the use of force in

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33 Jackson, above n 7, 786.
34 Ibid, 782; See also Shaw, above n 10, 494.
36 See Shaw, above n 10, 331.
37 *North Atlantic Coast Fisheries Arbitration* (1910) 11 RIAA 167 at 180.
international law. In the *Nicaragua case* the ICJ determined that, ‘The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.’ In support of this it cited an earlier statement by the Court that ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations (*I.C.J. Reports* 1949, p. 35).’ The importance of the sovereignty and territorial integrity of states was also affirmed by the ICJ in its 2008 judgement relating to *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*) where it stated that, ‘Critical for the Court’s assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty.’

Further, article 2(4) of the Charter prohibits ‘the threat or use of force against the territorial integrity or political independence of any state’. In fact, the introduction in the Charter of a prohibition of the use of force is a significant constraint on the 18th and early 19th century conceptions of sovereignty as absolute power, and of the right to go to war as fundamental to state sovereignty. This also means that unlike traditional acceptance of conquest and subjugation as a means to obtain title to territory, territory can no longer be acquired by force. This was confirmed by the ICJ in its *Advisory Opinion on*

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40 Ibid.
41 *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*) ICJ (*Judgement*) 23 May 2008 at para 122.
43 Fassbender, above n 29, 117-118.
44 Triggs, above n 4, 213-215.
the Israeli Wall where it stated that, ‘all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory’. 45 Despite Israel’s protests to the contrary, the Court considered that the wall ‘could well become permanent, in which case …it would be tantamount to de facto annexation’.46 Further, it determined that ‘the route chosen for the wall gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council’.47 It considered the severe adverse social and economic effects that the wall had on the Palestinian people, and determined that because of the route adopted, the wall constituted a breach of Israel’s obligations to respect the right of the Palestinian people to self-determination. 48

3.2.4. SOVEREIGNTY AND THE RIGHT TO SELF-DETERMINATION

The principle of self-determination of peoples also presents some challenges to state sovereignty and the territorial integrity of states. In East Timor (Portugal v Australia) the ICJ recognised that the right of peoples to self-determination has an erga omnes character and that it is ‘one of the essential principles of contemporary international law’.49 The Declaration on Friendly Relations affirms the notion that the right to self-determination cannot violate the principle of the territorial integrity of states,50 however, this is subject to the caveat that ‘sovereign and independent States comply with the principle of equal rights and

47 Ibid at para 122.
48 Ibid at para 122, see also para 133 -134 re adverse effects of the wall on the freedom of movement and basic human rights of the Palestinian people.
50 Declaration on Friendly Relations, subsection ‘The principle of equal rights and self-determination of peoples’. Brownlie, above n 42, 30.
self-determination of peoples as described above and thus possessed of a
government representing the whole people belonging to a territory without
distinction as to race, creed or colour".51

While the right to self-determination of peoples has wide acceptance in
international law, there is some controversy relating to its application and scope.
The Committee on the Elimination of Racial Discrimination, in General
Recommendation No. 21 (1996) stated that:

In the view of the Committee, international law has not recognized a general right of
peoples unilaterally to declare secession from a State. In this respect, the Committee
follows the views expressed in An Agenda for Peace (paras. 17 and following), namely,
that a fragmentation of States may be detrimental to the protection of human rights, as
well as to the preservation of peace and security. This does not, however, exclude the
possibility of arrangements reached by free agreements of all parties concerned.52

The principle of respect for the territorial integrity of a state inhibits secession
but not decolonisation. Self-determination of colonies does not violate the
territorial integrity of states because international law accords a special status to
colonies. This special status, ‘separate and distinct from the territory of the State
administering it’ is explicitly recognised in the Declaration on Friendly
Relations.53 Following its original application to decolonisation, questions
relating to the application and scope of the right to self-determination are being

51 Ibid.
52 Office of High Commissioner for Human Rights. Committee on the Elimination of Racial
Discrimination, General Recommendation 21, The right to self-determination (Forty-eighth
General Recommendation XXI(48) adopted at 1147th meeting on 8 March 1996.
53 Declaration on Friendly Relations subsection ‘The principle of equal rights and self-
determination of peoples.’ See Brownlie, above n 42, 32.
re-examined. In particular, there is a greater focus on which peoples are eligible to pursue self-determination, and the actual scope of the right to self-determination in a non-colonial context.54

In a 1997 report to the Canadian government relating to unilateral secession by Quebec, Crawford notes that:

By comparison with the acceptance of self-determination leading to the independence of colonial territories covered by Chapters XI and XII of the Charter (so-called "external self-determination"), the practice regarding unilateral secession of non-colonial territories is clear and distinct. Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent states, in situations where the secession is opposed by the government of that state. In such cases the principle of territorial integrity has been a significant limitation. 55

However, Crawford recognises that with the extension of minority rights, including the rights of national minorities and indigenous people, tentative changes are happening and the term ‘peoples’ is being regarded as more inclusive although the principle of the territorial integrity of states still applies.56

In fact, it appears that there is a growing body of opinion that supports the notion that the right to self-determination of peoples has a wider application beyond the context of decolonisation.57

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54 See Knop, above n  25, 80-82 for discussion re different approaches to self-determination and its relationship to human rights and democratic entitlement.
57 See Knop, above n  25, 73-74.
In *Reference re Secession of Quebec* [1998] the Supreme Court of Canada determined that:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination… a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. ⁵⁸

Further, Franck argues that democratic entitlement has gradually transformed from a moral prescription to an international legal obligation. ⁵⁹ He cites the advent of the *International Covenant on Civil and Political Rights* ⁶⁰ as signalling a new phase of the right of self-determination as ‘the right now entitles peoples in all states to free, fair and open participation in the democratic process of government freely chosen by each state’. ⁶¹

It is claimed that in the *Advisory Opinion on Western Sahara*, the ICJ regards ‘the free and genuine expression of the will of the peoples of the Territory’ as the dominant narrative of self-determination. ⁶² Certainly there has been a growing focus on the importance of political participation, and the United

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⁶⁰ *International Covenant on Civil and Political Rights*

⁶¹ Franck, above n ⁵⁹, 59. See also Knop, above n 25, 83-85.

Nations has increasingly become involved in the promotion of democracy and the monitoring of elections.\(^63\)

It appears that following the success of autonomy claims associated with decolonisation, the right of self-determination increasingly focuses on political participation in the domestic arena.\(^64\) In fact, following the 1960 General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, an implementation committee was established to assist with monitoring elections and referenda in non-self governing territories.\(^65\) In time self-determination came to be associated with a peoples choice of their own domestic political system, and it served as an organising principle for ‘democratic elections, protection of minority rights and autonomy regimes within existing States’.\(^66\) These developments suggest that, consistent with the caveat in the Declaration on Friendly Relations there may be an emerging right of external self-determination or secession, but only as an absolute last resort of a people who are subject to oppressive human rights violations, including a denial of political representation or participation.\(^67\)

\textit{Loizidou v Turkey}, a case concerning a Cypriot national, who owns property located in Kyrenia in Northern Cyprus that is administered by an unrecognised entity – the Turkish Republic of Northern Cyprus, offers some support for this proposition. In \textit{Loizidou v Turkey} Judge Wildhaber states that:

\(^{63}\) See Theodor Meron, \textit{The Humanization of International Law} (Boston: Martinus Nijhoff, 2006) 492-493.  
\(^{64}\) Ibid.  
\(^{65}\) Meron, above n 63, 492.  
\(^{66}\) Ibid.  
\(^{67}\) See Knop, above n 25, 73-68 for discussion of interpretations of the right to self-determination and the linkage with human rights.
Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an unaccountable and discriminatory way. 68

Further, in her Separate Opinion in the *Advisory Opinion on the Israeli Wall case*, Judge Higgins notes that:

There is a substantial body of doctrine and practice on "self-determination beyond colonialism". The United Nations Declaration on Friendly Relations, 1970 (General Assembly resolution 2625 (XXV)) speaks also of self-determination being applicable in circumstances where peoples are subject to "alien subjugation, domination, and exploitation". The General Assembly has passed many resolutions referring to the latter circumstance, having Afghanistan and the Occupied Arab Territories in mind (for example, General Assembly resolution 3236 (XXIX) of 1974 (Palestine); General Assembly resolution 2144 (XXV) of 1987 (Afghanistan). The Committee on Human Rights has consistently supported this post-colonial view of self-determination. 69

However, it appears that while the principle of self-determination of peoples applies to peoples where they are subject to oppression and the denial of basic human rights, judicial interpretation and state practice generally do not support a right of unilateral secession by peoples, preferring to focus on basic standards of

68 *Case of Loizidou v Turkey (Merits)* (Application No 15318/89) European Court of Human Rights (Grand Chamber) 18 December 1996, Reports 1996-VI. Concurring Opinion of Judge Wildhaber joined by Judge Ryssdal.
equality, non-discrimination, and political representation and participation that allows for recognition of the special character of those who qualify as peoples.  

3.2.5 SOVEREIGNTY, INDEPENDENCE AND NON-INTERVENTION

Traditionally, state authority within its own territorial borders was regarded as inviolable. The principle of non-intervention derives from customary international law, and is strengthened by the prohibition of the use of force in article 2(4) of the Charter, and article 2(7) of the Charter, which states that: ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.’ The only proviso is that ‘this principle shall not prejudice the application of enforcement measures under Chapter VII’.

The focus in the Charter on state sovereignty and non-intervention, is further reinforced by the 1949 Resolution on The Rights and Duties of States, the 1963 Resolution on The Inadmissability of Intervention, the 1970 Declaration on Friendly Relations, the 1974 Definition of Aggression, and the 1987

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70 See Knop, above n 25, 80; Triggs, above n 4, 165.
72 Charter of the United Nations article 2(7). See Brownlie, above, n 42, 4.
73 Ibid.
Declaration on the Non-use of Force,\textsuperscript{78} which attempt to elaborate on the duty to refrain from intervention in the internal affairs of states.\textsuperscript{79}

The foundational status in modern international law of the principle of state sovereignty and its corollary, the principle of non-intervention in the internal affairs of states, is reflected in the frequent interpretation of sovereignty as ‘independence’. The reference to independence relates to the formal status of states, as opposed to the \textit{de facto} independence or autonomy of ‘equal’ sovereign states.\textsuperscript{80} In the Advisory Opinion on the \textit{Customs Regime Between Germany and Austria} the Permanent Court of International Justice determined that ‘independence…may also be described as sovereignty (\textit{suprema potestat}), or external sovereignty, by which is meant that the State has over it no authority than that of international law’.\textsuperscript{81}

Similarly, Max Huber, the arbiter in the \textit{Island of Palmas case (United States of America v The Netherlands) Arbitral Award of 4 April 1928} related sovereignty to independence, territorial sovereignty and freedom from intervention. He determined that, ‘Sovereignty in the relations between States signifies

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{78} Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations commonly referred to as \textit{Declaration on the Non-use of Force} was adopted on 18 November 1987. GA Res 42/22, UN GAOR, 42\textsuperscript{nd} sess, 73\textsuperscript{rd} plen mtg, UN Doc A/Res/42/22 (1987). <http://www.un.org/documents/ga/res/42/a42r022.htm> at 25/04/2008.
\item \textsuperscript{80} See Werner, above n 7, 137-138.
\item \textsuperscript{81} \textit{Customs Regime Between Germany and Austria (Advisory Opinion) 5 September 1931} PCIJ Rep Series A/B No 41, p 57. See Werner, above n 7, 137-138.
\end{itemize}
\end{footnotesize}
independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a State.\textsuperscript{82}

The \textit{Lotus case} is generally cited for its ‘seminal pronouncement’\textsuperscript{83} that ‘restrictions upon the independence of states cannot therefore be presumed’.\textsuperscript{84} While this is supported by judicial pronouncements in both the \textit{Nicaragua case}\textsuperscript{85} and the Advisory Opinion on \textit{Legality of the Threat or Use of Nuclear Weapons},\textsuperscript{86} the freedom of states is not absolute. Shaw notes that:

international law permits freedom of action for states, unless there is a rule constraining this…such freedom exists within and not outside the international legal system and it is therefore international law which dictates the scope and content of the independence of states and not the states themselves individually and unilaterally.\textsuperscript{87}

\textbf{3.2.6. THE PRINCIPLE OF SOVEREIGN EQUALITY OF STATES}

The principle of sovereign equality of states implies recognition of a corresponding duty to respect the rights of other sovereign states. This was explicitly recognised in the \textit{Island of Palmas case} where Max Huber stated that ‘sovereignty not only gives states the right to exercise jurisdiction over their territories, but also puts them under an obligation to respect the rights of other

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\textsuperscript{83} Shaw, above n 10, 150.
\textsuperscript{84} \textit{Lotus case} PCIJ Series A No. 10, p. 18.
\textsuperscript{87} Shaw, above n 10, 150.
\end{flushright}
states’.  

Article 13 of the International Law Commission [ILC] Draft Declaration on the Rights and Duties of States clearly articulates the responsibility of states to carry out their obligations under international law. It states that ‘Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law.’

The principle of sovereign equality of states was incorporated in the Charter. Article 2(1) of the Charter states that, ‘The Organisation is based on the principle of the sovereign equality of all its Members.’ Wolfrum notes that the reference to the principle of sovereign equality of states relates to both the institutional treatment of states as members of the United Nations, and to the status of states in international relations. Articles 1(2) and 55 of the Charter actually impose upon the United Nations organisation a positive duty to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. The General Assembly Declaration on Friendly Relations which elaborates on the accepted meaning of principles of the Charter among member states, clearly recognises that ‘States… have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.’

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90 Brownlie, above n 42, 3.
93 Declaration on Friendly Relations. See Brownlie, above n 42, 27-33.
Consistent with article 5 of *The Rights and Duties of States*, sovereign equality is primarily understood as a guarantee of equality before the law. This does not refer to the actual scope of rights possessed by states or to their capacity to influence the way such rights are distributed, but rather to equal access to law.

Regardless of differences in social and economic development, and in political power and status, all states are regarded as equal in terms of international legal personality. As President Basdevant of the ICJ stated in 1951, ‘Before this Court, there are no great or small states.’ Sovereignty and sovereign equality of states is also regarded as the basis for the notion that states are only bound by international obligations to which they have freely consented. However, the role of consent in international law, while important, is undoubtedly subject to limitations, and Shaw proffers a ‘doctrine of consensus’ which reflects majority consensus in the emergence and adoption by states of new norms of international law to which they have not specifically consented.

Further, despite the obvious inequality in that the five permanent members of the Security Council enjoy a right of veto, and Security Council resolutions under Chapter VII of the Charter are legally binding, whereas General

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94 Draft Declaration on Rights and Duties of States Annexed to GA Res 375 (IV), UN GAOR, 4th sess, 270, plen mtg, Supplement No 10, 2 - article 5 states that ‘Every State has the right to equality in law with every other State.’
96 See Shaw, above n 10, 192.
97 Ibid, 27 citing ICJ Yearbook (1950-51) at 17.
98 Shaw, above n 10, 9.
99 Security Council resolutions under Chapter VII of the UN Charter are legally binding insofar as they ‘maintain or restore international peace and security’ - articles 39 and 41 of the *Charter of the United Nations*. 
Assembly resolutions are not, the sovereign equality of states finds expression in the requirement in article 18(1) of the Charter that regardless of inequalities in wealth, power and population, ‘each member of the General Assembly shall have one vote’.100

3.2.7. SOVEREIGN IMMUNITY

The principle of sovereign immunity derives from sovereign equality and independence of states. In Al-Adsani v United Kingdom (2002) [Al-Adsani case] the European Court of Human Rights referred to the principle of state immunity as ‘a concept of international law developed out of the principle par in parem non habet imperium, by virtue of which one state shall not be subject to the jurisdiction of another state’.101 The Al-Adsani case was a civil claim for compensation for alleged torture of a United Kingdom citizen in Kuwait, and the Court agreed that the grant of sovereign immunity in civil proceedings ‘pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty’.102 Traditionally, the sovereign equality of states was an impediment to the exercise of jurisdiction by municipal courts over foreign sovereign states without their consent.103 However, while the sovereign immunity exception to territorial jurisdiction is one of the oldest principles of international law, it is under challenge.104

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100 Charter of the United Nations article 18(1). See Brownlie, above n 42, 7.
101 Al-Adsani v United Kingdom (Judgement) (2002) 34 EHRR 273 at para 54.[Al-Adsani case]
102 Ibid.
103 Ibid, 492.
104 Triggs, above n 4, 180; See also Shaw, above n 10, 500-511.
The traditional absolute immunity approach, which regarded a sovereign entity as completely immune from jurisdiction by foreign courts regardless of the circumstances,\textsuperscript{105} has been tempered by the adoption of a more restrictive approach which recognises the need for sovereign states and their representatives to be accountable for their conduct in commercial transactions, and breaches of international criminal law.\textsuperscript{106} However, law relating to sovereign immunity is still evolving, and while international and national courts generally distinguish between immunities that derive from the status of a person, which is linked to the duration of office, and immunities that derive from the sovereign nature of the actual conduct which is generally an enduring immunity,\textsuperscript{107} this is an area that is characterised by different practices among states.

A number of Western states have adopted a restrictive approach to state immunities, while at the same time many developing states, along with powerful states in Asia, Eastern Europe, the Middle East and Latin America generally support an absolute immunity approach.\textsuperscript{108} Nevertheless, in a concession to commercial realities, many of these states enter into bilateral agreements that allow for arbitration of disputes before international tribunals, and it is slowly becoming increasingly difficult to insist on state immunity for acts that fall outside of the realm of official government and administrative acts.

\textsuperscript{105}Shaw, above n 10, 494.
\textsuperscript{106}Triggs, above n 4, 380-381.
\textsuperscript{107}Ibid, 382-383.
\textsuperscript{108}Ibid, 383-384.
The *United Nations Convention on Jurisdictional Immunities of States and Their Property* [UN Convention on Jurisdictional Immunities]\(^{109}\) which is not yet in force confirms the general principle of immunity and details exceptions relating to commercial and other defined transactions.\(^{110}\) It does not deal with criminal prosecution, and consistent with recent state practice, article 9 precludes a claim of immunity in relation to civil prosecutions for compensation for personal injury or tangible property damage caused by an act or omission allegedly attributable to the state.\(^{111}\) Sovereign immunity is an area of law which is characterised by strong national interests and ideological differences regarding the ‘personality, capacity and functions of the state’.\(^{112}\) This makes it difficult to achieve harmonisation of national laws. Also, while the *UN Convention on Jurisdictional Immunities* was an attempt to codify international law relating to state immunity, reservations to the convention are allowed, and sections of the Convention are open to interpretation in ‘significantly different ways’.\(^{113}\)

In *Schreiber v Canada (Attorney General)*, a civil claim for compensation for an alleged tort, the Supreme Court of Canada rejected the assertion by the United

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\(^{110}\) *United Nations Convention on Jurisdictional Immunities of States and Their Property*, article 3 details ‘Privileges and immunities not affected by the present Convention’ it includes privileges and immunities enjoyed by a state and persons connected with them in relation to official functions, along with privileges and immunities enjoyed by a head of state *ratione personae* – acting in the capacity as head of state. See also Triggs, above n 4, 385-386.


\(^{113}\) Ibid, 186 cites the applicability of the Convention to military activities as open to differing interpretation.
States, as an intervener in the case, that Germany should be immune from jurisdiction because its conduct, in issuing a warrant for the arrest of Mr Schreiber in Canada, was ‘\textit{acta jure imperii}’ - an official act of a public or governmental nature.\textsuperscript{114} After noting that ‘most of the international law authorities cited by the parties appear to accept that the personal injury exception does not distinguish between \textit{jure imperii} and \textit{jure gestionis} acts,’\textsuperscript{115} the Court stated that this interpretation ‘would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts’.\textsuperscript{116}

Nevertheless, responses to both civil and criminal prosecutions for breaches of human rights have been varied, and there is still uncertainty relating to the significance of \textit{jus cogens} norms, and the fundamental question of whether they trump state immunity. While it appears that the \textit{Pinochet case (No 3)}\textsuperscript{117} confirms that sovereign immunity applies to a former head of state for acts done in an official capacity while head of state, acts of torture prohibited by the \textit{Convention on Torture}\textsuperscript{118} are not characterised as official acts, and therefore do not attract immunity.\textsuperscript{119}

In the \textit{Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) [Arrest Warrant case]} Belgium sought to exercise

\textsuperscript{114} See Yee, above n 111, 650-653.
\textsuperscript{116}Ibid, at para 37.
\textsuperscript{117} R v Bow Street Metropolitan Stipendiary Magistrate: Ex parte Pinochet (No 3) [2000] I AC 147 House of Lords [Pinochet case (No 3)]
\textsuperscript{119} See Triggs, above n 4, 395-396.
universal jurisdiction in relation to grave breaches of the *Geneva Conventions* of 1940 and its Additional Protocols, and crimes against humanity allegedly committed by the then incumbent Congolese Minister for Foreign Affairs.  

Belgium argued that the *Pinochet case* (No 3) created an exception to immunity when Lord Millet stated that, ‘international law cannot be supposed to have established a crime having the nature of *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation which it seeks to impose’. However, following an examination of state practice, the Court determined that:

> It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The absence of any authoritative list of *jus cogens* norms, and ongoing uncertainty relating to the emergence and identification not only of new norms, but also of the actual content and scope of ‘community values’ within the international community of states, lends itself to varying interpretations of the significance of *jus cogens* norms and their relationship to obligations *erga omnes*. As with *jus cogens* norms, the ICJ along with other international courts, has demonstrated a reluctance to admit claims based on obligations *erga omnes*,

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121 *Pinochet case* (No 3) [2000] I AC 147 Dissenting Opinion of Lord Millet.
123 Boyle and Chinkin, above n 112, 17.
and has also failed to clarify the scope, content and practical significance of these concepts.\footnote{See Christian J Tams, Enforcing Obligations Erga Omnes in International Law (Cambridge: Cambridge University Press, 2005) 179-192.}

Further, in Articles on the Responsibility of States for Internationally Wrongful Acts the ILC used concepts such as obligations ‘owed to the international community as a whole’ (article 48) and ‘peremptory norms’ (articles 26 and 40) that relate to obligations erga omnes and jus cogens norms rather than these terms.\footnote{See Articles on the Responsibility of States for Internationally Wrongful Acts. See Brownlie, above n 42, 300-311.} Nevertheless, article 26 states that: ‘Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of international law.’\footnote{Ibid, 304.} Also, states are required to co-operate ‘to bring to an end through lawful means any serious breach’ of obligations under peremptory norms of general international law.\footnote{Ibid, Chapter III, article 41 (1). See Brownlie, above n 42, 306-307.} However, these concepts are ‘vaguely described and appear to be insufficiently co-ordinated’.\footnote{Kadelbach, above n 1, 36-37.}

In Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others [2006] [Jones case], Lord Bingham reviewed recent decisions and academic comment on state immunity in relation to potential prosecution for breach of human rights, and in particular breaches of the Torture Convention.\footnote{Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others [2006] UKHL 26.[Jones case] See para 2 (Lords of Appeal) is a civil claim for damages for acts including assault and battery, trespass to the person, false imprisonment and torture in the Kingdom of Saudi Arabia.} He stated that:
The International Court of Justice has made plain that breach of a *jus cogens* norm of international law does not suffice to confer jurisdiction (*Democratic Republic of the Congo v Rwanda* (unreported) 3 February 2006, para 64). As Hazel Fox QC put it (*The Law of State Immunity* (2004), p 525),

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.

