International Law and some Contemporary Problems of the Use of Force.

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One of the most important but also one of the most controversial areas of international law is the legal regulation of the use of military force. The nature, content and effectiveness of this domain of international law expresses, much more clearly than any other branch, the very nature of international law. One of the most prominent 20th century international lawyers, Louis Henkin, wrote, 'Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[2] This observation is true - almost all nations almost all of the time also observe the principle prohibiting the use of force and the threat of force in international relations. However, the use of military force between states belongs to what one may call 'low probability-high consequence events', and therefore every use of military force, even if relatively minor, has almost incomparable negative consequences in terms of human lives lost, properties and livelihoods destroyed, refugee flows created and all kinds of miseries increased. Therefore, a greater observance and respect for the principle of the non-use of force in international relations remains one of the most important tasks of international law and international lawyers.

From the right to war to the prohibition to use military force

Thucydides' *History of the Peloponnesian War* demonstrates a complete absence of any legal (or even legal-moral-religious) restrictions on the recourse to war in the Ancient world. As Thucydides writes, 'the Athenians and the Peloponnesians began the war after the thirty-year truce' since 'Sparta was forced into it because of her apprehensions over the growing power of Athens.'[3] Such an explanation for going to war sounds not only familiar but eerily contemporary. There had been a change in the balance of power in Ancient Greece favouring Athens, which caused Sparta to ally with smaller Greek city-states, forming the Peloponnesian League to militarily counter the Delian League as led by Athens. But differently from today's or even from yesterday's world, Greek city-states did not need any justifications for their recourse to arms. Athenians believed it to be 'an eternal law that the strong can rule the weak', as 'justice never kept anyone who was handed the chance to get something by force from getting more.'[4] Athenian ambassadors explained to the Melians (Melos – a small island in the Aegean Sea) that 'those who have power use it, while the weak make compromises. Given what we believe about the gods and know about men, we think that both are always forced to dominate everyone they can. We didn't lay down this law, it was there — and we weren't first to make use of it. Each of us must exercise what power he really thinks he can.'[5] The most significant difference, which also testifies to the progress made by mankind, is that today a threatening change in a balance of power is not in and of itself a good enough cause to go to war. Other justifications have to be found.

Adam Watson writes that 'warfare was not considered reprehensible in the ancient world. Indeed, the ability to decide when to go to war was the hallmark of independence, for a king or city corporation'.[6] The words 'emperor' and 'empire' did sound glorious indeed. For the Romans, any war, if duly declared, would then be 'just' as well as 'pious'.[7] Starting from St Augustine of Hippo (354-430), through Thomas Aquinas (1225-1273) to Spanish theologians-philosophers-lawyers Francisco de Vitoria (1483-1549) and Francisco Suarez (1548-1617), different just war theories tried to limit the recourse to war (just war should have a just cause, the right authority, the right intention and be the last resort). After Emerich de Vattel (1714-1767), positivism gradually started to prevail in international law, and the differentiation between just and unjust wars based on religious laws or the laws of nature (human nature or the nature of the state) lost its importance. As Vattel, whose book Droit des gens was on the desk of every diplomat for a century or more[8], wrote, 'it belongs to each nation to judge whether her situation will admit of pacific measures, before she has recourse to arms'.[9] Although this was not a return to the naked

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[2] L. Henkin, How Nations Behave: Law and Foreign Policy, Columbia University Press, 1979, p. 47.

[3] Thucydides, *The Peloponnesian War*, W. W. Norton & Company, 1998, pp. 11–12

[4] *Ibid.*

[5] *Ibid.*

[6] A. Watson, *The Evolution of International Society*, Routledge, 1992, p. 10

[7] A. Nussbaum, *A Concise History of the Law of Nations* (revised edn.), Macmillan, 1964, p. 11.

[8] P. Allott, *The Health of Nations: Society and law beyond the State* (Cambridge University Press, 2002), p. 416.

[9] E. Vattel, *Droit des gens: ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758); *English translation used The Law of Nations, or the principles of natural law applied to the conduct and the affairs of nations and of sovereigns*, B. Kapossy & R. Whatmore (eds), Liberty Fund, 2008, Book II, xviii, & 335.

power politics of Ancient Greece, it was only thinly veiled power politics where any offense, real or perceived, may have sufficed to justify the use of military force. Even under the international law of 'civilised nations' states could legitimately use military force for a wide range of purposes. The right to resort to arms was an important attribute of state sovereignty. In the nineteenth century, the only limitation on the use of force by a state was the requirement that there should have been a previous violation of practically any right of that state. The offended state was the only judge in its own case, and any violation could give rightful cause to use military force to restore justice and punish the offender. Ian Brownlie writes that:

> The right of war, as an aspect of sovereignty, which existed in the period before 1914, subject to the doctrine that war was a means of last resort in the enforcement of legal rights, was very rarely asserted either by statesmen or works of authority without some stereotyped plea to a right of self-preservation, and of self-defence, or to necessity or protection of vital interests, or merely alleged injury to rights or national honour and dignity.[10]

For example, in 1914 during the Vera Cruz incident, which was triggered by the arrest of several crewmembers from the USS *Dolphin* by Mexican authorities, the United States used military force against Mexico when Mexican authorities refused to honour the US flag with a 21-gun salute as an official apology.[11] Similarly, Great Britain and Germany used gunboats to force Venezuela to pay its debts to nationals of these states.[12]

Although the idea of a world without wars has already existed for hundreds of years,[13] the first attempts at legal limitations on the use of force are no more than a century old. The 1907 Hague Peace Conference adopted the Convention Respecting the Limitation of Employment of Force for the Recovery of Contract Debts, which provided that there should be no recourse to armed force unless the debtor state should refuse submission to arbitration or should fail to carry out the arbitration award (the Convention never entered into force).[14] The so-called Bryan Treaties that the United States concluded with various states in 1913-1914 established a 'cooling off' period, during which it was prohibited to use military force.[15]The Covenant of the League of Nations purported to put some further brakes on the right of states to use military force.[16] Finally, the Kellogg-Briand Pact of 1928 outlawed 'war as an instrument of national policy'.[17] However, it was not so much the shortcomings of these legal documents as the political realities that led to the Second World War, after which the members of the victorious coalition created the United Nations, whose main task was meant to be to put an end not only to wars but also to any unilateral use of military force.

The current UN Charter paradigm concerning the use of force can be called normative positivism, since it is based on the consent of states and not upon what states (or at least the most powerful of them) always do in practice. It is normative since it is not premised on the actual practices of states. It is positivist since it does not make distinctions between just, unjust, more justified and less justified causes for the use of military force.

The UN Charter paradigm on the use of force

Article 2 (4) of the UN Charter reads, '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'. This means that not only is the use of military force prohibited, but so is the threat to use such force. The Charter makes only two express exceptions to this prohibition: the use of military force in self-defence if an armed attack occurs (Article 51), and as a collective security measure authorised by the UN Security Council in cases of threats to international peace and security (Articles 39 and 42). However, notwithstanding, or maybe because of, its brevity, Article 2(4) has raised some heated discussions and doubts. First, as the article does not clarify what kind of force is prohibited, some authors and even states have tried to read economic and political pressure into the definition of force as prohibited by Article 2(4). However, it is clear from the *travaux preparatoires* of the UN Charter, as well as from the interpretations given by the majority of states to the content of this article, that its prohibition covers only the use, or threat of use, of military force. This, of course, does not mean that economic or political pressure is always lawful under international law; it only means that Article 2(4) does not cover such pressure. Second, as Article 2(4) singles out for special protection the above-mentioned three factors (territorial integrity, the political independence of states, and uses of force otherwise inconsistent with the purposes of the United Nations), certain authors, especially some American ones, have

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[10] Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1963), p. 41.

[11] *Ibid*. pp. 55-65.

[12] *Ibid*. p. 75.

[13] See, e.g., Abbe de Saint-Pierre, *Projet pour rendre la paix perpetuelle en Europe* (1713); E. Kant, *Toward Perpetual Peace* (1795).

[14] See, Nussbaum, *Op. cit*., p. 217.

[15] Brownlie, *Op.cit*., p. 23.

[16] *Ibid*. pp. 55-65.

[17] *Ibid*. p. 75.

tried to argue that if the use of force does not breach any of them (e.g., the use of force for the sake of the protection of human rights or the promotion of democracy) such use of force may be lawful. We will discuss some of these controversial issues later in this article, but here it suffices to say that such arguments express a minority view and are not accepted by most states. Although no state has overtly referred to such interpretations of Article 2(4) as a defence when using military force in violation of international law (e.g. NATO against Serbia over Kosovo in 1999, or Russia in annexing the Crimea in 2014), it is probable that some states may have believed that their behaviour did not breach either the letter, nor the spirit of Article 2(4). There has also been an increasing number of scholarly literature about the need for (or dangers of) the revival of medieval just war doctrines and their adaptation to the realities of the 21st century.[18] Bernard Badie, for example, observes that today 'France is at war almost everywhere, fighting not just enemies but simply "criminals" in "just wars" – the doctrine that had already fallen into desuetude but has now become resuscitated'.[19] Recourses to 'just war' theories have, of course, various causes and reasons, but usually the most ardent adherents of these theories have been those who have believed in the exclusivity of their social, political and economic models, who have been sure that their cause, in comparison with different causes, is so impartial, so just and so unbiased that it justifies the resort to military force. In addition, of course, one must have enough power in order to believe that one is able to prevail in a 'just war'. For the weak, 'just war' doctrines are of little practical use, if only as justifications of their acts of desperation.

