

INTERNATIONAL LAW AND THE USE OF FORCE: WHAT HAPPENS IN PRACTICE?¹

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I. INTRODUCTION

Kofi Annan, Secretary-General of the United Nations at the time of the 2003 Iraq conflict, has written:

“No principle of the Charter is more important than the principle of the non-use of force as embodied in Article 2, paragraph 4 Secretaries-General confront many challenges in the course of their tenures but the challenge that tests them and defines them inevitably involves the use of force.”²

The same might be said of Government leaders and their legal advisers.³

The aim of this article is to give some flavour of the role that the international law on the use of force plays in practice when a Government is contemplating the use of force internationally, or aiding or assisting others to do so, or even just being pressed for a view on what others are about to do or have done.

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1 This article is based upon a lecture given at the Indian Society of International Law on 13 September 2013. It draws upon and updates earlier talks and writings, including M. Wood, “Towards New Circumstances in which the Use of Force may be Authorized? The Cases of Humanitarian Intervention, Counter-terrorism and Weapons of Mass Destruction”, in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (2005), pp. 75-90; M. Wood, “The Law on the Use of Force: Current Challenges”, *Singapore Year Book of International Law*, vol. 11 (2007), pp. 1-14; M. Wood, “Terrorism and the International Law on the Use of Force,” in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014), pp.195-207.

2 R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (2010), pp. xii-xiii.

3 Two recent political memoirs deal directly with the international law on the use of force by the UK Government. John Morris, Lord Morris of Aberavon, Prime Minister Blair’s first Attorney General, has written a memoir entitled *Fifty Years in Politics and the Law* (University of Wales Press, 2011), which contains a frank chapter about the 1999 Kosovo intervention. Foreign Minister Straw’s autobiography, *Last Man Standing. Memoirs of a Political Survivor* (2012), has a chapter on the 2003 Iraq conflict, which begins with the statement, “I could have prevented the United Kingdom’s involvement in the Iraq war. I did not do so. I chose to support the war. Here’s why.”

There are at least five practical points that concern government lawyers, but which are not often discussed by international lawyers more generally.⁴ *First*, the distinction between the rules of public international law on the use of force and the conventions or rules of constitutional law concerning when a Government may deploy the State's armed forces or otherwise become involved in a conflict situation. For many States, though perhaps not until relatively recently for the United Kingdom, the crucial legal issues often arise in the context of constitutional law and practice, rather than public international law as such.⁵ In some States, to the extent that it is considered at all, international law seems to play an indirect role. Thus, for Germany and for Japan, the key issues are the limits on the use of force set out in their constitutions, which may or may not correspond to international law, including the role of the legislature in authorizing the deployment of armed forces outside the national territory. For Ireland, for Switzerland, and some other States, a key issue will be the conformity of any action (such as allowing overflight or refueling) with constitutional or other commitments to neutrality. This is so even in the United States. Domestic 'war powers' issues – the respective roles of the Commander-in-Chief and the Congress – loom large. For example, in September 2013, according to the US press, there was an oral opinion given by the US Justice Department to the White House that the President would be acting lawfully if he attacked Syria even without Congressional support, but that focused on U.S. law not international law (and in any event was overtaken by the President's request for Congressional support).

Of course, domestic law concerns are by no means absent in the UK. What should the role of the courts be in relation to the use of force? In the *CND* case in late 2002, prior to the invasion of Iraq in March 2003, the Court of Appeal was asked to interpret Security Council resolution 1441(2002) and the United Nations Charter, but declined to do so.⁶ What should the role of Parliament be? The Blair and Brown Governments engaged in a wide consultation on this and other constitutional issues. They seemed to have decided against legislation, but may have been planning to proceed by way of a Parliamentary resolution that would have introduced a presumption that Parliament would be consulted before the UK went to war (as had indeed happened before the Iraq conflict in 2003). The matter resurfaced under the Coalition Government at the time of the action over Libya in 2011.

4 I have discussed some of these in "The Role of International Lawyers in Government", in D. Feldman, *Law in Politics, Politics in Law* (Hart, 2014), pp. 109-116.

5 C. Ku and H. K. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law* (2003).

6 *R (On the Application of Campaign for Nuclear Disarmament) v. Prime Minister* [2002] EWHC 2777 (Admin), [2003] ACD 36.

The *Cabinet Manual* (the first edition of which was published in October 2011)⁷ states the following:

“*Military action*

5.36 Since the Second World War, the Government has notified the House of Commons of significant military action, either before or after the event, by means of a statement and has in some cases followed this with a debate on a motion for the adjournment of the House. [*Footnote reading: Examples before the Iraq debates of 2002 and 2003 include Afghanistan (4 and 8 October 2001); Kosovo (24 March 1999); and the Gulf War (17 and 21 January 1991).*].

5.37 In the two most recent examples of significant military action, in Iraq and Libya, Parliament has been given the opportunity for a substantive debate. Debates took place in Parliament shortly before military action in Iraq began in 2003. In relation to Libya, the Prime Minister made a statement in the House of Commons on 18 March 2011 in advance of military action, which was followed by a government motion for debate on 21 March, expressed in terms that the House ‘supports Her Majesty’s Government [...] in the taking of all necessary measures to protect civilians and civilian-populated areas’. [*Footnote reading: The full text of the motion is at Hansard, HC cd. 700 (21 March 2011).*]

5.38 In 2011, the Government acknowledged [*Footnote reading: Leader of the House of Commons, Hansard, HC col. 1066 (10 March 2011).*] that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate.”

In August 2013, the Chair of the Political and Constitutional Reform Select Committee announced that he would be asking the Committee to review the question of Parliament’s role in decisions to commit British forces to armed conflict overseas after the immediate (Syria) crisis had passed. He recalled:

“Our original (2011) inquiry concluded that the Government needed to honour the Foreign Secretary’s undertaking to the House of Commons to ‘enshrine in law for the future the necessity of consulting Parliament on military action’ [*HC Deb, 21 March 2011, col 799*]. The Foreign Secretary’s statement was made in March 2011, but the necessity of consulting

7 The *Cabinet Manual* is subtitled “A guide to laws, conventions and rules on the operation of government”. It is available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet_manual.pdf>.