Where state immunity is applicable, the national court has no jurisdiction to exercise.130

Further, consistent with the *Arrest Warrant case*, he determined that neither state practice, nor ‘judicial and learned opinion’ recognise an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law.131 However, as Caplan points out, ‘with respect to human rights violations, the forum state, not the foreign state defendant, enjoys ultimate authority, by operation of its domestic legal system, to modify a foreign state’s privileges of immunity’.132 What appears to be lacking in many cases is political will.

However, unlike ordinary customary international law, states can be legally bound by a *jus cogens* norm without their consent. In *Prosecutor v Furundzija* the ICTY Trial Chamber in statement relating to the effects of the *jus cogens* status of the prohibition of torture stated that:

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130 Ibid at para 24.
131 Ibid at para 27.
Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.\(^{133}\)

In the *Al-Adsani case*, Al-Adsani argued that the *jus cogens* prohibition of torture took precedence over other rules of international law that did not enjoy the same status, including state immunity that derives primarily from customary international law.\(^{134}\) State immunity, which is based on customary international law, has not reached the status of *jus cogens*, a norm from which ‘no derogation is permitted’.\(^{135}\) Nevertheless, a narrow majority upheld sovereign immunity in civil claims for damages for alleged torture outside the forum state. Importantly, eight dissenting judges found that, ‘The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial.’\(^{136}\) This is an indication that the law relating to state immunity is evolving, slowly and at times rather inconsistently.

Obviously state practice and judicial opinion currently favour retention of state immunity in civil claims for damages for breaches of fundamental human rights,
and in criminal prosecutions of serving state officials even where they are charged with war crimes and crimes against humanity. In time this may change. Judges Higgins, Kooijmans and Buergenthal, while recognising the requisite balance of interests between the need to allow states to function effectively at an international level and the need to stop impunity for perpetrators of grave crimes against the ‘community of mankind’, state in their joint Separate Opinion in the *Arrest Warrant case*:

>a trend is discernable that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.\(^{137}\)

Nevertheless, the decision by the ICJ in *Democratic Republic of Congo v Rwanda (Jurisdiction of the Court and Admissability of the Application)* [*DRC v Rwanda*],\(^{138}\) suggests that in the absence of consent to jurisdiction, it will be the International Criminal Court [ICC] and the independent tribunals who will prosecute serious crimes against humanity, and develop the law in this area.

In *DRC v Rwanda*, while the Court affirmed the *erga omnes* character of rights and obligations enshrined in the *Genocide Convention*, it rejected the notion that obligations *erga omnes* or *jus cogens* norms can establish the Court’s

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jurisdiction. It cited the Court’s decision in *East Timor (Portugal v. Australia)* [East Timor case]¹³⁹ that:

the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things … the fact that a dispute relates to compliance with a norm having such a character [*jus cogens*], which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.¹⁴⁰

In a dissenting opinion, Judge Weeramanty argues that unlike previous cases before the Court that had raised the question of duties owed *erga omnes*, the *East Timor case* also, ‘stressed the obverse aspect of rights opposable *erga omnes*.¹⁴¹ He suggests that:

The present case is one where quite clearly the consequences of the *erga omnes* principle follow through to their logical conclusion – that the obligation which is a corollary of the right may well have been contravened. This would lead, in my view, to the grant of judicial relief for the violation of the right.”¹⁴²

However, this was a dissenting opinion and it remains to be seen whether the ICJ will take the notion of *erga omnes* to its ‘logical conclusion’ and grant judicial relief. Undoubtedly, the significance of obligations *erga omnes* is limited by the fact that, consistent with article 36 of its Statute, the ICJ has affirmed the importance of state consent to jurisdiction and declined to exercise

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¹⁴⁰ *DRC v Rwanda (Jurisdiction of the Court and Admissibility of the Application)* (New Application 2002) General List No 126 of 3 February 2006 at para 64.
¹⁴¹ *East Timor case*, dissenting opinion of Judge Weeramanty, Part E Australia’s Objections Based on Judicial Propriety, at page 214. See also pages 214-216 re obligations *erga omnes*.
¹⁴² Ibid.
jurisdiction when the rights of a third state that is not a party to the dispute in question may be jeopardised, even when that party may allegedly be responsible for breaches of norms *jus cogens* or obligations *erga omnes*.

Limitations on the ICJ’s jurisdiction is consistent with the traditional notion that international legal obligations depend on state consent. However, under their constituting acts, the ICC, the International Criminal Tribunal for the Former Yugoslavia [ICTY] and the International Criminal Tribunal for Rwanda [ICTR] deny immunity to all people with official status, including heads of state. Further, in the majority judgement in the *Arrest Warrant case*, the Court did note that the immunity from prosecution enjoyed by incumbent state officials did not equate to impunity, and that they could be prosecuted in circumstances where (1) they do not enjoy criminal immunity under international law in their own countries (2) if the state they represent waives that immunity (3) if they cease to hold office and (4) if they are subject to proceedings in international criminal courts that do have jurisdiction.

3.3. CHANGING CONCEPTIONS OF STATE SOVEREIGNTY

There have always been hierarchies of power and material inequalities in the international system and the idea that state sovereignty implies a concentration of absolute power in the nation state has been referred to as a ‘sovereignty

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143 The *Rome Statute of the International Criminal Court* entered into force on 1 July 2002 – hereafter referred to as the *Rome Statute*. See article 36 relating to State consent to jurisdiction.


Nevertheless, the notion of sovereignty still finds a place in international law although there are significant challenges to traditional conceptions of state sovereignty and state autonomy. In particular globalisation, a process that has not only economic, but also profound social and political effects, involves an increasing interdependence of states.

3.3.1. GLOBALISATION

Globalisation is a complex phenomenon that excites both praise and criticism. The rise of ‘free market’ capitalism, rapid and increasingly speculative capital mobility and exchange rate volatility, the proliferation of trans-national corporations, and, the emergence of powerful international institutions such as the World Trade Organisation [WTO], the International Monetary Fund [IMF], and the World Bank along with a proliferation of non-government organisations [NGOs] and interest groups that increasingly intervene in what was traditionally regarded as the exclusive domain of sovereign states, has led to speculation about the relevance and functional authority of the nation-state. In particular the adoption by international organisations such as the IMF of ‘Washington Consensus’ market fundamentalism and the imposition of

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146 Jackson, above n 7, 794.
147 See Jensen, above n 29, 166.
149 See Jensen, above n 29, 167;
150 Stiglitz, above n 148, 59 notes that liberalisation of capital and financial markets ‘contributed to the global financial crises of the 1990s and can wreak havoc on a small emerging country.’
152 See Stiglitz, above n 148.
153 Keating, above n 13, 198-201. Fassbender, above n 29, 138- 140.
154 See Stiglitz, above n 148, 73-74 ‘Washington Consensus policies…were based on a simplistic model of the market economy, the competitive equilibrium model, in which Adam
conditionality agreements often requiring fiscal austerity, privatization and market liberalisation, impacted particularly on developing states’ capacity to organise and implement their own economic and social agendas. While many of these changes relate to the functional capacity of states to maintain their autonomy, globalisation also impacts on the legal rights of states.

Rapid change, and in particular rapid scientific and technological innovation and development often outstrips the capacity of national and international legal systems to effectively regulate it, and presents the spectre of a ‘legal gap in which authority becomes uncertain’. In an increasingly globalised and interdependent world the notion of state sovereignty as absolute authority at a domestic level is constantly being challenged.

Moreover, although federal states such as Australia have always presented a challenge to the conception of sovereignty as absolute power because they don’t have a single locus of power, other forms of political organisation, such as the European Union [EU] also offer an alternative vision of the fluidity and scope of the concept of state sovereignty. Albi notes the transformation in sovereignty during fifty years of integration in Europe, in that ‘approximately two thirds of legislation derives from EU institutions; EU law is supreme and directly applicable…and citizens of the Member States enjoy EU citizenship’.

Smith’s invisible hand works, and works perfectly.’ Adam Smith argued that market forces – the profit motive drives the economy to efficient outcomes as if by an ‘invisible hand’.


Albi, above n 9, 401.
member states, academic, judicial and political discourse generally describes the EU as a supranational organisation.\textsuperscript{158}

However, Mik argues that while EU Member States limit their sovereignty by agreeing in constitutional treaties to restrictions on their ability to legislate in some areas, they do not abdicate sovereignty because they remain masters of the treaties, and they freely determine their obligations within the framework of the EU.\textsuperscript{159} Also, Albi points out that in Central and Eastern European countries, where autonomy or statehood has only been re-established relatively recently, ‘the traditional language of sovereignty, independence, the ethnically defined nation-state and national self-determination’\textsuperscript{160} is dominant. This is reflected by the inclusion of ‘complex sovereignty provisions’ in the constitutions of Central and Eastern European Candidate Countries.\textsuperscript{161}

As recognised in the \textit{World Summit Outcome Document}, states are aware of their limitations in dealing with challenges such as the HIV/AIDS epidemic and other health issues; climate change; sustainable development; terrorism; transnational crime; and, peace and security. In this document, UN member states acknowledged the challenges of ‘living in an interdependent and global world and that many of today’s threats recognize no national boundaries, are interlinked and must be tackled at the global, regional and national levels in accordance with the Charter and international law’.\textsuperscript{162} Global co-operation is

\begin{footnotesize}
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  \item\textsuperscript{158} Ibid, 409.
  \item\textsuperscript{159} Mik, above n 11, 400.
  \item\textsuperscript{160} Albi., above n 9, 401.
  \item\textsuperscript{161} Ibid, 403.
  \item\textsuperscript{162} UN Doc A/60/L.1, UN General Assembly \textit{World Summit Outcome Document} (15 September 2005) at para 71.<\url{www.who.int/hiv/universalaccess2010/worldsummit.pdf}> at 25/09/2008
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needed to combat global challenges and this mandates recognition that ‘no state can best protect itself by acting entirely alone’. While the requirement for global co-operation doesn’t necessarily involve a diminution of state ‘sovereignty’, it suggests that states cannot function as discrete entities that exercise absolute control at a domestic level. Sovereignty is not an absolute fact. Rather, it is a scheme of interpretation that helps to order relationships between states, and as such it is malleable. While some states may choose to cling to the notion of absolute power at a domestic level, reality suggests that this is little more than a sovereignty fiction.

3.3.2. THE IMPACT OF HUMAN RIGHTS AND HUMANITARIAN LAW

Traditionally international law was concerned with relations between sovereign states, and individuals had no recourse to seek remedies against abuse perpetrated by their own state. However, the development and enforcement of individual and collective human rights has the potential to erode traditional conceptions of state sovereignty. In recent times, following the commitment in the Charter to promote and encourage ‘respect for human rights and fundamental freedoms’ and the adoption of the Universal Declaration of Human Rights, there has been a proliferation of human rights treaties and declarations which have had the effect of increasing recognition that human rights are a matter of international concern.

163 Ibid at para 72.
164 See Jensen, above n 29, 171.
165 Charter of the United Nations, article 1(3). Brownlie, above n 42, 3.
The international community has accepted core international human rights treaties - the *International Covenant on Civil and Political Rights* [ICCPR],\(^{167}\) the *Convention on the Elimination of All Forms of Racial Discrimination* [CERD],\(^{168}\) the *Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment* [CAT],\(^{169}\) *International Covenant on Economic, Cultural and Social Rights* [CSCR]\(^{170}\) the *Convention on the Elimination of All Forms of Discrimination Against Women* [CEDAW],\(^{171}\) the *Convention on the Rights of the Child* [CRC],\(^{172}\) along with the establishment of corresponding monitoring committees. Further, there has been wide acceptance of international humanitarian law as codified in the Geneva Conventions - *Geneva Convention relative to the Treatment of Prisoners of War*\(^{173}\), *Geneva Convention relative to the Protection of Civilian Persons in Time of War (2nd part)*\(^{174}\) and the two Additional Protocols - *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the*


\(^{169}\) *Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment* [CAT] entered into force 26 June 1987, been ratified by 145 States Parties (18 April 2008)

\(^{170}\) *International Covenant on Economic, Cultural and Social Rights* [CSCR] entered into force on 3 January 1976, ratified by 159 States parties (26 September 2008)


\(^{173}\) *Geneva Convention relative to the Treatment of Prisoners of War* entered into force on 21 October 1950

\(^{174}\) *Geneva Convention relative to the Protection of Civilian Persons in Time of War (2nd part)* entered into force on 21 October 1950
Protection of Victims of International Armed Conflicts (Protocol I) ¹⁷⁵ and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).¹⁷⁶ There are other treaties relating to war crimes and crimes against humanity such as the Convention on the Prevention and Punishment of the Crime of Genocide¹⁷⁷ along with various other treaties relating to issues like slavery and forced labour; the status and treatment of refugees; the rights of migrants and people with disabilities; and the administration of justice.¹⁷⁸ Acceptance by states of obligations under these treaties represents a significant constraint on sovereignty as absolute authority.

In the Tadic case¹⁷⁹ the Appeals Chamber addressed changing conceptions of state sovereignty. It stated that:

Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.¹⁸⁰

¹⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) entered into force on 7 December 1979
¹⁷⁹ Prosecutor v Dusko Tadic ICTY Case No IT-94-1-A [Tadic case]
¹⁸⁰ Tadic case (Decision on the Defence Motion for Interlocutary Appeal on Jurisdiction) ICTY Case No IT-94-1-A (Appeals Chamber) 2 October 1995 at para 55.
The traditional focus in international law on protection of state sovereignty is being eroded by human rights law and growing recognition of the principle that human rights are a matter of international concern. This was confirmed in the *Tadic case* which recognised that ‘norms [concerning crimes against laws and customs of war] due to their highly ethical and moral content have a universal character, not a territorial one’. The Appeals Chamber, in dismissing a claim of sovereign immunity, cited the decision at trial that:

> crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.  

(Decision at Trial, at para. 42.)

One of the most important developments in human rights and humanitarian law has been the establishment of the ICC and independent tribunals to investigate and prosecute international crimes. The *Rome Statute* of the ICC entered into force on 1 July 2002. The ICC, an independent body with its own budget, rather than an organ of the United Nations, was established to exercise jurisdiction over crimes such as genocide, crimes against humanity, war crimes,

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181 Meron, above n 63, 93.
182 *Tadic case (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* ICTY Case No IT-94-1- A (Appeals Chamber) 2 October 1995 at para 58.
and the crime of aggression. This extends the protection afforded by international human rights and humanitarian law.

Article 12(1) of the *Rome Statute* provides that any state party to the *Rome Statute* automatically accepts jurisdiction of the ICC with regard to genocide, crimes against humanity, war crimes and crimes of aggression. Further, apart from referrals to the ICC by a state party, article 13(b) of the *Rome Statute* recognizes that the ICC has jurisdiction to deal with allegations of genocide where ‘A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.’ As confirmed in *The Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Al Abd-Al-Rahman (Au Kushayb)* ‘the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute’. Security Council Resolution 1593 referred ‘the situation prevailing in Darfur since 1 July 2002’ to the ICC on 31 March

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185 See *Rome Statute of the International Criminal Court* articles 5. See also articles 6, 7 and 8 which give detailed definitions of what constitutes genocide, crimes against humanity and war crimes. Article 5(2) provides that ‘The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.’


187 *Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Al Abd-Al-Rahman (Au Kushayb)* ICC (Pre Trial chamber 1) No.: ICC-02/05-01/07 of 27 April 2007, at para 16.
2005.\textsuperscript{188} As Sudan is not a party to the \textit{Rome Statute} the Court could not otherwise have exercised jurisdiction.

However, the situation in Sudan presents a challenge to the authority of the Court, as while on 27 April 2007 the ICC issued arrest warrants for Ahmad Harun, former Minister of State for the Interior and current State Minister of Humanitarian Affairs, and Ali Kushayb, a Militia/Janjaweed leader, for war crimes and crimes against humanity, as at 5 June 2008 the Prosecutor informed the Security Council that the Government of Sudan continues to ignore its legal obligation to arrest Mr Harun and Mr Kushayb and surrender them to the court.\textsuperscript{189} At the June UN Security Council Meeting on the situation in Sudan, the French representative stated:

\begin{quote}
How can we persuade the population of Darfur to adhere to their genuine desire to make peace when a person wanted by the International Criminal Court for war crimes and crimes against humanity continues to serve in the Government and is in charge of humanitarian affairs? The people of Darfur have the right to justice. Those responsible for the gross violations committed in Darfur must be held accountable.\textsuperscript{190}
\end{quote}

The crimes within the jurisdiction of the ICC are regarded as so serious that they offend the international community as a whole and attract universal jurisdiction. This allows states to investigate and prosecute the perpetrators of such crimes.

regardless of a lack of connection of the perpetrators with the prosecuting state.\textsuperscript{191} However, many states will not exercise universal jurisdiction unless the right to do so has been incorporated into their domestic law, as they generally rely on nationality or presence of the alleged offender within their territory to found jurisdiction.\textsuperscript{192}

A 1993 Belgian law, \textit{Law Relative to the Repression of Serious Violations of the International Conventions of Geneva of August 12, 1949 and of the Protocols I and II of June 8, 1977} granted its courts jurisdiction over a broad range of breaches of international humanitarian law committed outside Belgian territory.\textsuperscript{193} Under this law Belgium attempted to exercise universal jurisdiction over ex-Chilean president Pinochet; ex-leaders of the Cambodian Khmer Rouge; an ex-minister of Morocco, an ex-president of Iran; an official of the government of the Democratic Republic of the Congo; and, Israeli Prime Minister Sharon.\textsuperscript{194} Belgium’s actions were not uncontroversial. In 2003, faced with a growing number of suits in Belgian courts and threats from the United States to withdraw support for retention of NATO headquarters in Brussels, the law was amended to significantly limit its scope.\textsuperscript{195} It would appear that where the matter extends beyond investigation or requests for extradition, judicial and

\textsuperscript{191} Jensen, above n 29, 178.
\textsuperscript{192} See Triggs, above n 4, 361.
\textsuperscript{193} \textit{Loi de 16 Juin 1993 à la repression des infractions graves aux conventions internationals de Geneve du 12 Aout 1949 et aux protocoles I et II du 8 Juin 1977}. This Act was amended in 1999 to encompass breaches of the Geneva Conventions and their Additional Protocols, crimes of genocide and crimes against humanity. See Meron, above n 63, 120.
\textsuperscript{194} Ibid.
\textsuperscript{195} The law now requires that 1. the suspect must be a Belgian national or have Belgium as their primary residence, and 2. the victim must be a Belgian national or have been living in Belgium for at least three years at the time the crimes were committed, in which case proceedings can only be instituted by request of the Federal Prosecutor. See Meron, above n 63, 122; Andreas Zimmermann ‘Violations of Fundamental Norms of International law and the Exercise of Universal Jurisdiction in Criminal Matters’ in Christian Tomuschat and Jean- Marc Thouvenin (eds), \textit{The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes} (Boston: Martinus Nijhoff, 2006) 334, 334.
academic opinion generally, although not always, supports a requirement for some connection.\textsuperscript{196}

Obviously many states are still reluctant to forgo the protection afforded by state immunity, especially when there is no nexus between the alleged offender and the prosecuting state, but their options are contracting. Hopefully, the \textit{Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)} case instituted before the ICJ by the Kingdom of Belgium on 16 February 2009, will help to clarify issues relating to immunity and obligations arising under the 1984 \textit{Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment} and ‘the customary obligation to punish crimes against humanity’.\textsuperscript{197}

These proceedings were instituted after ongoing requests by Belgium since 2001 that Mr Habre, the former President of Chad, who has lived in exile in Senegal since 1990, be brought to trial for crimes including crimes against humanity and torture alleged by a Belgian national of Chadian origin.\textsuperscript{198} At a minimum this case has already resulted in the Chadian Justice Minister informing Belgium on 7 October 2002, that they had lifted any immunity to which Mr Habre might have been entitled\textsuperscript{199} and the amendment of the Senegalese Penal Code and Code of Criminal Procedure to ‘include the offences of genocide, war crimes and crimes against humanity and to enable Senegalese

\textsuperscript{196}Meron, above n 63, 123 - 124.  
\textsuperscript{197}Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) ICJ [2009] Application Instituting Proceedings, 16 February 2009.  
\textsuperscript{198}Ibid, at para 7.  
\textsuperscript{199}Ibid, at para 5.
courts to exercise universal jurisdiction’.\textsuperscript{200} The primary problem for Senegal appears to be the prohibitive cost of prosecuting Mr Habre. However, this does not explain its reluctance to facilitate his extradition to Belgium, and Belgium has requested that the ICJ make a determination that failing prosecution by the Republic of Senegal, Mr Habre should be extradited to Belgium for prosecution.

While the exercise of universal jurisdiction is one means of facilitating an end to impunity for gross human rights abuse, Stein argues that in the interests of ensuring not only standards of substantive and procedural criminal law, but also in determining best outcomes – which in some cases may be political as opposed to judicial solutions, prosecution of foreign state officials should be left to international courts.\textsuperscript{201}

Unlike the ICC, the ICTY and the ICTR (both \textit{ad hoc} tribunals established by the UN Security Council) have primacy of jurisdiction over national courts. However, the core principle of complementarity in the \textit{Rome Statute} provides that the ICC exists to complement national criminal justice systems. It means that the ICC can only intervene if a state is genuinely unwilling or unable to carry out an investigation and prosecution.\textsuperscript{202} This allows states to pre-empt ICC prosecutions in situations where they undertake \textit{bona fide} national investigations and prosecutions.\textsuperscript{203} It also provides an incentive for states to bring their domestic legislation in to conformity with the \textit{Rome Statute}, thereby

\textsuperscript{200} Ibid, at para 6.

\textsuperscript{201} See Torstein Stein ‘Limits of International Law Immunities for Senior State Officials in Criminal Procedure’ in Christian Tomuschat and Jean- Marc Thouvenin (eds), \textit{The Fundamental Rules of the International Legal Order} (Boston: Martinus Nijhoff, 2006) 249, 263.

\textsuperscript{202} \textit{Rome Statute} article 17. See Jensen, above n 29, 179.