The prohibition of the use of force is one of the few imperative *(jus cogens)* norms of international law, from which states cannot derogate even with mutual consent. Although it may be surprising, it is nevertheless true that the prohibition of the use of force in international relations became a legally binding norm relatively recently. As a legal principle, it started its evolution after World War I and matured as a result of World War II; it was enshrined in the United Nations Charter and its importance has not diminished since, notwithstanding its overly frequent breaches. As the International Court of Justice put it in the *Nicaragua case*, 'If a State acts in a *way prima* facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.[20] Frederic Kirgis, commenting on the relationship between practice and *opinio juris* in the Nicaragua case, proposes the rule of a sliding scale:

> On the sliding scale, very frequent, consistent state practice establishes customary rule without much (or any) affirmative showing of an opinio juris so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, stronger showing of an opinio juris is required. At the other end of the scale a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.[21]

Like Kirgis, Oscar Schachter concludes that 'issues of proof of custom involve an inverse (and some might say, dialectical) relation between evidence of State practice and of *opinio juris*. The cases show that a strong finding of *opinio juris generalis* tends to reduce the required proof of State practice'[22] and 'conversely, a record of widespread and consistent practice revealing a pattern of claim and response has given rise to inferences of *opinio juris*, without any further evidence'.[23] However, Schachter goes further than Kirgis in his explanation of this phenomenon. He emphasises the differences between the rules which, for instance, determine territorial limits, relate to the right of passage and deal with the modalities of treaty relations on the one hand, and the rules against aggression, the rules outlawing genocide, the killing of PoWs, torture and large-scale racial discrimination, on the other. He is right that, for example, 'the rules against aggression and on self-defence are not just another set of international rules'.[24] The special status of some rules has been expressed by characterising such rules as *jus cogens* or *erga omnes*. And Schachter concludes that 'it is that difference in their normative claim, reflected in the *opinio juris*, that underlies decisions to recognize their continued customary law status even if State practice in regard to them is not uniform or consistent'.[25]

We may conclude that the relationship between the objective and subjective elements of practice varies in different areas of international relations. Legal norms (usually these are general principles), which govern relatively invariable (structural) relations, can be changed or annulled only together with a radical change of the structure of an international society. Value-loaded norms can survive notwithstanding contrary 'actual' practice because of the strong support of *opinio juris generalis*,

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[18] See, e.g., W. V. O'Brien, 'Desert Storm: A Just War Analysis', *St. John's Law Review*, 1992, vol. 66, Issue 3; G. R. Lucas Jr., '"New Rules for New Wars": International Law and Just War Doctrine for Irregular War', *Case Western Reserve Journal of International Law*, 2011, Vol. 43, Issue 3. A very interesting and detailed study of 'just war' problems can be found in *La retour de la guerre juste: Droit international, épistémologie et idéologie chez Carl Schmitt* by Celine Jouin (Editions de l' Ecole des études en science sociales, Librerie philosophique J. Vrin, 2013).

[19] B. Badie, *Nous ne sommes seuls au monde: un autre regard sur l' 'ordre international* ', La Dévouverte, 2016, p. 215.

[20] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) , ICJ Decision of 27 June 1986, para. 186.

[21] F. Kirgis, 'Custom on a Sliding Scale', *The American Journal of International Law*, 1987, p. 149.

[22] O. Schachter, 'Entangling Treaty and Custom', in Y. Dinstein (ed.), *International law in a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), p. 731.

[23] *Ibid*.

[24] *Ibid*., p. 734.

[25] *Ibid*.

while value-neutral norms need much more consistent 'actual' practice for their formation as well as survival. The more consistent and general the practice, the lower the necessity to look for the subjective element confirming the acceptance of such practice as legally binding. And on the contrary, strong *opinio juris generalis* is able to compensate the lack of consistency in 'actual' practice.

In international society, there are different categories of relations: variable and relatively invariable relations; relations based on values where compromises may be rare and difficult to make and relations based mainly on interests, which often differ (like, for example, the interests of states with long coastlines and those of landlocked states), but where compromises (sometimes as package deals) are not only necessary, but quite possible. International law does not develop and function in the same way in these different areas. Some basic principles of international law reflect the relatively invariable structure of international society. The principle of the sovereign equality of states certainly belongs to this category. *Pacta sunt servanda* and the principles of the non-use of force and the non-interference in the internal affairs of states may also come close to this category, though not every part of their content is so invariable. The principles reflecting the relatively invariable structure of international society can be violated but their violation, even if frequent, cannot abolish them without undermining, or even bringing down, the very foundations of existing international society. Such principles may, of course, change over time, but they can cease to exist only when the basic characteristics of the current international system change (such a change took place when the medieval feudal multi-layered European system was replaced by the Westphalian international system).

Although some international lawyers have claimed that due to the inefficiency of the UN collective security system, the Charter prohibition of the use of force has become redundant,[26] no state has made such a claim. While justifying their own transgressions, states are usually 'appealing to exceptions or justifications within the rule', and when condemning the use of force by others, they confirm their own adherence to the principle.

The right to self-defence

Article 51 of the UN Charter provides:

> 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.

The right to self-defence is the only right in the UN Charter that is called "inherent". On the one hand, such a reference to the inherent, inalienable, even natural character of this right shows its importance. Indeed, if states were not able to lawfully protect themselves against armed attacks, their very right to existence would be questionable. One the other hand, this formulation has led to some heated discussions, and opened doors to wide interpretations and even abuses.

Article 51 requests that states that use military force in self-defence report all the measures taken in the exercise of this right to the Security Council. The Council then decides what measures to take 'in order to maintain or restore international peace and security'. If the Council, say, authorises economic sanctions against an aggressor as a measure necessary to restore peace and security, does this mean that the victim state alone or together with its allies is barred from using military force in self-defence? Such an ambiguous legal situation existed in the period between the Iraqi invasion of Kuwait on the 1st of August 1990 and the 29th of November 1990, when the Security Council adopted resolution 678 authorising the 'use of all necessary means' (a euphemism implying the right to use military force) to liberate Kuwait and implement all the relevant Security Council resolutions. Could Kuwait and its allies start using military force in self-defence before the deadline given by the Council to Iraq to withdraw from Kuwait (the 15th of January 1991)? Such an ambiguous legal situation also caused the dispute over the character of Operation Desert Storm, which led to the liberation of Kuwait. Was it an operation of collective self-defence or an operation of collective security? In my opinion, it had characteristics of both.

Moreover, the Security Council may find that a state that is allegedly using force in self-defence is wrong in its assessment of its actions, that instead of lawfully using force in self-defence, it is in breach of the prohibition to use force. The possibility of facing such a situation means that states are not the final arbiters on matters of lawfulness regarding the use of force even in self-defence and, therefore, the right to self-defence may not be so inalienable after all.

However, the term 'inherent' in the context of self-defence has caused even more heated academic discussions and much more serious practical consequences in respect of so-called anticipatory self-defence, which is sometimes also called pre-emptive or even preventive self-defence. In short, the problem is the following: is it necessary for a victim of an armed

[26] See, e.g., T. Franck, 'Who Killed Article 2(4) or Changing Norms Governing the Use of Force by States', *The American Journal of International Law*, 1970, Vol. 64; but see also L. Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', *The American Journal of International Law*, 1971, Vol. 65.

attack to wait until, figuratively speaking, the bombs and missiles of the attacker begin to explode, or is it legally justifiable to take counter-measures involving military force at some earlier point, for example, intercepting missiles or bombers before they reach their targets?

In the positivist era of international law, the right of anticipatory self-defence was grounded on the formula put forward by the American Secretary of State Daniel Webster in the Caroline incident of 1837. In that case, the British authorities situated in Canada – at that time a British colony – destroyed the US steamboat *Caroline* while she was anchored on the American side of the Niagara river, reason being the *Caroline* was used to supply rebels against the British rule in Canada with medicaments, ammunition and other goods. The United States disagreed with the British government as to the legality of the action. Secretary of State Daniel Webster wrote to Mr Fox, the British Minister to Washington, that it had to be demonstrated that it was necessary to use force in a self-defence that was 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation' and that the act 'justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it'.[27] It seems to be possible to generalise all these criteria by the terms of necessity, immediacy and proportionality. Every use of force, even in self-defence, in order to be lawful, has to be necessary (e.g. it is possible that a limited military incursion by the forces of state A into the territory of state B remained without adequate immediate response; in such a case, state B is not entitled to respond *ex post facto* militarily against state A; this would breach both the requirements of necessity and immediacy), exercised within a reasonable time *period and proportionate to the situation that calls for the use of force*. Here clarification may be necessary: Sometimes it is assumed that there should be proportionality between the scale of an armed attack and the scale of the defensive response. It may well be the case, but not always. For example, in order to expel Iraq from the occupied Kuwait in 1991, the Coalition needed significantly more massive force than Saddam Hussein had needed in August 1990 to occupy Kuwait. The requirement of proportionality of the response of the Coalition relates to the task of liberating Kuwait, which, taking account of the strength of the Iraqi army, necessitated massive use of air and land power by the Coalition.

Analysing self-defence modalities, Yoram Dinstein distinguishes between 'on the spot reaction', 'defensive armed reprisals', responses to an 'accumulation of events' and 'war of self-defence', all different modalities of the use of force that can be resorted to depending on the character of the armed attack that has triggered the right to use force in self-defence.[28] The legality of these various modalities of self-defence is dependent on the character of the armed attack.