Parliament still isn't enshrined in law. It is a matter of some urgency that it should be, so that in future there can be no doubt about the necessity of involving Parliament before making conflict decisions.”⁸

A *second* practical point, for government lawyers, is that legal issues arise not only when a State uses force itself, but also when it aids or assists another State to use force. In the words of article 16 of the 2001 Articles on State Responsibility,

“A State which aids or assists another State in the commission of an internationally wrongful act ... is internationally responsible for doing so if

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.”⁹

The ILC Commentary to this article gives the following example: ‘The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State’. Given the fact of American air bases on United Kingdom territory,¹⁰ this is an issue that must presumably arise with some frequency. An example from the past is the use of UK territory by the US air force to carry out the bombing raids on Tripoli and Benghazi in 1986.¹¹

A *third* point is the question how strong the legal basis has to be before a State embarks upon a use of armed force – or assists another State to use force. This can

8 Graham Allen MP, 27 August 2013,

9 The ILC's Commentary (3) on this article includes the following: “Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing such aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.” The three conditions are further explained in Commentaries (4), (5) and (6) respectively: *Yearbook of the International Law Commission 2001*, Vol. II, Pt 2, pp. 65-67. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at pp. 222-223, para. 433. See J. Crawford, *State Responsibility - The General Part* (2013), pp. 399-412; H. P. Aust, *Complicity and the Law of State Responsibility* (2011), Chapters 5 and 6; V. Lowe, “Responsibility for the Conduct of Other States”, *Kokusaih gaikōzasshiō*, vol. 101 (2001) p.1.

10 In the United Kingdom itself, but also in British overseas territories, in particular the Sovereign Base Areas in Cyprus, and Diego Garcia in the British Indian Ocean Territory (BIOT).

11 C. Greenwood, “International Law and the United States’ Air Operation against Libya”, *West Virginia Law Review*, vol. 80 (1987), pp. 933-960, reprinted in C. Greenwood, *Essays on War in International Law* (2006), pp. 483-516.

be crucial, though it is not often discussed outside government. It was, however, raised squarely in the UK Attorney General's Iraq advice of 7 March 2003:

“27. [...] I remain of the opinion that the safest legal course would be to secure the adoption of a further [Security Council] resolution to authorise the use of force. [...]

28. Nevertheless, [...] I accept that a reasonable case can be made out that [Security Council] resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution. [...]

30. In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 [that was an intensive bombing operation in and around Baghdad, that lasted just a few days] and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a “reasonable case” does not mean that if the matter ever came before a court I would be confident that the court would agree with this view.”¹²

How strong a legal basis is required before a State resorts to armed force is ultimately a policy question rather than one of law. But lawyers can and should advise on the risks of acting on the basis of a ‘reasonable’, or ‘arguable’ or ‘reasonably arguable’ case, for example the risk of domestic and international proceedings, including criminal proceedings. In due course this may involve consideration of the Kampala definition of the crime of aggression: “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter”.¹³ In any event, it is important to bear in mind that the definition of the crime of aggression for the purposes of the Rome Statute of the International Criminal Court is not intended to have any effect on the *jus ad bellum*.¹⁴

12 “Attorney General’s advice to the Prime Minister of 7 March 2003”, *I.C.L.Q.*, vol. 54 (2005), p. 767; *British Year Book of International Law*, vol. 77 (2006), p. 819.

13 S. Murphy, “The Crime of Aggression at the ICC”, in M. Weller (ed.) *Oxford Handbook on the Use of Force* (forthcoming 2014).

14 This is clear from Article 10 of the Rome Statute (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”), and was restated at the Kampala Conference (“It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with Article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”: RC/Res. 6, Annex III, Understanding No. 4).

A *fourth* practical point, also little discussed, is the issue of proof of the relevant facts. At least after the event, a State which has used armed force may be required to demonstrate that the facts as known to it prior to the use of force were such as to justify, as a matter of international law, the resort to force under the circumstances.¹⁵ This may raise difficult issues where proof of the facts would require the disclosure of intelligence or sources.

And a *fifth* point is this. There is often loose talk, by non-lawyers and occasionally also lawyers, of the ‘legitimacy’ of a use of force. Legitimacy and legality are sometimes (deliberately) blurred. Yet the question whether action is lawful or not is distinct from whether it is ‘legitimate’, however that word is used. “Legitimacy is to be distinguished from legality (lawfulness), which means in this context conformity with international law.”¹⁶ To blur the two may sometimes seem like good politics. It is not good law. It is reminiscent of the view, expressed by some at the time of the action over Kosovo, that a use of force may be unlawful but justified.¹⁷ That may be so, but that is not a matter for legal assessment. Lawyers should confine themselves to law, or at least make it clear when they are stepping outside their field. And non-lawyers should not lightly assume they understand international law.¹⁸

The remainder of this article addresses current challenges to the rules of public international law on the use of force. It first asserts the continuing validity of the rules of international law on the use of force in today’s world. It then looks at issues

15 As Sir Franklin Berman put it: “[...] only the State itself can assess the threat it faces and how to respond. This is, however, emphatically not to say that the State’s own assessment is, as it were, final and binding; nor is it to say that, just because it is self-defence, it somehow escapes the possibility of objective judgement after the event [...]”: F. Berman, “The UN Charter and the Use of Force”, *Singapore Year Book of International Law*, vol. 10 (2006), p. 9, at p. 14.

16 R. Wolfrum, V. Röben (eds.), *Legitimacy in International Law* (Springer, Berlin, 2008) R. Wolfrum, “Legitimacy in International Law”, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012) (with bibliography).

17 See A. E. Roberts, “Legitimacy vs Legality: Can Uses of Force be Illegal but Justified?”, in P. Alston, E. MacDonald (eds.) *Human Rights, Intervention, and the Use of Force* (2008), pp. 179-213. The Independent International Commission on Kosovo commissioned by Sweden concluded in 2000 that ‘the intervention was legitimate, but not legal’ (*The Kosovo Report: Conflict, International Response, Lessons Learned* (2000), p. 28).