\textsuperscript{203} See Meron, above n 63, 149; Jensen, above n 29, 178-180.
encouraging a commitment to global governance and eroding the shield of impunity that has protected perpetrators of serious violations of international human rights and humanitarian law.\footnote{See Jensen, above n 29, 182.} Following the Nulyarimma v Thompson case\footnote{In Nulyarimma v Thompson (1999) 96 FCR 153 the Federal Court of Australia held that as the Convention on the Prevention and Punishment of Genocide had not been incorporated in Australian domestic law, genocide was not part of Australian law.} the crimes of genocide, war crimes and crimes against humanity were incorporated into Australian domestic law through enabling legislation.\footnote{See Triggs, above n 4, 360. Enabling legislation was the International Criminal Court (Consequential Amendments Act) 2002 (Cth).}

Justice Louise Arbour, Prosecutor ICTY and ICTR, in a statement at the launch of the ICC Global Ratification Campaign noted the importance of the establishment of the ICTY and the ICTR as a precedent for a ‘broad-based application of international humanitarian law, enforceable before an international forum,’ and linked human security to a system which allows for international judicial intervention.\footnote{Louise Arbour, ‘Introductory Statement by Justice Louise Arbour, Prosecutor ICTY and ICTR, at the Launch of the ICC Coalition’s Global Ratification Campaign’ The Hague Appeal for Peace, 13 May 1999. Press Release JL/PIU/401-E <http://un.org/icty/pressreal/p401-e.htm> at 9/09/2008.}

The ICTY’s jurisdiction is limited to the former Yugoslavia, and it has competence to deal with grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity.\footnote{Statute of the International Criminal Tribunal for the Former Yugoslavia adopted 25 May 1993 pursuant to Security Council Resolution 827, articles 1-5 <http://www.un.org/icty/legaldoc-e/index-e.htm> at 9/09/2008.} The ICTR has competence to prosecute crimes of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and Additional Protocol II committed in Rwanda and committed by Rwandan
citizens in neighbouring territories, between 1 January 1994 and 31 December 1994. 209

The ICTR and ICTY are powerful judicial institutions explicitly empowered by the Security Council of the United Nations, through resolutions that all member States have agreed will bind them, to conduct investigations and prosecutions. Their establishment has been followed by a proliferation of judicial bodies, such as the special court in Sierra Leone, the court in East Timor, national courts in Cambodia and Iraq, the Special Chamber of War Crimes in Sarajevo, and the ICC, which are dedicated to the prosecution of violations of international criminal law. 210 This has resulted in significant growth in the normative principles of international humanitarian law 211 and a criminalisation of serious violations of human rights. 212 Further, as confirmed by the ICJ in the Advisory Opinion on the Israeli Wall, 213 because core principles of human rights law continue to apply in situations of armed conflict, human rights law has the capacity to afford protection where the protection of international humanitarian law is not available. 214

It is evident that introduction of measures to make both states and individuals more accountable for violations of fundamental principles of international humanitarian and human rights law has made inroads into traditional

210 Meron, above n 63, 177.
211 Ibid, 183.
212 Ibid, 184.
214 Meron, above n 63, 47.
conceptions of state sovereignty as absolute authority. While there is general acceptance that the increased prominence of international humanitarian and human rights law has redefined the traditional conception of state sovereignty as absolute authority at a domestic level, acceptance of the notion that state authority is linked to a responsibility to protect, and the practical implications of this is contentious.

3.4. THE RESPONSIBILITY TO PROTECT

3.4.1. THE ROLE OF THE UN IN COMPLEX HUMANITARIAN EMERGENCIES

The 1994 genocide in Rwanda was a watershed for the United Nations and the broader international community. In the UN Secretary General’s 1999 Report to the General Assembly, Kofi Annan stated that, ‘the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder’.215

The genocide in Rwanda began shortly after the plane carrying Rwandan President Habyarimana and President Ntaryamira of Burundi was shot down on 6 April 1994. Within a period of 100 days, approximately 800,000 predominantly Tutsi, along with moderate Hutu people, were slaughtered in a well-planned and efficiently orchestrated enterprise.216 The Rwandan genocide occurred despite the presence of 2, 548 UN troops who were in Rwanda as part of the UN Assistance Mission for Rwanda [UNAMIR] monitoring observance

of the Arusha Peace Agreement,\textsuperscript{217} and the presence of a large contingent of international aid workers who were working on development projects in Rwanda.\textsuperscript{218}

UNAMIR was established on 5 October 1993 by Security Council resolution 872.\textsuperscript{219} Despite previous reports to the UN about the deteriorating security situation in Rwanda, and the ‘nightly grenade attacks, assassination attempts, political and ethnic killings’ and stockpiling of weapons by militias, the Security Council refused to seriously consider a request by the Belgian Foreign Minister on 14 February 1994 to strengthen the mandate of UNAMIR\textsuperscript{220}. As the genocide progressed, UNAMIR unsuccessfully sought to arrange a ceasefire, and following the unilateral withdrawal of troops by Belgium in response to the assassination of Belgian peacekeepers, the Security Council reduced UNAMIR’s strength from 2,548 to 270 ‘peacekeepers’ on 21 April 1994.\textsuperscript{221}

Prior to the withdrawal of the majority of UNAMIR troops, the first priority for foreign governments, the UN and foreign companies was the evacuation of foreigners to the detriment of Rwandans seeking protection.\textsuperscript{222} On 11 April 1994, UNAMIR troops stationed at the Ecole Technique Officielle at Kicukiro

\textsuperscript{219} SC Res 872, UN SCOR 48th sess, 3288\textsuperscript{th} mtg, UN Doc S/RES/872 (1993).
\textsuperscript{222} Orford, above n 216, 197-198.
were ordered to go to the airport to aid the evacuation of European civilians – in
doing so they abandoned approximately 2,000 Rwandans who sought refuge in
the school, and were subsequently slaughtered. Importantly, prior planning,
and public incitement of conflict allowed the genocide to proceed rapidly, while
the UN Security Council, which at the time included Rwanda as a non-permanent member, engaged in debate about whether the slaughter in Rwanda
was genocide or civil war. In fact, subsequent evidence reveals that a
Discussion Paper from the US Department of Defense cautioned against the use
of the term ‘genocide’ as a ‘Genocide finding could commit USG to actually do
something’. Meanwhile, UNAMIR’s mandate allowed it to act as an
intermediary between warring factions, to rescue civilians and provide
humanitarian assistance; it effectively became a bystander as it had no power or
capacity to end or even effectively mitigate the genocide.

The failure of the international community to respond effectively to the
genocide in Rwanda can be attributed in part to inherent problems with the
collective security system established by the Charter, in particular the lack of a
dedicated UN force, a tenuous financial position, and the difficulty of getting
agreement among the five permanent members of the Security Council.
However, another factor was undoubtedly the flow-on effects from the debacle

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223 Ibid, 198.
225 The National Security Archive. William Ferroggiaro (ed), The US and the Genocide in
Deputy Assistant Secretary of Defense for Middle East/Africa Region, Department of Defense’
226 Hilaire Mc Coubrey and Nigel White, The Blue Helmets: Legal Regulation of United Nations

Following the death of 18 US Rangers, one of whom was dragged through the streets of Mogadishu, the US reviewed its involvement in UN peacekeeping operations, and refocused on ensuring that UN peacekeeping was more efficient, cost-effective and selective, rather than on active US participation in peacekeeping.\footnote{Thakur, above n 227, 58.} Importantly, problems in Somalia, which was effectively a ‘failed state’\footnote{Simpson, above n 95, 59.} with no peace agreement in place, highlighted the critical limitations of UN peacekeeping and heightened recognition that, as the UN Secretary General stated:

> the responsibility for political compromise and national reconciliation must be borne by the leaders and people concerned. It was they who bore the main responsibility for
creating the political and security conditions in which peacemaking and peacekeeping could be effective. The international community could only facilitate, prod, encourage and assist. It could neither impose peace nor coerce unwilling parties into accepting it.232

Moreover, as McCoubrey and White note, it is ‘imperative that the mandates which UN forces are required to fulfil should at least be internally coherent and have some measure of practical feasibility’.233

Peacekeeping is based on consent, co-operation, the use of force only in self-defence, and clear command and control by the UN.234 However, enforcement operations authorised by the Security Council under Chapter VII of the Charter are coercive military operations where, because of the lack of a dedicated UN force, they are essentially carried out by contributing national forces with little in the way of command and control by the UN.235 This situation is less than ideal. It lends itself to disagreement between the UN and National forces operating under a UN banner relating to the scope and implementation of the mandate. The debacle in Somalia illustrates this point. In the initial phase of Operation Restore Hope the United Task Force under US command was required to ‘establish …a secure environment for humanitarian relief operations in Somalia’.236 Once food distribution improved, the Secretary General suggested that UNITAF should adopt a more offensive role in disarming the various factions;237 this led to a blurring of the line between a humanitarian

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233 McCoubrey and White, above n 226, 141.
234 Ibid, 19.
235 Ibid.
236 McCoubrey and White, above n 226, 34.
237 Ibid, 34-35.
function and an enforcement function, and resulted in practical problems in the field.\textsuperscript{238} In the absence of a recognised authority with the capacity to maintain law and order, and ongoing fighting among various factions in Somalia,\textsuperscript{239} the complicated command and control arrangements ultimately ‘proved… unworkable once crisis struck’.\textsuperscript{240}

A further consideration is that the majority of the population in areas where UN forces are present have no appreciation of the distinction between different mandates. Almost inevitably the presence of UN forces raises expectations that populations fleeing genocide, as in Rwanda and Srebrenica, can expect some protection from UN forces. Unfortunately, in both cases this proved to be incorrect. The UNPROFOR forces in Bosnia-Herzegovina had a mandate to use force to ensure the safety of UN troops assisting with humanitarian aid – there was no mandate to protect civilians.\textsuperscript{241} Likewise, in Rwanda, although on 17 May 1994 the Security Council authorised UNAMIR II to ‘contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda’, it had no enforcement capacity and could not be deployed before July.\textsuperscript{242}


\textsuperscript{239} See Chesterman, above n 12, 141.

\textsuperscript{240} Thakur, above n 227, 57.


\textsuperscript{242} McCoubrey and White, above n 226, 114.
It was not until 22 June 1994 that the Security Council authorised a Chapter VII intervention by the French, who were sympathetic to the Hutu regime, to use ‘all necessary means’ to ‘contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda’. Unfortunately this was simply too late for the majority of the Tutsis and Hutu moderates who had already been slaughtered in April 1994. Further, it only served to undermine the credibility of the UN’s role in complex humanitarian emergencies, as the deployment of French troops allowed the political, administrative and military Hutu leadership, who organised the genocide, to escape and re-establish their authority in refugee camps across the Rwandan border. The mass exodus of Hutu refugees to neighbouring states such as Zaire, Tanzania, and Burundi not only created humanitarian crises, but also led to increased inter-ethnic conflict and destabilisation of these states. Refugee camps established by the UN High Commissioner for Refugees [UNHCR] in Zaire and other areas neighbouring Rwanda were taken over by Hutu extremists who commandeered aid supplies and used the camps as bases for attacks against Tutsis in Rwanda. Continued attacks from the Democratic Republic of the Congo [DRC] prompted Rwanda to invade the DRC in August 1998, sparking further conflict

244 See McCoubrey and White, above n 226, 114-115; Sarooshi, above n 238, 223-226.
246 Weiss et al, above n 229, 72 -73; McCoubrey and White, above n 226, 114-115.
247 See Chesterman, above n 12, 147-148; Martin, above n 243, 166-169.
248 Weiss et al, above n 229, 73; Chesterman, above n 12, 147-148; Martin, above n 243,160-168.
involving nine nations and resulting in serious human rights violations and more than 3.5 million deaths.249

There needs to be a realistic appreciation that UN observer forces and peacekeepers cannot keep the peace if there is no peace to keep; and, that peace-making may involve more than preventive diplomacy, observation, sanctions, and negotiating cease-fires. Moreover, there needs to be recognition that peace-making and peace-keeping are complex, situation specific tasks; there are no easy solutions, and ‘neither peace-making nor peace-keeping will ultimately be judged successful if all that is left is a scorched earth and a traumatised society’.250

Intra-state conflict presents particular challenges. While there is a tendency to categorise conflicts such as the genocide in Rwanda and Bosnia-Herzegovina as instances of ‘ethnic conflict’ or ‘ethnic cleansing’, the presence of distinct ethnic groups does not in itself explain the outbreak of violence.251 Undoubtedly ethnicity can be a mobilising force in the generation of conflict, but other social, economic and political factors also need to be considered – the causes of conflict are likely to be complex, inter-related and fluid rather than simply attributable to ethnic difference.

249 Weiss et al, above n 229, 73. See also Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Application Instituting Proceedings 23 June 1999) ICJ General List No 117 (1999) – by Order of 30 January 2001 the ICJ removed the case from its List at the request of the DRC.
250 Janzekovic, above n 241, 83.
De Varennes cites the importance of elements such as marginalisation, discrimination – particularly in the distribution of power and resources, and a lack of appropriate political representation as factors that contribute to ethnic tension and a situation where, ‘Usually outnumbered, outvoted, discriminated or ignored in majoritarian, political systems, segments of the minority population come to believe that violence may be the only available tool to change the situation.’

Daalder attributes the breakup of the former Yugoslavia to ‘specific historical experiences, political developments, and economic conditions that combined to produce a virulent nationalism.’ Further, the influence of international institutions, aid organisations and other foreign actors, although well intentioned, is not benign and it can actively contribute to and exacerbate conflict. Orford, referring to the breakup of the former Yugoslavia, notes that the ‘economic liberalisation and restructuring of the state implemented by the international financial institutions of the World Bank and the IMF during the 1970s, 1980s and …1990s contributed to the conditions in which such hatreds (whether ancient or otherwise) were inflamed’.

The fact that the causes of conflict are generally complex and fluid has implications in terms of developing appropriate responses to mitigate and

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252 Ibid, 56.
manage such conflicts. Critically, the effectiveness of UN missions whether they have an observer, peacekeeping, peace-making or peace enforcement mandate is dependent on the willingness of states to provide both financial and practical support to UN missions. In the absence of a dedicated UN force, the UN relies on states to supply forces that are not only appropriately trained and equipped to carry out their mandate, but also, have a capacity to overcome structural problems which often arise in the context of the operation of United Nations forces. These problems include the establishment of effective command and control structures; multi-national inter-operability and disciplinary structures; and, UN mandates that are often ambiguous in substance and difficult to implement.

Following Rwanda, Somalia, Srebrenica and the NATO intervention in Kosovo there has been ongoing debate about the role of the UN in complex humanitarian emergencies, and appropriate responses to what is perceived as the paralysis that ensues when Security Council members adopt different perspectives on authorisation of Chapter VII action to halt serious violations of human rights.

3.4.2 DEVELOPMENT OF A ‘RESPONSIBILITY TO PROTECT’

The collective security system established by the Charter was designed to prevent the recurrence of another World War involving violent conflict between states. Accordingly its founding principles relate to traditional notions of state sovereignty, territorial integrity, and non-intervention in the internal affairs of

255 Mc Coubrey and White, above n 226, 123. See also Weiss et al (eds), above n 229, 105 notes that many states, including the United States, ‘are in arrears of their regular and peacekeeping dues, and the UN peacekeeping coffers were over $1 billion in arrears at the end of 2005.

256 Mc Coubrey and White, above n 226, 123 and 132-133.
states. However, we live in a world where conflicts are predominantly internal, rather than inter-state, and civilians rather than regular soldiers, are the primary casualties. Moreover, many of the most brutal conflicts and violations of human rights that have occurred in recent times involve either the direct or indirect complicity of governments acting against their own citizens. Pol Pot’s Cambodia,257 Idi Amin’s Uganda,258 Pinochet’s Chile,259 1994 Rwanda, the former Yugoslavia – Srebrenica and Kosovo, and current day Sudan,260 among others, illustrate the propensity of government authorities and their agents to engage in serious violations of the human rights of their own citizens.

Following the NATO intervention in Kosovo there has been ongoing debate about the legality/legitimacy and also the desirability of intervention in situations where a government is either unable or unwilling to afford protection to its own citizens. In 1999 Kofi Annan, Secretary General of the UN, challenged the international community to look at resolving the conflict between state sovereignty and humanitarian intervention.261 The Canadian government took up the challenge of trying to develop guidelines for intervention, and established the International Commission on Intervention and State Sovereignty [ICISS] for this purpose. In 2001 they published a document outlining the

257 Approximately 1.7 million Cambodians were killed under the Pol Pot regime in Cambodia. See Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice (London: Penguin Group, 1999) 38.
258 Janzekovic, above n 241, 83.
259 Robertson, above n 257, 342-344.
260 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004 Geneva, 25 found at para 626 that ‘Thousands were killed, women were raped, villages were burned, homes destroyed, and belongings looted. About 1.8 million were forcibly displaced and became refugees or internally-displaced persons. They need protection.’ At para 628 ‘It is regrettable that the Government of the Sudan has failed to protect the rights of its own people. The measures it has taken to counter the insurgency in Darfur have been in blatant violation of international law.’ <www.un.org/News/dh/sudan/com_inq_darfur.pdf> at 22/09/2008.
‘Responsibility to Protect’ [R2P]. As Thakur notes, R2P aims to effect three principal changes. It aims to:

1. change the conceptual language from ‘humanitarian intervention’ to ‘responsibility to protect’;
2. pin the responsibility on state authorities at the national level and the UNSC at the international level; and
3. ensure that interventions, when they do take place, are done properly.  

The ICISS report on R2P states that ‘the responsibility to protect involves three specific responsibilities: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild’.  

This envisages a broad ongoing commitment to assist populations in crisis.

However, one of the critical features of the R2P doctrine is that, consistent with the increased recognition and prominence of human rights, it draws the primary focus to the responsibility of governments towards their own citizens, rather than on a controversial and legally non-existent ‘right’ of humanitarian intervention by third states which not only collides with traditional notions of state sovereignty, but also raises the spectre of a new imperialism.  

The wider international community can only intervene when a state is unable or unwilling to protect their citizens from genocide, war crimes, crimes against humanity, or ethnic cleansing; when a particular state was itself the perpetrator of the crimes or atrocities; or, when ‘people living outside a particular state are directly

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262 Thakur, above n 227, 247.
264 See Orford, above n 216, 45-49.
threatened by actions taking place there’. 265 This is consistent with the notion that some rights are so important that:

the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.266

Further, military intervention under the ICISS R2P framework is subject to a ‘just cause’ threshold along with the requirement that any intervention must be taken with ‘right intention’ and only as a last resort after peaceful means of resolving the crisis have been exhausted. 267 Also any military intervention must not only have a reasonable prospect of success, but also be proportional in the sense that, consistent with international humanitarian law, it involves the minimum use of force necessary to achieve the desired humanitarian objective.268

In 2004 the UN High Level Panel on Threats, Challenges and Change issued a report A More Secure World: Our Shared Responsibility, suggesting that

The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the

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265 The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, Canada (December 2001) at para 2.31. See also UN General Assembly World Summit Outcome document. UN Doc A/60/L.1 at para 139.
266 Prosecutor v Furundzija ICTY Case No.: IT-95-17/1-T (Trial Chamber) 10 December 1998 at para 151.
267 Ibid at paras 432-438.
268 Ibid at para 4.39 and 4.40.
wider international community...there is growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider community. 269

At the September 2005 UN World Summit world leaders recognised that ‘Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’ 270 This responsibility to protect [R2P] was first affirmed by the Security Council in Security Council Resolution 1674 of 28 April 2006 relating to the protection of civilians during armed conflict. 271

However, adoption of the R2P doctrine was not without controversy, and as Thakur points out,

R2P is one of the most important normative advances in global governance since the Second World War. We managed to find international consensus on it by putting it in non-confrontational language, restricting the circumstances in which outside military intervention is justified to halt large-scale killings (not death caused by natural disasters) or ethnic cleansing, and surrounding it with prevention before and reconstruction after such intervention. 272

270 UN General Assembly World Summit Outcome Document. UN Doc A/60/L.1, para 138.
The *World Summit Outcome Document* affirmed the importance of working through the United Nations ‘to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ and made a commitment to building the capacity of states to protect their populations.\(^{273}\) Further, rather than creating a mandatory obligation for third states to intervene to protect populations from these crimes, states are required to act on a ‘case by case basis’ through the Security Council – there is no systematic duty to intervene.\(^{274}\)

While the law relating to state responsibility recognises that violations of ‘peremptory’ norms of general international law affect all states, it limits the consequences of such breaches to co-operation ‘to bring an end through lawful means any serious breach’,\(^{275}\) and an obligation not to ‘recognise as lawful a situation created by a serious breach’.\(^{276}\) However, the ILC also advised that a positive duty of co-operation as found in article 41(1) ‘may reflect the progressive development of international law’.\(^{277}\)

Documents such as the ICISS Report, the *World Summit Outcome Document*, along with statements by the Secretary General relating to R2P are not legally binding. It has been claimed that recognition of a positive obligation for sovereign states to protect their own citizens ‘represents a substantial leap

\(^{271}\) UN General Assembly *World Summit Outcome Document*. UN Doc A/60/L.1, at para 139.

\(^{274}\) Stahn, above n 6, 107.

\(^{275}\) Articles on the Responsibility of States for Internationally Wrongful Acts article 41(1).

\(^{276}\) Brownlie, above n 42, 307.

\(^{277}\) Ibid, article 41 (2)
forward in international law.’ 278 However, Hugo Grotius based his conception of law on the assumption that laws regulating the organisation and behaviour of states ‘exist ultimately for the benefit of the actual subjects of the rights and duties’. 279 Further, since the 17th Century there have been many attempts to protect individuals and groups from a state’s arbitrary exercise of authority 280 including the introduction of numerous human rights and humanitarian law treaties.

While the broad outline of R2P was accepted by the General Assembly in 2005, there is ongoing uncertainty relating to the actual scope and implications of R2P. Moreover, there is no consensus that acceptance by states of a ‘responsibility to protect’ necessarily implies acceptance of a positive duty to intervene, especially if that intervention involves the use of force. It is notable that the R2P framework envisages intervention under conventional Chapter VII arrangements; it is not a blueprint for unilateral intervention in the absence of Security Council authorisation.

In recognition of the problems that have plagued African states, the Constitutive Act of the African Union provides for ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances namely: war crimes, genocide and crimes against humanity’. 281

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279 Stahn, above n 6, 111.

280 Ibid.

Nevertheless, while the Protocol establishing the AU Peace and Security Council also provides that the Union has ‘primary responsibility for promoting peace, security and stability in Africa’\textsuperscript{282} it states that the AU Peace and Security Council ‘shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security’.\textsuperscript{283}

R2P fails to adequately address the challenge of the legality/legitimacy of intervention to prevent genocide, war crimes, crimes against humanity and ethnic cleansing when permanent members of the Security Council veto such intervention. The recommendation in the ICISS Report that the five permanent members of the Security Council should restrict use of their veto so as not ‘to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support’\textsuperscript{284} is interesting because of the qualifier ‘in matters where their vital state interests are not involved’.\textsuperscript{285} Obviously, fundamental human rights can be compromised where the interests of the permanent five are involved. Given that in extreme circumstances, and only as a last resort, military intervention may be necessary to prevent or contain genocide, war crimes, crimes against humanity, and ethnic cleansing, this iniquitous position highlights the need for reform of the Security Council.

\textsuperscript{282} Ibid, 286. See also article 16 (1) of the Protocol Relating to the Establishment of the Peace and Security Council.\textsuperscript{<www.africaunion.org/root/au/organ/psc/Protocol_peace%20and%20security.pdf - > at 10/07/2008
\textsuperscript{285} Ibid.
3.5. CONCLUSION

Sovereignty is not an absolute fact. It is a scheme of interpretation which helps to order relations between states, and as such it is malleable. The traditional conception of state sovereignty as absolute authority at a domestic level is constantly being challenged by forces such as globalisation and the increased focus in international law on human rights. Moreover, as Shaw states, ‘international law permits freedom of action for states, unless there is a rule constraining this…it is therefore international law which dictates the scope and content of the independence of states and not the states themselves individually and unilaterally’. 286

Rapid innovation and change associated with globalisation has far-reaching economic, social and political effects. It not only has the capacity to prolong and enhance quality of life, but also, has the capacity to facilitate the spread of disease, trans-national crime, terrorism, development of weapons of mass destruction, and conflict. However, in an increasingly interdependent world, globalisation has also stimulated recognition of the need for greater co-operation to combat problems that extend across borders. Globalisation and the increasing interdependence of states undoubtedly present ongoing challenges to the functional autonomy and traditionally conceived ‘sovereign’ authority of states. Further, the increased focus in international law on recognition of individual and collective human rights, along with the establishment of judicial bodies to investigate and prosecute serious international crimes, has eroded conceptions of sovereignty as absolute authority at a domestic level.