Thus, whilst the *Caroline* incident evidences that the occurrence of an armed attack is not necessary to justify the exercise of self-defence, it qualified the right of pre-emptive action with several rather strict conditions in order to be legally accepted. According to this formula, pre-emptive action is only lawful when the danger is imminent in a way that leaves the defending state no time for deliberation or to choose an alternative course of action. This implies that the danger can be identified credibly, specifically and with a high degree of certainty.[29]

The Israeli use of force in 1967 in the 6-day war against Egypt and other Arab states seems to be an example of an anticipatory use of force in self-defence as per the terms of the *Caroline case*, customary international law and, it is possible to argue, of Article 51 of the UN Charter, since the Charter has to be interpreted in the context of existing customary international law. The withdrawal of UN peacekeepers (UNEF) at the request of President Gamal Abdel Nasser of Egypt, the mobilisation and movements of Egyptian and other Arab armed forces, and last but not least, the blockade of the Straits of Tiran for Israeli navigation, seem to indicate, with high probability, that an attack on Israel would have been imminent. Israel, in the UN, referred to the blockade of the Straits of Tiran as an act of war, and therefore didn't raise the defence of anticipatory self-defence. However, it seems that if Israel were relying on this fact alone, its response may have breached the requirement of proportionality. The Israeli response, surely, was much more massive than, say, an on the spot reaction in the Straits of Tiran would have been and can be justified as an act of anticipatory self-defence.

Developments related to the 'war on terror' have given support to the two hitherto somewhat controversial interpretations of self-defence: it is now more widely accepted that there is room for anticipatory self-defence as well as for what Oscar Schachter, Yoram Dinstein and some others have called defensive reprisals, i.e. reprisals whose main purpose is not to punish (so-called *punitive reprisals* are certainly prohibited by international law). Or rather, in responses to terrorist attacks these two wider interpretations of the lawful use of force go hand in hand. Effective responses to typical terrorist pinprick attacks have to be carried out in most cases either *ex post facto* or in anticipation of new probable attacks from the same source. That is why such responses can be characterised both as defensive reprisals or acts of anticipatory self-defence.

Often military responses to terrorist attacks have to draw a fine balance between these two controversial modalities of the use of military force in self-defence—the Scylla of anticipatory self- defence and the Charybdis of reprisals. As Gregory Travalio writes, 'if the anticipated action by terrorists is not sufficiently imminent, the right to use force is not available for purposes of deterrence. On the other hand, if past terrorist actions by a group are too remote in time, the response by force is likely to be characterized as an illegal reprisal'.[30] Because terrorist warfare usually consists of a series of relatively

[27] 'The Caroline', J, Moore, 2 *Digest of International Law*, p. 412 . See also, R.Y. Jennings, 'The Caroline and McLeod Cases'. 32 *American Journal of International Law* (1938).

[28] Y. Dinstein, *War, Aggression, and Self-Defence, 2nd edition* (Cambridge University Press, 1994), pp. 213-245.

[29] T. Franck, "Terrorism and the Right of Self-Defence", *The American Journal of International Law*, 2001, vol. 95, p. 841

[30] G.M. Travalio, 'Terrorism, International Law, and the Use of Military Force', *Wisconsin International Law Journal*, 2000, Vol. 18, p. 165.

small-scale attacks that often need to be dealt with by measures that combine some elements of retaliation (since a response comes after the attack) and anticipation (since a response comes in anticipation of new attacks), the exercise of the right to self-defence against terrorist attacks requires at least some (sometimes quite considerable) practical use of the concepts of a anticipatory self-defence and defensive reprisals.

However, there is a different interpretation of the right to self-defence, which is sometimes called the 'Bush doctrine' or 'preventive self-defence'. In response to its perception of a fundamentally changed international situation in the wake of the 9/11 attacks against the United States, in 2002 the USA adopted a new *National Security Strategy* that stated, 'While the US will constantly strive to enlist the support of international community, we will not hesitate to act alone if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country'.[31] What the 'Bush Doctrine' implies is that the traditional conditions of anticipatory self-defence and the requirement of clear demonstration of the threatening intentions of the adversary are no longer tenable, since an attack by terrorists using weapons of mass destruction could be launched anytime, anywhere, without warning. Rather than wait for that to happen or waiting for the last moment, which would reduce the chance of forestalling such an attack, states have the right to use force preventively to eliminate such a threat in its early stage. Thus, the strategy would be better described as 'preventive' rather than 'pre-emptive' self-defence, because the aim is to prevent the materialisation of generalised threats, rather than to avert an identified, foreseeable and imminent threat.[32]

Michale Reisman has defined preventive self-defence as 'a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that *is not yet operational* and hence is *not yet directly threatening*, but which, if permitted to mature, could be neutralized only at a high, possibly *unacceptable*, *cost*. It is not hard to imagine circumstances in which PSD [preventive self-defence] might appear justified. Yet if universalized, the claim, by increasing the expectation and likelihood of violence, could undermine minimum order'.[33] German scholar Michael Bothe believes that to adapt the right to self-defence to these new perceived threats is unacceptable, would lead to vagueness and increase the risk of abuse. He argues:

> If we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts, such as the just war concept, to justify military force we are stepping on a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal.[34]

This seems to be the dominant position within international legal scholarship. To clarify the differences between anticipatory self-defence, which under certain strict conditions is arguably lawful, and preventive self-defence, which is contrary to existing international law, it is possible to compare two uses of military force both involving Israel: the 6-day war of June 1967 (discussed shortly above), which many international lawyers have considered to be within the frame of legitimate self-defence, and the 7th of June 1981 Israeli attack on the Osirak nuclear centre in Iraq, which in the eyes of most international lawyers, as well as those of the UN Security Council, was a clear breach of international law. In its Resolution 487 of 19 June 1981, the Security Council strongly condemned 'the military attack by Israel in violation of the Charter of the United Nations and the norms of international conduct'.[35]

The concept of self-defence is inherently linked to the concept of an armed attack. The mere possession or attempted acquisition of nuclear weapons or other weapon systems cannot be equated with an armed attack, notwithstanding how wide an interpretation we give the concept of 'armed attack'. The proliferation of weapons of mass destruction (WMD) and self-defence are phenomena from different legal domains or branches of international law. The proliferation of nuclear weapons may be considered a threat to international peace and security. When we talk about possible use of force against nuclear proliferation, we are not in the domain of self-defence; we are in the domain of arms control, or in the domain of threats to international, including regional, peace and security, and this is a matter for the UN Security Council to decide. Such use of military force is not only beyond the pale of international law but it is also dangerous in political and military terms. Andrea Armstrong and Michael Reisman have observed that Washington's claims of the pre-emptive (what I would prefer to call preventive) use of military force have copycat or mimetic effects. They correctly write that 'although the doctrine of the United States [the Bush doctrine] not unreasonably aims at enhancing its own security against an adversary apparently impervious to deterrence, wider adoption of a legal policy of pre-emptive self-defence may actually undermine international security. States simply appropriate the language of pre-emption to fit their individual security concerns and the strategies they craft to maintain their security – essentially becoming „free riders" in the international legal system'. [36]

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[31] *The National Security Strategy of the United States of America*, September 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf.> [Hereinafter National Security Strategy]

[32] Sapiro, M. 'Iraq: The Shifting Sands of Pre-emptive Self-Defence', 97 *American Journal of International Law*, 2003, p 599; Falk, R. 'What Future of the UN Charter System of War Prevention', 97 *American Journal of International Law*, 2003, p 598

[33] M. Reisman, Self-defense in an Age of Terrorism, ASIL Proceedings, 2003, p. 142.

[34] M. Bothe, 'Terrorism and the legality of pre-emptive force', *The European Journal of International Law*, 2000, Vol. 14, No. 2, p. 227.

[35] SC Res. 487 (June 19, 1981).

[36] A. Armstrong, M. Reisman, 'The Past and Future of the Claim of Pre-emptive Self-Defense', *The American Journal of International Law*, 2006, Vol. 100, p. 549.

Moreover, an empirical study carried out by Tai-Heng Cheng and Eduardas Valaitis shows that the US's large scale uses of force in the 'war on terror' have not observably reduced aggregate attacks against the United States and have likely increased hostility against it.[37] This means that not only has the United States become less secure as a result of the wide use of military force abroad in its 'war on terror' but also the existing legal restrictions on the recourse to military force have become undermined. Jean-Yves Le Drian, the French Minister of Defence, adds a practitioner's touch to the matter, arguing that we should not accept 'the notion of preventive war – the notion lacking juridical precision, which was introduced a dozen of years ago by the American administration then in office and whose destabilising effects we feel today. ... It is clear that the obsession with absolute security, leading to interventions in anticipation and resting on the idea of preventive war, has had serious consequences'.[38]

The use of military force in self-defence against terrorist attacks shows that the drawn dividing line, as in the example of the International Court of Justice in the *Nicaragua Case* between armed attacks and "less grave forms" of the use of force,[39] is no longer tenable, if it ever was. Yoram Dinstein, referring to J.L. Hargrove and J.I. Kunz, has rightly emphasised that 'in reality, there is no cause to remove small-scale armed attacks from the spectrum of armed attacks. Article 51 in no way limits itself to large, direct or important armed attacks.'[40] The same criticism also applies to Article 3(g) of the Definition of Aggression, which emphasises that actions by armed bands, groups, irregulars or mercenaries 'sent by or on behalf of a state' that carry out acts of armed force against another state 'of such gravity as to amount to an actual armed attack conducted by regular forces' could be considered as acts of aggression.[41] Why only attacks of such gravity? Why this difference? It falls on the requirement of proportionality between a legitimate purpose for the use of force, and the character and scale of force necessary to achieve that purpose, to hopefully assure that relatively minor incidents involving the use of military force do not escalate (sometimes unintentionally) into whole-scale wars.

