

CHINKS IN THE ARMOUR: INTERNATIONAL LAW, TERRORISM AND THE USE OF FORCE

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I INTRODUCTION

To the international lawyer, the question of the practical role of international law in world politics is akin to a question that might have been posed by the Sphinx. It is certainly a question that is difficult to answer. Moreover, as in the case of the Sphinx's riddle, some of the available solutions implicate the potential for the demise of any international lawyer called to respond to it. Recently, the threat of international terrorism has led to a fundamental re-evaluation of the relevance of international law in contemporary world affairs. It can be seen as somewhat paradoxical that some have used the threat of terrorism, not to call for a strengthening of the international legal order, but to press for its abandonment, or radical overhaul. Certain politicians, jurists and other commentators have predicted the collapse of the current international legal framework,¹ echoing in so doing the sentiment expressed by Jan Christian Smuts on the occasion of the founding of the League of Nations: 'The great caravan of humanity is again on the march'.² Even the United Nations Secretary-General has acknowledged:

We have come to a fork in the road. This may be a moment no less decisive than in 1945 itself, when the United Nations was founded. ... [W]e must decide whether it is possible to continue on the basis agreed then, or whether radical changes are needed.³

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1 Michael Glennon, 'Why the Security Council Failed' (2003) 82(3) *Foreign Affairs* 16; Anne-Marie Slaughter, 'A Chance to Reshape the UN', *Washington Post* (Washington), 13 April 2003, B07; Richard Perle, 'Thank God for the Death of the UN – Its Abject Failure Gave Us Only Anarchy. The World Needs Order', *The Guardian* (London), 21 March 2003, 26; Michael Reisman, 'Assessing Claims to Revise the Laws of War' (2003) 97 *American Journal of International Law* 82; Anthony Arend, 'International Law and Rogue States: The Failure of the Charter Framework' (2002) 36 *New England Law Review* 735; Robert Howse, 'The Road to Baghdad is Paved with Good Intentions' (2002) 13 *European Journal of International Law* 89.

2 Jan Christian Smuts, *The League of Nations: A Practical Suggestion* (1918) 71.

3 Secretary-General Kofi Annan (Speech delivered at the General Assembly, 58th sess, 7th plen mtg, 23 September 2003) [3], UN Doc A/58/PV.7 (2003).

Faced with a mounting crisis of faith in the international system, the international community is beginning to address a series of complex questions about the continued efficacy of international law and international institutions. Should the international legal framework be modified in order to keep pace with recent developments while preserving its existing structure and character, or is more radical reform needed? Has international law reached the limits of its capacity to provide a framework in which international peace and security can be fostered? Is global governance a viable aim that should be developed and strengthened, or must it give way in the face of the reality of American exceptionalism? And, in the case of the latter scenario, what might the consequences be?

This article seeks to engage with the central question faced by the international community in the current climate of turbulence and uncertainty: namely, whether the scourge of terrorism is such a radical new threat that it necessitates a reinvention, or even abandonment, of the current international legal order. The question is approached through an examination of recent forceful responses to terrorism. The 'war against terrorism' incorporates a number of renovations to the existing international legal order. These include, in particular, fundamental changes to what is arguably the most precarious aspect of international relations – the rules relating to the use of force. The amendments that are being proposed amount to violations of existing international law. Yet, these violations, should they receive broad acceptance, may bring about the development of a new international legal order. The article will first explore the framework established at the end of the Second World War to protect the international community from threats to international peace and security, and the capacity of this framework to respond to threats unforeseen by the drafters of the *Charter of the United Nations* ('Charter'). Secondly, the article examines the international community's response to the threat of terrorism and, in particular, the more recent tendency to resort to military intervention. The article will place contemporary policies for the use of counter-terrorist force in their historical and legal context and, to the extent they diverge from the current legal framework, consider whether they create the foundation for a new international legal order.

II THE CHARTER REGIME: PROHIBITION OF THE USE OF FORCE

The Charter governs the use of force by states in the international community. At the core of the regime is the prohibition of the use of force, contained in art 2(4) of the Charter. Article 2(4) provides that '[a]ll 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'. Certainly the language of art 2(4) is ambiguous and open to interpretation. It is sometimes suggested that the words 'against the territorial integrity or political independence of any State'

may have a qualifying effect on the prohibition.⁴ However, this is not supported by the *travaux préparatoires* (that is, the preparatory work and debates leading to the drafting of the Charter) depicting the drafter's intention behind the inclusion of this phrase. The debates during the drafting of this provision indicate that the phrase was not intended to be restrictive but, on the contrary, was merely included to give more specific guarantees to small states.⁵

The text of the Charter,⁶ its drafting history⁷ and the writings of eminent jurists⁸ suggest that the Charter was intended to be a complete description of the circumstances in which force could be used in the international order. At the date of the Charter's adoption, the prohibition of the use of force was clearly intended to be comprehensive, subject only to the express exceptions contained in the Charter. As is well known, these exceptions are twofold. First, the Security Council may authorise the use of force in response to 'any threat to the peace, breach of the peace, or act of aggression' where it considers such force is necessary to maintain or restore international peace and security.⁹ Secondly, under art 51, states may resort to 'the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. The language of art 51 reflects that resort to self-defence is intended to be an interim measure, permitted 'until the Security Council has taken measures necessary to maintain international peace and security'. Measures taken in its exercise are to 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.

In this way, the object of the Charter was to render unilateral use of force, even in self-defence, subject to control by the United Nations.¹⁰

Professor Louis Henkin described the Charter's prohibition of the use of force as 'the principal norm of international law of [the 20th] century'.¹¹ In the wake of

4 See, eg, Julius Stone, *Aggression and World Order* (1958) 95; Anthony D'Amato, 'Israel's Air Strike Upon the Iraqi Nuclear Reactor' (1983) 77 *American Journal of International Law* 584, 585; Jordan Paust (1984) 78 *American Society of International Law Proceedings* 92.

5 Leland Goodrich and Edvard Hambro, *Charter of the United Nations* (2nd ed, 1949) 103, 104–5; Hersch Lauterpacht, *Oppenheim's International Law* (7th ed, 1952) vol 2, 154; Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81(2) *Recueil des cours de l'Académie de Droit International* 455, 493; Ian Brownlie, *International Law and the Use of Force by States* (1963) 267.

6 See Hans Kelsen, *The Law of the United Nations* (1950) 109. Kelsen notes that the combined operation of art 103 and art 2(6) demonstrates that the Charter regime was intended to be the law not only of the United Nations, but of the whole international community.

7 Goodrich and Hambro, above n 5, 106–7.

8 Max Sorensen, 'Principes de Droit International Public' in *Recueil des Cours de l'Académie de Droit International de la Haye* (1960) vol 3, 101, 109, 240; Brownlie, above n 5, 113, 273; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1, 2. See also Statement of Mr Chaumont (France), Special Committee on the Question of Defining Aggression, 25 UN GAOR, 36, UN Doc A/AC.134/SR.57 (1970).

9 *Charter of the United Nations* arts 39, 42.

10 Brownlie, above n 5, 273.

two horrific World Wars, international law's traditional tolerance of the 'just war' collapsed, and renewed appreciation of the horror of world conflict heralded a regime in which war was recognised as inherently unjust. The Preamble to the Charter reflects the level of war-weariness on the part of the international community, expressing one of the principal ends of the United Nations to be 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'.

However, while the maintenance of peace was certainly a significant aim of the United Nations, it would be inaccurate to depict it as the overriding aim. At the first meeting of the First Commission of the San Francisco Conference – at which the Charter was drafted and ultimately adopted – the President of the Committee declared:

With regard to peace we feel the need to emphasise that our first object was to be strong to maintain peace, to maintain peace by our common effort and at all costs, at all costs with one exception – not the cost of justice.¹²

This qualification was ultimately included in the Charter's Preamble, which recognised that another of the principal ends of the United Nations was to ensure 'that armed force shall not be used, *save in the common interest*'.¹³

The prohibition of the use of force by states included in the Charter was not merely a utopian aspiration, but was intended to form an integral part of a broader dispute settlement and collective security system. The world order established at the conclusion of the Second World War was based on two interrelated underlying principles: first, to bring about the resolution of international disputes by peaceful means using force only as a measure of last resort and, secondly, recognition that the use of force would only be justified in the interest of the international community, and not individual states. In light of the fact the Charter was intended to be a complete description of the circumstances in which force could be used in the international order,¹⁴ it can be assumed that the drafters envisaged that 'justice' and the 'common interest' could be protected and enforced by way of the exceptions expressly provided for in the Charter.

However, state practice following the entry into force of the Charter evidences that the drafters' faith in the ability of the United Nations to protect and enforce 'justice' and the 'common interest' in this way was misconceived. Almost from its inception, the body at the heart of the United Nations' collective security system, the Security Council, was compromised. As a starting point, the world community failed to establish the machinery for collective security and enforcement envisaged in arts 43 to 47 of the Charter. These articles provide that, as soon as possible after the adoption of the Charter, the Security Council would negotiate special agreements with the Member states for the provision of armed

11 Louis Henkin, 'Use of Force: Law and US Policy' in Louis Henkin, Stanley Hoffman and Jeane Kirkpatrick, *Right v Might: International Law and the Use of Force* (2nd ed, 1991) 37.

12 Documents of the United Nations Conference on International Organization, San Francisco, UNCIO 1006 I/6, 2.

13 *Charter of the United Nations* Preamble (emphasis added).