286 Shaw, above n 10, 150.
Acceptance by states in the General Assembly World Summit Outcome Document of a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity has been hailed as a significant step forward in the protection of human rights. However, while the R2P doctrine attempts to extend the protection already afforded by existing human rights and humanitarian law, there is uncertainty relating to acceptance by states of a positive obligation to intervene in situations where a state is unwilling or unable to protect its’ own citizens from serious abuse. The R2P doctrine is influential but it has no legal effect. Consistent with this fact, essentially it reinforces the primacy of Security Council authorisation for intervention by third states in situations that constitute a ‘threat to the peace’. It does not address the challenge of the legality/legitimacy of intervention for humanitarian purposes in the absence of agreement among the permanent members of the Security Council.

Apart from offering guidelines that echo earlier notions of ‘just war’, perhaps the most significant contributions of the R2P doctrine relate to highlighting the inadequacy of existing arrangements to deal with severe humanitarian crises; challenging traditional conceptions of state sovereignty as absolute authority at an internal level; fostering debate about the legality, desirability, and execution of ‘humanitarian intervention’; and, reinforcing the need for Security Council reform, especially in relation to use by the five permanent members of the veto in situations involving serious abuses that involve jus cogens norms and obligations erga omnes.
In an ideal world, because of its privileged position as an arbiter of ‘threats to the peace’, the Security Council would actively promote means to prohibit the commission of serious abuses of *jus cogens* norms such as genocide, war crimes and crimes against humanity. Given that the causes and trajectories of conflict are fluid and complex, the question of whether this necessarily involves militarised humanitarian intervention, or a stronger ongoing focus on the prevention and mitigation of conflict, and a commitment to rebuild societies affected by conflict, will probably be determined on a case by case basis. This process is undoubtedly assisted by guidelines such as those suggested by the ICISS Report on ‘The Responsibility to Protect’.  

Fundamental questions relating to the desirability, legality and execution of humanitarian intervention to prevent or contain serious breaches of *jus cogens* norms that give rise to obligations *erga omnes* still need to be addressed. The question of whether states can take countermeasures in response to *erga omnes* breaches, and if so what countermeasures are allowable, remains an extremely controversial issue in the law of state responsibility. As Thakur notes, ‘legal debate on a clear, consistent and workable set of codified criteria for intervention is largely sterile…and political debate quickly degenerates from rational discussion to highly charged polemics’.

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288 Tams, above n 124, 14.  
289 Thakur, above n 227, 260.
4. HUMANITARIAN INTERVENTION

4. 1. INTRODUCTION

The NATO intervention in Kosovo in 1999 highlights some of the critical issues relating to humanitarian intervention. In particular it highlights questions relating to both the legality and desirability of humanitarian intervention in the absence of Security Council authorisation; the scope and limits of the responsibility of both national governments and the broader international community, to prevent or contain serious abuses of jus cogens norms that give rise to obligations erga omnes; and, questions relating to appropriate goals, scope and execution of humanitarian interventions.

It has been argued by various legal scholars that the NATO intervention in Kosovo was illegal but nevertheless legitimate.¹ Further, it has been suggested that along with the Economic Community of West African States’ [ECOWAS] interventions in the civil war in Liberia in 1990 and in Sierra Leone in 1996, which like the NATO intervention were not authorised by the Security Council and derive some legitimacy from ex post facto Security Council resolutions, it is potentially an instance of an ‘acceptable breach’ of international law.² The


suggestion that there can be ‘acceptable breaches’ of law raises fundamental questions about the validity of the law in question – in this case the prohibition of the use of force in international law and the prohibition of unauthorised intervention in the internal affairs of states.

The concept of humanitarian intervention owes much to natural law notions of ‘just war’ that enjoyed support at various stages throughout history prior to the introduction of the UN Charter. 3 While there is a wealth of literature offering different perspectives on the legality and desirability of humanitarian intervention, modern day proponents of humanitarian intervention generally argue that asserted customary international law notions of a ‘right’ of humanitarian intervention survived the prohibition of the use of force in the UN Charter 4 or that while humanitarian intervention may be technically illegal, it can be justified on grounds of moral necessity. 5

4. 2. HUMANITARIAN INTERVENTION AND CUSTOMARY INTERNATIONAL LAW

4.2.1. THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

The assertion that a customary international law right of intervention survived the UN Charter is problematical. It assumes that there was a clearly recognised customary law right of humanitarian intervention prior to the introduction of the UN Charter and that it has never been superceded or extinguished. However,

this is difficult to establish, especially as prior to the UN Charter the use of force was not illegal, and it is difficult to identify instances of state practice motivated by essentially humanitarian motives.\(^6\)

As Murphy notes, there were various interventions, primarily by European states, during the nineteenth century that appear to offer some support for acceptance of ‘the right [of states] to intervene for the protection of human rights’.\(^7\) However, while some concept of humanitarian intervention was evident, ‘its application was sporadic and uneven’\(^8\) rather than constituting settled state practice, and it is difficult to discern the requisite\(\textit{opinio juris sive necessitatis}\) – ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.\(^9\) These two conditions for the formation of rules of customary international law, as outlined in the \textit{North Sea Continental Shelf} cases were affirmed by the ICJ in the \textit{Nicaragua case}.\(^10\) In the \textit{Nicaragua case} the Court noted that, ‘reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law’.\(^11\)

The process of change in customary international law involves an element of uncertainty in terms of identifying exactly when one rule is superceded by another. As Hart notes, custom develops by means of a ‘process of growth, whereby courses of conduct once thought optional become first habitual or

\(^6\) Chesterman, above n 3, 35-36.
\(^8\) Ibid.
\(^9\) \textit{Nicaragua case} (Merits) ICJ Rep 14, at para 207.
\(^10\) Ibid.
\(^11\) Ibid.
usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed’. D’Amato likewise envisages a process of accretion where after one state has violated an established rule of customary international law, it will be easier for other states to do so, until eventually a new rule will emerge.

However, while the development of a new norm of customary international law is generally a slow process, as recognised in the *North Sea Continental Shelf* cases, time itself is not a critical component in the development of customary international law. In this case the Court specifically rejected the idea that the passage of only a short period of time could be ‘a bar to the formation of a new rule of customary international law’. It affirmed that the critical components are ‘state practice … both extensive and virtually uniform in the sense of the provision invoked, and …a general recognition that a rule of law or legal obligation is involved’.

After the introduction of the UN Charter, there are a number of instances of state practice that are cited as supporting a right of humanitarian intervention such as the Indian intervention in East Pakistan in 1971, Belgian and French intervention in Zaire in 1978, Tanzanian intervention in Uganda in 1978-9, action to protect the Kurds in Northern Iraq in 1991, and the ECOWAS

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15 Ibid.
16 See Chesterman, above n 3, 71-81; Murphy, above n 7, 97-108.
interventions in Liberia and Sierra Leone in 1989 and 1999. However, the requisite *opinio juris* is generally lacking. Not only have states consistently resisted attempts to characterise their actions as supporting a ‘right’ of humanitarian intervention, but also, international response to interventions has generally been either openly critical or ambiguous. In 1999 the United Kingdom Foreign Office unequivocally rejected a right of humanitarian intervention in international law not only on the basis of the UN Charter and general international law, along with state practice which in the ‘past two centuries…at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all’ but also, on prudential grounds because of the risk of abuse.

Boyle and Chinkin argue that the Security Council may ‘in effect extend or develop the law through its interpretation and application of the UN Charter’. The Security Council has a very broad discretion in its interpretation of ‘threat to the peace’ and one of the notable features of recent interventions authorised by the Security Council under Chapter VII, is evidence of a humanitarian component and the irrelevance of distinguishing between international war and civil war. Undoubtedly, the Security Council has extended the scope of ‘threat

17 Chesterman, above n 3, 130-133 (re Kurds 1991) and 134-137 (re Liberia and Sierra Leone)
18 Franck, above n 2, 220-221.
to or breach of the peace’ through the authorisation of ‘all necessary means’ to support humanitarian assistance in Somalia, Bosnia - Herzegovina, Rwanda, and to restore an elected leader in Haiti.23 While acknowledging that the legal position is unsettled, Boyle and Chinkin claim that this lends some support to arguments in favour of humanitarian intervention that has not been authorised by the Security Council as ‘there is the potential for extrapolation from Security Council practice on the basis of which claims for the evolution of customary international law may be made’.24

Apart from declarations by states, soft law or non-binding legal principles such as General Assembly resolutions, declarations and documents such as the *Universal Declaration of Human Rights*,25 and the General Assembly 2005 *World Summit Outcome Document*, which recognised that states have ‘a responsibility to protect their own citizens from ‘genocide, war crimes, ethnic cleansing and crimes against humanity,’26 can provide evidence of *opinio juris* to support the emergence of a new principle of customary international law.27

The principle that states have a responsibility to protect their own citizens from serious human rights abuse was endorsed by the Security Council in Security Council resolution 1674.28 General acceptance of soft law instruments undoubtedly helps to legitimise conduct consistent with the non-binding

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23 Ibid.
24 Ibid.
26 UN General Assembly *World Summit Outcome Document*. UN Doc A/60/L.1, at para 138.
27 Boyle and Chinkin, above n 21, 212 and 222-229.
principles articulated in such instruments and it also raises questions about the continued legality of alternative positions.\textsuperscript{29}

In 1997 Shaw argued that while article 2(4) of the Charter and state practice do not support the concept, ‘it is possible that such a right might evolve in cases of extreme humanitarian need’.\textsuperscript{30} However, for a right of humanitarian intervention to emerge in customary international law, there needs to be more evidence of settled state practice outside of Security Council actions authorised under Chapter VII of the Charter, which are thereby lawful. Further, such state practice must be accompanied by the requisite \textit{opinio juris} in order to support the emergence of a right of humanitarian intervention in customary international law.

\textbf{4.2.2. THE PROHIBITION OF INTERVENTION AND CUSTOMARY INTERNATIONAL LAW}

The scope of the prohibition of intervention in the domestic affairs of states, as exemplified in the domestic jurisdiction clause in article 2(7) of the Charter, is not fixed in stone. Even prior to the introduction of the UN Charter, the Permanent Court of International Justice [PCIJ] recognised that the demarcation between domestic and international spheres varies with the ‘changing nature of international relations’.\textsuperscript{31} Supporters of a right of humanitarian intervention often cite growing recognition of the importance of human rights as a counter

\textsuperscript{29} Ibid, 212.
\textsuperscript{30} Malcolm N Shaw, \textit{International Law} (4\textsuperscript{th} ed. Cambridge: Cambridge University Press, 1997) 803.
argument to insistence on strict compliance with the prohibitions of the use of force and of non-intervention in the domestic affairs of states.

In fact, there is significant practice by UN organs and the General Assembly in particular, which indicates that the principle of non-intervention is malleable. The General Assembly was intimately involved in the process of decolonisation, and both the General Assembly and the Security Council have at times condemned gross human rights abuse such as genocide and apartheid. Conforti concludes that an examination of records of meetings and resolutions adopted by UN organs such as the General Assembly, the Security Council and the Economic and Social Council reveals that situations within states that are injurious to human rights, and in particular gross violations of human rights are ‘now the object of UN action’ regardless of whether or not they constitute a breach of specific international obligations.

While it has been suggested that the domestic jurisdiction limitation in article 2(7) essentially encompasses ‘relations concerning the organisation of government…and the utilisation of the territory’ the rising prominence of the promotion of democratisation, which is particularly evident in post-conflict scenarios, suggests that limitations on international involvement in the domestic organisation of government are contracting.

32 Conforti, above n 22, 140-141.
33 Ibid, 142.
34 Ibid, 143.
There has been a dramatic increase in UN involvement in post-conflict states since 1988. As Kofi Annan stated in 2005:

The UN has also given concrete support for elections in more and more countries: in the last year alone, it has done so in more than 20 areas and countries, including Afghanistan, Palestine, Iraq, and Burundi. Since democracy is about far more than elections, the organization's work to improve governance throughout the developing world and to rebuild the rule of law and state institutions in war-torn countries is also of vital importance.

Further, the majority of post-conflict reconstruction missions have been given mandates that include the promotion of democratic governance and the protection of human rights. The focus on human rights was affirmed by the UN Department of Peacekeeping Operations in United Nations Peacekeeping Operations: Principles and Guidelines 2008, which states that, ‘International human rights law is an integral part of the normative framework for United Nations peacekeeping operations.’

It is notable that following the 1983 intervention in Grenada by the United States, the US Permanent Representative to the United Nations argued that the phrase ‘in any other manner inconsistent with the purposes of the United

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38 United Nations, UN Department of Peacekeeping Operations, ‘United Nations Peacekeeping Operations: Principles and Guidelines 2008’ New York, 2008, 14. See also p 27 ‘Most United Nations multi-dimensional peacekeeping operations are therefore mandated to promote and protect human rights by monitoring and helping to investigate human rights violations and/or developing the capacity of national actors and institutions to do so on their own.’
Nations’ in article 2(4) of the Charter could provide justification for an unauthorised use of force in pursuit of ‘other values also inscribed in the Charter – freedom, democracy, peace’. However, a US government publication relating to the history of Operation Urgent Fury indicates that it was designed to ‘rescue American citizens, restore a popular native government, and eliminate a perceived threat to the stability of the Caribbean and American strategic interests there’. The intervention in Grenada was ultimately more about securing America’s own interests in the region by reclaiming Grenada from the Soviet/Cuba orbit, than about humanitarian intervention to save an oppressed population.

Teson argues that permissible humanitarian intervention involves a ‘proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect’ - which relates to good consequences, good intentions and proportionality in the use of force. Drawing on Kantian moral philosophy, Teson argues that as sovereignty serves an instrumental purpose, it is human

39 Chesterman, above n 3, 52.
41 Murphy, above n 7, 110.
42 Teson, above n 5, 94.
33. Ibid, 111. Note: The doctrine of double effect regards acts in which innocents are killed as legitimate if:
1. the act has good consequences – such as killing enemy soldiers in a just war;
2. the actor’s intentions are good; and,
3. the act’s good consequences – such as killing of enemy soldiers – outweigh its bad consequences – such as killing of non-combatants.
rights rather than the rights of states that provide the ethical foundation of law.\textsuperscript{44} He claims that as the sovereign state is ‘created by men and women to protect themselves against injustice’\textsuperscript{45} gross violations of human rights represent a ‘betrayal of the principle of sovereignty itself’.\textsuperscript{46} He objects to the notion that states must obey international law - the prohibition of the use of force and the prohibition of intervention in the internal affairs of states, ‘if doing so allows an ongoing, equally egregious violation of international law’.\textsuperscript{47} Despite evidence that states still endorse the principle of non-intervention, Teson claims that it is ‘a doctrine of the past’.\textsuperscript{48} He argues that a failure by states and governments to secure and protect the human rights of their citizens should ensure that they are denied the protection of international law.\textsuperscript{49}

From a moral perspective Teson’s arguments and his appeals to ‘justice’ and ‘common humanity’\textsuperscript{50} appear to be quite compelling. However, it is questionable whether humanitarian intervention is necessarily the most effective means to deal with gross violations of human rights. Further, the suggestion that intervention undertaken by ‘a liberal government or alliance’ is permissible needs clarification. Who decides what constitutes a ‘liberal government or alliance’ and what gives liberal governments a monopoly on morality?

Undoubtedly, the increased prominence of human rights in international law has been attended by a reconceptualisation of the parameters of domestic

\textsuperscript{44} Boyle and Chinkin, above n 21, 16.
\textsuperscript{45} Ibid, 111.
\textsuperscript{46} Ibid., 110
\textsuperscript{47} Ibid.
\textsuperscript{48} Teson, above n 5, 128.
\textsuperscript{49} Ibid
\textsuperscript{50} Ibid, 129.
jurisdiction and the traditional focus on state consent. The association of sovereignty with a commitment to the prevention of gross violations of human rights was recognised by the international community with its adoption in 2005 of the General Assembly *World Outcome Document*. The responsibility to protect [R2P] was also affirmed by the Security Council in Security Council Resolution 1674 of 28 April 2006 relating to the protection of civilians during armed conflict. However, the R2P doctrine requires states to act on a case by case basis through the Security Council. It does not support a right of unauthorised intervention by states to protect human rights.

Traditional perceptions that state sovereignty is inviolable are being eroded by the advance of human rights, and in particular by the establishment of various judicial bodies to investigate and prosecute those responsible for serious violations of human rights. It is notable that three states party to the *Rome Statute* – Uganda, the Democratic Republic of the Congo and the Central African Republic – have referred situations occurring on their territories to the ICC. In addition, the Security Council has referred the situation in Darfur, Sudan – a non State Party. This is evidence of a growing commitment to securing compliance with human rights standards. However, while academics argue about the emergence of a right of humanitarian intervention in customary international law, this rhetoric does not appear to be matched by an overwhelming desire by states to actively participate in interventions to prevent

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51 UN General Assembly *World Summit Outcome Document*. UN Doc A/60/L.1, para 138.
or contain serious violations of human rights. It would appear to be a little premature to conclude that the principle of non-intervention is dead.

4.3. MORAL NECESSITY

Proponents of the moral necessity point of view generally suggest that this either requires absolution of illegality in exceptional circumstances, or a change in international law. Geoffrey Robertson rejects what he regards as the UN Charter’s nexus between grave human rights and international security, in favour of ‘more sophistication (in terms of the psychological necessity to eradicate behaviour that diminishes everyone’s humanity) or less (a crime-free global village)’. He regards international law’s strong focus on state practice as opposed to normative principles of fairness and justice as the primary reason for its failure to adequately address problems relating to ethnic conflict, and argues that following the era of decolonisation, there ‘must be some hope that the right of peoples to self-determination can revert to something akin to its true meaning, namely a right conferred on peoples against their own governments’.

In line with this sentiment, Thomas Franck argues that the NATO intervention was not unlawful because:

the illegal act produced a result more in keeping with the intent of the law (i.e. more legitimate) and more moral – than would have ensued had no action been taken to prevent

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57 Ibid, 143.
another Balkan genocide…the lawfulness of the act was mitigated, to the point of exoneration, in the circumstances in which it occurred.\textsuperscript{58}

Franck cites the increased focus on the legality/legitimacy conundrum \textsuperscript{59} as evidence that ‘law is rarely static and that its evolutionary response to changing circumstances may deliberately be to purchase a degree of contextual reasonableness at some cost to its absolute, one-size-fits-all, certainty.’ \textsuperscript{60} He argues for ‘nuanced exceptions’ in situations of extreme necessity.\textsuperscript{61} The position adopted by most NATO members and the majority of Security Council members was consistent with this position - while generally rejecting a ‘right’ of humanitarian intervention they regarded the NATO intervention in Kosovo as justifiable because of exceptional circumstances.\textsuperscript{62}

Essentially the arguments based on grounds of moral necessity recognise the ‘technical’ illegality of unauthorised humanitarian intervention. The fundamental question is whether it is necessary or desirable to change the law to allow intervention outside the existing parameters of international law. Stromseth argues that as a consequence of the NATO intervention in Kosovo the legal status of unauthorised humanitarian intervention remains uncertain.\textsuperscript{63} She sees this as an opportunity to reject a ‘formal doctrinal framework’ for humanitarian intervention in favour of a process of ‘normative evolution and capacity building’ that focuses on effective action to deal with human rights

\textsuperscript{58} Franck, above n 2, 226.
\textsuperscript{59} Ibid, 214- 216 re the legality/legitimacy conundrum which relates to the gap between a strictly positivist interpretation of law as opposed to an interpretation more consonant with ‘a common sense of moral justice’. This assumes that there is a universal sense of moral justice.
\textsuperscript{60} Ibid, 204-205.
\textsuperscript{61} Ibid, 227.
\textsuperscript{62} See Stromseth, above n 2, 238.
\textsuperscript{63} Ibid, 233.
Cassese disagrees with Simma’s proposition that ‘only a thin red line’ separates NATO’s action from legality.\(^6^6\) However, while he recognises that the NATO intervention in Kosovo did in fact constitute a serious breach of international law,\(^6^7\) he argues that humanitarian intervention may be morally justified and given ‘nascent trends’ such as greater respect for human rights; the notion that respect for human rights involves obligations \textit{erga omnes} that may require countermeasures by third states; increasing evidence of intervention in internal conflicts where human rights are seriously threatened; and, beliefs of some NGOs and government officials that in cases of serious human rights abuse ‘forcible protection of human rights may need to outweigh the necessity to avoid friction and conflict’\(^6^8\) under certain strict conditions resort to force may gradually become justified in the absence of Security Council authorisation.

Further, he claims that eventually there may be a ‘crystallisation of a general rule of international law authorising armed countermeasures for the

\(^{64}\) Ibid, 233 – 234.
\(^{65}\) Stromseth, above n 2, 271.
\(^{66}\) Simma, above n 1, 1-22.
\(^{68}\) Ibid, 26. See also 26-30 generally for discussion of nascent trends and conditions that may in Cassese’s opinion justify intervention and lead to the crystallisation of a general rule of international law authorising armed countermeasures.
exclusive purpose of putting an end to large scale atrocities amounting to crimes against humanity and constituting a threat to the peace.' He recognises the potential for abuse in recognition of exceptions to the UN collective security system and argues that such a rule should only be applicable in (1) special and unique circumstances; (2) must constitute an *extrema ratio*; (3) must be limited to stopping aggression and/or atrocities; (4) must be proportionate; and (5) must yield to UN authorised collective enforcement measures as soon as possible.

However, Peter Hilpold cautions that Cassese’s assertion that rather than searching for evidence of *opinio juris* as an essential element for the emergence of a rule of customary international law, *opinio necessitatis* – ‘the conviction that a state acts out of political, economic or moral necessity’ that can be deduced from ‘proclamations made by some intervenor states’ can in certain situations be sufficient, is not only rather clumsy, but also has doubtful validity. He points out that such a strong focus on the element of necessity is dangerous for the consensus oriented international order and it risks confounding political and moral excuses for intervention with legally relevant elements of state practice. Essentially the NATO intervention in Kosovo does not support Cassese’s argument because intervening states were generally determined to deny that their intervention could support the emergence of a right of humanitarian intervention. Further, we should not conflate moral necessity with legality. Ultimately the prohibition of the use

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69 Ibid, 29.
70 Ibid, 29.
72 Ibid, 461-465.
of force may offer ‘better protection for the weak than its abandonment prompted by an over-enthusiastic belief in the virtues of the intervenor.’

Even though the collective security system envisaged by the UN Charter is flawed, we need to seriously question not only the desirability, but also the efficacy, of tolerating unauthorised initiatives that involve the use of force to resolve humanitarian crises. Given the fluid and complex nature of conflict, Stromseth and Franck’s arguments for approaches that recognise the importance of the context in which a particular conflict is occurring, rather than trying to impose pre-determined guidelines for action, has merit. As Franck notes, ‘the onus of demonstrating to the “jury” of UN members that recourse to force in any particular instance is necessary and appropriate rests on those having extraordinary recourse to an unlawful remedy to prevent a much greater wrong’. 74

Even Simma who argues that the NATO intervention in Kosovo was illegal, but nevertheless legitimate because of the dictates of humanitarian necessity, cautions against the adoption by NATO of a policy of exceptionalism. 75 He concurs with the sentiment that rejection of the Security Council’s authority with regard to determining the use of force could ‘put the world on a slippery slope of competing claims of “rights” to intervene – with the potential consequence of escalating hostilities rather than resolving them’. 76

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73 Ibid, 461.
74 Franck, above n 2, 226.
75 Simma, above n 1, 21-22.
Further, as the ICJ stated in the *South West Africa* case, when considering whether humanitarian considerations on their own were sufficient to generate legal rights and obligations:

> a court of law…can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.\(^77\)

While at times the moral argument for intervention to prevent or contain gross abuse of human rights may be compelling, ultimately this does not give legal authority to unauthorised humanitarian intervention. Further, as Conforti notes, the illegality of unauthorised interventions for humanitarian reasons ‘cannot be removed by a subsequent (implied) ratification, for instance by providing a post-war administration of the territory wherein the war took place’.\(^78\) Neither Security Council resolution 1244 establishing UNMIK, the UN administration in Kosovo, nor Security Council resolutions 1483 and 1511 relating to the post-war situation in Iraq affect the illegality of the original interventions as they were not conducted under the control of the Security Council.\(^79\)

Consistent unauthorised intervention by states for genuinely humanitarian reasons in cases of human rights abuse undoubtedly lends support to the emergence of a new norm of customary international law, but only if it is accompanied by the requisite *opinio juris*. This was not the case in Kosovo or

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\(^77\) *South West Africa* Second Phase (1966) ICJ Rep 6 at para 49.