Finally, the necessity to use military force against terrorist attacks has raised the issue of the place of non-state actors in international relations generally, and particularly in the law regulating the use of military force in international relations. Until 9/11 the issue had been rather mute. Article 51, determining 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',* does not, however, say anything about who may or should be the author of such attacks in order to invoke the right to use military force in self-defence. In the aftermath of the Second World War, when the UN Charter was drafted, it was understood even without explicit statement that it must be another state that must be the author of an armed attack. However, even before 9/11, it had become clear that some non-state actors had acquired the capabilities to use military force against states that in their scale and *modus operandi* amounted to armed attacks as per the terms of the UN Charter and customary international law. 'It is by now', as the former Legal Advisor of the British Foreign Office Daniel Bethlehem writes, 'reasonably clear and accepted that states have a right of self-defence against attacks by non-state actors – as reflected, for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States'.[42]

However, as non-state terrorist organisations operate from and have their bases on the territories of states, the issue of the role of such states arises both in terms of their responsibility for the behaviour of non-state actors and the right of victim states and their allies (or the world community as a whole) to take coercive measures against such states. Of course, in the first place, it is the responsibility of all states to see to it that their territories are not used by non-state actors, or by third states for that matter, to attack other states. A failure to do so may be due either to the fact that they are unwilling or unable to do so. Sometimes there may even be a combination of both of these factors. Such may have been the situation, for example, in Afghanistan in 2001 when the Taliban government was not only unable but also unwilling to take all necessary measures to stop al-Qaida from attacking the United States.

In 2012, in *The American Journal of International Law*, Daniel Bethlehem published an article where he enumerated 16 principles relevant to the scope of a state's right of self-defence against an imminent or actual armed attack by non-state actors. In my opinion, principles 9 through 11 concerning the position of states, the territories of which are used by non-state actors for the purposes of armed activities against third states, correspond indeed to the law governing the use of military force, as well as rules of state responsibility, and are not at all controversial.[43] They state as follows:

9. States are required to take all reasonable steps to ensure that their territory is not used by non-state actors for purposes of armed activities—including planning, threatening, perpetrating, or providing material support for armed attacks—against other states and their interests.

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[37] Tai-Heng Cheng, E. Valaitis, 'Shaping an Obama Doctrine if Pre-emptive Force', *Temple Law Review*, 2009, vol. 82, p. 737.

[38] J-Y Le Drian, *Qui est l'Ennemi?* (Les éditions du Cerf, 2016), Empl. 139.

[39] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, I.C.J. Reports 1986, para. 191.

[40] Y. Dinstein, War, Aggression and Self-Defense (Cambridge University Press, 2001), p. 192.

[41] See 1974 U.N. Definition of Aggression, 29 U.N. GAOR, Supp. 31, art. 3(g), U.N. Doc. A/RES/3314 (XXIX) (1975).

[42] D. Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors', *The American Journal of International Law*, 2012, vol. 106, p. 5.

[43] Ibid.

10. Subject to the following paragraphs, a state may not take armed action in self-defence against a non-state actor in the territory or within the jurisdiction of another state ("the third state") without the consent of that state. The requirement for consent does not operate in circumstances in which there is an applicable resolution of the UN Security Council authorising the use of armed force under Chapter VII of the Charter or other relevant and applicable legal provision of similar effect. Where consent is required, all reasonable good faith efforts must be made to obtain consent.

11. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding with the non-state actor or is otherwise unwilling to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defence with no other reasonably available effective means to address an imminent or actual armed attack. In the case of a colluding or a harbouring state, the extent of the responsibility of that state for aiding or assisting the non-state actor in its armed activities may be relevant to considerations of the necessity to act in self-defence and the proportionality of such action, including against the colluding or harbouring state.

There is, however, a problem with principle 12, which allows the use of military force on the territory of a state where non-state actors are operating *without* the consent of that state if that state is unable (though willing) to prevent these non-state actors of committing armed attacks against third states. First of all, this does not correspond to state practice, meagre though it may be. For example, after 9/11 the United States did not rush to bomb Afghanistan, but demanded that the Taliban, which moreover was recognised as the legitimate government of Afghanistan only by three states – Pakistan, Saudi Arabia and the United Arab Emirates (UAE), 'Deliver to United States authorities all the leaders of Al-Qa'ida who hide in your land. Release all foreign diplomats, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating'.[44] Only when the Taliban rejected this ultimatum, did Washington launch *Operation Enduring Freedom*. The rejection of these demands by the Taliban government made the Taliban an accomplice of Al-Qaida; it demonstrated the Taliban's unwillingness to put an end to Al-Qaida's terrorist activities from within the territory of Afghanistan.

If a state that is unwilling to take effective measures to prevent its territory from being used by non-state actors that attack third states, it becomes a harbouring or accomplice state, i.e. a state that in itself is in breach of the prohibition to use military force. Therefore, it has to bear consequences for its illegal behaviour. However, this is not the case with a state that is unable to prevent its territory from being used by non-state actors against a third state. For example, a substantial part of the territory of Syria was occupied by ISIL – a terrorist entity that had emerged and spread from the territory of Iraq, and that was operating not only on the territory of these two countries but also attacked other states, including those in Europe. However, the coalition led by the United States did not seek the consent of the Government of Syria, and did not even inform the latter before using airpower against ISIL on Syrian territory. And though the coalition did not use force against governmental forces (this would have been an armed attack under Article 51 of the UN Charter), but against ISIL, the fact of not even seeking the consent of the Government of Syria amounts, at least, to interference in the internal affairs of Syria.

Of course, one may say that in the eyes of the Washington led coalition, the Government in Baghdad had lost its legitimacy. Moreover, they had all earlier recognised the National Coalition for Syrian Revolutionary and Opposition Forces as the sole representative of the Syrian people. This, however, is pure geopolitics thinly covered by moralising preaching that has nothing to do with international law. Above we already dealt with the dubious case of the use of chemical weapons during the civil war in Syria, which was attributed to the forces of President Bashar al-Assad immediately and without any serious proof by Western politicians and media. The world was lucky that due to Russian diplomatic efforts Western intervention against Syria was avoided and Syria's chemical weapons arsenal destroyed. Renaud Girard is right that 'if the Russians would not have intervened and Damascus would have fallen, a genocide against the Alawites would have been unleashed and the Christians would have been expelled, while their churches would have been in flames'. And he blames French diplomacy of naively believing in the myth of 'the moderate opposition'. Although there were such people as well, they were not in Syria but 'in hotels of London or Geneva'.[45]

Unilateral, i.e. not authorised by the UN Security Council, support for opposition forces, labelling them as democratic movements or freedom-fighters, the demonisation of incumbent governments (calling them 'regimes' instead) and threats to use or the actual use of direct or indirect military force is a very slippery slope. The case of Syria shows that such policies may instead give support to terrorist groups. Moreover, as the propaganda machine rolls forward, it becomes almost impossible to put the whole machine in reverse gear - backpedalling, even if necessary, is not an easy option, as no state is ever prepared to admit: sorry, we were wrong.

Although the war in Syria, as we have shown above, was to a great extent caused and is more so sustained by geopolitical reasons and the ambitions of regional as well as global actors, there are also some important legal considerations as to the

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[44] Address Before a Joint session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 *Weekly Compilation of Presidential Documents*, 1347 (20 Sept. 2001).

[45] R. Girard, 'La diplomatie française doit en finir avec le néo-conservatisme', *Le Figaro, Vox Monde*, 29 mars, 2016.

role of outside powers and their military in this armed conflict.

After the two terrible terrorist attacks claimed by and attributed to ISIL against the Russian passenger jet over the Sinai on the 31st of October 2015 and the Paris attacks of the 13th of November 2015, the UN Security Council on the 20th of November 2015 unanimously adopted Resolution 2249 (2015) that

> [C]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria.[46]

The Resolution 2249 (2015), though reaffirming 'that terrorism in all forms and manifestations *constitutes one of the most serious threats to international peace and security* and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed', lacks some traditional attributes of resolutions that have been used to undertake military measures against states or non-state actors in the past. It does not refer to Chapter VII of the UN Charter, nor does it 'authorise' the use of 'all necessary means', as it had done on numerous occasions before (e.g., RES. 678 (1990) on Iraq or RES. 1973 (2011) on Libya) but called on Member States 'to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council'. This resolution has been defined by some as an exercise in 'constructive ambiguity', [47] while others believe that Resolution 2249 does not give any new legal authority for using force.[48]

The Resolution of the Security Council of the 20th of November 2015 was the first resolution of the UN Security Council regarding Syria where the permanent members could agree upon measures to be taken against various terrorist groups, quite a few of which had hitherto been under the protective umbrella of their powerful sponsors. As a result of many compromises, it indeed contains some convoluted and sometimes even obscure language that does not follow usual patterns. Moreover, the wars against terrorist groups, including by the coalition led by the United States, as well as by Russia and Iran, were already taking place and it was certainly the fact of Russia stepping in that had provided the impetus for the peace process, if it can be so called. That is why the Resolution confirmed the right of those states that had already been involved in military attacks against ISIL and other terrorist groups as designated by the Security Council, to continue doing so. Authorising something ongoing lacks logic. Moreover, it has to be also said that the term 'calls upon' in the Resolution is in no way weaker than the term 'authorises'. I read it as active encouragement to undertake all necessary measures to defeat designated terrorist groups, while the term 'authorises' is weaker since it makes something, which would otherwise have been illegal, lawful without actively urging states to do anything explicitly. In that respect, the resolution gave both political and legal support to the Russian position, since earlier both the United States as well as France had demanded that Russia hit only ISIL. This was certainly not acceptable for Russia, since the Kremlin's strategy was from the outset based on acting in concert with the ground troops of the governmental forces. This was also the only way to have any sustainable success in the fight against the terrorist groups, including ISIL. Besides, for military strategic reasons it could have indeed been necessary to hit other groups that were fighting governmental forces first and distracting them from attacking ISIL. Moreover, attacking ISIL only from the air, without the ground troops, which would have defeated the terrorists on the terrain and made their reappearance impossible, would have been an almost certainly futile exercise (only the Kurdish forces in Syria had fought in concert with American airpower; from whence came success).