14 See above nn 6–8 and accompanying text.

forces that could be called upon by the Security Council where necessary for the purpose of maintaining international peace and security. In time, these articles proved abortive. In addition, the escalation of tensions between the then Soviet Union and the United States during the Cold War led to a deadlocked Security Council, and a reclassification of the Permanent Members of the Security Council as 'Permanent Rivals'.¹⁵ This deadlock manifested itself in extensive use of the veto power (vested in the Permanent Members by art 27(3) of the Charter), which was used 276 times between 1945 and 1991. In the first decade after the establishment of the United Nations, the veto was used 83 times (including 80 vetoes by the Soviet Union). In the decade between 1976 and 1985, the veto was used 60 times (including 34 vetoes by the United States). By way of comparison, the veto has only been used 15 times in over a decade since 1991.¹⁶

The flaws in the collective security regime were acknowledged at an early stage by the adoption of the 'Uniting for Peace' resolution by the General Assembly in 1950. Conscious of the failure of the Security Council to negotiate art 43 agreements and of the paralysing effect of the omnipresent veto on Security Council action, the General Assembly adopted a resolution resolving that:

if the Security Council, because of lack of unanimity of the permanent members, failed to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly [shall] ... make appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.¹⁷

Some fairly creative methods of interpretation of the Charter must be employed in order to justify the General Assembly's assumption of secondary responsibility for the maintenance of peace in this way. Under the Charter, the Security Council is vested with 'primary responsibility for the maintenance of international peace and security',¹⁸ while the General Assembly is merely vested with the power to make recommendations with regard to the 'principles of co-operation in the maintenance of international peace and security'.¹⁹ Moreover, the General Assembly's power in this regard is expressly excluded in circumstances where 'the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter ... unless the Security Council so requests'.²⁰ Shortly after the adoption of the Uniting for Peace resolution, Hans Kelsen acknowledged:

15 Ruth Wedgwood, 'Unilateral Action in the UN System' (2000) 11 *European Journal of International Law* 349, 351.

16 *Changing Patterns in the Use of the Veto in the Security Council* (2004) Global Policy Forum <<http://www.globalpolicy.org/security/data/vetotab.htm>> at 15 November 2004.

17 *Uniting for Peace*, GA Res 377, UN GAOR, 5th sess, Supp No 20, UN Doc A/1775 (1950).

18 *Charter of the United Nations* art 24.

19 *Ibid* art 11.

20 *Ibid* art 12.

However the question may be answered as to whether and to what extent the Resolution 'Uniting for Peace' is consistent with the wording of the Charter, it can hardly be denied that the United Nations under this Resolution assumes the character of an international organisation very different from that which the framers of the Charter had in mind.²¹

While rarely resorted to today, the Uniting for Peace resolution remains of interest as an early example of a manifest acknowledgement by the international community that the black letter of the Charter can prove inadequate in the face of the political vagaries of the international community. In recent times, this contention has been repeated with more aggression and conviction than we have seen previously. The old threat of nuclear confrontation between rival superpowers may have passed, but has been replaced by the 'new' threat of widespread and interconnected networks of terrorists who defy containment by sovereign borders and seek weapons of mass destruction. President George W Bush famously threatened the United Nations that its failure to authorise force against a rogue state possessing such weapons would see the world body 'fade into history as an ineffective, irrelevant debating society'.²² In the face of action against Iraq in the absence of United Nations authorisation, commentators declared that, '[w]ith the dramatic rupture of the UN Security Council, it became clear that the grand attempt to subject the use of force to the rule of law had failed'.²³ In his Separate Opinion of 6 November 2003 in the *Oil Platforms* case, Judge Simma was prompted to remark:

Everybody will be aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2(4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter. ... What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force.²⁴

As the following discussion seeks to show, a knee-jerk dismissal of the Charter as dead parchment in the face of the threat of international terrorism is premature and reactive. The lessons learned from the experience of two world wars, including the need for severe restrictions on the use of force, are no less relevant today. Moreover, like other constitutional and quasi-constitutional instruments, the Charter is an organic document with a meaning that can evolve with the international society it regulates. In such circumstances, it is tempting to embrace the pragmatism of Rogers, who considered that '[t]he choice is not between the Charter norms and chaos. The choice is between the Charter and other means to

21 Kelsen, above n 6.

22 George W Bush (Speech delivered at the Naval Station Mayport, Florida, 13 February 2003), <<http://www.whitehouse.gov/news/releases/2003/02/20030213-3.html>> at 15 November 2004.

23 Glennon, above n 1, 16.

24 *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Rep 1, Separate Opinion of Judge Simma [6].

fill in the corners of an incomplete canvas'.²⁵ This has been evidenced in recent times by states proposing and, at times, actively resorting to action that goes beyond the narrow exceptions recognised in the Charter. Certainly, the principle *ex injuria jus non oritur* – law cannot originate in an illegal act – was affirmed by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* ('*Nicaragua*') where the Court held that 'instances of a state's conduct inconsistent with a given rule should generally ... [be] treated as breaches of that rule, not as indications of the recognition of a new rule'.²⁶ However, the Court also acknowledged that this principle has important exceptions such that '[r]eliance by a State on a novel right or an unprecedented exception to the principle [of customary international law] might, if shared in principle by other States, tend towards a modification of customary international law'.²⁷ In the international legal system, lawbreakers can sometimes turn out to be lawmakers.

Eminent jurists have suggested that this principle is equally applicable in relation to the interpretation of the Charter. Hans Kelsen noted that the Charter may be changed, not only by amendments carried out in accordance with the formal amendment procedure, but 'also by its actual application based on an interpretation which, more or less consistent with the letter of the law, is not in conformity with the ascertainable intention of the authors'.²⁸ This is consistent with art 31(3)(b) of the *Vienna Convention on the Law of Treaties*,²⁹ which provides that a treaty shall be interpreted with regard to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.

State practice may therefore lead to the development of customary international legal exceptions and extensions to the Charter framework regulating the use of force. The idea that customary international law may operate to supplement Charter norms was recognised by the International Court of Justice in the *Nicaragua* case,³⁰ and was affirmed recently in the *Oil Platforms* case.³¹ In the *Nicaragua* case, the Court expressly declared that the Charter exists alongside and not to the exclusion of customary international legal principles:

25 William Rogers, 'The Principles of Force, the Force of Principles' in Henkin, Hoffman and Kirkpatrick, above n 11, 106.

26 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 98.

27 *Ibid* 109 [207].

28 Hans Kelsen, *Recent Trends in the Law of the United Nations* (1951) 911. See also Thomas Franck, 'The Use of Force by States without Prior Security Authorization' (Hersch Lauterpacht Lecture, Cambridge University, 21–23 November 2000) 6: 'What emerges from the vast legacy of recorded debates and decisions of the principal political organs is that they tend to treat the Charter not as static formula, but as a constitutive instrument capable of organic growth'.

29 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

30 *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 94–7.

31 *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Rep 1, [42].

As regards the suggestion that the areas covered by the two sources of law [the Charter and customary international law] are identical, the Court observes that the United Nations Charter ... by no means covers the whole area of the regulation of the use of force in international relations. ... It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that in the field in question ... customary international law continues to exist alongside treaty law.³²

However, developments in the Charter regime must proceed with regard to the long-term consequences of these developments. While the rhetoric of the 'war against terrorism' has done much to legitimise the use of armed force in response to terrorism on the political level,³³ certain policies employed in the course of this operation are not easily defensible from an international legal perspective. Legal justification serves as an important supplement to political legitimacy: while political justification need only satisfy the domestic conscience in the short-term, legal justification cannot escape considerations of precedent and the long-term effect on the international order. In considering proposed developments to the regime governing the use of force, it is important to return to the two principles underlying the Charter regime, namely that force was only to be used as a measure of last resort to settle international disputes, and then only in the interest of the international community, not individual states. While some may dismiss these aims as anachronistic ideals, it is important not to forget the context in which they originated, namely the previous generation's experience of an unacceptable level of bloodshed during two world wars. In a speech to the General Assembly in September 2003, Kofi Annan urged states not to discard the lessons which the generation founding the United Nations sought to enshrine in the Charter:

The United Nations is by no means a perfect instrument, but it is a precious one. I urge you to seek agreement on ways of improving it, but above all of using it as its founders intended: to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to re-establish the basic conditions for justice and the rule of law, and to promote social progress and better standards of life in larger freedom. The world may have changed, but those aims are as valid and urgent as ever. We must keep them firmly in our sights.³⁴

III TOWARDS A NEW LEGAL ORDER? USE OF FORCE AGAINST TERRORISTS

For all the talk of terrorism being a 'new' threat, it is clear that it has affected states throughout history. As long as there have been causes to fight for, both legitimate and illegitimate, terrorist tactics have been used to fight them. Both international and domestic legal systems grappled with terrorism for many years prior to September 11.

32 *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 94, 96-7, [181].

33 See the excellent article by Frédéric Mégret, 'War? Legal Semantics and the Move to Violence' (2002) 13 *European Journal of International Law* 361.