\(^78\) Conforti, above n 22, 209.

\(^79\) Ibid.
Iraq. The attempt by the International Commission on Intervention and State Sovereignty [ICSS] to develop criteria to guide humanitarian intervention, and recognition by the General Assembly and the Security Council of a ‘responsibility to protect’ are positive moves towards ensuring protection against the most egregious forms of human rights abuse.\(^\text{80}\) However, these initiatives, while extending recognition that states have a responsibility to protect their own citizens from human rights abuse, envisage intervention under conventional Chapter VII arrangements; they do not support unauthorised humanitarian intervention. Ultimately gradual change, consistent with developing appreciation by states of a need to use force, as a last resort, to avoid or contain gross violations of human rights, may be preferable to a situation where powerful states adopt the rhetoric of humanitarian intervention to reject the relevance of international law in pursuit of their own ends.

4.4. JUS COGENS, OBLIGATIONS ERGA OMNES AND HUMANITARIAN INTERVENTION

Arguments in favour of humanitarian intervention suggest that it should be reserved for cases involving serious breaches of human rights such as genocide, war crimes, and crimes against humanity. The ICC has jurisdiction over these crimes, (along with the crime of aggression) and elements of the crimes are codified in articles 6, 7 and 8 of the *Rome Statute*.\(^\text{81}\) Crimes such as genocide,


\(^{81}\) *Rome Statute of the International Criminal Court* – entered into force on 2 July 2002. See article 6 (Genocide) article 7 (Crimes against humanity) and article 8 (War crimes) <http://www.icc-cpi.int/NR/donlyres/E9AEFF7-5572-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf> at 12/02/2009.
war crimes and crimes against humanity are recognised as so serious that the
prohibition of such crimes has the status of *jus cogens* norms, which are
hierarchically superior to ordinary norms of customary international law that do
not enjoy the same status. In the *Kupreskic case* norms of international
humanitarian law, such as the prohibition of war crimes and genocide were
identified as both norms *jus cogens* and obligations *erga omnes*. The concept
of obligations *erga omnes* derives from the statement by the ICJ in the
*Barcelona Traction case* that:

> an essential distinction should be drawn between the obligations of a State towards the
> international community as a whole, and those arising vis-à-vis another State in the field
> of diplomatic protection. By their very nature the former are the concern of all States. In
> view of the importance of the rights involved, all States can be held to have a legal
> interest in their protection; they are obligations *erga omnes*.

In its advisory opinion on reservations to the *Genocide Convention*, the ICJ
recognised that, ‘the principles underlying the Convention are principles which
are recognised by civilised nations as binding on States, even without any
conventional obligation’. This is regarded as recognition of the status of the

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82 The concept of *jus cogens* norms derives from the *Vienna Convention on the Law of Treaties*,
article 53. Stefan Kadelbach, ‘*Jus Cogens*, *Obligations Erga Omnes* and Other Rules – The
Identification of Fundamental Norms’ in Christian Tomuschat and Jean- Marc Thouvenin (eds),
*The Fundamental Rules of the International legal Order: Jus Cogens and Obligations Erga

83 *Prosecutor v Kupreškić et al. (Judgement)* ICTY Case No IT-95-16 (Trial Chamber II) 14
January 2000 at para 519 – identifies norms of IHL as creating ‘obligations toward the
international community as a whole…every member has a ‘legal interest’ in their observance
and consequently a legal entitlement to demand respect for such obligations’ para 520 identifies
war crimes, crimes against humanity and genocide as *jus cogens*.


85 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide
prohibition of genocide as a norm of customary international law.\textsuperscript{86} There is ongoing debate among legal scholars about the legal implications of classification of norms \textit{jus cogens} and obligations \textit{erga omnes}.\textsuperscript{87}

The \textit{Convention on the Prevention and Punishment of the Crime of Genocide} \textbf{[Genocide Convention]} came into force on 12 January 1951.\textsuperscript{88} Genocide is generally regarded as one of the most heinous crimes that threaten humanity. Nevertheless, although it is ‘right at the core of the values protected by human rights instruments and customary norms’, it is deliberately defined narrowly, in part because of the reluctance of states to subject their own leaders and military personnel to the risk of prosecution.\textsuperscript{89} According to article 2 of the \textit{Genocide Convention}, genocide means:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.\textsuperscript{90}


\textsuperscript{89} Schabas, above n 86, 3.

The *Genocide Convention* is considered part of customary international law.\(^91\) As noted in the *Akayesu case*, ‘the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group’.\(^92\)

Schabas argues that it is possible that by virtue of the ‘treaty based obligation to prevent genocide in article 1 of the *Genocide Convention* and the customary norm that it reflects’, humanitarian intervention without Security Council approval could be legally permissible, because as a *jus cogens* norm, ‘it trumps any incompatible obligation, even one dictated by the Charter of the United Nations’.\(^93\) The critical problem, and one which Schabas admits,\(^94\) is that the prohibition of the use of force, outside of the exceptions recognised in the UN Charter, is also a *jus cogens* norm. Further, while the *Genocide Convention* details provisions relating to punishment of genocide, it only refers to prevention of genocide in article VIII in terms of any contracting party calling ‘upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention

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\(^91\) *Prosecutor v Jean-Paul Akayesu* ICTR (Trial Chamber) Case No. ICTR-96-4-T (Judgement) 2 September 1998 at para 496.

\(^92\) Ibid at para 497.

\(^93\) Schabas, above n 86, 500.

\(^94\) Ibid, 502.
and suppression of acts of genocide or any of the other acts enumerated in article III.95

In April 2004, in an address to the United Nations Commission on Human Rights, the UN Secretary General Kofi Annan outlined a Five Point Action Plan to prevent genocide. The Plan included the following:

(a) preventing armed conflict, which usually provides the context for genocide;
(b) protection of civilians in armed conflict including a mandate for United Nations peacekeepers to protect civilians;
(c) ending impunity through judicial action in both national and international courts;
(d) early and clear warning of situations that could potentially degenerate into genocide and the development of a United Nation’s capacity to analyse and manage information; and
(e) swift and decisive action along a continuum of steps, including military action.96

While significant steps have been made with regard to the punishment of genocide, the prevention of genocide still presents challenges. In the Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) the ICJ attempted to clarify the scope of the obligation to prevent genocide. It stated that:

The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case

95 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) [2007] ICJ Rep 1 at para 426. [ Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) ]
envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate.

Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.97

The Court determined that the obligation to prevent genocide requires states parties ‘to employ all means reasonably available to them, so as to prevent genocide so far as possible’.98 This obligation arises ‘at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed’.99 Further, ‘it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them’.100

It is not clear if the obligation to prevent genocide is intended to apply to states other than those on whose territory the acts of genocide are occurring. However, it is notable that in early discussion at the Security Council relating to the genocide in Rwanda, states were reluctant to categorise the situation as genocide because of apprehension that this would require them to ‘do something’.101

Further, following the troubled US intervention in Somalia the US

97 Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) ICJ Rep at para 427.
98 Ibid at para 430.
99 Ibid at para 431.
100 Ibid at para 438.
administration demonstrated a reluctance to become involved in further interventions and deliberately resisted attempts to categorise both the Rwandan and Bosnian conflicts as genocide. Harris, formerly of the US State Department, notes with regard to the Bosnian conflict, that ‘the administration was ever vigilant to diffuse pressure to act, and an admission of genocide would have created one of the greatest pressures’.102

On 30 April 1994 the President of the Security Council stated that ‘the Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable under international law’103 – the term ‘genocide’ was avoided. Obviously there is a perception by states that the classification of incidents as genocide is attended by some measure of state responsibility to ‘prevent or punish’. However, the actual scope of the obligation needs clarification.

Judge ad hoc Lauterpacht in a separate opinion in the Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) Further Requests for the Indication of Provisional Measures in September 1993 considered whether every contracting party is ‘under an obligation individually and actively to intervene to prevent genocide outside its territory’.104 He concluded that the limited response of contracting parties to incidents such as ‘the Tutsi massacre of Hutu in Burundi in 1965 and 1972, the Paraguayan massacre of Aché Indians prior to 1974, the Khmer Rouge

massacre in Kampuchea between 1975 and 1978 and the contemporary Iranian killings of Bahai’s’ suggests ‘the permissibility of inactivity’. The nature of genocide, which is generally state-supported and often occurs as part of a wider conflict suggests that the prevention of genocide may present difficult challenges in terms of mounting a timely and effective response. This is compounded by the fact that in many cases involving genocide and crimes against humanity, there is significant involvement of paramilitary groups who are trained in violence but unlike regular military forces are not bound by any code of conduct. Paramilitary organizations, often referred to as militias, are frequently implicated in the worst excesses of the regimes which they serve, including mass murder, genocide, rape, torture, and various other human rights violations.

A 1994 United Nations report listed 83 paramilitary groups in the former Yugoslavia. Fifty six were Serb, 13 Croat, and 14 Bosnian Muslim. Governments have often resorted to the use of paramilitary organisations – in Rwanda much of the violence was carried out by the Interahamwe and Impuzamugambi. In proceedings before the ICTR, Jean Kambanda, Prime

\[^{105}\] Ibid.
\[^{108}\] Ibid, 12.
\[^{109}\] See Prosecutor v Francois Karera ICTR (Trial Chamber) Case No ICTR 01-74-T (Judgement) 7 December 2007, para 533-541; Prosecutor v Jean – Paul Akayesu ICTR (Trial Chamber) Case No ICTR-96-4-T (Judgement) 2 September 1988, para 123-128.
\[^{110}\] Prosecutor v Jean Kambanda [1998] ICTR (Judgement and Sentence) Case No ICTR 97-23-S at para (39)v and (39)vi.
Minister of the Interim Government of Rwanda from 8 April 1994 until 17 July 1994 acknowledged that:

before 6 April 1994, political parties in concert with the Rwanda Armed Forces organized and began the military training of the youth wings of the MRND and CDR political parties (Interahamwe and Impuzamugambi respectively) with the intent to use them in the massacres that ensued… the Government headed by him distributed arms and ammunition to these groups.

These groups acted in concert with the Rwandan military and local municipal authorities to perpetrate crimes against Tutsi civilians in various locations throughout Rwanda.

In Sudan ‘the Janjaweed militias have been a key component in the government’s military campaign in Darfur; a campaign that has resulted in the murder, rape and forced displacement of thousands of civilians’. The murder of civilians, rape and violence continue despite the presence of a joint African Union and UN hybrid operation – UNAMID which was established under Chapter VII of the UN Charter with a mandate to contribute with, among other things, the protection of civilians, the security of humanitarian assistance, the

112 Ibid, at para 39 (vi)
114 Human Rights Watch Briefing Paper 20 July 2004 ‘Darfur Documents Confirm Government Policy of Militia Support’ <http://www.hrw.org/legacy/english/docs/2004/07/19/darfur9096.htm#5> at 24/01/2009. See also ICC Warrant of Arrest for Ali Kushayb No ICC-02/05-01/07 of 27 April 2007 which at p 4 cites ‘reasonable grounds to believe that the attacks perpetrated by the Sudanese Armed Forces and/or the Militia/Jangaweed were of a systematic or widespread nature’. 
implementation of various ceasefire agreements, the promotion of respect for and protection of human rights and fundamental freedoms in Darfur.115

Governing authorities have varying degrees of control over such paramilitary organisations, and as noted in the Nicaragua case, the question of state responsibility for the actions of paramilitaries relates to the degree of direction or control exercised by the offending State so that the actions that constitute direct or indirect intervention can be imputed to that State.116

Nevertheless, in the Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) the ICJ states that ‘Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide’.117 The Court further noted that, ‘A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.’118 This includes exercising control over paramilitary organisations.

In the Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) the ICJ qualified the obligation to prevent genocide as comparable to an obligation of ‘due diligence’ and identified ‘the capacity to influence effectively the actions

117 Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) [ 2007] ICJ Rep 1 at para 162.
118 Ibid, at para 430.
of persons likely to commit, or already committing genocide’ as relevant to an assessment of whether a state has discharged the obligation to prevent genocide. The Court linked the capacity to influence to ‘among other things…the geographical distance of the State concerned from the scene of events, and on the strength of the political links, as well as links of other kinds, between the authorities of that State and the main actors in the events’. With the increased prevalence of outsourcing of military and security functions, this means that states cannot hide behind paramilitary organisations in an effort to avoid prosecution for genocide and other crimes.

With regard to the scope of the duty of states to prevent genocide, the injunction by the ICJ for states to prevent genocide is conditioned by the requirement that ‘every State may only act within the limits permitted by international law’. Further, the Court set a fairly high threshold for breach of the obligation to prevent genocide. It decided that the obligation to prevent genocide required that ‘a sufficiently direct and certain causal nexus’ between the respondent's wrongful act and the applicant's injury could be established ‘only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations’.

Article 41 of the International Law Commission’s *Articles on the Responsibility of States for Internationally Wrongful Acts* [Articles on State Responsibility]...
relates to ‘consequences of a serious breach of an obligation’ under peremptory norms of general international law, and it requires states to ‘co-operate to bring an end through lawful means any serious breach’. Article 48 of *Articles on State Responsibility* relates to ‘Invocation of responsibility by a State other than an injured State’ and it refers to (a) an obligation ‘owed to a group of States and ‘established for the protection of a collective interest of the group’, and (b) the breach of an obligation ‘owed to the International community as a whole’.\(^{123}\) The commentary indicates that paragraph 1(b) refers to obligations *erga omnes*.\(^{124}\)

However, remedies for breach of such obligations are limited. Uninjured states invoking the responsibility of a state can only claim (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation …in the interest of the injured State or of the beneficiaries of the obligation breached,\(^{125}\) but only in situations where an injured state could itself claim reparation – ‘a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible’.\(^{126}\)

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\(^{125}\) *Articles on the Responsibility of States for Internationally Wrongful Acts*, article 48. 1(b). See Brownlie, above n 25, 308.

Obviously with regard to a breach of an obligation *erga omnes* while uninjured states can act as indicated above, there is no suggestion that states have a right to use force to do so. Further article 54 which relates to countermeasures taken by states other than an injured state for breach of obligations *erga omnes* is conditioned by the requirement of ‘lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached’.  

Hillgruber argues that article 1 of the *Genocide Convention* should be interpreted in a manner consistent with the intention to ‘multilateralise’ enforcement of the Convention ‘to permit all the contracting States to adopt the coercive measures under international law that otherwise only a State that is directly affected is entitled to take, including reprisals’. He argues that if third states are not allowed to take reprisals the ‘prohibition of genocide would be virtually unenforceable’. The *Naulilaa Case (Portugal v. Germany)* determined that:

> A reprisal is an act of self-help… by the injured state, responding—after an unsatisfied demand—to an act contrary to international law committed by the offending state….Its object is to effect reparation from the offending state for the offense or a return to legality by the avoidance of further offenses.

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129 Ibid.

130 *Naulilaa Case (Portugal v. Germany)* 2 UN Reports Of International Arbitral Awards 1012 (Portuguese-German Mixed Arbitral Tribunal, 1928)
However, state practice does not support a customary law right by third states to take reprisals for breaches of human rights.\textsuperscript{131} Further, in cases where third states have resorted to reprisals these were generally allowed under agreements between those states and were justified by reference to the doctrine of \textit{rebus sic stantibus} - fundamental change of circumstances.\textsuperscript{132} Hillgruber cites the termination by the Netherlands of a development aid agreement with Surinam in 1982; the suspension by the European Community of the Preferential Customs Agreement with Yugoslavia in 1991 due to violations of international humanitarian law during the conflict in the Balkans; and, the suspension of air traffic and freezing of Yugoslav assets during the conflict in Kosovo as evidence of contractually permitted reprisals by third states rather than support for a customary law right of reprisal.\textsuperscript{133} While measures short of the use of force such as economic and other non-military sanctions may be permitted in international law, there is no general duty for third states to take reprisals in response to gross violations of human rights.

In fact, the UN General Assembly in its 1970 \textit{Declaration on Friendly Relations} states that ‘States have a duty to refrain from acts of reprisal involving the use of force.’\textsuperscript{134} Further, with regard to the Geneva Conventions contracting parties are obliged under article 1 of the four Geneva Conventions not only to respect, but also to ‘ensure respect’ for the Conventions. However, article 89 of Additional Protocol 1 to the Geneva Conventions requires that in ‘situations of serious

\textsuperscript{131} Hillgruber, above n. 128, 278.
\textsuperscript{132} Ibid., 285.
\textsuperscript{133} Hillgruber, above n 128, 285-286.
\textsuperscript{134} \textit{Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations} Annex to Resolution 2625 (XXV) of the UN General Assembly adopted without vote, 24 October 1970. See Brownlie, above n 25, 29.
violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter’.\textsuperscript{135}

While in 1998 the United States Ambassador for War Crimes stated that, ‘a State Party may choose from among a range of measures – diplomatic pressure, economic sanctions, judicial initiatives, or the use of military force – to ‘undertake’ to prevent or punish genocide’\textsuperscript{136} all states, including the most powerful states, are still subject to prevailing international law, including the prohibition of the use of force outside of the two recognised exceptions.

Legal scholars have argued that when the collective security system envisaged by the founders of the UN Charter does not work or works imperfectly, member states can intervene, on behalf of the international community as a whole, on the basis of customary international law, if they are doing so in response to violations of obligations \textit{erga omnes}.\textsuperscript{137} This assumes that the commission of international crimes that breach norms \textit{jus cogens} and create obligations \textit{erga omnes} mandates a use of force.

However, it would appear that legal obligations which arise from recognition of the prohibition of crimes such as genocide, war crimes and crimes against


\textsuperscript{136} Address by David Scheffer at the Conference on ‘Genocide and Crimes Against Humanity Early Warning and Prevention’ Holocaust Museum, Washington DC, 10 December 1998 cited in Schabas, above n 86, 496.

\textsuperscript{137} Conforti, above n 22, 209 citing Picone.
humanity as *jus cogens* norms that give rise to obligations *erga omnes* include the following: a duty to prosecute or extradite perpetrators of such crimes; the inapplicability of statutes of limitations for such crimes; the inapplicability of immunities up to and including immunity for Heads of State for such crimes; the inapplicability of the defence of obedience to superior orders except as a mitigating factor in sentencing; the universal application of these obligations in time of peace or war; non-derogation in states of emergency; and universal jurisdiction over perpetrators of such crimes.\textsuperscript{138} States have a duty to prevent genocide, and to ensure respect for laws relating to war crimes and crimes against humanity, however, unauthorised humanitarian intervention to do so, is not at this stage recognised as a legal option in international law.

4. 5. DESIRABILITY OF HUMANITARIAN INTERVENTION

4.5.1. THE RATIONALE FOR INTERVENTION

There is significant questioning of the desirability of a ‘right of intervention’ that is open to abuse, given the rather dubious history of interventions to support a particular ideology as in the classic holy wars of medieval times, the exploitation of colonialism, and past interventions as ‘vehicles for national aggrandizement, imposition of puppets in power, or for the institution of political and economic systems detested by the indigenous population’.\textsuperscript{139} Janzekovic notes that, ‘Hitler’s Blitzkrieg into Austria and Poland at the start of

\textsuperscript{138} Bassiouini, above n 87, 63 -74.

WWII was ostensibly to protect fellow countrymen in those states being threatened or abused.¹⁴⁰

Undoubtedly the humanitarian impulse demonstrated by an increasing multiplicity of ‘humanitarian’ actors, is in some instances motivated by religious or political agendas, which inevitably raise the spectre of a new imperialism. There is ongoing tension between proponents of politicised ‘humanitarian’ intervention to assist ‘deserving’ populations, and traditional conceptions of humanitarian assistance as guided by the principles of ‘humanity, neutrality and impartiality’.¹⁴¹ Suspicion of a new imperialism have been powerfully reinforced by the application of the rhetoric of humanitarianism to the ill-conceived and poorly executed intervention by a ‘coalition of the willing’ in Iraq.¹⁴² In the context of debate about the legality and desirability of intervention for humanitarian purposes, it is worth bearing in mind the statement by the ICJ in the *Nicaragua case* that:

An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering" and "to protect life and health and to ensure respect for the human being"; it must also, and above all be given without discrimination to all in need.¹⁴³

¹⁴² Thakur, above n 1, 266.
The catastrophic bombing campaign unleashed on Iraq in March 2003 by a ‘coalition of the willing’ can hardly be described as humanitarian either in its purpose or in its execution. If humanitarian intervention to prevent or contain serious abuse of human rights is to be taken seriously it must not be tainted by any suggestion of a moral crusade to push particular social, economic or political agendas.

In Iraq, following the initial ‘shock and awe’ aerial campaign and the ground offensive, the US was reluctant to cede primary responsibility for the reconstruction of Iraq to the UN and on 8 May 2003 it established the Coalition Provisional Authority (CPA) which exercised extensive powers of government. As Fox notes, the CPA used its legislative authority to engage in a project of social engineering - ‘Iraqi political, legal, economic, and regulatory institutions were remade to accord with models generally found in western developed states.’ While this is consistent with the stated intention of the US to effect regime change it is not entirely consistent with the dicta in the Nicaragua case that:

"A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the..."
choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force.\textsuperscript{148}

Such broad action to effectively restructure Iraqi society appears to be inconsistent with the right of the Iraqi people to self-determination, which although commonly associated with freedom from colonial oppression, also has an internal dimension.\textsuperscript{149} It highlights the risk that intervention in the absence of Security Council authorisation, which will almost invariably be undertaken by powerful states against weaker states, will be structured around preconceived goals dictated by the geopolitical interests of the intervening state, rather than the rights and interests of the affected population.\textsuperscript{150}

One of the critical factors in the emergence of the Responsibility to Protect [R2P] doctrine was recognition of the need to move debate away from a ‘right’ of humanitarian intervention which focuses on the rights of intervening states rather than the rights of affected populations.\textsuperscript{151} A focus on the rights of affected populations should by implication, necessarily entail a stronger focus on ensuring that any intervention complies with international human rights and

\textsuperscript{148} Nicaragua case (1986) ICJ (Merits) Rep 14 at para 205.
humanitarian law and also takes into consideration the aftermath of militarised interventions.

4.5.2. MYANMAR, RESPONSIBILITY TO PROTECT AND HUMANITARIAN INTERVENTION

On 2 May 2008 Myanmar was hit by Cyclone Nargis with devastating consequences. While there has been ongoing concern for some time about the human rights situation in Myanmar, debate about the application of Responsibility to Protect [R2P] to the situation in Myanmar highlighted some of the inherent difficulties relating to humanitarian intervention.

The R2P doctrine as espoused by the ICISS was an attempt to move the conceptual boundaries of sovereignty as absolute authority, towards an association of sovereignty with a responsibility on the part of states to protect the safety and lives of their own citizens, and to be accountable at both national and international levels for both ‘acts of commission and omission’. It was also an attempt to ‘establish clearer rules, procedures and criteria for determining whether, when and how to intervene’. The basic principle of sovereignty as engaging a responsibility to protect was endorsed by both the General Assembly and the Security Council. However, it must be distinguished from a purported ‘right’ of humanitarian intervention which is

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154 Ibid, 11.
generally asserted under either pre Charter or post Charter customary international law.