Therefore, I believe that Resolution 2249 had both a political and legal impact by authoritatively confirming not only the right but also the obligation (at least political) of all states that were capable of contributing to the defeat of the designated terrorist groups in Syria to take all necessary measures in order to achieve this end.

It should to be noted that the American led coalition on the one hand, and the Russian Federation on the other, had different, though partly overlapping, legal grounds for using military force in Syria. If the Western powers had used the arguments of self-defence, both individual and especially collective, Russia additionally had the consent (invitation) of the Government of Syria. The American led coalition's use of force is based on the Iraqi Government's letter of the 22nd of September 2014 to the President of the Security Council, in which the Government had sought for international assistance

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[46] http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249 (2015).

[47] EJIL Talk by D. Akande/M. Milanovic, 'The Constructive Ambiguity of the Security Council´s ISIS Resolution,, http://www.ejiltalk.org/the-constructiveambiguity-of-the-security-councils-isis-resolution.

[48] M. Weller, Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self-Defence Against Designated Terrorist Groups, http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-selfdefence-against-designated-terrorist-groups.

against ISIL/Daesh. In this letter, the Iraqi Foreign Minister noted that ISIL posed a direct threat to Iraq and had established a safe haven outside of Iraq's borders; he requested for the US to strike ISIL.[49] Hence, the right of the American led coalition to use force against ISIL in Iraq arose from the request of Iraq and the right to collective self-defence. Moreover, since France was attacked and other Western states threatened by ISIL, it is possible to argue that they also used their right to individual self-defence.

It has to be noted, however, that using military force against ISIL on Syrian territory without any consultation with or consent of the Government in Baghdad, the Coalition was, at least until the adoption of Security Council Resolution 2249, violating the sovereignty of Syria notwithstanding that military force was used on territories not controlled by the Government of Syria and not against the armed forces of Syria. Professor Peter Hilpold is right in observing:

A last brief consideration has also to be made as to the question whether the fragile nature of the Syrian state broadens the scope for any possible intervention. This question has to be answered in the negative. Syria has an internationally recognized government and even if government troops have withdrawn from many regions and are embattled, in others state sovereignty is still in place and foreign intervention is prohibited without authorization by the government or the UN Security Council. In an *argumentum de minore ad maius* it should be remembered that the use of force is even prohibited against de facto regimes or failed states.[50]

Russia, acting upon an invitation from the Government of Syria, was also acting in collective self-defence together with the Government of Syria, as ISIL, besides downing the Russian airplane on the 31st of October 2015, had already for some time been a clear and present danger for Russia. Hundreds of young Russian men and also some women were fighting for ISIL in Syria and Iraq, establishing links with terrorist groups in Russia. Therefore, Russia was also acting in individual self-defence. Due to the request and consent of the Government of Syria, Russia's attacks did not need to be limited to ISIL.

Collective security and the use of force.

Although the UN Security Council has not always worked as it should, it is not the time nor is there reason to weaken the Council further. On the contrary, the Security Council is one of the only existing bodies that reflects, though imperfectly and somewhat outdatedly, the balance of power in the world. Strengthening the Council should not be accomplished by means of abolishing the right to veto, or by-passing the Council in cases of threats to international peace and security, but through the enlargement of its membership and increasing cooperation, particularly between the permanent members of the Council. As long as permanent members see each other more as global competitors and rivals and less as responsible partners (though not necessarily friends), allies or like-minded peoples, who may have different interests and values but who are ready to compromise and bracket their differences to find solutions to the challenges facing humankind, the Council will not function effectively. Therefore, it seems adequate that we also shortly analyse the potential and shortcomings of this collective security mechanism.

Article 39 of the UN Charter provides, 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Further, Article 42 stipulates, 'Should the Security Council consider that measures provided for in Article 41 (i.e., measures not involving use of military force) 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'.

These articles of the UN Charter, and more widely Chapter 7 as a whole, provide for the possibility of the use of military force for the purposes of collective security. Such uses of force have to be decided or authorised by the UN Security Council. For example, in its resolution 678 of the 29th of November 1990, the Security Council authorised 'Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, *to use all necessary means* to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. It is important to note that here the Security Council did not decide or order the 'use all necessary means'; instead, it authorised states individually and collectively to do that. The reason for such a nuance is that the initial intention of the drafters of the UN Charter to create United Nations armed forces, as provided in Article 43 of the Charter, was never realised in practice. Instead, special operations involving relatively lightly armed UN military personnel were invented, whose main task has been to help maintain peace, serving mostly as buffers between conflicting states or factions within the same state, though gradually such operations have become more muscled; they are no longer acting only as passive buffer zones.[51] These operations are called UN peacekeeping operations, and forces participating in them are called peacekeepers. Later, some

[49] http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf

[50] P. Hilpold, 'The Security Council and the Fight against Terrorism: Does SC Resolution 2249 (2015) lead to a more Hobbesian or a more Kantian international society?' (Available at SSRN:http://ssrn.com/abstract=2704467 or http://dx.doi.org/10.2139/ssrn.2704467http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704467)

[51] See, e.g., Kai Michael Kenkel, 'Five Generations of Peace Operations: from the "thin blue line" to "painting the country blue"', *Rev. Bras. Polit. Int*., 2013, 56 (1).

regional organisations, like the European Union, African Union and the Commonwealth of Independent States (CIS), have also resorted to peacekeeping operations. However, where there is no peace to keep but the situation constitutes a threat to international peace and security, the United Nations may have to authorise states either individually or collectively to use all necessary means, including military force, in order to maintain or restore international peace and security.

Chapter VIII of the UN Charter foresees the creation of regional organisations of collective security, and provides for the use of enforcement actions by such organisations. However, Article 53 stipulates that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'. Notwithstanding this clause in the UN Charter, some regional organisations have taken such actions without the Security Council's authorisation (e.g. the ECOWAS – the Economic Community of Western African States – at the beginning of the 1990s in Liberia and Sierra Leone). Moreover, the ECOWAS and the African Union changed their respective constitutive documents in order to provide for such enforcement actions without the Security Council's authorisation.[52] *The African Union (AU)* has formally claimed for itself the right to intervene in Member States in instances of gross human rights violations. In accordance with Art. 4 (h) Constitutive Act of the AU, the organisation may intervene in a Member State pursuant to a decision of the Assembly of Heads of State and Government in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity. In accordance with Art. 7 (1) Constitutive Act of the African Union, the Assembly may take such a decision on the basis of a 2/3 majority. Aside from arguing that the AU would be claiming a 'right of emergency' for itself, it is also arguable that Art. 4 (h) constitutes a collective, *ex ante form of intervention* by invitation. Since the Member States of the AU have given their express consent to military intervention under certain conditions, the use of force would fall outside the scope of the prohibition in Art. 2 (4) UN Charter and not be in violation of the UN Charter. However, this argument raises, in turn, the question whether such an invitation can be extended for an open-ended period of time, or whether it has to be limited to a particular conflict.[53]

The use of force for humanitarian purposes.

In the 1990s, after the collapse of the bi-polar world with its imposed discipline and relative stability, there was an increase in internal conflicts in different parts of the world. Somalia and then even more terribly Rwanda, and also in Haiti and the former Yugoslavia in the Balkans have been the most prominent examples. Such conflicts involved massive human rights violations (even acts of genocide) that often escalated into prolonged humanitarian crises. Some of these tragedies spilled over and constituted threats to regional peace and security, while others, though limited to a single state, like the military coup and its effects in Haiti in 1991, created refugee flows and disturbed public opinion abroad, especially in the nearby United States. As a result, the UN Security Council started adopting so-called Chapter VII resolutions (on Somalia, Haiti, the former Yugoslavia etc.) whereby the Council, having found that certain situations involving massive human rights violations constituted threats to international peace and security, decided to send peacekeepers whose mandate, among other tasks (maintaining or restoring peace, helping find political solutions to the conflict, etc.), included wide-range humanitarian components. As such operations were authorised by the UN Security Council and constituted a form of maintenance or restoration of peace and security, there have not been any serious doubts raised as to their legality or legitimacy, though such practice rather creatively enlarged the competences of the Security Council, extending it to humanitarian crises that had traditionally been beyond the remit of the Security Council.

However, a much more controversial question remains concerning the unilateral, i.e. not authorised by the UN Security Council, use of military force for humanitarian purposes, or as it has been usually called 'humanitarian intervention' or R2P (responsibility to protect). Historically, eminent authors such as Hugo Grotius and Emerich Vattel had supported the idea that in certain extreme circumstances states could lawfully use military force to protect nationals of other states from their own governments (however, one should not forget that at that time the use of military force was not prohibited, and was even considered an attribute of state sovereignty). In the nineteenth century, some European powers indeed intervened in the Ottoman Empire in support of the Christians in the Balkans and the Middle East.[54] However, when the conditions for the lawful use of military force became increasingly restricted, and especially after the adoption of the UN Charter with its Article 2(4) prohibiting the use and threat of force, it also became more and more difficult to justify the use of military force for humanitarian purposes.

Today, in most circumstances, the use of military force for humanitarian purposes is not only counterproductive, but in the absence of the Security Council's authorisation it is also unlawful. As a general proposition, such a conclusion is predicated on, in my opinion, political realities, existing legal norms, and maybe most importantly, sound morality, notwithstanding an allegedly noble aim for the use of force – the protection of human rights in cases of their massive violation. The important point to be made is that any use of military force, even one that would genuinely be carried out

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[52] See, e.g., A Abass 'The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organisations?' in D Lewis (ed) *Global Governance and the Quest for Justice, vol 1 International and Regional Organisations* (Hart Oxford 2006), 91–112.