34 Annan, above n 3, [4].

Traditionally, the international legal community has regarded terrorism as a phenomenon most appropriately classified as a crime, and best addressed by establishing a co-operative scheme for the domestic prosecution of terrorist offences. International law relating to terrorism is found in 12 terrorist conventions, entered into between 1963 and 1999, relating to a range of individual terrorist offences including attacks against aircraft,³⁵ attacks on government representatives,³⁶ the taking of hostages,³⁷ possession of nuclear material,³⁸ attacks against ships,³⁹ attacks on fixed oil platforms,⁴⁰ manufacture of unmarked plastic explosives,⁴¹ terrorist bombings⁴² and the financing of terrorism.⁴³ States are in the process of negotiating a Comprehensive Convention on International Terrorism, which seeks to apply the obligations under the existing piecemeal conventions more generally. The conventions aim to prevent and suppress a range of terrorist and terrorist-related acts by globalising the regime for domestic criminal prosecution of individuals who perpetrate such acts. They follow largely the same model between them, imposing a set of obligations on states in relation to specific acts. These obligations are threefold: first, to criminalise the act under domestic law, secondly, to establish jurisdiction for their courts to hear infractions constituted by such acts and, thirdly, a duty to 'prosecute or extradite' suspected terrorists found within their territory. The aim is the achievement of a world in which there is 'nowhere to run and nowhere to hide' for those guilty of terrorism.

Alongside this organised international regime for the criminal prosecution of terrorists, a more *ad hoc* practice of using military force against terrorists has simultaneously developed. While this practice certainly predates the response to September 11, the belligerent rhetoric of the 'war against terrorism' has given

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- 35 *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969); *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973); *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, opened for signature 24 February 1988, 1652 UNTS 499 (entered into force 6 August 1989).
- 36 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).
- 37 *International Convention against the Taking of Hostages*, 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).
- 38 *Convention on the Physical Protection of Nuclear Material*, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987).
- 39 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).
- 40 *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).
- 41 *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, opened for signature 1 March 1991, 39 SD 28 (entered into force 21 June 1998).
- 42 *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).
- 43 *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002).

new prominence to the use of military force. Moreover, use of force is contemplated beyond circumstances of self-defence, and extends to a number of circumstances that do not appear to fit neatly within the current regime governing the use of force in the international community.

The blueprint for the 'war against terrorism' is found in a publication of the United States government entitled the *National Security Strategy of the United States of America*⁴⁴ ('Strategy'). The Strategy expands the possibility for unilateral use of force beyond the isolated category of 'self-defence if an armed attack occurs against a Member state of the United Nations' currently recognised by the Charter regime. In particular, the Strategy incorporates three doctrines of questionable legality under the current international legal framework.

First, *unilateral attacks against terrorist organisations and the states harbouring them*. The Strategy declares that it will disrupt and destroy terrorist organisations, 'defending the United States ... by identifying and destroying the threat before it reaches our borders'. While the intention is declared to enlist the support of the international community, the policy warns that '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'. In doing so, the Strategy emphasises, '[w]e make no distinction between terrorists and those who knowingly harbour or provide aid to them'.⁴⁵

Secondly, *unilateral pre-emptive self-defence*, or the unilateral resort to force in response to a threat that is not imminent, but might materialise at some stage in the future. Such action is regarded as particularly necessary against states in possession of weapons of mass destruction who have demonstrated aggressive intent with regard to other nations, and who it is suspected might pass these weapons on to terrorists.

The third doctrine is *unilateral humanitarian intervention*, or the unilateral resort to force to relieve a population from egregious human rights abuses. This element of the Strategy springs from the rationale that danger can incubate in weak, incompetent and/or profoundly corrupt states where transnational terrorist groups can locate safe havens in which to plan, recruit, train and hide following a terrorist attack.

Each of these bases of action will be considered in turn to ascertain whether they comply with the current regime governing the use of force in the international community.

A Unilateral Attacks against Terrorist Organisations and the States that Harbour Them

Undoubtedly, if self-defence is an element of the regime governing the use of force, most would accept that self-defence should be available to protect a state against actual or anticipated terrorist attacks. The reality is that the self-defence

44 National Security Council, *National Security Strategy of the United States of America* (2002) The White House <<http://www.whitehouse.gov/nsc/nss.pdf>> at 15 November 2004.

45 *Ibid* 5.

exception is circumscribed by important limits, which curb the ability of a state to use force against terrorists.

To explain the operation of these limits, it is helpful to have regard to the United States' response to al Qaeda's attacks on the World Trade Centre and the Pentagon on September 11. The reaction to the events of September 11 was expressed rapidly in terms of recourse to force. According to National Security notes,⁴⁶ 13 hours after the first plane hit the north tower of the World Trade Centre, President Bush assembled his most senior national security advisers in the conference room of the Presidential Emergency Operations Centre, including Vice-President Dick Cheney, Defence Secretary Donald Rumsfeld, National Security Adviser Condoleezza Rice, Secretary of State Colin Powell and then-CIA Director George Tenet. The President informed his advisers: 'This is the time for self-defense. We have made the decision to punish whoever harbours terrorists, not just the perpetrators'. George Tenet offered a sobering thought. The CIA had been working on the al Qaeda problem for years, and Tenet noted that this would involve action against 60 countries. President Bush is said to have responded, '[I]et's pick them off one at a time'.⁴⁷

In the event, the response by the United States was more measured. However, the action against Afghanistan in 2001 still tested the boundaries of self-defence. On 7 October 2001, the United States Ambassador to the United Nations, John Negroponte, wrote to the President of the Security Council to report that 'the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States on September 11, 2001'.⁴⁸ The letter explained that the United States had clear and compelling information that the al Qaeda organisation had a central role in the attacks, and continued:

The attacks on September 11, 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaida organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. ... From the territory of Afghanistan, the Al-Qaida organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad. ... In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated ... measures against Al-Qaida terrorist training camps and military installations of the Taliban regime in Afghanistan.⁴⁹

In order to determine whether the use of military force against Afghanistan was justified, it is necessary to return to the parameters of art 51 of the Charter. Article 51 permits states to exercise their 'inherent right of self-defence ... if an armed attack occurs against a Member of the United Nations'. By referring to a

46 Dan Balz and Bob Woodward, 'America's Chaotic Road to War', *Washington Post* (Washington), 27 January 2002, A01.

47 *Ibid.*

48 Letter from the Permanent Representative of the United States of America to the President of the Security Council United Nations, 7 October 2001, UN Doc S/2001/946 (2001).

49 *Ibid.*

state's 'inherent' right to self-defence, the Charter encompasses the customary international legal definition of self-defence, and the additional limits there imposed.⁵⁰ These limits were famously articulated in the *Caroline* incident, arising out of an attack on an American ship, the *Caroline*, which was set alight and sent over Niagara Falls by British troops during the Canadian Rebellion of 1837. Britain claimed that the ship was being used by Canadian rebels and their American supporters in attacks against Canada, and that the attack on the ship was made in self-defence. The letter from United States Secretary of State Daniel Webster to Lord Ashburton of the United Kingdom has long been regarded as containing the definitive statement of the right of self-defence under customary international law. Daniel Webster expressed, and Lord Ashburton did not dispute by return letter, that those claiming self-defence must show 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.⁵¹ Accordingly, beyond the express terms of article 51, the lawfulness of measures taken in self-defence depends on observance of the criteria of imminence of threat, and necessity and proportionality of the measures taken in response.

The application of these limits to the use of force against Afghanistan raises four important questions: (1) Was the action by the United States and its allies in response to an 'armed attack' within the meaning of art 51? (2) Was the use of force in response to an imminent threat? (3) Was the use of force *necessary* to repel the threat? (4) Was the overthrow of the Taliban regime a *proportionate* response?

All four questions raise controversial issues. The second, third and fourth questions involve an application of the current legal framework to the particular factual circumstances of the war against Afghanistan, issues that have been explored in depth elsewhere.⁵² It is the first question that is of normative interest in the sense that it raises the possibility of an extension to the current international legal regime governing the use of force. The normative issue is whether contemporary international law recognises an attack by a non-state terrorist group to be an 'armed attack' within the meaning of article 51 which would justify the use of force against that group, and any third state in which the group is located.

50 *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 94 [176].

51 Letter from Daniel Webster, Secretary of State, to Lord Ashburton, 6 August 1842, reprinted in John Bassett Moore, *A Digest of International Law* (1906) vol 2, 409, 412. The criteria of necessity and proportionality were confirmed by the International Court of Justice in *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 103 [194].

52 Pierre Klein, 'Le Droit International à l'Épreuve du Terrorisme' (course delivered at the Hague Academy of International Law Lectures, The Hague, 11–15 August 2003); Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401; Olivier Corten and François Dubuisson, 'Opération 'Liberté Immuable': Une Extension Abusive du Concept de Légitime Défense' (2002) vol 1, 106 *Revue Générale de Droit International Public* 51; Christopher Greenwood, 'International Law and the "War against Terrorism"' (2002) 78 *International Affairs* 301; Jordan Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond' (2002) 35 *Cornell International Law Journal* 533.

Until recently, many would have been content to construe the attacks against the World Trade Centre and the Pentagon as ‘armed attack[s]’. However, the International Court of Justice’s recent Advisory Opinion in the Israel/Palestine case has undermined any conviction in that position. In that case, the Court declined to recognise Israel’s capacity to rely on self-defence on the basis that ‘Israel does not claim that the attacks against it are imputable to a foreign State’.⁵³ The Court held that ‘[a]rticle 51 of the Charter...recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*’.⁵⁴ If this is the legal position (and it is important to acknowledge the persuasive dissents of Judge Higgins,⁵⁵ Judge Kooijmans⁵⁶ and Judge Buergenthal⁵⁷ on this point), the law relating to the use of force has been immune to the extension of international law beyond state relations that has occurred in other areas, and remains distinctly state-centric. The complication of this is that, unless the terrorists are located in the state launching the counter-terrorist attack, a state that consents to the counter-terrorist attack on its territory or on territory outside the jurisdiction of any state, such as the high seas, any counter-terrorist attack will constitute a use of force against the territorial integrity of the state in whose territory the terrorists are located. Absent Security Council authorization, this attack will be unlawful unless it can be established that the state acted against has itself engaged in an ‘armed attack’ against the state resorting to self-defence. The question then becomes: what level of state engagement in a terrorist attack is necessary to implicate a state in an ‘armed attack’ within the meaning of article 51 justifying the use of force against that state in self-defence?