R2P sought to develop criteria to guide intervention in cases involving large scale loss of life ‘which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale ethnic cleansing’.156 It required consideration of right intention; the exhaustion of reasonable alternatives; respect for the principle of proportionality; and, reasonable prospects of success.157 It also envisaged working with the authority of the United Nations either with Security Council authorisation under Chapter VII of the Charter; referral to the General Assembly under the ‘Uniting for Peace’ procedure; or, action by regional organisations under Chapter VIII of the Charter with subsequent Security Council authorisation.158

The Myanmar crisis excited debate among governments, relief agencies, the United Nations, and the international media, about appropriate international responses, and the desirability of humanitarian intervention.159 The French Foreign Minister, Bernard Kouchner, a critic of traditional apolitical humanitarian assistance as exemplified by the neutrality and impartiality of the

International Committee of the Red Cross [ICRC], called on the UN to invoke the R2P doctrine, and mount an armed humanitarian intervention.\textsuperscript{160} He stated that ‘it would only take half an hour for the French boats and French helicopters to reach the disaster area’ and argued that humanitarian assistance might have to be imposed on Myanmar if the military regime refused to co-operate.\textsuperscript{161}

Calls for humanitarian intervention were resisted by a number of states including Russia, South Africa, and China who argued that, as a natural disaster, the aftermath of the cyclone was essentially an internal matter and it did not constitute a threat to regional peace and security.\textsuperscript{162} Further, China argued that all ASEAN members and most Asia-Pacific countries agree that there are more appropriate ways to address the problem in Myanmar.\textsuperscript{163}

Gareth Evans, one of the original architects of the R2P doctrine, pointed out that attempts to extend the doctrine may be counterproductive and incite resistance to R2P particularly from the global south.\textsuperscript{164} Nevertheless, he also pointed out that if the actions of the military junta, in denying aid to thousands of people at risk of death can be characterised as a ‘crime against humanity’ it is possible that it would fall within the scope of R2P, as ‘overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or


\textsuperscript{161} Ibid.

\textsuperscript{162} UN SCOR S/PV.5619 62nd sess, 5619th mtg

\textsuperscript{163} Ibid , at p 3.

threatened’ was a scenario envisaged in the original report which initiated R2P. Whether such intervention would justify the use of force is another question. Humanitarian intervention must always be a last resort after other means of resolving a particular crisis have been exhausted.

Also, if the intention is to assist people suffering the effects of a natural disaster, arguably there are organisations better equipped to deal with this than a military force - assuming that an appropriately trained and equipped military force could be organised and deployed with sufficient speed to achieve meaningful results. On 6 May 1994, in the face of ongoing slaughter in Rwanda and ongoing debate among Security Council members as to whether or not the conflict could be characterised as genocide, non-permanent members of the Security Council presented a resolution designed to reinforce the existing United Nations Assistance Mission for Rwanda [UNAMIR] with 5,500 troops. However, only Ethiopia offered a unit ready for immediate service – other offers came from Congo, Ghana, Malawi, Nigeria, Senegal, Zambia and Zimbabwe but all required UN equipment and none had airlift capability.

The UN General Assembly has supported the provision of humanitarian assistance during natural disasters, but as provided for in GA resolution A/RES/182 such assistance is guided by principles of ‘humanity, neutrality and impartiality’ and recognises that ‘The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter

165 Ibid.
166 Schabas, above n 86, 461.
167 Ibid.
of the United Nations.' The UN Economic and Social Council also committed to ‘strengthen their engagement and capacity-building efforts with regional organizations to help bolster humanitarian responses in support of the efforts of national Governments and regional organizations’. To attempt to bring natural disasters within the scope of humanitarian intervention simply undermines the primary purpose and effectiveness of both humanitarian assistance and humanitarian intervention. UN Secretary General Ban Ki-Moon in an address at an event on Responsible Sovereignty, affirmed that the scope of R2P is intentionally narrow, and that, ‘Extending the principle to cover other calamities, such as HIV/AIDS, climate change or response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.’

There are existing organisations with significant experience and expertise in dealing with humanitarian disasters, including the United Nations. The UN’s Office for the Co-ordination of Humanitarian Affairs has a standby team of disaster management professionals - the United Nations Disaster Assessment and Co-ordination [UNDAC] team which, as outlined above, is committed to neutrality and impartiality.

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Further, there are various NGOs with varying levels of expertise in disaster relief. In fact, the proliferation of NGOs with varying levels of expertise and at times different agendas working in the same area has the potential to create problems in terms of service delivery. As noted by Schoenhaus,

in an ideal world, all the participants in any given humanitarian response effort would share a common understanding of one another's capabilities and limitations, as well as their roles and missions. Overlapping efforts would be kept to a minimum while cooperation in the pursuit of progress and solutions would be instinctive. In the real world, however, mission analysis is often ad hoc; training is spotty and tends to focus on individual agency goals, and coordination with other organizations is worked out on the fly.172

Nevertheless, there is no guarantee that militarised intervention will be more effective than other modes of intervention, especially when organisations such as the UN and the International Federation of Red Cross and Red Crescent Societies have high levels of expertise in humanitarian assistance, and are committed to principles of humanity, neutrality and impartiality in service delivery.

Ultimately a special meeting of ASEAN Foreign Ministers was convened on 19 May 2008 to establish an ASEAN Humanitarian Task Force and a tripartite body with representation from the government of Myanmar, ASEAN and the UN, to co-ordinate, facilitate and monitor the delivery of international assistance

to Myanmar. While there is ongoing concern about human rights abuse in Myanmar, militarised humanitarian intervention was not an appropriate response to disaster relief.

4.5.3. THE NATO INTERVENTION IN KOSOVO

The NATO intervention in Kosovo precipitated much debate not only about the legality/legitimacy of the intervention, but also, about future prospects for humanitarian intervention and in particular questions about how to resolve the challenges presented by the continuing focus on state sovereignty and the prohibitions of intervention and the use of force and purported Security Council paralysis in the face of gross abuse of human rights. It also raised questions about the most appropriate way to execute humanitarian interventions in order to secure long term peace and security in both the affected state and neighbouring states that may be actively affected by or even supporting the conflict.

NATO was created as a collective self-defence organisation which would respond to an armed attack against any of its members with ‘such action as it deems necessary, including the use of armed forces, to restore and maintain the

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173 ASEAN-UN International Pledging Conference on Cyclone Nargis, Yangon, Myanmar 25 May 2008, ASEAN and UN Chairman’s Summary.
security of the North Atlantic area’. The NATO treaty recognises the primacy of the Security Council in the ‘maintenance of international peace and security’. While members of NATO cited Security Council resolutions 1199 of 23 September 1998 and 1203 of 24 October 1998 as justification for the NATO intervention in Kosovo, neither of these resolutions specifically authorised the use of ‘all necessary means’ to deal with the grave humanitarian situation in Kosovo. Nor did they authorise intervention by a regional organisation under Chapter VIII of the UN Charter.

The NATO intervention was not a classic case of humanitarian intervention as although the level of abuse of human rights normally considered as sufficient to warrant armed intervention – such as genocide, war crimes, crimes against humanity, and ethnic cleansing were a significant risk, especially given the history of the FRY government in Bosnia, there was insufficient evidence that they had occurred at the time the NATO campaign was launched. Further, the choice of a ‘zero casualty’ aerial campaign actually resulted in the intensification of ethnic cleansing on the ground. The execution of the NATO campaign, which involved the deliberate targeting of dual use infrastructure with significant impact on civilians, was strongly criticised as not only inconsistent

178 Ibid, article 7.
182 Ibid, 142.
183 Ibid, 146.
with international humanitarian law, but also with the principal objective of ‘humanitarian’ assistance.\(^{184}\) As Janzekovic notes, despite the intention to ‘save lives…prevent forced displacement of Kosovar Albanians…and protect the precarious political stability of the Balkan’s region’\(^{185}\) the Kosovo operation failed in that there was significant displacement of Kosovo Albanians, with approximately 5,000 Kosovars summarily executed.\(^{186}\)

There were also significant violations by NATO of international humanitarian laws relating to discrimination, targeting and the use of weapons that cause unnecessary suffering.\(^{187}\) The adoption by NATO forces of a broad definition of military objective’ resulted in the targeting of bridges, railway lines, and dual-use industrial and media/communication facilities where their effective contribution to the military effort and ‘definite’ military advantage to be gained from such attacks was at times rather tenuous.\(^{188}\) The NATO Joint Forces Air Component Commander stated that:

> I felt that on the first night the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off so the next


\(^{185}\) Janzekovic, above n 140, 183.

\(^{186}\) Ibid, 183-185.

\(^{187}\) Ibid.

\(^{188}\) Boivin, above n 184, Note: a distinction has to be made between those lines and means of communications that are of fundamental military importance and those that are not. Only those lines of communication that are of fundamental military importance are military objectives. See Michael Boethe, ‘Targeting’ in Andru E Wall (ed), Legal and Ethical Lessons of NATO’S Kosovo Campaign, (2002) 78 International Law Studies (Newport: Naval War College, 2002) 173, 186-187.
morning the leading citizens of Belgrade would have got up and asked “Why are we doing this?” and asked Milosevic the same question.189

This was consistent with what the Commander In Chief regarded as the tension between the principles of military necessity and proportionality and the perceived ‘military importance of striking hard at the outset of a conflict to surprise, to shock, and thus to effect a rapid end to conflict’.190 Ultimately this increased the suffering of the Kosovo Albanians while minimising the risk of NATO casualties.

NATO deliberately resisted calls to commit ground forces to the intervention in Kosovo. Tony Blair echoed the concerns of other NATO states in the comment that, ‘there is a difficulty with committing ground troops in order to fight our way in: no one should underestimate the sheer scale of what is involved in the action. We would be talking about 100,000 ground troops, and possibly even more’.191 The primary concern was the prospect of opposition from Yugoslavia and Russia which could result in ‘high casualty rates among NATO forces’.192 The Report notes that there were ‘fears among some observers that bombing might actually exacerbate the conflict by removing all constraints from Belgrade’.193 In the end this is what transpired.

189 Boethe, above n 188, 178.
192 Ibid
Ruth Wedgewood claims that in assessing the legality of military tactics ‘the merits of a war make a difference in our tolerance for methods of warfighting’. She obviously considers that ‘right intention’ obviates the need for strict compliance with international human rights and humanitarian law as ‘Lacking a choice of the field of engagement, humanitarian intervention may be forced to resort to bluntly coercive methods’. If we go down this road it defeats the fundamental intent of international humanitarian law - to limit the brutality of war, as generally both belligerents believe in the justness of their cause. This is one of the factors that make conflict so intractable; simple black and white moral judgements rarely capture the complexity of conflicts, and democratic governments do not have a monopoly on morality. While ‘humanitarian protection’ may be difficult in the context of humanitarian intervention, this does not make international humanitarian law irrelevant.

Developments subsequent to the NATO intervention have highlighted questions relating to the appropriate execution and limits of humanitarian interventions, and the limitations and desirability of the imposition of a UN transitional administration in post-conflict scenarios. In June 1999, following the NATO bombing campaign in Kosovo, UN Security Council resolution 1244 provided for the establishment of the United Nations Interim Administration in Kosovo (UNMIK) with a sweeping mandate to provide Kosovo with a ‘transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and

195 Ibid, 440.
normal life for all inhabitants in Kosovo’. While this was consistent with the *Attishari/Chernomyrdin Agreement* of 3 June 1999, and the *Rambouillet Accords*, which were earlier attempts to resolve the crisis in Kosovo, it was unprecedented in that the legal framework governing Kosovo delegated virtually all of the traditional functions of government to international organisations, and unlike the situation in East Timor and Eastern Slavonia, there was no clearly prescribed endpoint for the occupation of Kosovo.

Both the *Attishari/Chernomyrdin Agreement* and the *Rambouillet Accords* provided for ultimate functional political autonomy for Kosovo. The *Attishari/Chernomyrdin Agreement* set out ten principles to progress a resolution of the crisis, including the establishment of an interim administration to ‘provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions’ and a political process to establish ‘democratic self-governing institutions’. The *Rambouillet Accords* concluded on 15 October 1999, while professing a commitment to the ‘sovereignty and territorial integrity of the Federal Republic of Yugoslavia’, effectively required the abnegation of FRY sovereignty over Kosovo, with

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196 UN SCOR 4011th mtg, UN Doc S/RES 1244 (1999)
198 Fox, above n 37, 93-95. See also UNMIK online for documents and information relating to the establishment and functioning of UNMIK <http://www.unmikonline.org/> at 8/11/2008.
199 Fox, above n 37, 84.
201 Ibid, principle 8.
functional autonomy for Kosovo and the internationalisation of all military authority in Kosovo.\textsuperscript{203}

The United Nations Interim Administration Mission [UNMIK] set up in accordance with UN Security Council Resolution 1244, established an international presence in Kosovo with a broad mandate to provide ‘transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo’.\textsuperscript{204} One of the critical problems was that the final status of Kosovo was officially in limbo and the departure of the Serb institutions of state created a law and order vacuum.\textsuperscript{205}

In March 2004, nearly five years after international authorities had taken over responsibility for Kosovo, there was a further outbreak of large scale ethnic violence.\textsuperscript{206} It is claimed that the violence resulted in ‘the departure of almost the entire remaining community of Serbs in Kosovo Polje/Fushe Kosove, 19 dead, 954 wounded, 4,100 persons displaced, 550 homes destroyed’.\textsuperscript{207} Kosovo remained deeply divided.

\textsuperscript{203} Fox, above n 37, 89-91. See also UNMIK online for documents and information relating to the establishment and functioning of UNMIK. <http://www.unmikonline.org/> at 8/11/2008.


On 17 February 2008 the Provisional Institutions of Self-Government Assembly of Kosovo made a unilateral Declaration of Independence from Serbia. Serbia immediately objected. It claimed that the unilateral declaration of independence violates Security Council resolution 1244 (1999), international law, and the UN Charter. Accordingly, on 15 August 2008 Serbia submitted to the UN General Assembly a ‘Request for an Advisory Opinion of the International Court of Justice on whether the Unilateral Declaration of Independence of Kosovo [Declaration of Independence] is in Accordance with International Law.’

Kosovo’s Declaration of Independence has sparked considerable controversy and fear that it may create a precedent for other secessionist claims. The potential for a unilateral declaration of independence to have a destabilising effect was recognised by Kosovo in its Declaration of Independence, where it stated that, ‘Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation.’ Nevertheless, the majority of states are reluctant to officially recognise Kosovo, and many of the 53 states that have done so as at 5 December 2008, have declared that the situation is *sui generis* and cannot be regarded as a precedent for further

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210 Ibid.
secessionist claims. In an emergency session of the UN Security Council convened to discuss Kosovo’s action, the United Kingdom representative argued that ‘the legacy of Milosevic’s oppression had made it impossible for Kosovo to return to control by Belgrade’.

However, at the 63rd General Assembly Plenary meeting on 23 September 2008, a meeting overshadowed by the burgeoning financial and ‘interrelated food and energy crises’, President Tadic of Serbia stressed the importance of respect for international law and the territorial integrity of sovereign States. He linked this to the danger inherent in ‘the unilateral, illegal and illegitimate declaration of independence by the ethnic Albanian authorities of our southern province of Kosovo and Metohija …after walking away from the negotiating table’ and suggested that Kosovo, intent on the pursuit of independence, had not acted in good faith. Pursuant to Security Council Resolution 1244 of 1999, which allowed for the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK), Kosovo had not been under Serb control since 1999. However, Resolution 1244 had explicitly reaffirmed ‘the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2’. Further, Kosovo Serbs rejected co-operation.

213 Ibid.
214 UN Doc GA/10749, 63rd Plenary mtg, 5th and 6th sessions, 23 September 2008.
215 Ibid.
216 Ibid.
with the authorities in Pristina, and following local elections held on 11 May 2008 parallel municipal authorities operate in Serb majority municipalities in Kosovo.219

Despite its opposition to recognition of the independence of Kosovo, Russia linked the situation in Kosovo to its recognition of the independence of Abkhazia and South Ossetia, following conflict between Russia and Georgia in August 2008.220 Undoubtedly Kosovo’s unilateral Declaration of Independence presents challenges to international law and to the ongoing security of Eastern Europe, and this was evident in the statement by NATO in the 69th Rose-Roth Seminar Report on Euro-Atlantic Integration of the Balkans (Montenegro, 24-26 June 2008), that ‘despite the international presence since 1999 the situation in Kosovo remained fragile and confused…the international community remained divided about a solution and the status and roles of the UN and the EU are unclear’.221

On 8 October 2008 the General Assembly of the United Nations adopted resolution A/RES/63/3 in which, referring to Article 65 of the Statute of the Court, it requested the International Court of Justice to ‘render an advisory opinion on the following question: Is the unilateral declaration of independence

221 NATO Parliamentary Assembly, Seminar Report 69th Rose-Roth Seminar in Sveti Stefan, Montenegro, 24-26 June 2008. It was also noted that ‘Despite Mr Feith’s confidence about the imminent deployment of EULEX (European Union rule of law mission in Kosovo), described as “the largest ESDP (European Security and Defence Policy) operation ever”, and reassurances by NATO about the continuing presence of KFOR, uncertainties about the upholding of the rule of law in Kosovo persist.’ <http://www.natopa.int/default.asp?SHORTCUT=1607> at 20/09/2008.
by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’

After nearly ten years of involvement in Kosovo, the NATO led Kosovo Force KFOR is still talking about the need to ‘support the development of a stable, democratic, multietnic and peaceful Kosovo’. As at February 2009, KFOR is still active in Kosovo and it leads approximately 15,000 international forces. The situation remains volatile and ‘Kosovska Mitrovica remains deeply split and rife with tension between Serbs and ethnic Albanians, nearly a year after Kosovo - under UN administration since a 1999 NATO air war wrested control of the province from Serbia - declared independence’. Moreover, as the International Crisis Group reports:

Divisions between Albanian and Serb areas have widened, and prospects for a unitary state are evaporating. If a de facto partition hardens, the future of the two thirds of Kosovo’s Serbs who live south of the River Ibar division line will be problematic …Serb defiance has entrenched north of the Ibar, where Kosovo courts, border and customs posts do not operate, and Kosovo Serbs continue to refuse to cooperate with Kosovo institutions or the EU.

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223 NATO webpage, Topics ‘NATO’s role in Kosovo’<http://www.nato.int/issues/kfor/index.html> at 6/02/2009.  
Following Kosovo’s declaration of independence, which faced strong opposition from Serbia and Russia, the international community was tardy in meeting its commitments to deploy the European Union [EU] EULEX rule of law mission and the International Civilian Office [ICO] to supervise independence. Kosovo continues to represent significant challenges for the international community and in particular the EU and the United Nations.226 While humanitarian intervention may help to contain human rights abuse, and in the Kosovo case there is some doubt as to how effective the aerial bombardment was in this respect, it does not guarantee any long term solution unless it is supplemented by measures to address the underlying causes of conflict.

4. 6. ALTERNATIVES TO HUMANITARIAN INTERVENTION

One of the critical questions that is posed in debate about humanitarian intervention is how the international community can respond to instances of gross human rights abuse such as genocide, war crimes and crimes against humanity, if, even when other avenues to address the problem have failed, there is no consensus in the Security Council about the need for forceful intervention. The international community has access to a range of non-violent options to deal with serious human rights abuse – diplomatic pressure, mediation, sanctions, judicial action, along with the application of development assistance, rule of law and conflict prevention strategies designed to minimise the risk of abuse in volatile areas. It is beyond the scope of this paper to deal comprehensively with

alternatives to humanitarian intervention and discussion will be confined to a brief review of the potential effectiveness of sanctions, judicial action, and other non-violent measures such as diplomatic pressure and mediation.

4.6.1. SANCTIONS

As Thakur notes ‘sanctions – diplomatic isolation, restrictions on travel, trade and financial transactions, arms embargoes – increased dramatically in the 1990s.’ However, they have been subject to criticism because of the harsh consequences they often have for civilian populations in the target state and for third states whose economy is linked to that of the target state. Consequently, the Security Council has at times authorised derogation of state compliance with sanctions for humanitarian reasons.

While it may prove to be impossible to get Security Council authorisation for humanitarian intervention, as was the likely scenario in Kosovo, even measures short of the use of force such as ensuring that agreed sanctions are upheld presents difficulties in securing compliance. This was evident in the case of the mandatory embargo on arms intended for South Africa that was imposed by Security Council resolution 418 of 4 November 1977. Mr. Alleyne (Trinidad and Tobago) Chairman of the Security Council’s Committee on sanctions against South Africa advised that, the embargo was ‘something of a leaky barrier through which arms and military technology for bolstering a domestic

227 Thakur, above n 1, 134; Conforti, above n 22, 191
228 Ibid.
arms industry in South Africa have flowed freely’. Despite the fact that violations were often denounced, states devised numerous ways to elude the spirit of the sanctions and the UN Sanctions Secretariat concluded that the arms embargo not only ‘failed to degrade South Africa’s military hardware and capabilities’ but that ‘the racist regime succeeded in building up its endogenous military production capacity’.231

With regard to the ongoing conflict in the Sudan, UN Security Council resolutions 1556 (2004) and 1591 (2005) introduced and strengthened an arms embargo on armed groups and the Janjaweed militia. The latter resolution also introduced a travel ban and assets freeze against four individuals from rebel groups, a pro-government militia and formerly of the Sudanese air force.232 However, a 2008 report by a Panel of Experts concerning the situation in the Sudan, notes ‘continued flagrant violation of the arms embargo by all parties in Darfur…which allow both the Government of the Sudan and the Darfur armed groups to continue to conduct offensive military operations both inside and outside Darfur’.233 Further, the weak response of the UN and the government of the Sudan to multiple successful attacks on peacekeeping forces for the purpose of gaining arms and related material has undermined confidence in their ability to provide security in Darfur.234 Consequently, violations of international human

rights and humanitarian law are common and violators operate in a climate of virtual impunity.\textsuperscript{235} This is compounded by inadequate monitoring mechanisms.\textsuperscript{236} Given weak compliance mechanisms – normally a Sanctions Committee relies on reports from the states themselves;\textsuperscript{237} broad sanctions remain a relatively ineffective mechanism to deal with serious abuse of human rights. Further, adverse impacts of broad sanctions on innocent local populations not only undermine international support for sanctions, but also undermine the legitimacy of the Security Council.

The introduction of ‘smart’ or targeted sanctions that are designed to alleviate some of the problems associated with the implementation and monitoring of broad sanctions and in particular to minimise hardship for local populations was an attempt to improve the effectiveness of the sanctions regime.\textsuperscript{238} Targeted sanctions such as freezing personal financial assets, travel and visa bans, and sanctions on particular commodities such as oil, diamonds and timber have a greater probability of impacting directly on those actually responsible for perpetrating abuse while limiting negative impacts on local populations.\textsuperscript{239} Smart sanctions can be modified according to changing conditions in targeted states and assessments of their effectiveness and any unintended consequences. They can also be time limited and effectively become part of the ongoing negotiating process between the international community and targeted elites who are responsible for human rights abuse. Operational problems associated

\textsuperscript{236} Ibid, Recommendations, para 343-353.
\textsuperscript{237} Conforti, above n 22, 190.
\textsuperscript{238} Thakur, above n 1, 140-151.
\textsuperscript{239} Michael Brzoska, ‘From Dumb to Smart? Recent Reforms of UN Sanctions’ (2003) 9 Global Governance 519, 521-523.
with legal loopholes, inadequate technology and limited institutional capacity or commitment to ensuring compliance are likely to be a constant challenge for any sanctions regime. However, the introduction of smart sanctions offers some hope that sanctions can become an important component in the international community’s response to gross abuse of human rights.