[53] E. De Witt, M. Wood, Collective Security, Max Planck Encyclopedia of Public International Law (http://www.mpepil.com/).

[54] L. R. Schumacher, 'The Eastern Question as a Europe question: Viewing the ascent of "Europe" through the lens of Ottoman decline,' Journal of European Studies (March 2014), pp 64–80; N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Springer, 1985).

for the sake of saving human lives, contains in itself the significant potential for even greater loss of life, the infliction of grievous bodily harm on a massive scale, the loss of property and the infringement of other values, including those which are protected as fundamental human rights.

Of course, the same may be said about the use of force in exercising one's inherent right to self-defence 'if an armed attack occurs', as confirmed in Article 51 of the UN Charter. However, wars of self-defence (though this right is also abused) are by their very nature wars of necessity – they are never wars of choice, if we discount surrendering as an acceptable moral choice (in which case there is no use of force). Yet, the use of force by state A with humanitarian purposes against state B, in a case where B does not in any way threaten A's security, can never be a war of necessity in the same sense (in both a physical and moral sense) as wars of self-defence are (though a humanitarian crisis in neighbouring country C may constitute a security threat for A due, for instance, to refugee flows, but this is a different issue to be addressed separately). However, one may ask: can there not be any circumstances in which the use of force by state A in the territory of and against state B, in the case of a severe humanitarian crisis in the latter, even if the crisis does not constitute security threats to A, may be considered a 'war of necessity', if not in the physical sense (in that respect there is always a choice: intervene militarily or not) as wars of self-defence are, but in a moral sense, which wars of self-defence also are? I believe that in certain circumstances it would be possible to give a positive answer to this question. In situations where the use of military force is the only means of preventing or stopping massive human rights violations such as genocide or crimes against humanity, the absolute proscription to use force would deprive the prohibition to commit massive human right violations of their enforceability even in principle. In such a case, these prohibitions cannot be considered valid human rights norms, since one of the conditions of validity for legal norms is their enforceability, at least in principle, if not always in practice. In that sense, the use of military force in certain extreme circumstances may have the characteristics of a 'war of necessity' – a war of moral necessity. For example, both the world community of states and individual states that had the necessary capacities to first prevent and then stop genocide in Rwanda (this would have clearly been a lesser evil than allowing the foreseeable and preventable genocide to happen and once started not to stop it), failed in their duty both collectively and individually. Theirs was a moral surrender similar to the behaviour of those nations which surrender without a fight, or attempt to fight, when attacked by an enemy, resisting whom would not necessarily be a lost cause.

Moral justification for the use of military force for the sake of the protection of human rights in a foreign country can be best based on ideas developed by British political and legal philosopher Lord Raymond Plant. As human rights are real only to the extent of their enforceability (at least in principle though not always in practice, but this is another, though no less important, matter which belongs more to the realm of practical politics and law than moral philosophy), their unenforceability, even in principle, deprives them of their quality as human rights. Lord Plant writes:

> Our responsibility for the rights of others is therefore not confined to non-interference in those rights, but also has to involve responsibility for doing what we can to secure those enforceability conditions, just because these are part of having a right and therefore must be involved in what respecting rights means. This seems to me to be the best way of linking a concern for rights and the possibility of intervention in a particular country, which may not be securing the enforcement conditions.[55]

If there are circumstances when the use of military force is the only means of protecting rights, and the resort to such an extreme measure, which in itself is wrought with the danger of massive violations of most fundamental human rights, is proportionate to the seriousness of the human rights violations (genocide, crimes against humanity and systemic massive violations of international humanitarian law), then the use of military force may be morally justified as a necessary condition of these rights being rights. The most important general guiding principle in such a situation should be that *extreme human suffering, which one attempts to stop or prevent, has to be significantly and foreseeably higher than the human suffering that inevitably results from the use of force to end the suffering.* And the objective should always be to stop or prevent extreme human suffering and not to effect regime change or promote democracy, though this may occur as an inevitable or even necessary corollary of the intervention.

From these arguments of moral philosophy, it is possible to move to the legal justification of the use of military force for the sake of the protection of human rights.

The UN Security Council's authorisation would make interventions on humanitarian grounds both lawful under international law and legitimate in the eyes of most people, and even though they may, in principle, do more harm than good, in such cases there is nevertheless less chance that hasty decisions, dictated by narrow self-interest and facilitated by an ignorance of the risks that any military operation involves, are made. However, in extreme circumstances, I believe, there may not only be a moral-philosophical, but also a legal justification for intervention on humanitarian grounds, even without the Security Council's authorisation. It is necessary to emphasise, first, the importance of the words 'in extreme circumstances' since any use of military force, as we have just discussed, inevitably leads to a serious loss of life – it always creates circumstances conducive to massive violations of the right to life – the most basic human right without which the enjoyment of all other rights becomes meaningless and impossible. Nevertheless, there may be circumstances when the use of military force may be justified not only on moral but also on legal grounds.

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[55] R. Plant, 'Rights, Rules and World Order' in *Global Governance: Ethics and Economics of the World Order*, M. Desai, P. Redfern eds. (Pinter, 1995), p. 207.

First, let us deal with a preliminary point. It is often said that if there were a right to use military force for the sake of human rights, states would constantly abuse it. This may well be the case, and in some military interventions allegedly carried out for humanitarian purposes, such justifications have been used to conceal other aims, or at least other aims have been paramount. However, so far states have more often referred to the right to self-defence when using force abusively, rather than referring to humanitarian concerns. Moreover, the fact that the use of military force with the purported aim of protecting human rights in cases of their gross and massive violation is sometimes abused, should not in itself serve as an absolute obstacle on the road to human rights protection even by means of force, if other means have proven to be, or would clearly be, inadequate, and it is also one of those rare situations when the use of force foreseeably does less harm than the abstention from the use of force would do. Almost every right, almost every good may be open to abuse. As the former President of the International Court of Justice Dame Rosalyn Higgins has written, 'we must face the reality that we live in a decentralised international legal order, where claims may be made either in good faith or abusively'.[56] The fact that claims over some goods or rights are made abusively should not mean that these goods or rights thereby become any less valuable.

Now, here is the main argument, in my opinion, in favour of both the legality and legitimacy of the use of force for humanitarian purposes in extreme circumstances of human suffering. There is no doubt, as we have discussed above, that the principle of the prohibition of the use of force is one of the fundamental principles of international law. *The United Nations International Law Commission*, in its various reports dealing with the issue of peremptory norms in international law (*jus cogens* norms), from which states cannot deviate or derogate even with the consent of other states, has always given as an example of such norms the norm prohibiting the use of military force.[57] As we discussed above, this norm has not lost and should not lose its fundamental importance notwithstanding its all too frequent violation. On the contrary, its significance is only enhanced by such breaches; the reason being that if a norm protects something that people continue to value highly (peace in this case), then violations of such a norm indicate that it is necessary to strengthen the norm instead of discarding it. In legal terms, we may say that in such cases strong opinio juris compensates for a less than perfect observance of the norm in practice. However, the prohibition of the use of force is not the only fundamental principle of international law. The principle of respect for and protection of human rights, acquired the same status during the second half of the previous century. In its *Draft Articles on Responsibility of States*, the *International Law Commissio*n emphasises not only the importance of the non-use of force principle as a peremptory norm of international law, but also the same character of certain human rights norms, such as the prohibition of genocide, slavery and torture.[58]

In cases of gross and massive violation of such fundamental human right as the right to life, which are always accompanied by egregious violations of many other rights, the prohibition of the use of military force may yield to the obligation to respect and protect human rights. In such cases, we have two equally important and weighty principles of international law that cannot be observed at the same time and in the same context; one has to give way. Such a potential for collision is enshrined in the very nature of the principles of international law. As one of the greatest twentieth century international lawyers Oscar Schachter wrote, 'principles, in contrast [to rules], lack the element of definiteness, they are "open-textured", leaving room for various interpretations'.[59] He also emphasises that sometimes 'particular situations are covered by more than one principle. … They point to different legal conclusions. Indeed, it has often been observed that principles like proverbs can be paired off into opposites'.[60] In particular situations, the prohibition to commit acts of genocide or crimes against humanity, and even more importantly, the obligation to prevent such acts being committed,[61] may outweigh the prohibition to use military force. In such extreme and rare situations, the use of force for humanitarian purposes, even without (though of course it would be better with) the Security Council's authorisation, may be both legitimate and lawful. Such legitimisation takes place *ex post facto* and may acquire different forms. Let us consider some examples.

There have been three significant, rather large-scale and successful foreign invasions that have put an end to massive human rights violations, which may have been characterised either as genocide, crimes against humanity or war crimes (though interestingly and understandably, none of the invading states referred to humanitarian concerns as the only or main reason or justification for their actions). The overthrow of the regimes of Idi Amin in Uganda in 1979, the ousting of Pol Pot in the same year in the so-called Democratic Kampuchea, and the Indian 1971-72 military intervention in Eastern Pakistan, which all put an end to massive crimes against civilian populations, and all ended with the removal of the regimes that had committed those atrocities (in the case of the Indian intervention, it led to the breakup of Pakistan

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[56] R. Higgins, Problems and Process: International Law and How We Use It, Clarendon Press, 1994, p. 247.

[57] See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 112.

[58] *Ibid*., pp.112-113.

[59] O. Schachter, *International Law in Theory and Practice. General Course in Public International Law*, Recueille des Cours de l'Academie de Droit International, 1982, vol. V, p. 43.