In answering this question, it is important not to confuse principles of state responsibility with the right to resort to force against a state under article 51. It is true that, under the rules of state responsibility, a state may be held responsible for the conduct of a terrorist organisation where the organisation is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.⁵⁸ A state may also be held responsible for such conduct if and to the extent that the state acknowledges and adopts the conduct in question as its own.⁵⁹ Evidence of statements by the Taliban,⁶⁰ apparently endorsing the terrorist acts, could have been used to impute legal responsibility to the Taliban for these acts.⁶¹ However, while state responsibility may justify diplomatic, economic or

53 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep [139].

54 *Ibid* (emphasis added).

55 Separate Opinion of Judge Higgins, *ibid* [33].

56 Separate Opinion of Judge Kooijmans, *ibid* [35].

57 Declaration of Judge Buergenthal, *ibid* [6].

58 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN GOAR, 56th sess, Supp No 10, [art 8] UN Doc A/56/10, (2001).

59 *Ibid* art 11.

60 See ‘Mullah Omar – In His Own Words’, *The Guardian* (London), 26 April 2001, in Byers, above n 52, 409.

61 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, 36.

judicial sanctions against a state,⁶² it is overly simplistic to suggest that this responsibility amounts to an 'armed attack' justifying the use of force against the responsible state in self-defence.⁶³ To find that a state has committed an 'armed attack' justifying the use of force against that state, the test may be stricter than the test for state responsibility for such an attack.

The International Court of Justice considered this issue in the *Nicaragua* case. In that case, the Court was asked to determine whether Nicaragua's support of armed groups in neighbouring countries constituted an 'armed attack' against those countries justifying resort to collective self-defence by the United States. In its judgment, the Court held it was 'necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.⁶⁴ Referring to the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*⁶⁵ the Court noted that, '[a]longside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force'.⁶⁶ Referring to art 3(g) of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) ('Definition of Aggression'),⁶⁷ the Court held:

it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.⁶⁸

In this way, the Court appeared to assimilate the phrase 'armed attack' with that of 'aggression'.⁶⁹

Having regard to the Definition of Aggression, the use of force in self-defence will be justified in response to a state which has 'substantial involvement' with a terrorist group responsible for an attack.⁷⁰ However, it is less clear whether force will be justified against a third state which has a lesser involvement with a terrorist group, for example, a state harbouring terrorists. It must be noted that the failure to extend the Definition of Aggression to support for terrorist groups was far from accidental, but was the subject of extensive debate within the Special

62 Paust, above n 52, 540; Michael Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Houston Journal of International Law* 3, 35–6, 54.

63 See, eg, *Corfu Channel (United Kingdom of Great Britain v Albania) (Merits)* [1949] ICJ Rep 4, where Albania was found responsible for damage to British ships by mines laid by Yugoslav warships, but military intervention by the British in response was held to have been unlawful.

64 *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 101.

65 GA Res 2625 (XXV), UN GAOR, 25th sess, Supp No 28, UN Doc A/8028 (1970).

66 *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 101.

67 *Resolution on the Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 29th sess, Supp No 31, UN Doc A/9631 (1974).

68 *Ibid* 103.

69 This interpretation gains further force in light of the French version of art 51 of the Charter, which refers to 'une agression armée', which can be interpreted in a broader manner than 'armed attack'.

70 *Charter of the United Nations* art 3(g).

Committee for the Definition of Aggression, and was expressly rejected.⁷¹ However, since 1974, there have been transformations in the nature of international society which may have led to a development in the position at customary international law. For example, art 3(f) of the Definition of Aggression provides that aggression includes '[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State'. In light of the increasing sophistication of international terrorism, with terrorist groups now recognised as capable of acts of aggression on a state-level, it could be argued that art 3(f) should be extended to encompass states allowing their territory to be used by terrorist groups. To ascertain whether this position has garnered sufficient support to testify to its recognition under customary international law, it is necessary to have regard to state practice.

Two states stand out in the international community as active supporters of the right to use force against third states harbouring terrorists, namely Israel and the United States. In order to ascertain whether there is a broader consensus on the issue, it is helpful to look to the international community's response to the actions by these states. Until the mid-1980s, counter-terrorist force against third states was almost consistently condemned as a violation of the prohibition on the use of force. Nevertheless, since that time, it is possible to discern a decline in opposition to, if not an increasing tolerance for, coercive measures against terrorism, even where those measures violate the territorial integrity of a third state.

Israel has used counter-terrorist force against Egypt in 1956, against Lebanon in 1968 and 1982, against an Iraqi aircraft in 1973, against Uganda in 1976, against Tunisia in 1985 and against a Libyan aircraft in 1986. Israel's occupation of the Sinai Peninsula in 1956, partly in response to cross-border infiltrations and attacks by the Palestinian *Fedayeen*, was deemed disproportionate by a majority of Security Council members,⁷² and repudiated by the General Assembly (convened under the Uniting for Peace procedures) by a resounding 64 votes to five, with six abstentions.⁷³ Israel's attack on Beirut airport in December 1968 was unanimously condemned by the Security Council by Resolution 262,⁷⁴ though the United States qualified its vote by acknowledging in principle that a state subject to continuing terrorist attacks may respond by appropriate use of force to defend itself against further attacks.⁷⁵ Interceptions of civilian aircraft in

71 See *Report of the Sixth Committee*, UN GAOR, 28th Session, 11, UN Doc A/9411 (1973): 'it was found unacceptable that the mere fact that the receiving State organized, helped to organize or encouraged the formation of armed bands should constitute an act of aggression independently of whether or not it also participated in sending them on the incursions. Nor was it acceptable, *a fortiori*, that by making its territory available to such armed bands a State could be considered as committing an act of aggression'.

72 *Draft Security Council Resolution*, 749th mtg, UN Doc S/3710 (1956) (supported by a majority, but failed to pass due to the veto of the United Kingdom and France); UN SCOR, 748th mtg (1956), 11 [71], cited in Thomas Franck, *Recourse to Force* (2002) 55.

73 GA Res 997, UN SCOR, Fourth Year, Special Supplement No 3, UN Doc A/RES/997 (ES-I) (1956).

74 SC Res 262, UN SCOR, 1462nd mtg (1968).

75 *The Yearbook of the United Nations* (1968) 228, cited in Christine Gray, *International Law and the Use of Force* (2000) 116.

1973 and 1986 were considered unlawful by a unanimous Security Council,⁷⁶ though in the latter case, the United States vetoed the proposed resolution on the basis that, although it considered Israel's action unlawful, it agreed with the general principle that '[a] state whose territory or citizens are subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks'. During debate in the Security Council following the Entebbe incident, in which Israeli forces mounted a successful rescue operation against a hijacked plane in Uganda, a majority of states expressed the view that the action violated art 2(4) of the Charter.⁷⁷ Israel's attack against PLO headquarters in Tunisia was vigorously condemned in Resolution 573 as an act of armed aggression in flagrant violation of the Charter.⁷⁸

By contrast, coercive counter-terrorist measures by the United States in more recent times have received considerably less opposition from states in the international community. The United States has taken counter-terrorist military action against Libya in 1986, against Iraq in 1993, against Sudan and Afghanistan in 1998 and against Afghanistan in 2001. While missile strikes against Tripoli in response to the Berlin disco bombing in 1986 were not supported by a majority of states in the Security Council,⁷⁹ the United States received a more sympathetic reaction to missile strikes against Iraq in response to the attempted assassination of former President Bush by Iraqi agents in Kuwait.⁸⁰ However, states were still reluctant to express support for a developing legal principle with only Russia and the United Kingdom offering express support for the United States' legal argument.⁸¹ Opposition was markedly muted following US missile attacks on a terrorist training camp in Afghanistan and a pharmaceutical plant in Sudan in response to terrorist attacks on US embassies in Kenya and Ethiopia. Sudan requested a meeting of the Security Council, but the issue was not put on the agenda and there was only a very brief meeting with no action taken.⁸²

Of course, mere failure to condemn the United States should not be taken as acceptance of a legal doctrine permitting force in these circumstances. Nevertheless, it indicates a trend of increasing tolerance that has recently culminated in a show of widespread support for an extension of the principle. Following the military intervention by the United States and its allies against the Taliban regime in Afghanistan, the Security Council expressed its unanimous support for the action. In Resolutions 1368⁸³ and 1373,⁸⁴ the Security Council

76 SC Res 337, UN SCOR, 1740th mtg, (1973); Draft Security Council Resolution S/17796.Rev 1, 6 February 1986.

77 UN SCOR, 31st sess, 1939th mtg, UN Doc S/PV.1939 (1976); UN SCOR, 31st sess, 1940th mtg, UN Doc S/PV.1940 (1976).

78 SC Res 573, UN SCOR, 2615th mtg (1985).

79 *The Yearbook of the United Nations* (1986) 247, cited in Gray, above n 75, 117.

80 *The Yearbook of the United Nations* (1993) cited in Gray, *ibid*.

81 *Ibid*.

82 *Ibid* 118.