18 It is a little disturbing to see eminent persons, however ignorant they are of the international law on the use of force, or indeed of the facts, pontificating on the lawfulness or otherwise of some proposed or actual use of force. It is even more disturbing that the media should repeat what they say as gospel. Those who do know something of these matters, including government lawyers, and indeed former government lawyers, are in part to blame, since – the occasional blogger (notably on *EJILTalk!*; *AJIL Unbound*; *Opinio Juris* - www.opiniojuris.org) apart – they often maintain a discreet silence.

of self-defence, especially against non-State actors (such as ‘terrorist’ groups) and where there is a risk of attack with weapons of mass destruction. And then it examines the concepts of ‘humanitarian intervention’ and ‘responsibility to protect’.

The overall conclusion is that the existing rules, in particular the Security Council’s powers under Chapter VII of the Charter to authorise the use of force, and the right of self-defence recognised in Article 51 of the Charter, are adequate to address current threats.

II. THE CONTINUING VALIDITY OF CHARTER-BASED RULES ON THE USE OF FORCE IN TODAY’S WORLD

The rules of international law on the use of force are relatively easy to state, though they may be difficult to apply in practice.¹⁹ The rules are to be found in the Charter and in customary international law.²⁰ The Charter contains, among the Principles of the United Nations, a prohibition of the threat or use of force (Article

19 A Government legal adviser does not have the luxury of academic speculation, and is not likely to be much interested in, or influenced by, or even have time to read most of what is written in law journals or books. What may matter more to a Government lawyer is his or her Government’s traditional view on the point of law, say, on anticipatory self-defence, or the legal basis for the rescue of nationals. Nevertheless, writings may offer important guidance and information. Waldock’s 1951 Hague Academy lectures remain an excellent introduction to the international law on the use of force: C. H. M. Waldock, “The Regulation of the Use of Force by Individual States in International Law”, *Recueil des Cours*, vol. 81 (1952), p. 455. Other seminal works include D. W. Bowett, *Self-Defence in International Law* (1957); I Brownlie, *The Use of Force by States in International Law* (1963); C. Gray, *International Law and the Use of Force* (3rd ed., 2008); T. Ruys, *‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2013); O. Corten, *Le droit contre la guerre* (2nd ed., 2014) - for an earlier edition in English, see O. Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* (2010); Y. Dinstein, *War, Aggression and Self-Defence* (5th ed., 2011). A new journal is to be published from August 2014: *Journal on the Use of Force and International Law*, which will include a digest of State practice on the use of force. The *Institut de Droit International* (through its Tenth Commission - Present Problems of the Use of Force in International Law) has recently worked on a number of use of force issues and adopted four resolutions: Self-defence (27 October 2007, Santiago); Humanitarian Action (27 October 2007, Santiago); Military assistance on request (8 September 2011, Rhodes); Authorization of the Use of Force by the United Nations (9 September 2011, Rhodes): see also the ‘Complementary Report’ on ‘Humanitarian Intervention/Humanitarian Actions’ by the Secretary General of the *Institut*, Joe Verhoeven, for the Tokyo session in 2013. The *International Law Association’s* Committee on the Use of Force is currently considering aspects of aggression.

20 The political organs of the United Nations, in particular the General Assembly, have contributed to the development of the law through consensus resolutions: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (‘Friendly Relations

2, paragraph 4). The Charter refers to two not unrelated circumstances in which the prohibition does not apply.²¹ First, forcible measures may be taken or authorised by the Security Council, acting under Chapter VII of the Charter. Second, force may be used in the exercise of the right of individual or collective self-defence, as recognised in Article 51 of the Charter. A further possible exception that has been suggested, chiefly it seems by UK Governments, is the use of force to avert an overwhelming humanitarian catastrophe (sometimes referred to as ‘humanitarian intervention’). This is not mentioned in the Charter, and so must be found, if at all, in customary international law. Force used at the request or with the consent, duly given, of the government of the territorial State does not give rise to an issue under the *jus ad bellum*. The use of force in retaliation (punishment, revenge or reprisals) is illegal. Such terms are best avoided, even in political rhetoric.

It has occasionally been suggested, at least by certain academics, that the rules of international law on the use of force are dead, or that there is some fundamental gulf between the United States and other countries in this matter.²² The late Tom Franck even referred to an emerging approach among American law professors and practitioners:

Declaration’) (GA res. 2625 (XXV)); Definition of Aggression (GA res. 3314 (XXIX)); Declaration on the Non-use of Force (GA res. 42/22). So too has the International Court of Justice in a series of judgments: *Corfu Channel (United Kingdom v. Albania)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*; *Legality of the Threat or Use of Nuclear Weapons* advisory opinion; *Oil Platforms (Islamic Republic of Iran v. United States of America)*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*; see C. Gray, “The International Court of Justice and the Use of Force”, in C. J. Tams, J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013), pp. 237-261; P. Webb, *International Judicial Integration and Fragmentation* (2013), pp. 103-144. For a comment on the *Oil Platforms* case, see W. Taft, “Self-Defense and the Oil Platforms Decision”, *Yale J. Int’l L.*, vol. 29 (2004), p. 295: extract in (2004) *Digest of United States Practice in International Law*, pp. 974-976. Other international courts and tribunals have addressed issues of the *jus ad bellum*: see, for example, S. D. Murphy, *Litigating War. Mass Civilian Injury and the Eritrea-Ethiopia Claims Commission* (2013).

21. The Uniting for Peace resolution is occasionally referred to as an alternative route if the Security Council is unable to act because of the veto. That is a problematic suggestion. The General Assembly may make recommendations. Unlike the Security Council, it cannot authorize, cannot make lawful that which is otherwise unlawful. See C. Binder, “Uniting for Peace Resolution (1950)” in *Max Planck Encyclopedia of Public International Law* (2012); L. D. Johnson, ““Uniting for Peace”, Does It Still Any Useful Purpose?”, *AJIL Unbound*, 15 July 2014 <[http:// www.asil.org/blogs/%E2%80%9Cuniting-peace%E2%80%9D-does-it-still-sence-any-useful-purpose.>](http://www.asil.org/blogs/%E2%80%9Cuniting-peace%E2%80%9D-does-it-still-sence-any-useful-purpose.>) The Institute of International Law has resolved that ‘the General Assembly should exercise its competence under the “Uniting for Peace” Resolution to *recommend* such measures as it deems appropriate’: Institute of International Law, Resolution on Authorization of the Use of Force by the United Nations (9 September 2011), Article 7 (emphasis added).
- 22 M. J. Glennon, “Why the Security Council Failed”, *Foreign Affairs*, no. 16 (May/June 2003); M. J. Glennon, “How International Rules Die”, *Geo. L.J.*, no. 93 (2005), p. 939.