[60] *Ibid*

[61] Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide provides that 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'. (http://www2.ohchr.org/english/law/genocide.htm). It is necessary to reiterate that crimes against humanity and systemic war crimes are often no less serious crimes than acts of genocide. Crimes against humanity are, by definition, 'widespread and systematic', while war crimes, if not individual excesses but state policy (or policy of other organised groups), are also always massive and heinous. For an act to be considered as genocide, the massiveness of the crime is not an obligatory requirement. What matters most is the genocidal intent.

and the creation of a new state in Eastern Pakistan - Bangladesh). None of these interventions were sanctioned by the United Nations, and the intervening states preferred to refer more to the right of self-defence as the justification than to 'purely humanitarian concerns'.[62] Naturally, in all these cases, besides the humanitarian issues, there were other concerns and interests present, if not dominant, but none of these military operations could be qualified as actions of self-defence. There is something significant in the fact that all three of these large-scale, successful foreign military interventions, which were responses to genuine humanitarian catastrophes (even if not justified wholly by references to them) and which put an end to those catastrophes, were carried out by non-Western nations. One of the reasons for their success in the sense of the sustainability of the main objective of their interventions (the end of mass atrocities and not democracy building) may have been in that after overthrowing bloody dictators (Idi Amin and Pol Pot) and putting an end to Islamabad's repressions in Eastern Pakistan, the intervening states did not attempt to put in place pro-Western or Western-sounding and Western-looking governments. They also did not carry out nation building exercises with the aim of 'widening the circle of liberal democracies' in the world.

In favour of the legitimacy, and at the end of the day also of the legality, of these interventions speaks the fact that, though there was some criticism from at least certain states and circles at the time of the interventions, in two out of the three cases – the Indian and Tanzanian interventions – their results were relatively quickly accepted by the world community. So, Bangladesh – a state that emerged as a result of the Indian intervention, which took place, let us recall – in 1971-1972, became a member of the United Nations as soon as 1974, being approved for UN membership by its Security Council and the General Assembly. Compare this with the continuing non-recognition of the so-called Turkish Republic of Northern Cyprus, which was created as a result of the Turkish invasion of Cyprus in 1974. Neither the United Nations nor the Organisation of African Unity (the predecessor of the current AU) condemned the Tanzanian military invasion of Uganda, and most states soon recognised the new government in Kampala. The reaction to the Vietnamese intervention in Kampuchea was different due to the geopolitics of the region, where the interests of three permanent members of the Security Council – China, the Soviet Union and the United States – clashed. It is of interest to note that in 1999 Mr A. P. Van Walsum, the Dutch Representative to the United Nations, referred to the Vietnamese intervention in Cambodia in 1979 that had helped to put an end to Pol Pot's genocide. He expressed regret that at that time his own country, by its behaviour in the UN, had allowed the genocidal Khmer Rouge to occupy the Cambodian seat in the General Assembly for more than a decade.[63] Although this statement was somewhat ingenious and self-serving, as it was made, inter alia, to justify the Dutch support for the military intervention against Serbia over Kosovo, it nevertheless has some evidential value. As to the role and approach of the United States to the issue at the time, the attitude of Robert Rosenstock, an international lawyer and the then legal advisor of the US Mission to the United Nations, is revealing. Debbie Sharnak writes, 'The Carter Administration confronted the difficult choice of whether to vote to seat the Khmer Rouge's genocidal regime; support Samrin's communist, Vietnamese-installed government; or, to abstain from voting altogether. *After weighing geopolitical concerns about human rights costs against national interests in a Cold War context* [emphasis added], Carter's representative to the Credentials Committee, Robert Rosenstock, cast the vote in favour of seating the Khmer Rouge. As he rose from the table, - someone grabbed his hand to congratulate him. Rosenstock looked up to find to his horror that he was shaking hands with Pol Pot's foreign minister, Ieng Sary. "I felt like washing my hands", Rosenstock reported. Rosenstock's reaction to this episode, a mixture of disgust and resignation, encapsulates the contradiction of what this vote ultimately signified. In the act of seating the Khmer Rouge at the United Nations, Jimmy Carter, the supposed human rights president, aligned himself with an ousted genocidal regime'.[64]

One could also take note of the ECOWAS unauthorised intervention in Liberia, which instead of being condemned, was ex post facto ratified by the Security Council.[65] In February 1998 ECOWAS, once again without prior authorisation of the Security Council, intervened in the civil war and humanitarian crisis in Sierra Leone.[66] These developments seem to indicate that in extreme circumstances of humanitarian crises, the world community is ready to legitimise non-authorised (by the Security Council) use of military force for humanitarian purposes. However, these cases have been exceptions rather than a rule. And though it has been possible, as we showed above, to build moral and even legal justifications for such interventions, successful (i.e. those doing more good than harm) interventions on humanitarian grounds have been so exceptional that the more recent developments in the field, instead of giving support for the use of military force to protect human rights, have shown that the world community is not ready to accept military interventions on humanitarian grounds, if not authorised by the UN Security Council. The most important reason for this is not theoretical or normative but pragmatic – military interventions for humanitarian purposes have not, in most cases, worked. They have done more harm than good.

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[62] In December 1971, immediately after the Indian intervention had started, the Indian Ambassador to the UN declared: '[W]e have on this particular occasion absolutely nothing but the purest of intentions: to rescue the people of East Bengal from what they are suffering' (UN Doc. S/PV.1606, 4 December 1971, p. 86). Soon, however, the Indian Government denounced this statement of its Ambassador and referred to the right of self-defence instead.

[63] Press Release SC/6686 4011th Meeting (PM) 10 June1999.

[64] D. Sharnak, 'Jimmy Carter, Cambodia, and the United Nations. Human Rights in a Cold War Climate', University of Wisconsin-Madison, April 2010.

[65] ECOWAS forces entered Liberia on 23 August 1990. The first reaction of the Security Council came in January 1991 when the Council lauded ECOWAS for working to bring peace to Liberia and encouraged all parties to co-operate with ECOWAS. Note by the Press Office of the Security Council, S/22133, 23 January 1991.

[66] See more in R. Higgins, 'Some Thoughts on the Evolving Relationship between the Security Council and NATO', in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, Bruylant, 1998, p. 521.

The twenty first century started with an attempt to reformulate and rephrase the concept of humanitarian intervention in terms of the responsibility to protect (R2P). First, the *International Commission on Intervention and State Sovereignty* elaborated this idea in its report in 2001's *The Responsibility to Protect*.[67] Then the idea was developed by the *High Level Panel on Threats, Challenges and Change* in its report *A More Secure World: Our Shared Responsibility*[68] in 2004. Then came the report of the United Nations Secretary General *In Larger Freedom: Towards Development, Security and Human Rights for All*,[69] and finally, the concept found its expression in the UN General Assembly 2005 Outcome Document.[70]

First, it is necessary to underline that none of these documents creates legally binding rights and obligations. Second, though using different terminology and emphasising different aspects of the problem, in substance they did not add much to what was already known. They also did not clarify the most controversial issues on which discussions had been and continue to be held. For example, there was not, and there still is not, any doubt that every state is responsible for the protection of the rights of its citizens (this obligation stems from numerous universal and regional human rights documents as well, as from customary norms of international law), and that if a state commits acts of genocide, war crimes, ethnic cleansing or crimes against humanity it bears responsibility for these acts under international law. Moreover, those individuals who are personally responsible for such acts, be they heads of states or governments or the highest ranking military officers, bear criminal liability under international law. What is not clear, and what none of these documents clarifies, is the question: is it lawful for individual states or international organisations to use military force in order to protect the nationals of foreign countries in the territory of a foreign country, if the government of that country commits acts of genocide, crimes against humanity, ethnic cleansing or war crimes against its own people or is unable or unwilling to protect its people in cases of such crimes committed on its territory by any other party?

It was the *Commission on State Sovereignty and Intervention* that in 2001 attempted to go furthest in allowing the use of military force in certain circumstances, even without the Security Council's authorisation. The Commission developed five criteria of legitimacy for intervention (just cause, right intention, last resort, proportionality of means, and reasonable prospect of success[71]), applicable both to the Security Council and states. In these criteria, we see a kind of revival of the old idea of 'just wars' that was prevalent when natural law concepts reigned in international legal literature, before positivist approaches started to prevail and the use of military force became outlawed in international law. The furthest the Commission went down the road towards legitimising the use of military force without the Security Council's authorisation is in the following two paragraphs:

6.39 The first message is that if the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states will surely intensify. And there is a risk then that such interventions, without the discipline and constraints of UN authorization, will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles.

6.40 The second message is that if, following the failure of the Council to act, a military intervention is undertaken by an ad hoc coalition or individual state which does fully observe and respect all the criteria we have identified, and if that intervention is carried through successfully – and is seen by world public opinion to have been carried through successfully – then this may have enduringly serious consequences for the stature and credibility of the UN itself.[72]

These propositions are not and are not meant to be legally binding norms, but rather warnings to the Security Council that if it does not act, others may react and the Council may lose its exceptional position and authority under international law.

Addressing the UN Human Rights Commission in April 1999, the then Secretary General of the United Nations Kofi Annan emphasised, 'Emerging slowly, but I believe surely is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty'.[73] Later, when speaking of Kosovo in Stockholm, he said, 'There is emerging international law that countries cannot hide behind sovereignty and abuse people without expecting the rest of the world to do something about it'.[74] Speaking in The Hague on the occasion of the centennial of the first Hague

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[67] See more in R. Higgins, 'Some Thoughts on the Evolving Relationship between the Security Council and NATO', in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, Bruylant, 1998, p. 521.

[68] A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 56-57, para.2 01 (2004), available at <http:ll//www.un.org/secureworld/report. pdf>.

[69] In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, U N Doc. A/59/2005, paras.1 6-22 (2005), available at <http://www.un.org/largerfreedom/contents.htm>.

[70] 2005 World Summit Outcome, GA Res. 60/1, paras.1 38-39 (Oct. 24, 2005).