83 SC Res 1368, 4370th mtg, UN Doc S/RES/1368 (2001).

84 *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (2001).

reaffirmed the inherent right of individual or collective self-defence. In the latter Resolution, the Security Council also reaffirmed 'the principle established by the General Assembly in its declaration of October 1970 (Resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts'.⁸⁵

Support for the war against Afghanistan, coupled with heightened concern about terrorism worldwide, leads to the conclusion that a modification of customary international law can be said to have occurred.⁸⁶ Support for the legality of the action against Afghanistan was demonstrated by a wide number of states.⁸⁷ Only a limited number of states expressed their opposition, or reservations, to the use of force in these circumstances.⁸⁸ This is a clear example of international law developing in response to contemporary threats to international society, to the point where necessary and proportionate force may legitimately be used in self-defence against a state which knowingly harbours terrorist groups following a terrorist attack of the scale of an armed attack.

B Unilateral Pre-emptive Self-Defence

One of the most widely-discussed elements of the *National Security Strategy of the United States of America* is the doctrine of 'pre-emptive self-defence'. This doctrine has been advanced more forcefully than ever⁸⁹ by the Bush administration out of a fear that rogue states acquiring weapons of mass destruction will pass such weapons on to terrorists, with catastrophic effect for the United States and its allies. The objective is explained in Part V of the Strategy:

85 Ibid.

86 Byers, above n 52, 409.

87 See, eg, *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (2001); GA Res 56/1, 56th sess, UN Doc A/RES/56/1 (2001); North Atlantic Treaty Organisation ('NATO'), 'Statement by the North Atlantic Council' (Press Release 124, 12 September 2001); Organization of American States resolution CP/RES 796 (1293/01), 19 September 2001; Conclusions and Plan of Action of the Extraordinary European Council meeting, 21 September 2001, 1, <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/140.en.pdf> at 15 November 2004; *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, 4385th mtg, UN Doc S/RES/1373 (2001). For the positions of Angola, Australia, Canada, Chile, Cyprus, Croatia, Ethiopia, France, Israel, Italy, Japan, Kyrgyzstan, Lithuania, Portugal, Romania, the Seychelles, Singapore, Sweden and the Ukraine, see Centre de Droit International de l'Université Libre de Bruxelles, 'L'intervention des Etats-Unis et du Royaume-Uni en Afghanistan le 7 Octobre 2001' ('CDI extracts'), <<http://www.ulb.ac.be/droit/cdi/fichiers/PEAP1.htm>> at 15 November 2004.

88 See the positions of Belarus, Brazil, North Korea, Cuba, Iraq, Iran and Malaysia: Centre de Droit International de l'Université Libre de Bruxelles, above n 87.

89 See George Shultz, *Turmoil and Triumph* (1993) 645–53. The need to act pre-emptively was previously advocated by the former Secretary of State George Shultz in a number of speeches during the early 1980s.

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. ... The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.⁹⁰

Can the Bush Administration's policy of pre-emptive self-defence be justified under current international law? Alternatively, is there evidence of sufficient state support for the formation of a new principle of customary international law? Despite the claim in the above quotation that the United States has 'long maintained the option of pre-emptive actions', the historical record indicates that the United States had never, prior to the recent intervention in Iraq, engaged in a pre-emptive military attack against another nation.⁹¹ The only occasion where pre-emptive military action was seriously contemplated by the United States, but not ultimately used, was the Cuban missile crisis of October 1962. This saw President Kennedy impose a naval quarantine on Cuba in order 'to interdict ... the delivery of offensive weapons and associated material'⁹² in response to photographic evidence that the Soviet Union was installing medium-range missiles in Cuba capable of hitting the United States. The United States ultimately elected not to rely on the legal concept of self-defence for reasons explained by the then Legal Adviser to the State Department, Abram Chayes:

In retrospect ... I think the central difficulty with the Article 51 argument was that it seemed to trivialize the whole effort at legal justification. No doubt the phrase 'armed attack' must be construed broadly enough to permit some anticipatory response. But it is a very different matter to expand it to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome. To accept that reading is to make the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either ... Whenever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible ... In this sense, I believe that an Article 51 defence would have signalled that the United States did not take the legal issues involved very seriously, that in its view the situation was to be governed by national discretion, not international law.⁹³

In more recent action, the United States has expressly avoided language of pre-emption to justify its action. This is apparent from its pleadings before the

90 National Security Council, above n 44, 15.

91 Richard F Grimmett, 'US Use of Military Force', CRS Report for Congress RS21311, (18 September 2002), <<http://fpc.state.gov/documents/organization/13841.pdf>> at 15 November 2004.

92 Proclamation 3504, 27 Fed Reg 10401, 25 October 1962, cited in David M Ackerman, 'International Law and the Preemptive Use of Force against Iraq', CRS Report for Congress RS21314, 17 March 2003 <<http://www.usembassy.it/pdf/other/RS21314.pdf>> at 15 November 2004.

93 Abram Chayes, *The Cuban Missile Crisis* (1974) 63–4, cited in Ackerman, *ibid*.

International Court of Justice in *Aerial Incident of 3 July 1988*⁹⁴ and *Oil Platforms*⁹⁵ where it ‘went to great lengths to put its actions in the context of the ongoing conflict and to portray them as a response to prior Iranian action’.⁹⁶

The one significant case where a state did rely on pre-emptive self-defence to justify its use of force was unanimously condemned by the Security Council, and by over 100 states in the General Assembly. In June 1981, Israel bombed and destroyed the Iraqi Osirak nuclear reactor near Baghdad. Israel claimed that ‘in removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right to self-defence within the meaning of this term in international law and as preserved also under the United Nations Charter’.⁹⁷ Israel was unable to point to evidence of an imminent nuclear attack by Iraq against Israel. Instead, Israel argued that the Iraqi reactor under construction was designed to produce nuclear bombs whose target would have been Israel based on the fact that Iraq considered itself to be in a state of war with Israel, that it had participated in three wars with Israel in 1948, 1967 and 1973, and that it continued to deny Israel’s right to exist. The international community came out in clear opposition to Israel’s action. Resolution 487, passed unanimously by the Security Council including the United States, ‘strongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct’ and ‘call[ed] upon Israel to refrain in the future from any such acts or threats thereof’.⁹⁸ The General Assembly also passed a resolution by 109 votes to two (with Israel and the United States voting against the resolution) expressing its ‘deep alarm over the unprecedented Israeli act of aggression on the Iraqi nuclear installations on 7 June 1981, which created a grave threat to international peace and security’. Many of those who abstained did so only on the basis that they considered it was a matter for the Security Council not the General Assembly.

This doctrine of pre-emptive self-defence must be distinguished from the less controversial (though still contested) doctrine of anticipatory self-defence. Anticipatory self-defence has a long history in international law. The most celebrated example harks back to the *Caroline* incident referred to earlier, in which self-defence was acknowledged to be justified in the face of a threat which was ‘instant, overwhelming, leaving no choice of means and no moment for deliberation’.⁹⁹ The doctrine of anticipatory self-defence recognises that force will be justified against an armed attack that is imminent. Some argue that the language of art 51 put an end to the right to resort to force in anticipation of an

94 *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America) (Written Pleadings)* International Court of Justice, <<http://www.icj-cij.org/icjwww/icasess/iirus/iirusframe.htm>> at 15 November 2004.

95 *Oil Platforms (Islamic Republic of Iran v United States) (Written Pleadings)* International Court of Justice, <<http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>> at 15 November 2004.

96 Christine Gray, ‘The US *National Security Strategy* and the New “Bush Doctrine” on Preemptive Self-Defense’ (2002) 1 *Chinese Journal of International Law* 440, 442.

97 *Explanation of Votes on Security Council Resolution (1981)* 20 ILM 994, 996.

98 SC Res 487, UN SCOR, 2288th meeting (1981).

99 Letter from Daniel Webster to Lord Ashburton, above n 51.

attack by its express requirement for an 'armed attack'.¹⁰⁰ However, as Professor Franck notes, common sense, rather than textual literalism, is often the best guide to interpretation of international legal norms.¹⁰¹ Indeed, it would seem an absurd interpretation of the law if a state had to await a certain armed attack (which could compromise its ability to respond) before it was entitled to defend itself.¹⁰² As has been said before, the Charter is not a suicide pact.

The doctrine of pre-emptive self-defence proposed by the Bush administration moves the law one step beyond the doctrine of anticipatory self-defence. Essentially, the proposed doctrine advocates removing the requirement for 'imminence' of attack from the current test for anticipatory self-defence. The Strategy claims the right to act in self-defence 'even if uncertainty remains as to the time and place of the enemy's attack'.¹⁰³ The doctrine was actively employed in the lead-up to the recent Gulf War as one of the early justifications for the use of force against Iraq.¹⁰⁴ In his speech to the United Nations Security Council, Secretary of State Colin Powell made clear that the threat of an attack by Iraq was not imminent. Rather, he expressed the need for military attack as part of a long-term risk prevention strategy:

Given Saddam Hussein's history of aggression, given what we know of his grandiose plans, given what we know of his terrorist associations, and given his determination to exact revenge on those who oppose him, should we take the risk that he will not someday use these weapons at a time and a place and in a manner of his choosing, at a time when the world is in a much weaker position to respond?¹⁰⁵

The doctrine proposed by the Strategy is intensely problematic in that it does not even appear to posit a requirement of 'certainty' in relation to future armed attack. While rapid advances in weapons technology may mean that self-defence can be utilised in response to threats that are less imminent in the temporal sense than described by Secretary Webster over 150 years ago, the danger must be imminent in that it can be identified credibly, specifically and with a high degree of certainty.¹⁰⁶ To extend the right of self-defence to enable states to defend themselves whenever they felt threatened by the actions of another state would

100 Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 *European Journal of International Law* 227; Albrecht Randelzhofer, 'Article 51' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) 803; Yoran Dinstein, *War, Aggression and Self-Defence* (1988) 184.