“that classifies international law as a disposable tool of diplomacy, its system of rules merely one of many considerations to be taken into account by government [...]”²³

This was an exaggeration, but it reflected a real concern at the time. Passages in the US *National Security Strategy* of 2002²⁴ caused alarm, as did the United States claim to be engaged in a ‘global war on terrorism.’ At the same time, there is growing concern at the failure to respond adequately to modern security threats (not least, transnational terrorism and the proliferation of weapons of mass destruction) and to humanitarian catastrophes (such as in Rwanda, Darfur, and Syria). Such concerns have led some to push the boundaries of the law, seeking to construct a unilateral right to use force preventively or for humanitarian purposes, and to argue for implied or retrospective authorisation by the Security Council for the use of force.

Recourse to armed force by the United Kingdom over a four-year period between 1999 and 2003 raised important issues.²⁵ The Kosovo intervention in 1999 involved a major issue of principle: was there a right of unilateral ‘humanitarian intervention’? The use of force against Al Qaida in Afghanistan in 2001 (following the attacks on the United States on 11 September 2001) also raised an important issue: the right of self-defence against attacks by non-State actors. The use of force against Iraq in March 2003, though politically and legally the most controversial,²⁶ involved no great issue of legal principle. As the Attorney General’s now public advice of 7 March 2003 indicates, for the United Kingdom, the legality of the invasion turned solely on whether it had been authorised by the Security Council. It is clear that the Security Council may authorise the use of force. The only question was: had it done so? That turned on the interpretation of a series of Security Council resolutions.²⁷ Whatever one’s view on the merits, each of these cases illustrates that the United Kingdom Government gives careful consideration to the relevant

23 T. M. Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium”, *A.J.I.L.*, no. 100 (2006), p. 88 at p. 89.

24 *I.L.M.*, 41 (2002), p. 1478. A bullet point in the March 2005 US *National Defense Strategy* read: “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”

25 For an earlier case, see G. Marston, “Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government”, *I.C.L.Q.*, no. 37 (1988), p. 773.

26 Many, including UN Secretary-General Kofi Annan, and the Legal Department of the Russian Ministry of Foreign Affairs (“Legal Assessment of the Use of Force against Iraq”, *I.C.L.Q.*, vol. 52 (2003), p. 1059), said that the use of force against Iraq in March 2003 was unlawful. Many, but by no means all, international law academics agreed. Some were even moved to write to the newspapers: M. Craven, “We are Teachers of International Law”, *Leiden J. Int’l L.*, vol. 17 (2004), p. 363.

27 For the legal justifications of the UK, USA and Australia, see their respective letters to the President of the Security Council: S/2003/350, S/2003/351 and S/2003/252. For the UK legal position, see the Attorney General’s Written Answer to a Parliamentary Question, 17 March 2003, *Hansard*, 646 HL Debs., WA 2; FCO Paper “Iraq: Legal Basis for the Use of Force”, *B.Y.I.L.*, no. 73 (2003), pp. 792-796; *I.C.L.Q.*, vol. 52 (2003), pp. 811-14; “Attorney General’s advice to the Prime Minister of 7 March 2003”, *note 12*; U.K., H.C., “Review of

questions of the international law on the use of force. This is confirmed by the careful legal advice given to the UK Government over possible strikes on Syria, at least judging by the published summary.

So suggestions of ‘the death of Article 2(4)’ were certainly wide of the mark. A more important question is whether there are significant shortcomings in the traditional body of rules on the use of force by States. Is the law as it is, the law as it ought to be?²⁸ Are existing rules adequate to meet current threats, especially from non-State actors and weapons of mass destruction?

The General Assembly of the United Nations, at the level of Heads of State and Government, responded to this question in its 2005 World Summit Outcome document. The Heads of State and Government reaffirmed:

“that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter”.²⁹

Intelligence on Weapons of Mass Destruction”, *Butler Review*, (July 2004), HC 898, at paras. 366-387; Information Commissioner’s Enforcement Notice of 22 May 2006, addressed to the Legal Secretariat to the Law Officers, Annex 6 (Legality of Military Action in Iraq: Disclosure Statement made by the Cabinet Office and the Legal Secretariat to the Law Officers). For the US legal position, see W. Taft, T. Buchwald, “Preemption, Iraq, and International Law”, *A.J.I.L.*, vol. 97 (2003), p. 557 (without the usual disclaimer). For the Australian legal position, see “Memorandum of Advice on the Use of Force against Iraq to the Commonwealth Government, 18 March 2003”, *Melbourne J. Int’l L.*, no. 4 (2003), pp. 178-182.

28 See, for example, Prime Minister Blair’s March 2004 Sedgefield speech, in which he said “It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do about it, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe [...]. This may be the law, but should it be?”. The Foreign Affairs Committee asked the Government to set out its response to the Prime Minister’s question: see *Response of the Secretary of State for Foreign and Commonwealth Affairs to the Seventh Report* (Cm 6340) of September 2004, response to recommendation 63. For earlier consideration of these issues by the Foreign Affairs Committee, see its “Foreign Policy Aspects of the War against Terrorism”, Cm 1196 in *Sessional Papers* (2002) and “Response of the Secretary of State for Foreign and Commonwealth Affairs”, Cm 5739 in *Sessional Papers*, vol. 2 (2002-2003). See also the evidence of Daniel Bethlehem, Philippe Sands, and Jutta Brunnée/Stephen Toope to the Foreign Affairs Committee of the British House of Commons in 2004: Seventh Report of the Foreign Affairs Committee in U.K., H.C., “Foreign Policy Aspects of the War Against Terrorism”, in *Sessional Papers* (2003-2004).

29 General Assembly res. 60/1, para. 79. This followed similar statements by the Secretary-General’s High-level Panel in its report *A More Secure World: Our Shared Responsibility*

It seems that, in the view of the Heads of State and Government, the rules on the use of force in the Charter, when properly interpreted and applied, are adequate to meet new challenges. What is needed are not new rules, but political will on the part of States, including members of the Security Council and potential troop-contributors. The 2005 World Summit Outcome thus offered one response to a debate that took off after 9/11 questioning the effectiveness, the relevance, and even the existence of rules of international law on the use of force.³⁰

III. SELF-DEFENCE, TRANSNATIONAL TERRORIST GROUPS AND WEAPONS OF MASS DESTRUCTION

Article 51 of the Charter provides that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations [...]”