4.6.2. JUDICIAL PROCEEDINGS

It is generally accepted that aggression, genocide, racial discrimination, slavery, apartheid and self-determination create obligations *erga omnes*. However, although all states have a legal interest in seeing that obligations *erga omnes* are observed, the ICJ has demonstrated a reluctance to admit a claim on the basis of a breach of obligations *erga omnes*. In fact, in the *East Timor (Portugal v Australia)* case the Court decided that ‘the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things’.241

The establishment of the ICC, the ICTY, ICTR along with other judicial bodies such as the Special Chamber of War Crimes in Sarajevo, the Special Court for Sierra Leone,242 the establishment of Extraordinary Chambers in the Courts of Cambodia [ECCC] for the prosecution of crimes committed during the period of Democratic Kampuchea (1975-1979),243 and the principle of universal jurisdiction mark an important advance in protection of human rights.

240 Triggs, above n 184, 462.
242 Meron, above n 1, 177. See also Nowak, above n 150, 296.
243 See A/RES/57/228B of 22 May 2003 adopted by the General Assembly at its 57th session.
Prosecution for war crimes, crimes against humanity and genocide occur after the fact, if at all. Guatemala and South Africa opted for truth and reconciliation commissions rather than formal judicial processes, and for many reasons, not everyone responsible for serious violations of human rights and international humanitarian law will be prosecuted. In the case of Cambodia it was not until 1999 that the Report of the Group of Experts for Cambodia pursuant to General Assembly Resolution 52/125, recommended the establishment of an international tribunal and truth commission to investigate and prosecute people responsible for crimes committed during the Khmer Rouge period from 1975 until 1979. On 18 July 2007 the Co-Prosecutors filed the first Introductory Submission of the ECC indicating that, based on their investigations which were assisted by the Cambodian National Police, ‘serious and extensive violations of international humanitarian law and Cambodian law occurred …during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979’. It has been claimed that in Northern Uganda, ‘ICC prosecution of leaders of the Lord's Resistance Army was a critical factor in driving the rebels to the negotiating table,’ with the result that ‘a cessation of hostilities was agreed and a

widely consultative peace process undertaken.

However, this is not guaranteed. On 31 March 2005, the UN Security Council referred ‘the situation prevailing in Darfur since 1 July 2002’ to the ICC. As Sudan is not a party to the Rome Statute the Court could not have exercised jurisdiction without this referral. The ICC Office of the Prosecutor requested information from numerous sources, collected thousands of documents, and also interviewed over fifty independent experts. Following thorough analysis of this information the Prosecutor concluded that the statutory requirements for initiating an investigation were satisfied. Subsequently on 27 April 2007 the ICC issued a warrant for the arrest of Ahmed Harun, Minister for State for Humanitarian Affairs in the Government of the Sudan, and Ali Kushayb, ‘believed to be one of the top commanders of the Militia/Jangaweed’, on fifty one counts relating to war crimes and crimes against humanity.

However, the government of the Sudan has failed to co-operate with the ICC and both Harun and Ali Kushayb remain at large. Further, information that the ICC Pre-Trial Chamber will, on 4 March 2009, rule on an application by the Prosecutor under article 58 of the Rome Statute for a warrant for the arrest of Sudan’s current Head of State, Omar al-Bashir, has raised concerns about the
security of the joint AU/UN UNAMID mission in the Sudan. UNAMID like its predecessor AMIS suffers from a chronic lack of capacity in terms of both personnel and equipment and has done so since its deployment in January 2008. In this time it has been attacked by both the government of the Sudan and rebel forces.

The prospect of the ICC issuing a warrant for al Bashir’s arrest produced threats from Khalil Ibrahim, chairman of the Justice and Equality Movement (JEM), the most powerful rebel group in Darfur, ‘that his forces will redouble their efforts to topple the Sudanese Government the moment an international arrest warrant is issued against President al-Bashir … the war will intensify.’ Further, the prospect of the arrest of a serving African Head of State has excited condemnation from members of the African Union who fear that it may derail the fragile peace process in the Sudan. This sentiment was echoed in a UN Security Council Update Report dated 13 February 2009, which cited the risk that the indictment ‘may stimulate both sides of the conflict to step back from

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252 UN Doc S/2008/647. Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan, para 311
peaceful negotiations and commence new military offensives. Another risk is possible obstruction, violence or reprisals as a result of any indictment.  

On 4 March 2009 the Pre-Trial Chamber 1 of the ICC issued a warrant for the arrest of the current President of the Sudan, Omar Al Bashir. The warrant lists seven counts that incur individual criminal responsibility under article 25 (3) (a) of the *Rome Statute*. This includes the following:

- five counts of crimes against humanity: murder – article 7(1)(a); extermination – article 7(1)(b); forcible transfer – article 7(1)(d); torture – article 7(1)(f); and rape – article 7(1)(g); and, two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities – article 8(2)(e)(i); and pillaging – article 8(2)(e)(v).  

The majority of the Judges found that there was insufficient evidence of specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups to sustain a charge of genocide.  

This is the first arrest warrant the ICC has issued for a sitting Head of State. The Court maintains that the official status of al Bashir does not preclude criminal responsibility under the *Rome Statute*, and ‘immunities or specific procedural rules related to the official capacity of a person, whether under national or

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255 Ibid.  
256 *Rome Statute of the International Criminal Court*, entered into force on 1 July 2002. Article 25(3)(a) of the *Rome Statute* provides that: In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;  
international law, are not an obstacle for the Court’s jurisdiction over such a person.\textsuperscript{259}

After the ICC issued the arrest warrant, Sudan expelled thirteen non-government humanitarian organisations - including Action Contre la Faim (ACF), Care International, CHF International, International Rescue Committee (IRC), Mercy Corps, both the French and Dutch branches of Médecins sans Frontières (MSF), Norwegian Refugee Council, Oxfam GB, Solidarite, PATCO and Save the Children Fund of both the United Kingdom and the United States.\textsuperscript{260}

The security situation in Darfur remains extremely fragile. UNAMID forces are overstretched and there is a strong risk that the indictment of al-Bashir will ignite further tensions in a large and complex country, characterised by religious, ethnic and socio-economic diversity, which since independence has ‘suffered two civil wars between the North and the South, a civil war in the East and ongoing and possibly intensifying conflict in the West’.\textsuperscript{261}

4.6.3. DIPLOMATIC PRESSURE AND MEDIATION

It is arguable that there is no crisis that highlights problems with the efficacy of the Security Council as an arbiter of appropriate mechanisms to deal with ongoing conflict and human rights abuse more poignantly than the situation in the Middle East relating to Israel’s occupation of Gaza and the West Bank. Israel has a history of disregarding international law and the rights of the

\textsuperscript{259} Ibid.


Palestinian people. Further, since 1972 the United States has consistently vetoed Security Council resolutions critical of Israel.

Despite Israel’s claim of an end to its illegal occupation of Gaza with its disengagement from the Gaza Strip in August 2005, Israel continued to exercise control over the following - the air space and territorial waters of the Gaza Strip; the joint population registry of Gaza and the West Bank; the entry of foreigners to the Gaza Strip; the movement of people and goods between Gaza and the West Bank; the movement of goods into the Gaza Strip; and most elements of the taxation system of the Gaza Strip. In September 2007, following Hamas’ seizure of control in Gaza, Israel declared Gaza a ‘hostile entity’ and enforced a blockade of Gaza with dire humanitarian consequences. B’Tselem, an Israeli Human Rights organisation described the Gaza Strip as ‘one big prison’ and similar observations were made by Robert Sherry, Special Co-ordinator for the Middle East Peace Process and Personal Representative for the UN Secretary General.

On 16 December 2008 Security Council resolution 1850 called on ‘all States and international organisations …to support the Palestinian government …to

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assist in the development of the Palestinian economy, to maximise the resources available to the Palestinian Authority, and to contribute to the Palestinian institution-building program in preparation for statehood.\footnote{UN Doc S/RES/1850 (2008), UN SCOR 6045\textsuperscript{th} mtg on 16 December 2008.} At a Security Council meeting on 18 December 2008, Robert Sherry described this resolution as ‘a clear and united message of its [international community] commitment to the irreversibility of the process leading to the creation of a Palestinian State’.\footnote{UN Doc S/PV.6049 of 18 December 2008.}

On 27 December 2008 Israel launched a three-week offensive in Gaza with the stated aim of ending rocket attacks by Hamas. Approximately 1,300 Palestinians were killed and 5,300 were injured in a military operation carried out in densely populated areas, which deliberately targeted infrastructure and reduced homes, schools, hospitals and marketplaces to rubble.\footnote{See UN Press Release, ‘Gaza: after donor conference, aid inflow still restricted, UN says’ UN News Centre, <http://www.un.org/apps/news/story.asp?NewsID=30072&Cr=gaza&Crl=> at 29/02/2009.}

Haaretz, an Israeli newspaper, published the following material provided to Israeli officers and soldiers by the IDF Rabbinate during Operation Cast Lead:

[There is] a biblical ban on surrendering a single millimeter of it [the Land of Israel] to gentiles, though all sorts of impure distortions and foolishness of autonomy, enclaves and other national weaknesses. We will not abandon it to the hands of another nation, not a finger, not a nail of it.’ This is an excerpt from a publication entitled "Daily Torah studies for the soldier and the commander in Operation Cast Lead," issued by the IDF rabbinate. The text is from "Books of Rabbi Shlomo Aviner," who heads the Ateret Cohanim yeshiva in the Muslim quarter of the Old City in Jerusalem.\footnote{Amos Harel, ‘IDF Rabbinate publication during Gaza war: we will show no mercy on the cruel’ HAERETZ.com, 10 March 2009 <http://www.haaretz.com/hasen/spages/1058758.html> at 15/03/2009.}
This indicates contempt for international law relating to the acquisition of territory by force and also for the basic human rights of the Palestinian people. The characterisation of the Gaza offensive as a religious war against gentiles is also contrary to the basic tenets of international human rights and humanitarian law and it suggests that the IDF condones a policy of ethnic cleansing.

Security Council resolution 1860 of 8 January 2009 which called for an ‘immediate, durable and fully respected ceasefire leading to the full withdrawal of Israeli forces from Gaza’\(^{271}\) was supported by every member of the Security Council with the exception of the United States which abstained from voting. Ultimately America’s geopolitical interest in supporting Israel outweighed any consideration of the illegality of Israel’s continued disregard for international human rights and humanitarian law, including the Palestinian peoples right to self-determination\(^{272}\) and successive calls by the international community for Israel to withdraw from the occupied territories, end illegal settlements, and make a genuine commitment to the peace process, along with recognition of the need for Palestinians to eschew violence.\(^{273}\) Ultimately diplomacy and mediation will achieve nothing if there is no genuine will by parties to resolve conflict.

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This is even more apparent when one party has the almost unequivocal support of a permanent member of the UN Security Council who is prepared to use the veto power to protect an ally regardless of world opinion.\textsuperscript{274} As Thakur notes, ‘the Palestinian issue is the most blatant example of normative inconsistency’.\textsuperscript{275} Selective use of the veto to protect the geopolitical interests of the five permanent members of the UN undermines the credibility of the Security Council as the appropriate body to authorise the use of force in international law.

The use of the veto and even the ‘hidden veto’ that prevents substantial discussion of important issues is controversial. There has been ongoing debate about the need for Security Council reform, extension of the permanent membership, and the need for greater transparency and restraint in the use of the veto.\textsuperscript{276} It has been suggested that permanent members of the Security Council should not cast a veto ‘where genocide, crimes against humanity and similar acts are involved’ as there is debate as to whether the use of the veto is ‘legally compatible with the obligation to prevent genocide under the Genocide Convention’.\textsuperscript{277}

The use of the veto by Western ‘liberal’ states in situations involving egregious human rights abuse undermines Teson’s argument that permissible humanitarian interventions can be undertaken by a ‘liberal government or alliance, aimed at

\textsuperscript{274} UN Doc A/RES ES-10/18 of 23 January 2009. Tenth emergency special session, agenda item 5; UN Doc A/RES/63/201 of 28 January 2009
\textsuperscript{275} Thakur, above n 1, 284-285.
\textsuperscript{276} Center for UN Reform Education, advised that ‘Member States met on 16 and 17 March 2009 to discuss the veto in the second of five meetings devoted to different substantive issues connected to Security Council reform.’ Almost half the member states took the floor arguing for reform of the Security Council. <http://www.centerforunreform.org/node/394> at 10/03/2009.
ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect’. The problem is that the qualifier ‘liberal’ is not clearly defined and the fact that a government may be commonly regarded as liberal does not guarantee they will necessarily uphold basic principles of human rights and humanitarian law. It does not overcome the fundamental problem that what Teson and others who argue in favour of humanitarian intervention are proposing is a return to the pre-Charter regime where the use of force was conditioned, if at all, by vague perceptions of just war. As Thakur warns, ‘the inconsistent practice, the double standards and the sporadic nature of Western powers’ interest in human rights protection… shows that noble principles are convenient cloaks for hegemonic interests’. 279

4. 7. CONCLUSION

While there has been much debate about the legality and desirability of humanitarian intervention it would appear that it is almost inevitable that the decision to intervene in any particular instance will be dictated primarily by political as opposed to moral and/or legal considerations. Further, while states may achieve desirable outcomes with military interventions, as in the case of Tanzania’s intervention in Uganda in 1979 which deposed the ruthless dictator Idi Amin, states are reluctant to support a broad right of humanitarian intervention. In this instance, while Tanzania claimed that it was acting in self-defence, the intervention was condemned by the OAU [Organisation of African Unity] as a violation of the principle of non-intervention in the domestic affairs

278 Teson, above n 5, 94. Note ‘double effect’ relates to good intentions, good consequences and proportionality in the use of force.
279 Thakur, above n 1, 269.
of states. Likewise, Vietnam’s intervention in Cambodia which ousted the Pol Pot regime, that was responsible for extreme human rights violations, was also condemned by the majority of the international community.

Further, with the NATO intervention in Kosovo the United Kingdom claimed that the intervention was a legal response justified by ‘overwhelming humanitarian necessity’ and the Netherlands also argued in pleadings in the *Legality of the Use of Force (Provisional Measures) case* that the intervention was a legal humanitarian intervention that could be justified on the basis of previous state practice. Neither of these propositions is, at this stage, recognised as a sound legal argument. The United States, Canada and France relied on a dubious claim of implied authorisation to use force on the basis of the Federal Republic of Yugoslavia’s violation of obligations imposed by Security Council resolutions 1199 and 1203. Germany relied on a moral obligation. The intervention was condemned by Russia, China, Belarus and India at an emergency session of the Security Council on 24 March 1999. The NATO intervention offers little support for an emerging norm of humanitarian

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280 Nowak, above n 150, 332-333; See also Chesterman, above n 3, 78.
281 Chesterman, above n 3, 80; Murphy, above n 7, 104.
282 Chesterman, above n 3, 212.
283 *Legality of the Use of Force (Serbia and Montenegro v Belgium)* Pleadings 10 May 1999 at 10am – uncorrected translation CR 99/14. Note the Court did not make a determination on the merits of this case as it decided that ‘it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999’ – *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) judgement of 15 December 2004. ICJ Rep 279 at para 129.
284 Simma, above n 1, 12.
285 Nowak, above n 150, 334-337;
286 Chesterman, above n 3, 212 and 216.
287 Chesterman, above n 3, 211. UN Doc S/PV.3988 (1999)
intervention. At best it can be regarded as a legitimate, as opposed to a legal, intervention although even this is contentious.

Following the troubled US intervention in Somalia the US administration demonstrated a reluctance to become involved in further interventions and deliberately resisted attempts to categorise both the Rwandan and Bosnian conflicts as genocide. Harris, formerly of the US State Department notes with regard to the Bosnian conflict, that ‘the administration was ever vigilant to diffuse pressure to act, and an admission of genocide would have created one of the greatest pressures’. One of the critical problems is not only a perceived lack of will to confront such challenges, but the reality that the task is enormous and it requires serious ongoing commitment and immense resources.

The United Nations does not have the capacity or the resources to be all things to all people. As the UN Department of Peacekeeping acknowledges, they are increasingly confronted by complex peace operations, which present significant challenges. Apart from military involvement, ‘the many faces of peacekeeping now include administrators and economists, police officers and legal experts, de-miners and electoral observers, human rights monitors and specialists in civil affairs and governance, humanitarian workers and experts in communications and public information.’ United Nations field operations increasingly take

288 See Legality of the Use of Force (Serbia and Montenegro v Belgium) Request for Provisional Measures. Pleadings 10 May 1999 ICJ Doc CR 99/14 Ian Brownlie representing FRY, pp 36-40 re status of humanitarian intervention in international law; Simma, above n 1, 1-22.
289 Simma, above n 1, 1-22.
place in fragmented or failed states where there is no clear distinction between combatants and civilians and problems are compounded by the ready availability of weapons and the spread of religious and philosophical ideologies that are at times opposed to the basic tenets of the UN Charter.\textsuperscript{292} If the Security Council authorises military intervention to prevent or contain serious abuse such as genocide, war crimes and crimes against humanity, it is important that adequately trained, equipped, and financed forces are made available by member states and that they are given realistic and achievable mandates.

While well intentioned people may argue for a right of humanitarian intervention, it would appear that, if the international community as a whole is genuinely concerned with intervention to prevent or contain the most egregious forms of human rights abuse, then this should be evident in a greater commitment to ensuring that the UN has the functional capacity to operate effectively in maintaining international peace and security. This does not appear to be the case.

5. CONCLUSION

Humanitarian intervention is a bellwether topic in international law. It not only gives a strong indication of the efficacy of the collective security system envisaged by the original architects of the UN Charter, but also, of the relevance of international laws relating to the prohibition of force, non-intervention in the domestic affairs of states and human rights and humanitarian law.

The decades since the introduction of the Charter have seen rapid change. While the first General Assembly of the United Nations on 10 January 1946 involved representatives of 51 states, by 2006 the membership had burgeoned to 192 states.\(^1\) Further, globalisation and the development of new communication technologies facilitated a greater inter-relationship and interdependence of states, and an increased focus on the development of regional alliances along with changing perceptions of state sovereignty.\(^2\) However, as noted by the Secretary-General of the United Nations Boutros Boutros- Ghali in the 1992 *Agenda for Peace*, global transition has been marked by contradictory trends – a rise in assertions of nationalism has been accompanied by ethnic, religious, cultural and social tensions that threaten international peace and security.\(^3\)

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The most prevalent form of conflict today is not inter-state conflict; it is intra-state conflict which is often particularly brutal and intractable because it tends to be characterised by the adoption of a ‘total war’ mindset where combatants are determined to eliminate their adversaries as they regard the characteristics of their adversaries as a cause of the war and fear that absolute victory is the only viable option for their own survival or to achieve various socio-cultural, economic or political objectives. Further, conflict in failed states or quasi-states with limited ability to exercise formal authority over their populations has resulted in ‘anarchy, chronic disorder, massive flight of refugees and deadly civil wars waged without regard for laws of armed conflict’. Such conflicts present particular challenges for the maintenance of international peace and security.

Following the devastating carnage of World War Two, one of the primary concerns for the drafters of the Charter was the need to develop an effective mechanism to secure international peace and security. Accordingly, the Charter envisaged a collective security system operating with the active support of a ‘United Nations’ organisation that was intended to provide a forum for the development of global consensus on issues of international concern. Blocs which can variously be described as caucusing and/or voting blocs developed from as early as 1957 when four blocs – the Latin American; Asian and African; Eastern European; and Western European and others were endorsed by the General Assembly. Bloc affiliations are fluid and over time a number of

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5 Karns and Mingst, above n 2, 324 citing Zartman 19995 and Rotberg 2003.  
6 The United Nations ‘Chapter IV: The United Nations’ UNIMUN Background, p 20
different blocs developed around some commonality of interests or values. These included the Non – Aligned Movement; the Group of 77; Association of South East Asian Nations [ASEAN]; the Organisation of African Unity [OAU]; NATO; The Organisation of Petroleum Exporting Countries [OPEC]; and the European Union [EU]. While the end of the Cold War and an increase in Security Council activity during the 1990s saw a decline in the relative importance of the General Assembly, the North/South divide persists on a number of issues including UN intervention. Nevertheless, it is not only developing states in the ‘global South’ who have at times demonstrated both ambivalence and reluctance to agree to international action to support human rights; permanent members of the Security Council and other developed states have also relied on the veil of state sovereignty to protect their own interests.

In a climate of rapid change it has become apparent that state sovereignty is malleable rather than static. As Shaw notes, ‘international law permits freedom of action for states, unless there is a rule constraining this…it is therefore international law which dictates the scope and content of the independence of states and not the states themselves individually and unilaterally’. Undoubtedly traditional conceptions of state sovereignty as implying absolute authority at a domestic level have been challenged by globalisation and the increasing interdependence of states, along with the growing prominence of

7 Ibid.
9 Weiss et al, above n 8, 223. Weiss points out that powerful states like the US fall back on the state sovereignty line when UN agencies or the EU question US policies relating to the treatment of suspected terrorists or issues like the death penalty.
human rights and humanitarian law. There is wide acceptance of international human rights law treaties.\textsuperscript{11} Further, increased recognition of universal jurisdiction along with the proliferation of judicial bodies such as the ICC, the ICTY and the ICTR that deny immunity to all people with official status, including heads of state\textsuperscript{12} has redefined the contours of state sovereignty. The ICTR and ICTY Statutes provide that these tribunals will not only have concurrent jurisdiction with national courts to prosecute serious violations of international humanitarian law, but also will have primacy over national courts.\textsuperscript{13} While the Rome Statute provides that the ICC’s jurisdiction is based on the principle of complementarity to national courts, it also provides that the court can override national jurisdiction in exceptional circumstances relating to reluctance or inability of national courts to prosecute, or where the gravity of the case warrants an exercise of the ICC’s jurisdiction.\textsuperscript{14} There is an emerging consensus that state officials have a responsibility to protect their own populations from egregious human rights abuse and that they should be held accountable for any complicity in crime. This was affirmed by the ICJ in the \textit{Arrest Warrant case}.\textsuperscript{15} State officials or their agents can no longer oppress their own populations with absolute impunity and the traditional sovereign right of states to use force was curtailed by the Charter.

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\textsuperscript{11} See Chapter 3 of this paper – pp 114-116.
\textsuperscript{13} Antonio Cassese, \textit{International Criminal Law} (2\textsuperscript{nd} ed. Oxford: Oxford University Press, 2008) 339. See article 8 of the Statute of the ICTR and article 9 of the Statute of the ICTY.
\textsuperscript{14} Ibid, 343. See articles 17(2) and 17 (3) of the \textit{Rome Statute}.
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Prior to the introduction of the Charter there were few constraints on the use of force in international law. The collective security system envisaged by the Charter was intended to curb the unrestrained use of force by states in the pursuit of their own geopolitical interests. However, the bipolarity that characterised the cold war and the more recent pre-eminence of the United States, which encouraged it to simply bypass the United Nations,\(^{16}\) presented significant challenges for the UN collective security regime.