101 Franck, above n 72, 98.

102 See Derek Bowett, *Self-Defense in International Law* (1958) 185–6; Miriam Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defense' (2003) 97 *American Journal of International Law* 599, 602.

103 National Security Council, above n 44, 15.

104 See President George W Bush (Speech delivered at the 2002 Graduation Exercise of the United States Military Academy, West Point, 1 June 2002), <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>> at 15 November 2004; President George W Bush (Speech delivered at the United Nations General Assembly, New York, 12 September 2002), <<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>> at 15 November 2004.

105 Secretary of State Colin Powell (Speech delivered at the United Nations Security Council, 5 February 2003), <<http://www.state.gov/secretary/rm/2003/17300.htm>> at 15 November 2004.

106 John Yoo, 'Using Force' (2004) 71 *University of Chicago Law Review* 26; Sapiro, above n 102, 604; Abraham Sofaer, 'On the Necessity of Pre-emption' (2003) 14 *European Journal of International Law* 209, 221–3.

open the floodgates to the cycle of violence the Charter was enacted to prevent.¹⁰⁷ In response to the September 2004 school siege by Chechen terrorists in southern Russia, Russian Chief of Staff General Yury Baluyevsky told reporters, '[a]s for carrying out preventive strikes against terrorist bases, we will take all measures to liquidate terrorist bases in any region of the world'.¹⁰⁸ Israel, North Korea, India and Pakistan are other states that could reasonably resort to the doctrine, which would undoubtedly have a destabilising if not disastrous impact on international peace and security. Moreover, it is a position which has garnered little support among members of the international community,¹⁰⁹ let alone the widespread and uniform state practice necessary to establish a principle of customary international law.¹¹⁰ Any attempt by states to rely on this doctrine would be in clear violation of international law.

C Unilateral Humanitarian Intervention

A surprising and welcome aspect of the 'war against terrorism' has been the renewed focus on regimes that violate the human rights of their citizens, a focus stemming from a perceived link between these regimes and the incubation of terrorism. A language of 'rogue states' and 'failed states' has emerged, with both being branded as threats to the national security of the United States. As President Bush expressed it:

weak states ... can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.¹¹¹

The United States has thereby declared itself to be fighting, not only a 'war against terrorism', but a 'war of ideas'.¹¹² A key aspect of the Strategy is to extend the benefits of democracy, development, free markets and free trade to every corner of the world. Specific measures that the Bush administration intends to take to this end include 'supporting moderate and modern government, especially in the Muslim world, to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation'¹¹³ and 'diminishing the underlying conditions that spawn terrorism by enlisting the international community to focus its efforts and resources on areas most at risk'.¹¹⁴

107 See Brownlie, above n 5, 275.

108 Nicholas Kravov, 'Russia Vows Pre-emptive Terror Hits', *The Washington Times* (Washington), 9 September 2004, A01.

109 See, eg, Annan, above n 3, 4; 'Russia, France, Germany Say Iraq War Illegal', *Reuters*, 20 March 2003; 'French Foreign Minister Renews Attack on US Foreign Policy', *Agence France Presse*, 1 March 2002; 'Patten Lays into Bush's America - Fury at President's "Axis of Evil" Speech', *The Guardian* (London), 9 February 2002, 1.

110 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 1, 47.

111 National Security Council, above n 44.

112 *Ibid* 6.

113 *Ibid*.

114 *Ibid*.

While the use of force for humanitarian purposes can, and has on several occasions, been authorised by the Security Council, the Strategy envisages the use of force in circumstances where Security Council authorisation is not given. Military action against regimes for the purpose of rescuing a population from massive human rights violations, without the prior authorisation of the Security Council or the consent of the legitimate government of the State acted against, has attracted the legal moniker of 'humanitarian intervention'. Such intervention is clearly outside the framework of the Charter. First, it falls foul of the Charter as it does not come under either of the exceptions to the prohibition on the use of force – the force would be resorted to without Security Council authorisation and could not constitute collective self-defence as the force would be used without the target state's request or indeed consent. Secondly, art 2(7) of the Charter prevents intervention by the United Nations 'in matters which are essentially within the domestic jurisdiction of any state'.

Traditionally, supporters of the doctrine of humanitarian intervention have been a vocal minority, battling against a strong current of authority to the contrary, such as the Charter, subsequent reaffirmation of the principle of the non-use of force by States¹¹⁵ and the International Court of Justice's statement in the *Nicaragua* case that, in the absence of any justification unequivocally provided by the Charter, 'the use of force could not be the appropriate method to monitor or ensure ... respect [for human rights]'¹¹⁶. Moreover, the straws of state practice held up in support of the doctrine¹¹⁷ have easily been distinguished and discounted by its resisters as examples of thinly veiled advancement of national interest.

The doctrine received renewed support following North Atlantic Treaty Organisation ('NATO') air strikes against Serbia in the spring of 1999. In the face of widespread and ongoing ethnic cleansing of the Kosovar Albanians by Bosnian Serb forces, the international legal community found itself unable to act. Self-defence was clearly not available, as the only state able to resort to this right was the state perpetrating the genocide. The Security Council was deadlocked by the threatened veto of China and Russia, a threat widely regarded to be based, not on objection by these states to relief for the Kosovar Albanians, but on the implications of this precedent for Taiwan and Chechnya. In these circumstances,

115 See *Essentials of Peace*, GA Res 290(IV), UN GAOR, 4th sess, 261st plen mtg, UN Doc A/Res/290 (1949); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131(XX), UN GAOR, 20th sess (1965); *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States*, GA Res 2625 (XXV) UN GAOR, 25th sess, Supp No 28, UN Doc A/8028 (1970); *Resolution on the Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 29th sess, Supp No 31, UN Doc A/9631 (1974); *Manila Declaration on the Peaceful Settlement of International Disputes*, GA Res 37/10, 38th sess, 68th plen mtg, UN Doc A/Res/37/10 (1982); *Declaration on the Rights of Peoples to Peace*, GA Res 39/11, 39th sess, 57th plen mtg, UN Doc A/Res/39/11 (1984); *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22, 42nd sess, 73rd plen mtg, UN Doc A/Res/42/22 (1987).

116 *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 101 [268].

117 For example, the Congo (Stanleyville) rescue mission in 1964, India's intervention in Bangladesh in 1971, United States' intervention in Grenada in 1983, United States' intervention in Panama in 1989 and Iraq-Kuwait conflict in 1991.

the NATO forces launched military strikes in the absence of Security Council authorisation.

The reaction by states in the international community is best summed up by the finding of the Independent International Commission on Kosovo that the use of force by NATO was legitimate, though not legal.¹¹⁸ States expressed support for the NATO action, though largely on moral rather than legal grounds.¹¹⁹ Even the NATO states avoided justifying the action in legal terms, with representatives of key NATO states referring to the action as '*sui generis*'¹²⁰ (in the case of US Secretary of State Madeleine Albright), 'an exceptional measure'¹²¹ (in the case of the British Ambassador to the United Nations, Sir Jeremy Greenstock) and emphasising that the action 'must not become a precedent' (in the case of German Foreign Minister Klaus Kinkel).¹²² Subsequent debates on the issue in the Security Council and General Assembly demonstrate that insufficient *opinio juris* existed among states in the international community to support recognition of a doctrine of humanitarian intervention in customary international law. The majority of states continued to oppose the doctrine, insisting that the United Nations must maintain primacy and control in the area of conflict resolution¹²³ and proffering enhanced political will in the Security Council¹²⁴ and implementation of the broadly supported Brahimi report¹²⁵ as the solution to the

118 Independent International Commission on Kosovo, 'The Kosovo Report' (1st ed, 2001).

119 See statements of United States, Canada, Slovenia, Bahrain, Gambia, Netherlands, France, United Kingdom, Germany, Albania, Bosnia-Herzegovina: United Nations, 'Nato Action against Serbian Military Targets Prompts Divergent Views As Security Council Holds Urgent Meeting On Situation in Kosovo' (Press Release, 24 March 1999) UN Doc SC/6657, <<http://www.un.org/News/Press/docs/1999/19990324.sc6657.html>> at 15 November 2004.

120 US Secretary of State Madeleine Albright, 'Press Conference with the Russian Foreign Minister Igor Ivanov' (Singapore, 26 July 1999) Department of State, United States of America <<http://secretary.state.gov/www/statements/1999/990726b.html>> at 15 November 2004.

121 Above, n 119, 10.

122 Statement of German Foreign Minister Kinkel, *Deutscher Bundestag, Plenarprotokoll* 13/248, 16 October 1998, 23, 129.

123 See comments of Russia and Cuba in Fourth Committee debate on comprehensive review of peacekeeping operations, (UN Press Release, 9 November 2000) GA/SPD/200 <<http://www.un.org/News/Press/docs/2000/20001109.gaspd200.doc.html>> at 15 November 2004; (UN Press Release, 10 November 2000) GA/SPD/202 <<http://www.un.org/News/Press/docs/2000/20001110.gaspd202.doc.html>> at 15 November 2004. For the comments of China, the Philippines, Slovenia, Cuba in response to the *UN Secretary-General's Report on the Work of the Organization*, UN Doc A/55/1 Supplement 1, see (2000) (UN Press Release, 27 September 2000) GA/9781 <<http://www.un.org/News/Press/docs/2000/20000927.ga9781.doc.html>> at 15 November 2004; (UN Press Release, 27 September 2000) GA/9782 <<http://www.un.org/News/Press/docs/2000/20000927.ga9782.doc.html>> at 15 November 2004; For the comments of Tunisia and Estonia at the Millennium Summit see (UN Press Release, 7 September 2000) GA/9754 <<http://www.un.org/News/Press/docs/2000/20000907.ga9754.doc.html>> at 15 November 2004. For the comments of Belarus, Mongolia, Cuba, Mexico, Russian Federation, Algeria, Croatia and Iran in Fourth Committee debate on the concept of humanitarian intervention see (UN Press Release, 20 October 1999) GA/SPD/166 <<http://www.un.org/News/Press/docs/1999/19991020.gaspd166.doc.html>> at 15 November 2004.