Article 51 thus recognizes the inherent right of self-defence under customary international law. It is sometimes suggested that the right of self-defence as recognized in the Charter is too restrictive for the modern age. The US 2002 *National Security Strategy*, with its references to preventive action, seemed to reflect such a view. Suggestions of this kind tend to overlook, or downplay, the potential role of the Security Council in authorizing States to use force preventively to avert terrorist threats.

Three main questions arise in connection with self-defence against terrorist attacks. Does the right of self-defence apply at all in response to attacks by non-State actors, including transnational terrorist groups? Is there a right of ‘anticipatory’ self-defence? And, if these questions are answered in the affirmative, how does the requirement of imminence apply in relation to attacks by terrorists or with

(A/59/565), paras. 185-203; and by the Secretary-General in his report *In Larger Freedom: Towards Development, Security and Human Rights for All* (A/59/2005), paras. 122-126.

30 The response of the UK Government to the Foreign Affairs Committee in July 2004 was along similar lines: ‘In the Government’s view, the right approach is to continue to seek to build a political consensus on the circumstances in which it is appropriate to resort to military action within the current legal framework rather than seeking to change existing rules of international law on the use of force. Existing rules are sufficiently flexible to meet the new threats we face. The role of the Security Council is central to that process. Seeking to develop the rules of international law other than on a case-by-case basis would be very difficult, and probably unsuccessful.’: Letter from the Parliamentary Relations and Devolution Department, Foreign and Commonwealth Office, 5 July 2004.

weapons of mass destruction?³¹

Some question whether the right of self-defence is at all available in response to attacks by non-State actors, such as transnational terrorist groups. Yet in the immediate aftermath of the terrorist attacks of 11 September 2001, the Security Council adopted resolutions 1368 (2001) and 1373 (2001) reaffirming ‘the inherent right of individual and collective self-defence as recognized by the Charter of the United Nations’. And State practice, including the practice of the members of the North Atlantic Treaty Organization,³² the members of the Organization of American States³³ and others,³⁴ supports such a right. This is notwithstanding the International Court of Justice’s brief *dictum* in the *Israeli Wall* advisory opinion³⁵ and its (possibly significant) silence in *Armed Activities on the Territory of the Congo* case.³⁶ A subsequent Chatham House study, which developed a set of Principles on the Use of Force in Self-Defence, concluded that necessary and proportionate action could be taken where the territorial State is itself unable or unwilling to take the necessary action.³⁷ The Leiden Policy Recommendations on Counter-Terrorism and International Law of 1 April 2010 reached a similar conclusion,³⁸ as did a set of principles published in 2012 by former FCO legal adviser Daniel Bethlehem.³⁹ The Chatham House and Leiden Principles were the outcome of collective discussions among private individuals (though Leiden was an initiative of the Dutch Government). The Bethlehem Principles may reflect a degree of intergovernmental consultation though the extent to which they represent the views of governments is far from clear.

31 Wood (2014), *note 1*.

32 (2001) 40 I.L.M. 1267.

33 *Ibid.*, p. 1273.

34 Russian Minister for Foreign Affairs, Replies to questions from Al Jazeera TV, 10 September 2004, cited in Wood (2005), *note 1*, p. 87.

35 *Note 20*, paras. 138-139.

36 *Note 20*, para. 147. Uganda did not claim that it had been subjected to an armed attack by the armed forces of the DRC; the claimed attack came from a rebel group called the Allied Democratic Forces (ADF). There was no satisfactory proof of the direct or indirect involvement of the DRC Government in these attacks by the ADF.

37 E Wilmshurst, “The Chatham House Principles of International Law on the Use of Force in Self-Defence”, *I.C.L.Q.*, vol. 55 (2006), p. 963. For comments by participants, see E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* – Working Paper (The Royal Institute of International Affairs, October 2005).

38 “Leiden Policy Recommendations on Counter-Terrorism and International Law”, *Netherlands International Law Review*, no. 57 (2010), p. 531; also published, with background studies, in L. van den Herik, N. Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (2013), p. 706.

39 D Bethlehem, “Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors”, *AJIL*, no. 106 (2012), pp. 770-777; for comment see *AJIL*, no. 107 (2013), pp. 378-395, 563-585.

The question whether a right of anticipatory self-defence has survived the UN Charter remains controversial, among States and among authors. During the Cold War, one side seemed to take the position that action in self-defence was only lawful if an armed attack had actually been launched. The United States, the United Kingdom and others maintained what might be termed the ‘*Caroline* approach’, that is, that force may be used in self-defence in the face of an imminent attack. The International Court of Justice has not yet addressed the matter; indeed it has expressly left the question open.⁴⁰ The end of the Cold War, and the new threats have not, yet, led to general agreement among States on the question of anticipatory self-defence.⁴¹

The third question is the most difficult. What constitutes an imminent attack in the context of transnational terrorist groups and weapons of mass destruction? The *Caroline* language is familiar: ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.⁴² The Attorney General said in the House of Lords in April 2004:

“The concept of what constitutes an ‘imminent’ armed attack will develop to meet new circumstances and new threats [...]. It must be right that States are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.”⁴³

40 The Court left the question open in *Nicaragua* (ICJ Rep. 1986, 103, para.194; the Parties had not directly raised “the issue of lawfulness of a response to the imminent threat of armed attack”). It did the same in *Armed Activities on the Territory of the Congo, note 20*, para.143 - the facts did not warrant any pronouncement on whether self-defence would be available in the light of an imminent attack; however, in that case, after saying that the prohibition against the use of force was ‘a cornerstone of the United Nations Charter’ and citing Article 2.4, the Court continued: ‘Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council’ (para.148). See S. Ratner, “Self-Defence Against Terrorists: The Meaning of Armed Attack”, in L. van den Herik, and N. Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (2013), p. 334.

41 In some respects, new divisions have emerged, in part as a result of language in the US *National Security Strategy* of 2002 referring to ‘preventive’ action.

