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## ARTICLES

## THE LAW ON THE USE OF FORCE: CURRENT CHALLENGES

by MICHAEL WOOD\*

My predecessor as Legal Adviser to the UK Foreign and Commonwealth Office, Sir Franklin Berman, wrote in the 2006 volume of this *Year Book* that ‘the law is under challenge from increasing demands for the use of force and for its legal validation.’ The present article seeks to address current challenges to the rules of public international law on the use of force (*jus ad bellum*). It first describes the relevance and continuing validity of the existing rules in today’s world. It then discusses issues of self-defence, especially against non-State actors (such as terrorist groups) and against weapons of mass destruction. Thereafter it examines the concepts of ‘humanitarian intervention’ and ‘responsibility to protect’. In conclusion, the article suggests that existing rules, in particular the Security Council’s powers under Chapter VII of the Charter of the United Nations to authorise the use of force, and the right of self-defence recognised in Article 51 of the Charter, are adequate to address current threats.

When I was a student at Cambridge in the 1960s, among the most inspiring teachers was Professor Clive Parry, who frequently used to say how well his former students were doing. The person he mentioned most often, and with greatest pride, was Lee Kuan Yew. So early on I knew there was a special link between Singapore and international law. That view was reinforced at the Third United Nations Conference on the Law of the Sea, when I was greatly impressed by the contribution of the Singapore delegation. To sit under the chairmanship of Ambassador Tommy Koh was to learn a great deal. It could also be challenging. You could not get away with a lazy remark, or deliberate wooliness, or even silence, without being brought to task.

My predecessor as Legal Adviser to the UK Foreign and Commonwealth Office, Sir Franklin Berman, wrote in the 2006 volume of this *Year Book* that ‘the law is under challenge from increasing demands for the use of force and for its legal validation.’<sup>1</sup> I have also dealt with aspects of the subject elsewhere.<sup>2</sup> This article seeks to address current challenges to the rules of public international law on the use of force (*jus ad bellum*). It first describes the relevance and continuing validity of the existing rules in today’s world. It then discusses issues of self-defence, especially against non-State actors (such as terrorist groups) and against weapons of mass destruction. Thereafter it examines the concepts of ‘humanitarian intervention’ and ‘responsibility to protect’. In conclusion, this article suggests that

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<sup>1</sup> Sir Franklin Berman, KCMG, QC, “The UN Charter and the Use of Force” (2006) 10 SYBIL 9 at 10.

<sup>2</sup> “Towards New Circumstances in which the Use of Force may be Authorized? The Cases of Humanitarian Intervention, Counter-terrorism, and Weapons of Mass Destruction”, in N. Blokker and N. Schrijver eds., *The Security Council and the Use of Force: Theory and Reality—A Need for Change?* (Martinus Nijhoff, 2005) at 75; third Hersch Lauterpacht Memorial Lecture, 9 November 2006, “The Security Council and the Use of Force”, available on the Lauterpacht Centre website; *The principle of non-intervention* (Chatham House International Law Discussion Group, 28 February 2007), available on the Chatham House website; “Nécessité et légitime défense dans la lutte contre le terrorisme: quelle est la pertinence de l’affaire de la Caroline aujourd’hui?”, in: SFDI, *La nécessité en droit international* (2007), 281.

the existing rules, in particular the Security Council's powers under Chapter VII of the Charter of the United Nations to authorise the use of force, and the right of self-defence recognised in Article 51 of the Charter, are adequate to address current threats.

# I. THE CONTINUING VALIDITY AND RELEVANCE OF CHARTER-BASED RULES ON THE USE OF FORCE IN TODAY'S WORLD

The rules of international law on the use of force (*jus ad bellum*) are relatively easy to state, though they can be difficult to apply in concrete cases.<sup>3</sup> They are to be found in the Charter and in customary international law.<sup>4</sup> The Charter contains, among the Principles of the United Nations, a prohibition of the threat or use of force (Article 2, paragraph 4). The Charter refers to two not unrelated circumstances in which the prohibition does not apply. First, forcible measures may be taken or authorised by the Security Council, acting under Chapter VII of the Charter. Second, force may be used in the exercise of the right of individual and collective self-defence, as recognised in Article 51 of the Charter. A further possible exception is the use of force to avert an overwhelming humanitarian catastrophe (sometimes referred to as 'humanitarian intervention'). This is not mentioned in the Charter and so must be found, if at all, in customary international law.<sup>5</sup>