Nevertheless, the traditional conception of a ‘threat to the peace’ as involving the potential for interstate conflict has been reappraised to encompass not only intra-state conflict, but also to recognise that, ‘non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.’\(^{17}\) Security Council resolution 688 of 5 April 1991 was the first time that the Security Council explicitly recognised the consequences of state repression of its own population – massive refugee flows, as a threat to international peace and security.\(^{18}\) Human rights abuse and massive refugee flows were again at issue in Somalia, which was effectively a failed state with no single competent governing authority, and Security Council resolution 794 of 1992 authorised the use of ‘all necessary means’ to create a safe environment for the delivery of humanitarian aid.\(^{19}\) Further, the threats posed by weapons of mass destruction, terrorism, financial markets, HIV/AIDS, human rights abuse,


\(^{19}\) Ibid, 330-333.
climate change and food shortages have all assumed global proportions.  

Internal conflicts have become more prevalent and more complex especially in failed or fragmented states without clear lines of authority, while at the same time there is increased focus on the importance of regional inter-governmental organisations partly as a response to the negative impacts of globalisation, and perceived failures of the UN collective security system.

While there have been a number of militarised interventions that ostensibly support humanitarian intervention - the Indian intervention in East Pakistan in 1971, Belgian and French intervention in Zaire in 1978, Tanzanian intervention in Uganda in 1978-9, action to protect the Kurds in Northern Iraq in 1991, and the ECOWAS interventions in Liberia and Sierra Leone in 1989 and 1999, not only have states consistently resisted attempts to characterise their actions as supporting a ‘right’ of humanitarian intervention, but also, international response to interventions has generally been either openly critical or ambiguous. Further, state practice has been inconsistent and highly selective –

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21 Ibid; See also Kars and Mingst, above n 2, 145-209.


it generally supports the assertion that states will only intervene if it is consistent with perceptions of their own national interests.26

Holzgrefe points out that historical selectivity in the exercise of a ‘right’ of unauthorised intervention is not necessarily a barrier to its ‘being a customary international law’.27 However, this is not entirely consistent with the requirement for settled state practice accompanied by *opinio juris* as a condition for the existence of customary international law,28 nor is selectivity dictated by the geopolitical interests of states consistent with an emerging consensus that humanitarian intervention should be guided by the needs of oppressed populations rather than the ‘rights’ and interests of intervening states.29

The ICISS report on ‘The Responsibility to Protect’ identified a number of preconditions for intervention in extreme cases - right authority, just cause, right intention, last resort, proportional means and importantly reasonable prospects of success.30 In a similar vein Stromseth argues that factors such as threshold triggering conditions involving significant loss of life and ‘severe violations of fundamental human rights’; the inability of the Security Council to authorise military action; the necessity to use force to stop abuse perpetrated by

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27 Holzgrefe, above n 24, 47.
government forces; the use of proportional means; humanitarian purpose and effect; collective as opposed to unilateral action; support of oppressed local population for intervention; and, reasonable prospect of success could offer guidelines to support the emergence of a normative consensus in favour of humanitarian intervention in exceptional circumstances.31

However, in the absence of settled state practice and the requisite *opinio juris*, it would appear that there is, at this point in time, no customary international law right of humanitarian intervention. Further, despite the attempt in the *Genocide Convention* to ensure that states are under an obligation to prevent genocide this does not mandate a use of force to do so. As noted previously,32 legal obligations which arise from recognition of crimes such as genocide, war crimes and crimes against humanity as *jus cogens* norms that give rise to obligations *erga omnes* include the following: a duty to prosecute or extradite perpetrators of such crimes; the inapplicability of statutes of limitations for such crimes; the inapplicability of immunities up to and including immunity for Heads of State for such crimes; the inapplicability of the defence of obedience to superior orders except as a mitigating factor in sentencing; the universal application of these obligations in time of peace or war; non-derogation in states of emergency; and universal jurisdiction over perpetrators of such crimes.33

32 See Chapter 4 of this paper ‘Humanitarian Intervention’ at 4.4 *Jus Cogens*, Obligations *Erga Omnes* and Humanitarian Intervention, pp 161-175.
While states have a duty to prevent genocide, and to ensure respect for laws relating to war crimes and crimes against humanity, humanitarian intervention is not at this stage recognised as a legal option in international law. Further, despite significant advances in protection of human rights, and in particular the establishment of numerous judicial bodies to investigate and prosecute crimes such as genocide, war crimes and crimes against humanity, the use of force in international law is still confined to self-defence and force authorised by the Security Council under its Chapter VII powers.

There is a perception that classification of a conflict as involving genocide triggers a responsibility on the part of states to work towards its prevention. This is consistent with the focus in the *Genocide Convention* on the prevention as well as the punishment of genocide. However, states are not obliged to use force to prevent genocide or other egregious abuse of human rights. The injunction by the ICJ in the *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)* for states to prevent genocide is conditioned by the requirement that ‘every State may only act within the limits permitted by international law’. Moreover, remedies for breaches of obligations *erga omnes* are limited and are also restricted to lawful measures to ensure cessation of the breach and reparation or restitution where possible.

Although at this point in time it appears that there is no right of humanitarian intervention in international law, it is possible that this may change. Certainly

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34 *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement)* [2007] ICJ Rep 1 at para 430.
debate about the continuing legitimacy of the prohibitions of the use of force and non-intervention in the domestic affairs of states that followed the NATO intervention in Kosovo suggests that the relevance of these prohibitions, which were traditionally regarded as cornerstones of the UN Charter, is being reappraised. It is notable that the process of change in customary international law involves an element of uncertainty in terms of identifying exactly when one rule is superceded by another. However, rather than focusing on the legality of humanitarian intervention, we need to direct more attention to questions relating to its desirability and efficacy.

This is particularly important given that there does not appear to be strong state support for a ‘right’ of humanitarian intervention. Realistically, this is critical for the development of a right of humanitarian intervention in customary international law. It is also critical for the execution of humanitarian intervention. The United Nations does not have a standing army and any authorised humanitarian intervention must be undertaken by states that are willing to provide adequately armed and trained troops. Given the reluctance of states to embrace the notion of article 43 agreements as envisaged by the drafters of the Charter, and also to provide both military and financial support for authorised UN humanitarian missions, this situation is unlikely to change. In fact, the push for humanitarian intervention appears to come largely from academics, NGOs and other well intentioned people who are concerned about gross abuse of human rights.
The increased prominence of human rights has resulted in a greater focus not only on the development of more effective instruments to ensure compliance with international human rights law and to punish transgressions, but also, debate about prevention of the most egregious forms of human rights abuse. Undoubtedly, this has been assisted by advances in communications technology and the proliferation of increasingly sophisticated and politically active transnational non-government organisations [NGOs] and social movements that espouse human rights and humanitarian values. In a speech at the Davos World Economic Forum on 29 January 2009 Secretary General Ban Ki Moon recognised the growing significance of civil society organisations and their involvement in consultations on UN policy and programme matters. He stated that, ‘Our times demand a new definition of leadership - global leadership. They demand a new constellation of international cooperation - governments, civil society and the private sector, working together for a collective global good.’

As Karns and Mingst note, technological developments and particularly the internet have provided the infrastructure for linking various NGOs, advocacy groups and interest groups in different parts of the world. It enabled more than a thousand NGOs and social movements to mobilise international support for the International Campaign to Ban Landmines partly by redefining the issue as ‘as a humanitarian or human security issue, instead of an arms control or national security issue’. NGOs have become an increasing important player in transnational governance debates.

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37 Ibid.
38 Karns and Mingst, above n 2, 506.
39 Karns and Mingst, above n 2, 211; See also Weiss et al, above n 8, 126.
The growing importance of human rights discourse is linked to attempts to find a global consensus about values. In an increasingly interrelated and interdependent world that is nevertheless characterised by great diversity, the discourse of human rights is an appeal to our common humanity. As Ignatieff notes, ‘Modern moral universalism is built upon the experience of a new kind of crime: the crime against humanity.’

By focusing on the most egregious abuse of human rights, international society can find a degree of moral cohesion and work towards the development of internationally acceptable strategies to deal with such abuse. However, the suffering and oppression of people is at times appropriated by Western governments and NGOs to generate the impression of a moral community in the West as distinct from a perception of unscrupulous predator states in the global South.

While many humanitarian organisations still support classic non-political needs based humanitarianism, others have become more political to the extent that they ‘problematisate the non-Western state’ and encourage Western activism in support of human rights victims. Moreover, some human rights activists have embraced the notion of militarised humanitarian intervention to secure a ‘positive peace’ that focuses on human rights protections, rather than just an absence of war. David Kennedy offers a powerful critique of

42 Chandler, above n 40, 37.
humanitarianism’s preoccupation with justifications for intervention, and argues that a responsible approach to intervention might ‘avoid fantasies of a costless, neutral engagement in faraway places… [and] more easily acknowledge its part in the quotidian and its ongoing responsibility’.” This raises the question of the extent to which it is necessary or appropriate to use force to secure basic human rights, and how to reconcile the prohibitions of the use of force and its corollary, the prohibition of intervention in the domestic affairs of states with the prohibition of genocide and demands for respect for fundamental human rights.

The excesses of colonialism; the holocaust; and, the embrace of torture and prolonged detention without trial by the United States Bush administration should temper any tendency to demonise the global South as the epicentre of human rights abuse. It also prompts a critical examination of Fernando Teson’s suggestion that Western liberal states or coalitions should be allowed a right of humanitarian intervention. It is naïve to imagine that Western liberal states inevitably occupy the moral high ground on humanitarian issues or that they will invariably eschew their own geopolitical interests and act selflessly for the

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benefit of oppressed populations. History does not support this conclusion. European states often invoked the claim of helping humanity in their imperial missions, and the United States likewise invoked humanitarian motives to support the suppression of native Americans and also interventions in the Phillipines and Latin America.47

Moreover, the ‘civilising’ mission of the West has generally focused on civil and political rights to the detriment of social, economic and cultural rights in affected states. As Ikechi Mgbeoji observes, ‘millions of people in the global South have been massacred by proxies of the global North in the name of imposing democracy and a free market’.48 Unfortunately, neither democracy nor a free market guarantees respect for human rights. Despite the assertion that democracy ‘provides one of the philosophical foundations of human rights’49 in Western philosophical thought, it needs to be acknowledged that there are multiple forms of ‘democracy’ and a focus on electoral democracy in particular can merely reinforce the tyranny of the majority. It is not in itself a guarantee that human rights will be respected by elected governments. Ultimately any intervention, rather than being narrowly driven by a particular ideological position, must necessarily consider local conditions and the needs, interests and values of local populations. At a very minimum, responsible humanitarianism, consistent with respect for human rights, must prioritise such considerations.

48Ikechi Mgbeoji, above n 41, 160.
49 Nowak, above n 18, 46.
NGOs and the various media outlets undoubtedly influenced perceptions of urgency to intervene in Kosovo to avert a human rights catastrophe.\textsuperscript{50} In fact major news agencies were a powerful ally for NATO during the NATO intervention in Kosovo.\textsuperscript{51} However, the adoption by NATO forces of a ‘zero casualty’ air campaign that prioritised the minimisation of NATO casualties, along with the deliberate targeting of civilian infrastructure in Kosovo actually resulted in the escalation of ethnic cleansing, mass displacement of Kosovo Albanians, and increased hardship for the population that NATO was ostensibly trying to protect.\textsuperscript{52} Further, while it was evident that non-violent means of conflict resolution had failed to resolve the Kosovo crisis, it is also arguable that the Rambouillet process of coercive diplomacy was not entirely reasonable in its demands of ‘the virtual abnegation of Yugoslav sovereignty over Kosovo’.\textsuperscript{53}

While there was a theoretical commitment to preserve the territorial integrity of the FRY, the status of Kosovo was effectively left in limbo and the Rambouillet Accords provided that NATO, rather than the UN, would establish a KFOR force with extensive power in Kosovo.\textsuperscript{54} Ultimately the NATO intervention assisted the Kosovo Albanians in their quest for formal independence from the FRY. However, ongoing tension between Kosovo Albanians and the Serb minority resident in Kosovo has been exacerbated by Kosovo’s unilateral


\textsuperscript{51} Ibid.

\textsuperscript{52} Nowak, above n 18, 334-335; Weiss et al, above n 8, 77-78.

\textsuperscript{53} Gregory Fox, \textit{Humanitarian Occupation} (Cambridge: Cambridge University Press, 2008) 89.

\textsuperscript{54} Ibid, 89-91.
declaration of independence on 17 February 2008. Following a request by the General Assembly for an advisory opinion, the legal status of Kosovo’s unilateral declaration of independence is under consideration by the ICJ. The situation in Kosovo continues to present significant ongoing challenges for the UN with concern by a number of member states that it may fuel further separatist movements and thereby contribute to a destabilisation of international peace and security. Undoubtedly, developing more effective mechanisms to manage internal conflict is the major challenge of our times.

The most persistent criticisms of the United Nations within the context of the humanitarian intervention debate relate to the selectivity and adequacy of its response to humanitarian dilemmas. In 2003 UN Secretary General Kofi Annan, referring to challenges presented by unilateralism and the pre-emptive use of force, suggested that the UN had reached a ‘fork in the road’ and that it was time to consider whether radical changes were needed to ensure that the organisation functioned more effectively. One of the critical limitations of the

56 See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion); UN Doc A/63/L.2 of 8 October 2008.
57 UN Doc S/PV.6025 record of Security Council meeting on 26 November 2008 convened to discuss the situation in Kosovo; UN Doc S/2008/692 Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo; See also Center on International Co-operation at New York University with support of Peacekeeping Best Practices Section of UN Department of Peacekeeping Operations, Briefing Paper, 'Annual Review of Global Peace Operations 2008'
58 Holzgrefe, above n 24, 45-49; Coleman, above n 21, 200; Thakur, above n 26; Karns and Mingst, above n 2, 326.
United Nations that has been evident almost since the establishment of the UN is that the five permanent members of the Security Council enjoy a privileged status and that they have not discharged their obligations as members of the Security Council with due diligence and respect for their role in maintaining international peace and security in accordance with prevailing international law.60

During the Cold War ‘over 100 major conflicts around the world have left some 20 million dead. The United Nations was rendered powerless to deal with many of these crises because of the vetoes - 279 of them - cast in the Security Council, which were a vivid expression of the divisions of that period.’61 Initial optimism at the end of the Cold War that members of the Security Council would refrain from exercising their veto in line with perceptions of their own geopolitical interests soon dissipated in the face of the reality that the US would consistently oppose any attempts to censure Israel and China and Russia would veto resolutions critical of their own allies.62

The ten non-permanent members of the Security Council, who are elected for two year terms, are chosen on the basis of achieving equitable regional representation, with five seats allocated to Africa and Asia, two seats to both

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60 Weiss et al, above n 8, 223. Weiss points out that powerful states like the US fall back on the state sovereignty line when UN agencies or the EU question US policies re treatment of suspected terrorists or issues like the death penalty.
Latin America and Europe, and the remaining seat to Eastern Europe. 63 Essentially this fails to adequately address criticisms that the Security Council is unrepresentative as the permanent members enjoy a privileged status in that they can exercise a right of veto on substantive matters. 64 Further, the power of the permanent five is reinforced by articles 25 and 103 of the UN Charter. 65

One of the most important developments in humanitarian protection in recent times has been recognition by both the General Assembly and the Security Council of the ‘Responsibility to Protect’ [R2P]. R2P provides that, ‘Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’ 66 The primary importance of R2P is that it challenges traditional conceptions of state sovereignty as implying absolute authority at a domestic level; it places human rights firmly within the purview of the international community by fostering debate about the legality, desirability and execution of interventions to prevent or contain egregious forms of human rights abuse, and it brings into question the use the veto in situations involving serious abuses that involve *jus cogens* norms and obligations *erga omnes*. Hopefully growing recognition of R2P will be a catalyst for change by focusing attention on the need for more effective mechanisms to ensure compliance with universally accepted norms of

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63 See Karns and Mingst, above n 2, 110-111.
64 Ibid, 7.
65 See *Charter of the United Nations* article 25 ‘Members of the United Nations agree to accept and carry out the decisions of the Security Council’. Article 103 relates to the primacy of obligations under the UN Charter. It provides that, ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’
international human rights and humanitarian law. Undoubtedly, it makes it increasingly difficult for states responsible for egregious human rights abuse to rely on the rather porous shield of state sovereignty.

There have been numerous calls for reform of the Security Council. These have included calls for the reform of operating procedures and in particular the lack of transparency in its decision making; reform to make the Security Council more representative; and, to review the exercise of the veto particularly in cases involving egregious abuse of human rights. Predictably, the permanent five have resisted attempts to dilute their own power and other members of the United Nations have failed to reach agreement on reform. Constant speculation about the need for Security Council reform fuels claims that the UN faces a credibility crisis.

One of the critical problems that goes to the heart of the credibility issue is that the Security Council is not only partisan in its response to humanitarian crises, but also, that when it authorises peacekeeping, peace enforcement or ‘humanitarian intervention’ missions under its Chapter VII powers, it often fails to ensure that troops responsible for carrying out the missions are adequately trained, armed and supported, and that they have realistic and achievable mandates. As noted by Karns and Mingst, ‘international action was often too

67 See Christine Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 International and Comparative Law Quarterly 850, 850-862 for a discussion on the role of soft law such as non-binding or voluntary resolutions, codes of conduct, and statements which purport to lay down international principles in the development of customary international law.
68 See Karns and Mingst, above n 2, 139-142.
little or too late to save thousands of human lives in Somalia, Srebrenica, Rwanda and Sierra Leone’.70

While the rhetoric of R2P attempted to focus greater attention on ‘appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ and a commitment to building the capacity of states to protect their own populations71 it did not mandate unauthorised humanitarian intervention. It is an important step along the way to securing more effective protection of human rights. Nevertheless, it is still offset by the fact that ‘the operational capacity and political will to engage in humanitarian intervention has been on a roller coaster’.72

If we hope to have any success in avoiding the brutal excesses of conflict such as genocide, war crimes and crimes against humanity, we need to develop a more sophisticated understanding of the conditions in which violent conflicts and in particular inter-ethnic or inter-cultural conflicts erupt. While the majority of states in the world are characterised by a degree of ethnic and cultural heterogeneity, the presence of minorities in a state does not in itself appear to be a sufficient condition for the outbreak of conflict. Conflict is a complex phenomenon. Undoubtedly however, factors such as rapid change in economic,

70 Karns and Mingst, above n 2, 326; See also Nowak, above n 18, 313 - 317.
71 UN General Assembly World Summit Outcome Document. UN Doc A/60/L.1, at para 139.
72 Thakur, above n 26, 212.
social and political circumstances can exacerbate tensions over the distribution of power, recognition and resources.\(^\text{73}\)

Further, unscrupulous leaders can mobilise underlying ethnic or cultural allegiances and tensions to excite conflict. The 1998 judgement in the *Akayesu* case notes comments by the Russian delegate to the Genocide Convention that, ‘It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized.’\(^\text{74}\) Certainly the role played by hate propaganda in mobilising support for crimes in Nazi Germany, Rwanda\(^\text{75}\) and in the Balkans has been recognised in both case law and academic literature.\(^\text{76}\) While delegates to the *Genocide Convention*, and in particular the United States rejected attempts to prohibit hate propaganda, the lacuna this created has ostensibly been rectified by other human rights instruments and in particular article 4 of the *Convention on the Elimination of All Forms of Racial Discrimination*.\(^\text{77}\) The challenge is to create more effective mechanisms to engender respect for human rights and ensure greater compliance with directives against discrimination.

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\(^{76}\) Alvarez, above n 75, 428; *Prosecutor v Tadic (Sentencing judgement)* ICTY Case No. IT-94-1-T 14 July 1997 at para 66-68.

Obviously violent conflict doesn’t occur in a vacuum. The genocide in Rwanda was preceded by a long history of ‘periodic, systematic, violent purges of Tutsis’ by the Hutu majority.\(^78\) Further, despite evidence of repression of the Tutsis, France provided troops and arms to support the Habyarimana government on the premise that the purported threat to the government by Tutsis based in Uganda was an ‘Anglo-Saxon threat to Francophone Africa’.\(^79\) Even after the genocide began, the French assisted the Hutus and helped them ‘circumvent the UN arms embargo’.\(^80\) Likewise, the United States continues to give extensive economic and political support to Israel despite its prolonged illegal occupation of the West Bank and a ruling by the ICJ that the Israeli occupation violated a broad range of human rights treaties.\(^81\) The People’s Republic of China and the Russian Federation continue to supply large quantities of arms and ammunition, aircraft and other military equipment to the Sudan. This occurs despite the embargo on ‘arms and related materiel of all types’\(^82\) and ‘technical training or assistance related to the provision, manufacture, maintenance or use’ of such arms and equipment imposed by the Security Council on non-government groups in 2004\(^83\) and despite evidence that such arms and equipment have been deployed against civilians in Darfur.\(^84\) This

\(^{78}\) Alvarez, above n 75, 389.
\(^{79}\) Ibid citing Prunier and Human Rights Watch.
\(^{80}\) Ibid, 390.
\(^{83}\) Ibid at para 8.
is significant because the five permanent members of the Security Council bear the greatest responsibility for the maintenance of international peace and security. Incidentally, of the five permanent members who enjoy a right of veto, it is notable that the United States, Russia, France and the United Kingdom were, along with Germany, the biggest suppliers of conventional weapons to other states for the period from 2004 until 2008, while China was the largest recipient of arms transfers for this period.85

However, as Joanna Spear notes, internal conflict presents particular challenges as arms embargoes are generally ineffective,86 and light weapons which are often used in internal conflicts are ‘plentiful, cheap, durable, and available through a variety of legitimate and illegitimate sources’.87 The ready availability of small arms and light weapons can ‘fuel conflict, undermine peace and development programs and exacerbate human rights violations’.88 Spear’s suggestion that there needs to be tighter state control of transfers of light weapons and, consistent with Boutros-Ghali’s call for an early warning system,89 a stronger focus not only on monitoring the activities of governments, but also, greater attention to monitoring the formation, training and arming of

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87 Ibid, 389.
militia groups and the ‘purchase, deployment, and use of weapons by sub-state groups’\textsuperscript{90} deserves consideration.

International law does have the capacity to change to ensure that it maintains its relevance. This is evidenced by changing conceptions of the rights and responsibilities of sovereign states. It is also evidenced by the fact that states generally continue to support the prohibition of the use of force and this has helped to foster international co-operation and prevent major inter-state conflict. International law has also moved to overcome jurisdictional limitations on investigation and prosecution of crimes such as genocide, war crimes and crimes against humanity committed in the context of intra-state conflict.\textsuperscript{91} Further, despite its flaws, and in particular critical shortcomings in terms of operating procedures, the use of the veto and the representativeness of the Security Council, the United Nations, working in co-operation with regional organisations, is the most appropriate vehicle through which the international community can develop and pursue more effective strategies to deal with challenges to international peace and security.

The five permanent members of the Security Council enjoy a position of immense privilege. However, this position of privilege is also attended by a responsibility to act in the interests of the organisation. Active support by members of the Security Council for states that demonstrate contempt for fundamental principles of international law undermines the credibility of the United Nations. Rather than focus on an ‘emerging’ right of humanitarian

\textsuperscript{90} Spear, above n 86, 400 and see generally 399-403.

\textsuperscript{91} Cassese, above n 13, 336-344.
intervention which does not appear to have strong state support, perhaps it would be better to direct more energy towards reforming the United Nations. In particular, more attention should be directed towards strengthening the commitment and capacity of the UN to develop more effective and holistic approaches to the promotion of human rights, conflict prevention and conflict resolution. This would require the financial, moral and material support of all member states of the United Nations. Ideally it would also help to address some of the critical questions relating to the legitimacy of international law.
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