42 C. Greenwood, “Caroline, The”, in *Max Planck Encyclopedia of Public International Law* (2012).

43 Hansard, 21 April 2004, cols. 370-371. William H Taft IV, when State Department Legal Adviser, made similar remarks on a number of occasions. For example, on 27 October 2004 he said that “[t]he right of self-defence could be meaningless if a state cannot prevent an aggressive first strike involving weapons of mass destruction. The right of self-defence must attach early enough to be meaningful and effective, and the concept of “imminence”

In the same speech, however, Lord Goldsmith explicitly distanced the British Government from an American doctrine of preventive action, as set out in the 2002 *National Security Strategy*:

“It is [...] the Government’s view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive attack against a threat that is more remote”.⁴⁴

The application of the imminence criterion can be difficult in practice. A classic example is the Israeli attack on a nuclear plant in Iraq in 1981. On 7 June 1981, Israel bombed a research centre near Baghdad, destroying the Osirak nuclear reactor which, it said, was developing nuclear bombs that would have been ready for use against Israel in 1985. The Security Council, after extended debate,⁴⁵ unanimously and strongly condemned ‘the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.’⁴⁶ The debate focused on the necessity of Israel’s actions. It was agreed that Israel had failed to exhaust all peaceful means for resolution of the matter. Israel had also failed to produce evidence that it was threatened with an imminent attack.

The Chatham House Principles have something to say on the matter.⁴⁷ Principle D says that ‘the criterion of imminence must be interpreted so as to take into account current kinds of threat’ and that:

must take into account the threat posed by weapons of mass destruction, the intentions of those who possess such weapons and the catastrophic consequences of their use’: *Digest of United States Practice in International Law* (2004), p. 971.

44 See, to the same effect, para. 3 of the Attorney General’s advice of 7 March 2003, in which he said: ‘[...] there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognized in international law.’ The High-level Panel expressed it well at para. 188 of its report (A/59/565): ‘Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened. Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.’

45 S/PV. 2280-2288.

46 Security Council resolution 487 (1981) of 19 June 1981.

47 *Note 37*. See also N. Lubell, ‘The Problem of Imminence in an Uncertain World’ (M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2014).

“Force may be used only when any further delay would result in an inability by the threatened State effectively to defend against or avert the attack against it.

In assessing the imminence of the attack, reference may be made to the gravity of the attack [e.g. WMD], the capability of the attacker [e.g. possession of WMD], and the nature of the threat, for example if the attack is likely to come without warning.”

The commentary, after referring to the *Caroline* formula, notes that in the context of contemporary threats ‘imminence cannot be construed by reference to a temporal criterion only, but must reflect the wider circumstances of the threat.’ A key element is whether ‘it is believed that any further delay in countering the intended attack will result in the inability of the defending State effectively to defend itself against the attack. In this sense necessity will determine imminence.’

The Leiden Policy Recommendations⁴⁸ set the matter in a wider context. They “recognize that the use of force is a measure of last resort to be employed only where absolutely necessary” and that “States and the Security Council should give priority, wherever possible, to law enforcement measures.”⁴⁹ They emphasise the need for as much transparency as possible.⁵⁰ They give particular emphasis to the role of the Security Council.⁵¹ On the requirement of imminence in the context of terrorist attacks, they say:

“Whether an attack may be regarded as imminent falls to be assessed by reference to the immediacy of the attack, its nature and gravity. There must be a reasonable and objective basis for concluding that an attack will be launched, while bearing in mind that terrorists typically rely on the unpredictability of attacks in order to spread terror among civilians. Armed force may only be used when it is anticipated that delay would result in an inability by the threatened state effectively to avert the attack.”⁵²

48 *Note 38.*

49 *Ibid.*, principle 30.

50 *Ibid.*, *passim.*

51 *Ibid.*, principles 34-37; M. Wood, “The Role of the UN Security Council in relation to the Use of Force against Terrorists” in L. van den Herik, N. Schrijver, *note 38*; L. Sievers, S. Daws, *The Procedure of the UN Security Council* (4th ed., 2014).

52 *Ibid.*, principle 46; E. Wilmshurst, “Anticipatory Self-Defence against Terrorists”, in L. van den Herik, N. Schrijver, *note 38.*

IV. HUMANITARIAN INTERVENTION AND ‘RESPONSIBILITY TO PROTECT’

The term ‘humanitarian intervention’ is used in two different ways in connection with the use of force. In the past, it was used chiefly in the context of the rescue by a State of its nationals abroad when the territorial State was unable or unwilling to do so. The more recent usage, however, refers to forceful intervention by a third State or States to save people from their own Government’s action or inaction. That is the subject of this section. Even in this context, however, the term may be overly broad, since it hardly reflects the wholly exceptional circumstances in which any such right might be exercised.

Over the years, the British Government has been a leading proponent of an exceptional and strictly limited right of States to use force to avert an overwhelming humanitarian catastrophe - not, it was initially said, a general doctrine of humanitarian intervention.⁵³ The claim was first made in relation to the establishment of the safe havens in northern Iraq in the spring of 1991.⁵⁴ This was a strictly limited intervention, both in scale and in terms of the use of force. The claim was, at least for the British Government, ‘the underlying justification of the No-Fly Zones’ in northern and southern Iraq.⁵⁵ And it was restated in the following terms in 1998 in connection with the events then unfolding in Kosovo (even though the subsequent attack on Serbia in 1999 was on a far larger scale, and involved much more force, than the safe havens and the no-fly zones):

“There is no general doctrine of humanitarian intervention in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council’s express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of

53 S. Murphy, *Humanitarian Intervention: the United Nations in an Evolving World Order* (1996); C. Greenwood, “Humanitarian Intervention: The Case of Kosovo”, *Finnish Y.B.I.L.*, vol. 10 (1999), p. 141; S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (2001).

54 *B.Y.I.L.*, vol. 63 (1992), pp. 827-828.