[71] *International Commission on Intervention and State Sovereignty, the Responsibility to Protect*, paras. 4.18, 4.32-48.

[72] *Ibid*, paras.6,39; 6,40.

[73] Press Release SG/SM 6949, 7 April 1999.

[74] *Financial Times*, 26 May 1999, p. 2.

Peace Conference, the Secretary-General, once again, stressed the need to act through the Security Council. At the same time, he expressed his belief that 'unless the Security Council can unite around the aim of confronting massive human rights violations and crimes against humanity on the scale of Kosovo, then we will betray the very ideals that inspired the founding of the United Nations'.[75] In autumn of the same year, in his article in *The Economist* Kofi Annan wrote that 'in cases where forceful intervention does become necessary, the Security Council–the body charged with authorising the use of force under international law–*must be able to rise to the challenge* [emphasis added]'.[76] Two days later, in his address to the General Assembly, the Secretary General warned, 'The Charter requires the Council to be defender of common interest, and unless it is seen to be so–in the era of human rights, interdependence, and globalisation–there is a danger that others could seek to take its place'.[77]

It seems to be possible to draw the following three conclusions from the statements of the former Secretary-General: (1) Although the United Nations has to be 'respectful of the sovereignty of States', in cases of massive human rights violations and crimes against humanity, humanitarian concerns must prevail over state sovereignty; (2) The role of the Security Council, and the United Nations as a whole, should be central in dealing with extreme humanitarian catastrophes threatening international peace and security; (3) However, the Security Council, and especially its permanent members, have to act responsibly and 'unite behind the principle that massive and systematic violations of human rights conducted against an entire people cannot be allowed to stand'.[78] The world community has to rely on the Security Council on issues involving the use of force, but it can do so only if the Council and its permanent members act with the utmost sense of responsibility. If the Council neglects its responsibility, other institutions may have to fill the void.

However, notwithstanding the report of the *Commission on State Sovereignty and Intervention*, Kofi Annan's cautious statements and other documents mentioned above that were adopted later foreclose any interventions on humanitarian grounds if unauthorised by the United Nations Security Council. Alex Bellamy's conclusion that 'as agreed by world leaders in 2005, R2P does not countenance non-consensual military force without the authorization of the Security Council and does not set out criteria for the use of force beyond the four threshold crimes [i.e. genocide, crimes against humanity, ethnic cleansing and war crimes] and the idea that the Council should assume responsibility in cases where the host state is "manifestly failing" to protect'.[79] Therefore, Carsten Stahn is justified in calling R2P partly 'Old Wine in New Bottles'.[80]

How relying on various interpretations of R2P may backfire can be seen in the situation in which Gareth Evans found himself. Being an ardent supporter of the concept of R2P as well as a co-chair of the International Commission on Intervention and State Sovereignty, Evans – the former Foreign Minister of Australia – encountered difficulties in explaining why Russia was wrong in August 2008 when invoking the R2P concept as justification for the Kremlin's response to the Georgian attack on Tskhinvali, the capital of South Ossetia.[81] He was forced to admit that 'in the absence of UN Security Council approval, there is no legal authority for an R2P-based military intervention'. And he added, 'The 2005 General Assembly Outcome Document makes it clear that any country or group of countries seeking to apply forceful means to address an R2P situation - where another country is manifestly failing to protect its people and peaceful means are inadequate - must take that action through the Security Council'.[82] Evans is certainly right in that 'the sense of moral outrage at reports of civilians being killed and ethnically cleansed can have an unintended effect of clouding judgement as to what is the best response, which is another reason to channel action collectively through the United Nations'.[83] The point is not whether Russia correctly invoked the R2P concept (in any case, it was only secondary in the Kremlin's justifications for its military response), and as Gareth Evans correctly points out, Russia's response was 'manifestly excessive', i.e. disproportionate to the Georgian attack. The point is that depending on the political, economic and strategic interests as well as the ideological proclivities, states use various concepts in their own self-interest. Moreover, as Alex de Waal comments on Gareth Evans' and Samantha Power's enthusiastic support of the concepts of R2P and humanitarian intervention, 'in the face of "evil", the idealists tend to turn righteous and forget to ask important questions about what they want to achieve and how'.[84] More often than not, lesser sharp instruments than military intervention or a dogged insistence on regime change save more lives. Although, they may hurt the idealists' sense of self-righteousness and also prevent or delay the achievement of other goals such as the 'democratisation of the wider Middle East' or securing control over energy resources.

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[75] Press Release, SG/SM/6997.

[76] *The Economist*, 18 September 1999.

[77] SG/SM/7136, 20 September 1999.

[78] *Ibid*.

[79] A. J. Bellamy, 'The Responsibility to Protect and the problem of military intervention', International Affairs, 2008, Vol. 84, No 4, p. 638.

[80] C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *The American Journal of International Law*, 2007, Vol. 101, p. 111.

[81] G. Evans, 'Russia, Georgia and the Responsibility to Protect', *Amsterdam Law Forum*, 2009, Vol. 1, No. 2.

[82] *Ibid*.

[83] *Ibid*.

[84] A. de Waal, 'How to End Mass Atrocities', *The New York Times*, 9 March, 2009.

The events, developments, mistakes, tragedies and disappointments after the high expectations of the post-Cold War period (though, no doubt, there have also been success stories, and they have to be taken into account and lessons learned from them also) testify that central principles of international law and the UN Charter, confirmed in the Nicaragua case by the International Court of Justice, such as the non-use of force and the non-interference in internal affairs of states, retain their relevance. And this notwithstanding (or maybe even because of) the emergence of international human rights law and the evolution of humanitarian law. This also means that the concept of responsibility to protect (R2P) has to be interpreted in the light of these and other principles of international law. The Institute of International Law *(l'Institut de Droit International)* studied the problems of humanitarian intervention that now are mostly considered under the heading of R2P, for more than a decade. In 2007 the Santiago (Chile) session, the Institute adopted a resolution where the question of 'the lawfulness of military actions which have not been authorised by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes' was left for further study due to the differing, often opposing, views of the members of the Institute.[85] However, in 2015 at the Tallinn session, the Institute, having meticulously studied the practice and views of various states in the period after 2007 (done by Professor Michael Reisman together with Judge Hisashi Owada and the 10th Commission), came to this conclusion: 'The Commission has concluded that state practice over the past decade has not witnessed enough clear movement away from the traditional requirement of Security Council authorisation for a putative Humanitarian Intervention; while some unilateral actions may have received a degree of informal or post hoc approval, practice indicates that the international community continues to view unilateral Humanitarian Intervention undertaken without the authorisation of the United Nations Security Council as presumptively unlawful, though sometimes subject to retroactive validation'.[86] After the high expectations of some that the world community, or those acting in its name, would be able to impartially interfere in order to prevent, or put an end to, atrocities within countries, the majority of experts have become rather pessimistic as to the ability of outside interveners to make things better. Usually the opposite is true.[87] And the matter is not only, or even much, that unilateral (i.e., without authorisation of the Security Council) interventions in the name of humanity are often abusive, but also because foreign military (and often non-military) interventions rarely make things better. Moreover, as Mathew Burrows and Robert A. Manning observe, 'in this increasingly post-Western world, Western policies and norms that are viewed as threats to national sovereignty are being more broadly questioned. Thus value-based issues such as democracy promotion and the Right to Protect (R2P) tend to spark strong counteraction from not just authoritarians like China, but also many emerging democracies who worry about maintaining their national sovereignty'.[88] And it is not only that. As two 2016 published books with revealing titles – *Mission Failure: America and the World in the Post-Cold War Era* by American Michael Mandelbaum and *Pourquoi Perd-On La Guerre?* by Frenchman Gérard Chaliand testify, no Western intervention in the post-Cold War era has achieved its political aims. Professor Mandelbaum writes, 'The United States did not succeed in getting China to protect human rights, or constructing smoothly functioning free markets or genuinely representative political institutions in Russia. It did not succeed in installing well-run, widely accepted governments in Somalia, Haiti, Bosnia, or Kosovo. It did not transform Afghanistan or Iraq into tolerant, effectively administered countries. It did not bring democracy to the Middle East or harmony between Israelis and Arabs'.[89] Gérard Chaliand observes that 'the balance sheet of wars waged by the major military power of the XXI century, the United States, often backed up by numerous allies, is without any doubt negative: enormous sums squandered with mediocre military results and politically disastrous consequences.'[90]

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[85] Present Problems of the Use of Armed Force in International Law—Humanitarian Action (Rapporteurs Mr Reisman/Owada), Institut de Droit Internationale, Session de Santiago—2007 (http://justitiaetpace.org/resolutions_chrono.php?start=2001&end=2007).

[86] 10th Commission: Humanitarian Action, Traveaux de la session de Tallinn (http://justitiaetpace.org/annuaire_resultat.php?id=16).

[87] See, e.g., an insightful analysis of reasons of successes and failures of different interventions in Rory Stewart & Gerald Knaus, *Can Intervention Work* (W.W. Norton & Company, 2011). One of the main conclusions of the authors is that the success or failure of outside interventions depend less on what the intervenors do, on their characteristics and staying-power and much more on the characteristics of societies where interventions take place. The greatest problem is that intervenors are often rather ignorant of the latter.

[88] M. Burrows, R. A. Manning, 'Kissinger's Nightmare: How an Inverted US-China-Russia May Be Game-Changer', *Valdai Paper* N. 33, 2015

[89] M.Mandelbaum, *Mission Failure: America and the World in the Post-Cold War Era*, OUP, 2016, Empl. 248.

[90] G. Chaliand, *Pourquoi Perd-On La Guerre? Un nouvel art occidental*, Odile Jacob, 2016, p. 17.