124 See comments of Pakistan, Brazil, India, Tanzania and Chile in Fourth Committee debate on comprehensive review of peacekeeping operations, GA/SPD/200 and GA/SPD/202, above n 123.

125 See comments of Norway, Ireland, Colombia, Kuwait, Japan, Bhutan, Germany, United Arab Emirates, Egypt, Cameroon, Tunisia and Belgium in response to the *UN Secretary-General's Report on the Work of the Organization*, UN Doc A/55/1 Supplement 1 (2000) GA/9781 and GA/9782, above n 123.

current inertia in conflict situations. Smaller states remained suspicious that humanitarian intervention was a Trojan horse that would be used to achieve Western domination.¹²⁶ Larger states feared that acceptance of such a doctrine would ultimately give rise to a *duty* to intervene, whenever a humanitarian crisis occurs, to prevent or ameliorate the crisis.¹²⁷ Their preference was to maintain the flexibility to intervene in crises where it was commensurate with their national interest, but retain the freedom to stay out where it was not.

Importantly, though, this opposition did not appear to reflect any broadly held view that the sovereignty of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants.¹²⁸ Over the last 50 years, there has been a tectonic shift in international consciousness regarding the significance of human rights. Certainly the Charter regime was never initially intended to be utilised for the protection and enforcement of human rights. John P Humphrey, the first Director of the Division of Human Rights at the UN, reported that, but for the efforts of a few deeply committed delegates, and the representatives of some 42 private organisations brought in as consultants by the United States, human rights would have received 'only a passing reference' in the Charter.¹²⁹ In the end, the Charter is clearly directed to the preservation of order, not the protection of human rights. Even the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 was denied legal weight and, on the occasion of its adoption, Eleanor Roosevelt stated that it 'was not a treaty or international agreement and did not impose legal obligations'.¹³⁰ The barest enforcement mechanism, the right to petition the United Nations, was ultimately removed from the final draft of the Universal Declaration on Human Rights at the request of the United Kingdom.¹³¹

Over the following decades, the international community gradually strengthened its resolve to actively protect human rights. A raft of legally binding international human rights treaties has been entered into by a consistently wide number of states, defining extensive rights. Protection of human rights has become a central concern of the international community in spite of the Charter's apparent overriding concern for the maintenance of international order and non-intervention in domestic affairs. Indeed, protection of human rights has been found to intersect with preservation of international order, in that oppressed or threatened individuals or groups are driven to violence and other drastic forms of

126 UN Press Release, above n 119, 189.

127 Adam Roberts, 'NATO's "Humanitarian War" over Kosovo' (1999) 41 *Survival* 102, 120.

128 See comments of Cyprus (cf comments of Democratic People's Republic of Korea) in response to the *UN Secretary-General's Report on the Work of the Organization* UN Doc A/55/1 Supplement 1 (2000) GA/9781, above n 123; comments of Liechtenstein in Fourth Committee debate on comprehensive review of peacekeeping operations, GA/SPD/202, above n 123.

129 John Humphrey, 'The UN Charter and the Universal Declaration of Human Rights' in Evan Luard (ed), *The International Protection of Human Rights* (1967) 39, cited by Tom Farer and Felice Gaer in 'The UN and Human Rights: At the End of the Beginning' in Adam Roberts and Benedict Kingsbury (eds), *United Nations, Divided World* (1993) 245.

130 2 UN GAOR (Pt 1, 3rd Committee) (1948), 32.

131 Howard Tolley, 'The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications' (1984) 6 *Human Rights Quarterly* 422, 423.

action in attempts to relieve their suffering. In recent years, the Security Council has shown an increasing tendency to recognise large-scale violations of human rights committed within the borders of an individual country to be threats to *international* peace and security justifying action under ch VII of the Charter.¹³² On occasions, this has been justified on the basis that the destabilisation in a country has international dimensions, such as flows of refugees or the threat of hostilities spreading to other countries.¹³³ However, during the 1990s, in Somalia¹³⁴, Rwanda¹³⁵, Haiti¹³⁶ and Zaire,¹³⁷ the Security Council authorised intervention in an internal conflict under Chapter VII without even invoking the possible international dimensions of the conflict.

Contemporaneously, there has been a diminution in the significance of the state and sovereignty as a limit upon the capacity of the international community to protect human rights. The growing importance of human rights and the diminishing deference to state sovereignty are not unrelated.¹³⁸ Contemporary international society recognises that the concept of sovereignty evokes responsibilities towards the international community as well as rights against it, such that a state no longer has a monopoly over the decision whether to accord human rights to its citizens.¹³⁹ In its report, *The Responsibility to Protect*, which was commissioned to form the basis of a push for state consensus on the

132 For example, during the anti-apartheid campaigns of the 1980s, the United Nations committed itself to the implementation of human rights with respect to South Africa, rejecting claims of sovereign rights.

133 An obvious example is the humanitarian crisis in the Congo that emerged in the immediate aftermath of the 14 week civil war in Rwanda in 1994, during which an estimated 1.7 million Hutu fled across the border into neighbouring Zaire (now Democratic Republic of the Congo), including Hutu militiamen who began waging guerrilla warfare from Zaire, giving the civil conflict manifestly international dimensions.

134 *Resolution on Measures to Establish a Secure Environment for Humanitarian Relief Operations in Somalia*, SC Res 794, UN SCOR, 47th sess, 3145th mtg, UN Doc S/Res/794 (1992): 'the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security'.

135 *Resolution on Establishment of a Temporary Multinational Operation for Humanitarian Purposes in Rwanda until the Deployment of the Expanded UN Assistance Mission for Rwanda*, SC Res 929, UN SCOR, 49th sess, 3392nd mtg, UN Doc S/Res/929 (1994): 'the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region'.

136 *Resolution on Authorization to Form a Multinational Force under Unified Command and Control to Restore the Legitimately Elected President and Authorities of the Government of Haiti and Extension of the Mandate of the UN Mission in Haiti*, SC Res 940, UN SCOR, 49th sess, 3413 mtg, UN Doc S/Res/940 (1994): 'concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission'.

137 *Resolution on Establishment of a Multinational Humanitarian Intervention Force for the Great Lakes Region*, SC Res 1080, UN SCOR, 51st sess, 3713 mtg, UN Doc S/Res/1080 (1996).

138 Louis Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1.

139 Three generations of Secretary-General have reflected this outlook: see Javier Pérez de Cuéllar, Report of the Secretary-General, *Yearbook of the United Nations 1991*, [11]; Boutros Boutros-Ghali, Provisional Records of the 3046th mtg of the Security Council, 47th sess, UN Doc S/PV.3046 (31 January 1992); Kofi Annan, (UN Press Release, 20 September 1999) SG/SM/7136, GA/9596 <<http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html> at 15 November 2004>. For early authoritative statements of this principle, see Hugo Grotius, *On the War of Law and Peace* (1646) bk 2, ch 4, [2.1] and Emmerich de Vattel, *The Law of Nations* (1758) bk 2, ch 2, s 17.

principle of humanitarian intervention, the International Commission on Intervention and State Sovereignty confirmed this changing conception of sovereignty on the part of states:

in the course of our consultations ... [w]e found broad willingness to accept the idea that the responsibility to protect its people from killing and other grave harm was the most basic and fundamental of all the responsibilities that sovereignty imposes – and that if a state cannot or will not protect its people from such harm, then coercive intervention for human protection purposes, including ultimately military intervention, by others in the international community may be warranted in extreme cases. We found broad support, in other words, for the core principle identified in this report, the idea of the responsibility to protect.¹⁴⁰

Accordingly, the legal landscape is certainly open to the recognition of a doctrine of humanitarian intervention. The one thing lacking in the aftermath of the NATO intervention in Kosovo was a broader acceptance on the part of states necessary to breathe life into the principle. Surprisingly, impetus for recognition of the principle has emerged in a new form, cloaked in the rather unlikely guise of counter-terrorism. In the course of the ‘war against terrorism’, human rights concerns have already been pressed as a contributing basis for the overthrow of two regimes by recourse to military force – the Taliban regime in Afghanistan and Saddam Hussein’s regime in Iraq. While humanitarian concerns were not the primary motivation for either action, and humanitarian intervention was never formally asserted as a justification, the human rights motivation is arguably a necessary element to justify the toppling of the Taliban regime (a consequence which otherwise might have exceeded the bounds of proportionate self-defence). Further, against the backdrop of a continuing failure to locate weapons of mass destruction, the liberation of the Iraqi population has become the rationale most strongly advocated in support of the 2003 Gulf War.

The doctrine of humanitarian intervention has not yet garnered sufficient support to claim recognition as a principle of customary international law. However, if states do seek, in future, to rely on the principle of humanitarian intervention, they cannot ignore that the principle has important limits. While there is no consensus as to the criteria for evaluating when intervention will be ‘humanitarian’, six fundamental requirements can be distilled from the literature:

1. *Gravity* of human rights abuse – the level of human rights abuse must have reached a qualitative and quantitative level that has variously been described as ‘severe violations of international human rights ... on a sustained basis’,¹⁴¹ ‘serious and irreparable harm [amounting to] large scale loss of life ... or large scale “ethnic cleansing”’¹⁴² and ‘ongoing or imminent genocide, or comparable mass slaughter or loss of life’.¹⁴³

140 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) 69.