55 “Attorney General’s advice to the Prime Minister of 7 March 2003”, *note 12*, para. 4; M. Wood, “Iraq, No-Fly Zones”, in *Max Planck Encyclopedia of Public International Law* (2012).

relevant decisions of the Security Council bearing on the situation in question.”⁵⁶

On 29 August 2013, following the use of chemical weapons in Syria, the British Prime Minister’s Office issued a statement of the Government’s legal position, which included the following:

“If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).”⁵⁷

As is often the case, there was no comparable statement of the US legal justification for the use of force. There is, however, an interesting piece by Michael

56 Baroness Symons, *Hansard HL Debs.*, WA 139-40, 16 November 1998, *B.Y.I.L.*, vol. 69 (1998), p. 593. The Foreign Affairs Committee of the House of Commons, after taking evidence from international lawyers, including Professors Brownlie, Chinkin, Greenwood and Lowe (*Memoranda in I.C.L.Q.*, vol. 49 (2000), pp. 876-943), concluded ‘that, at the very least, the doctrine of humanitarian necessity has a tenuous basis in current international customary law, and this renders NATO action legally questionable’: Conclusion (18) of the Fourth Report of the Foreign Affairs Committee, Session 1999-2000.

57 Available at <<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position>>. Apart from the reference to ‘the doctrine of humanitarian intervention’, the 2013 text follows closely the language of the statement of the criteria that was set out, in connection with Kosovo, in a note of 7 October 1998, circulated by the United Kingdom within NATO (and cited by A Roberts, “NATO’s “Humanitarian War” over Kosovo”, *Survival*, vol. 41 (1999), p. 106; *B.Y.I.L.*, vol. 70 (1999), pp. 571-572).

Schmitt, Stockton Professor at the US Naval War College, suggesting that the US Government should adopt the same legal rationale as the British one.⁵⁸

The Attorney General's advice of 7 March 2003 had said that '[t]he doctrine [of a right to intervene to avert an overwhelming humanitarian catastrophe] remains controversial.'⁵⁹ The question is whether State practice and *opinio juris* are by now sufficient to establish as a matter of customary international law a right to intervene to avert an overwhelming humanitarian catastrophe, despite the silence of the United Nations Charter and in the face of the general prohibition on the use of force in the UN Charter.⁶⁰

In 1991, the United Kingdom's legal position on intervention was a somewhat isolated one. In earlier cases which might have been seen as humanitarian interventions (India-East Pakistan 1971; Vietnam-Cambodia 1978; Tanzania-Uganda 1979; ECOWAS action in Liberia 1990⁶¹), the States concerned justified their actions on other grounds, primarily self-defence. NATO's Kosovo operation could have been an important piece of State practice and *opinio juris*.⁶² In fact, it was less than clear-cut, especially as regards *opinio juris* since many participating States were not at all explicit as to the legal basis for their actions.

However much the development of a right to intervene on humanitarian grounds may have been welcomed in some quarters, it is difficult to demonstrate that State practice and *opinio juris* since the safe havens in northern Iraq in 1991, or the Kosovo intervention in 1999, have moved in the direction of those claiming the existence in customary international law of such a right. The claim has not secured much 'traction' or, at least, had not done so until August/September 2013 in connection with Syria. Legal advice given to the UN Secretary-General in 2003 was to the effect that the supposed right of humanitarian intervention, despite the events in Kosovo and the debate that had followed, had not yet crystallized into a

58 M. N. Schmitt, "The Syrian Intervention: Assessing the Possible International Law Justifications", *International Law Studies*, no. 89 (2013), p. 744.

59 'Attorney General's advice to the Prime Minister of 7 March 2003', note 12, para. 4.

60 For a thorough assessment see O. Corten (2014), note 19, pp. 801-874.

61 For an analysis of these and other examples, see C. Kress, "Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force", *Journal on the Use of Force and International Law*, vol. 1 (2014), p. 1.

62 Much was made, during the Kosovo debates, including before the International Court of Justice during the *Legality of Use of Force* cases, of a paper entitled *Is Intervention Ever Justified?* prepared in July 1984 by the Planning Staff of the Foreign and Commonwealth Office, extracts from which were published in *B.Y.I.L.*, vol. 57 (1986), p. 619. The paper suggested (at para. II. 22) that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal'.

rule.⁶³ The High-level Panel's report *Our Common Future* of 2004, and the Secretary-General's report *In larger freedom* of 2005, did not mention any such right. The ensuing General Assembly debate in April 2005 offered no support; on the contrary, those who addressed the question of humanitarian intervention saw it as a matter to be decided upon by the Security Council, not one where unilateral action was permitted. There is no hint of a unilateral right in the 2005 World Summit Outcome. Deeds of course speak louder than words, but these expressions of opinion by many States cannot simply be ignored. Perhaps for the present, and absent further practice, claims such as those made in 1991 and 1999, and again in 2013, may have to rely on some exceptional defence or justification of necessity, such as is found in domestic legal systems, rather than on positive law.⁶⁴

In 2001, the British Government sought to promote criteria for the circumstances in which the Security Council should be ready to authorise the use of force in the face of an overwhelming humanitarian crisis.⁶⁵ This was an attempt to develop the underlying policy for Council action, not the law. The initiative did not lead to immediate results. Other initiatives followed, stimulated by concern at the unilateralism inherent in the Kosovo action. The most influential was the International Commission on Intervention and State Sovereignty, set up by the Canadian Government and co-chaired by the former Australian Foreign Minister, Gareth Evans. The Commission's 2001 report was entitled *The Responsibility to Protect*.⁶⁶ The Secretary-General's High-level Panel likewise endorsed:

63 R. Zacklin, *note 2*, p. 144.

64 M. Wood, "The Law on the Use of Force: Current Challenges", *Singapore Year Book of International Law*, vol.11 (2007), p. 1, 11. The United States has, to this point (2014), not embraced such a right. It justified its actions to protect the Kurds in northern Iraq and the Shia in the south, and the NATO action over Kosovo, on 'a range of other factors.' Michael Matheson, former State Department Deputy Legal Adviser, has explained American reticence as follow: "the assertion by states or regional organizations of a *legal right* to carry out such "benign" uses of force on their own authority could create precedents for future interventions by others that might be destabilizing and dangerous. This is one of the main reasons the United States has never asserted the doctrine." Matheson goes on to claim that "there is a much stronger legal and political basis for forcible humanitarian intervention under Chapters VII or VIII." M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (2006), p. 139.

65 *B.Y.I.L.*, vol. 72 (2001), p. 695.

66 *Report of the International Commission on State Sovereignty and Intervention: The Responsibility to Protect* (2001). This was preceded by a report by the Danish Institute for International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999). R2P has spawned a vast literature: see, for example, S. Zizek, "The Responsibility to Protect". in M. Evans, *International Law* (4th ed., 2014), pp. 509-533 (with bibliography).

“The emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”⁶⁷

The Panel went on to propose that the Security Council adopt guidelines (not unlike those suggested by the British Government in 2001) as to when it should act. This was proposed expressly to ensure the legitimacy of the Security Council’s actions, not their legality. The Secretary-General’s report *In larger freedom* was in similar terms. In the event, however, the Security Council did not adopt any such guidelines. Nor did the General Assembly support their adoption.

In paragraphs 138 and 139 of the 2005 World Summit Outcome – a General Assembly resolution and as such not legally binding, the Heads of State and Government noted that ‘[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’ They went on to say that ‘the international community, through the United Nations’ also has the responsibility to use appropriate peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations. The key sentence then follows:

“In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”

This sentence is complex, and merits careful analysis. The first question is whether, by using the word ‘responsibility,’ the General Assembly was asserting that ‘the international community, through the United Nations’ has an international legal obligation to protect populations. The answer, surely, is ‘no’. Although individual States have positive obligations under human rights law that would be encompassed in the concept ‘responsibility to protect’, it does not follow that ‘responsibility to protect’ amounts to a new international legal obligation, created by General Assembly fiat. So to claim might limit acceptance of the important political principle. States, particularly those who would bear the main burden of action, are unlikely to be willing to agree to a legal obligation to act to achieve

67 Note 29, para. 203.

objectives that may require huge resources and where, depending on the circumstances, success may be uncertain. In any event, it is difficult to see how ‘the international community, through the United Nations’ could bear a legal obligation.⁶⁸ The ‘international community’ is not a legal person, capable of bearing rights and obligations. The United Nations is, but the language of the 2005 World Summit Outcome does not suggest that the Assembly intended to recognise some new international legal obligation upon the United Nations as an organization, as distinct from a political commitment.

On the other hand, as a political commitment, the passage on ‘responsibility to protect’ in the 2005 World Summit Outcome is potentially significant, and suggests that States have come quite far. What is significant, legally as well as politically, is that in the 2005 World Summit Outcome the General Assembly, that is to say, the membership of the United Nations as a whole, confirmed that enforcement action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is within the remit of the Security Council. It may be recalled that as recently as 1993, one learned authority could write that “[n]otwithstanding the risk that unilateral intervention for humanitarian purposes is open to abuse, it is far from clear that such action can properly be authorized by the United Nations.”⁶⁹ By 2005 the power to authorize intervention for humanitarian purposes was well established in the practice of the Security Council, and any remaining legal doubts have surely been removed by the 2005 World Summit Outcome. In fact, the Assembly went further. It clearly said that it expected the Security Council to take action in appropriate cases, and the Security Council itself has acknowledged this.⁷⁰

V. CONCLUSIONS

It is suggested that the existing rules of international law on the use of force, in particular as regards Security Council authorisation and self-defence, properly interpreted and applied, are adequate to address current threats. Whilst by no means perfect, they are preferable to any alternative rules that could be agreed. Efforts radically to amend or reinterpret the rules are neither desirable, nor likely to succeed. One or a few States, however powerful, cannot change established rules of international law, Charter-based ones at that.

68 ‘International community’ is a term with ever shifting meaning, a chameleon or Humpty-Dumpty term; it means whatever one wants it to mean.

69 R. Higgins, *Problems and Process: International Law and How We Use It* (1994), p. 254.

70 Security Council resolution 1674 (2006) reaffirmed paragraphs 138 and 139 of the 2005 World Summit Outcome Document. See also Security Council resolution 1706 (2006) on Darfur.

The collective security system established by the United Nations Charter, supported by the wider international system (including such bodies as the International Atomic Energy Agency and regional organizations), is in principle capable of responding to current and future threats, whether from overwhelming humanitarian catastrophes, so-called 'rogue' and 'failed' States, transnational terrorist groups, weapons of mass destruction, or a combination thereof. This has already been demonstrated by robust Council action in the face of aggression and terrorist threats, as well as some effective action in the field of counter-proliferation. Where the Council cannot or does not act swiftly enough, the right of individual or collective self-defence may protect States' direct interests. If the Council fails to act to prevent an overwhelming humanitarian catastrophe, States willing and able might exceptionally act anyway, perhaps with an argument based on necessity.

However, the conclusion that the existing rules on the use of force are adequate ultimately depends on the effectiveness of the collective security system established by the Charter of the United Nations, and in particular on the willingness of members of the Security Council and others to respond in practice to current threats. The powers of the Council in relation to the maintenance of international peace and security are clear. Both its broad interpretation of threats to the peace, and its power to authorise others to use force, have equipped it to take effective action against non-State actors and to counter humanitarian crises.

This may be thought to be an unduly optimistic view, even wishful thinking. But experience suggests that collective decisions (whether for action or inaction) are almost invariably better than unilateral ones. The alternative to reliance on the current rules would likely be a reversion to pre-Charter unilateralism, even to a pre-Covenant era.

What is needed is a broader consensus on the existing rules of international law on the use of force and on their application, as well as greater support for international institutions, and particularly for a Security Council that is effective and seen to be legitimate. Effectiveness depends upon the political will of the Members of the United Nations. It does not depend upon new rules, or upon Council reform. As for legitimacy, it is far from obvious that those whose constant refrain is to criticize the Security Council would be satisfied with any reform proposal that has been on the table. Considerable improvements – deserving of greater recognition – have been made over the years in its working methods.⁷¹ Unjustified criticisms of the Security Council may have an insidious impact on its perceived legitimacy. 'Demonization' of the Security Council is not an obvious way to promote multilateralism.

71 L. Sievers and S. Daws, *The Procedure of the UN Security Council* (4th ed., 2014).

As noted above, for a Government's legal adviser, following the traditional position of his or her Government as it has developed case-by-case over the years, the rules of international law on the use of force are relatively easy to state. What is needed is a greater degree of common understanding, particularly among Governments, as to what the rules are. And this is not just a case of reconciling the views of the developing countries with the developed, or the countries of the Non-aligned Movement with others. There are important differences among European countries, and between the United States and others. How can such greater understanding be achieved? Not, it is believed, by abstract declarations at the United Nations. Not by some new treaty. Greater common understanding will be built case-by-case, through discussions among Governments, and through debate with and within civil society and the academic world.