141 United Nations, above n 119, 193.

142 International Commission on Intervention and State Sovereignty, above n 140, XII.

143 Kenneth Roth, ‘War in Iraq: Not Humanitarian Intervention’, *Human Rights Watch World Report 2004*, 2 (2004) <http://www.hrw.org/wr2k4/3.htm#_Toc58744952> at 15 November 2004.

2. *Inefficacy* of Security Council – the Security Council must be unable to act due to an unreasonable deadlock or delay, and must not have explicitly prohibited intervention.¹⁴⁴
3. *Necessity* of military action – Intervention is only permissible when the danger to the individuals concerned is imminent or ongoing, and every non-military option for the prevention of the crisis has been explored and determined to be insufficient.¹⁴⁵
4. *Proportionality* of action – The action must have a ‘reasonable’¹⁴⁶ or ‘high’¹⁴⁷ chance of success, do more good than harm,¹⁴⁸ employ the minimum amount of force calculated to accomplish the objective¹⁴⁹ and must be discontinued as soon as this objective is achieved.¹⁵⁰
5. *Acceptability* by international community, in particular from countries in the region and those for whom the action is intended.¹⁵¹
6. *Genuine humanitarian intention* – The intervention must be for the sole,¹⁵² ‘primary’,¹⁵³ ‘dominant’,¹⁵⁴ or ‘overriding’¹⁵⁵ purpose of restoring respect for human rights.¹⁵⁶

If we apply these principles to the recent intervention by the coalition of the willing in the 2003 Gulf War, the narrow scope of the principle is brought into stark relief. Though Saddam Hussein’s regime was undoubtedly one in which

144 International Commission on Intervention and State Sovereignty, above n 140, XII–XIII.

145 United Nations, above n 119, 193 (suggests this includes the taking of economic sanctions); Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs, *Humanitarian Intervention*, Advisory Report No 13 (2000) 29–30; Scheveningen Seminar on Humanitarian Intervention, *Chairman’s Conclusions* (24–26 November 1999), criterion (4) (affirmed in Noordwijk Seminar on Humanitarian Intervention, *Chairman’s Conclusions* (16–19 April 2000)); Antonio Cassese, ‘*Ex Iniuria ius Oritur*: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 *European Journal of International Law* 23, 27; David Scheffer, ‘Toward a Modern Doctrine of Humanitarian Intervention’ (1992) 23 *University of Toledo Law Review* 253, 291; Richard Lillich, ‘Forcible Self-Help by States to Protect Human Rights’ (1967) 53 *Iowa Law Review* 325, 347.

146 International Commission on Intervention and State Sovereignty, above n 140, XIII; Simon Chesterman, *Just War or Just Peace?* (2001) 380.

147 Scheveningen Seminar on Humanitarian Intervention, above n 145, criterion (10).

148 Roth, above n 143, 3; Chesterman, above n 146, 380.

149 International Commission on Intervention and State Sovereignty, above n 140, XII.

150 United Nations, above n 119, 194; Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs, above n 145; Cassese, above n 145, 27; Lillich, above n 145, 350.

151 United Nations, above n 119, 193–4; Scheveningen Seminar on Humanitarian Intervention, above n 145, criteria (8), (9); Cassese, above n 145, 27.

152 Scheveningen Seminar on Humanitarian Intervention, above n 145, criterion 7; Cassese, above n 145, 27.

153 International Commission on Intervention and State Sovereignty, above n 140, XII; Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs, above n 145, 30; Scheffer, above n 145, 291.

154 Roth, above n 143, 2.

155 United Nations, above n 119, 193.

156 Chesterman, above n 146, 380; Lillich, above n 145, 350; cf Sean Murphy, *Humanitarian Intervention: The United Nations is an Evolving World Order* (1996) 385 (this criterion is controversial).

human rights were egregiously violated, it is unlikely that the strict requirements of the principle of humanitarian intervention were satisfied at the time of the intervention in March 2003. First, there was no known genocide or mass killing occurring at the time of the intervention. Secondly, it is arguable that the Security Council was not unreasonably deadlocked, but rather declined to authorise force based on a genuine assessment by a majority of the Council that force would not be justified in the circumstances. Certain members of the Security Council expressed a desire to address the situation through other measures.

This brief analysis, though inadequate, does suggest that, while the parameters of the principle are still very much in development, and insufficient state will exists to recognise the principle as customary international law, the principle could form a workable part of the international legal framework where limitations are incorporated to ensure against its over-use and abuse.

IV CONCLUSION

In responding to the threat of international terrorism, international law has been found wanting. Powerful states, frustrated with the limitations placed by international law on their capacity to respond, have condemned international law as out-dated and ill-equipped to deal with contemporary threats to international peace and security. Subsequent reliance by these states on international law to support their actions despite this condemnation has led still others to denounce international law as ‘a grab-bag of rules that national actors dip into when they need a convenient norm to justify or add legitimacy to decisions already reached on other grounds’.¹⁵⁷ This has led some to pose that a more realistic response would be to abandon international law altogether, and acknowledge a return to the ‘might is right’ model derived from the Athenians at Melos where ‘the strong do what they can and the weak suffer what they must’.

In response to these criticisms, this article makes two broader points. First, to the extent that the international legal framework is outdated, international law has shown itself to be adaptable to change in response to new threats. As with any legal system, reform and development of the principles underlying the system are crucial to avoid their relegation to the remnants of history. Preferably this will be achieved by states coming together to achieve consensus by treaty. However, states are not always rigorous in attending to their maintenance obligations. In reality, the law is often amended by state practice in violation of the current international legal framework. Violations of international law serve as a precedent and have the capacity to reform the law, particularly where the violator receives widespread support for its actions.¹⁵⁸ A state’s failure to comply with international law is therefore not something for which the body of international law should be condemned. International law provides valuable objective standards which can assist States to plot their reaction to extreme events by

157 Anthony D’Amato, ‘International Law as an Autopoietic System’, Draft paper presented at Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 15 November 2003, 2.

158 *Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 109 [207].

reference to principles developed through the wisdom of experience, and which aim to ensure states do not go beyond what is necessary and proportionate. Where a state acts outside this legal framework, it does so in the knowledge that the action forms a precedent that others may follow. Such a decision is one that must be taken with the utmost caution and forethought, particularly by the most influential states in the international community. The problem with acting outside the law in the short-term is that you lose its protection in the long-term.

Secondly, international law is not always what a particular state, or group of states, declares it to be. Declaration of a legal position by a state, even a powerful state, does not serve to pressure-cook new principles of law which automatically bind the international community. While treaties can be enacted more quickly, customary international law can generally only be produced at a (frustratingly) slow simmer. Formation of principles of customary international law requires evidence of 'extensive and virtually uniform state practice'.¹⁵⁹ Practice that tends toward the creation of a new principle will therefore be subject to the response of other states and the scrutiny of the 'invisible college of international lawyers'.¹⁶⁰ In the end, it will be up to the international community to determine whether an action on the part of states is a violation or renovation of international law.

The combined effect of these two observations leads to the imperative that careful reflection should be given to the question whether the counter-terrorist responses proposed by the Bush administration in the *National Security Strategy* should be adopted as renovations to the international legal order. In doing so, we need to ensure that the proposed renovations do not, in seeking to stamp out terrorism, tilt the balance too far in another direction. It is necessary to approach consideration of these principles with a global and long-term vision. If these doctrines do become recognised as part of the international legal order, will they become a destabilising force in the delicate ecosystem of the international community? Even if it could be argued that they pose less of a threat when wielded by an allied hegemon like the United States, can the international order survive them being brandished by others in the international community, or a subsequent superpower? Modern history has shown that economic superpowers, seemingly invincible in their time, have a relatively short life-span. We are already seeing predictions of China as the next economic superpower.

Of course, it is always difficult to forecast the effect of a new legal order on future international stability. We might, however, question whether the Israeli experience provides a microcosmic example. In response to increasing terrorist threats against its civilian population, the Israeli government has resorted to a number of forceful measures which violate international legal norms, including forceful reprisals, targeted assassinations and torture. Some have argued that the effect of this policy has been that the sporadic terrorist acts have developed into

159 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 1, 47.

160 Oscar Schachter, 'The Invisible College of International Lawyers' (1977-78) 72 *Northwestern University Law Review* 218.

an unrelenting assault on Israeli civilians.¹⁶¹ If this is an accurate analysis, let us hope that the Israeli experience does not anticipate a future scenario for the global community. A report released by the US State Department in June 2004 announced that the number of significant international terrorism episodes increased last year, and that the number of those injured in all international terrorism episodes went up by more than 50 per cent.¹⁶²

Terrorism poses a raft of challenges to the global order. International law does not provide the perfect solution to these, but it is an important tool that can be employed to useful effect in the fight against terrorism and other threats to international stability. In determining our best response to global terrorism for the future, we must recognise the need for a viable international framework and prevent despoiling it in a way that will prevent us having access to it in the future.

161 Tom Farer, 'Beyond the Charter Frame: Unilateralism or Condominium?' (2002) 96 *American Journal of International Law* 359, 364.

162 *Patterns of Global Terrorism 2003* (2004) United States Department of State <<http://www.state.gov/s/ct/rls/pgtrpt/2003/33771.htm>> at 15 November 2004.