It has occasionally been suggested, most often in the United States, that the rules of international law on the use of force are dead, or that there is some fundamental gulf between the United States and other countries in this matter.<sup>6</sup> Professor Franck recently referred to an emerging approach among American law professors and practitioners:

that classifies international law as a disposable tool of diplomacy, its system of rules merely one of many considerations to be taken into account by government [...]. As for the leaders of the executive branch, it appears to be the common intuition that international law is to be seen as an anomaly, a myth propagated by weak states to prevent the strong from maximizing their power advantage.<sup>7</sup>

<sup>3</sup> In the author's view, the best introduction to the international law on the use of force remains Waldock's Hague Academy lectures: C H M Waldock, "The Regulation of the Use of Force by Individual States in International Law" (1952) 81 *Recueil des Cours* 455. Other works include D W Bowett, *Self-Defence in International Law* (1957); I Brownlie, *The Use of Force by States in International Law* (1963); T M Franck, *Recourse to Force. State Action Against Threats and Armed Attacks* (2002); C Gray, *International Law and the Use of Force* (2004); Y Dinstein, *War, Aggression and Self-Defence* (2005). For recent consideration of some of the points raised in this article, see "Workshop: A Century of Reports—Enquiries into Collective Security" (2006) 11 *Journal of Conflict & Security Law* at 307-508. The *Institut de Droit International's* Tenth Commission (Present Problems of the Use of Force in International Law) has begun to consider some of these issues, through four Sub-groups: A. Self-defence, B. Humanitarian intervention; C. Authorization of the use of force by the United Nations; D. Intervention by invitation.

<sup>4</sup> The political organs of the United Nations, in particular the General Assembly, have contributed to the law through consensus resolutions: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration) (GA res. 2625 (XXV)); Definition of Aggression (GA res. 3314 (XXIX)); Declaration on the Non-use of Force 1988 (GA res. 42/22). So too has the International Court of Justice in a series of (in some respects controversial) judgments: *Corfu Channel (United Kingdom v Albania)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*; *Legality of the Threat or Use of Nuclear Weapons* advisory opinion; *Oil Platforms (Islamic Republic of Iran v United States of America)*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*. For an important comment on the *Oil Platforms* case, see W Taft, "Self-Defense and the Oil Platforms Decision" (2004) 29 *Yale J. Int'l L.* 295: extract in (2004) *Digest of United States Practice in International Law* at 974-976.

<sup>5</sup> Force used at the request or with the consent, duly given, of the government of the territorial State does not give rise to an issue under the *jus ad bellum*. The use of force in retaliation (punishment, revenge or reprisals) is illegal. Such terms are best avoided, even in political rhetoric.

<sup>6</sup> For example, M J Glennon, "Why the Security Council Failed" (May/June 2003) *Foreign Affairs* 16; M J Glennon, "How International Rules Die" (2005) 93 *Geo. L.J.*, 939.

<sup>7</sup> T M Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100 *A.J.I.L.* 88 at 89.

This may be an exaggeration, but it reflects a growing concern. Passages in the US *National Security Strategy* of 2002<sup>8</sup> caused alarm, as did the United States claim to be engaged in a 'global war on terrorism.' The US *National Defense Strategy* of March 2005 listed together 'international fora, judicial processes, and terrorism' as traditional weapons that the weak would use against the United States.<sup>9</sup> At the same time, there is growing concern at the failure to respond adequately to modern security threats (not least, transnational terrorism and the proliferation of weapons of mass destruction) and to humanitarian catastrophes (such as in Rwanda in 1994 and Darfur today). Such concerns have led some to push the boundaries of the law, arguing for a unilateral right to use force preventively or for humanitarian purposes, and for implied or retrospective authorisation by the Security Council for the use of force.

Recourse to armed force by the United Kingdom over a four-year period between 1999 and 2003 raised important issues.<sup>10</sup> The Kosovo intervention in 1999 involved a major issue of principle: was there a right of unilateral 'humanitarian intervention'? The use of force against Al Qaida in Afghanistan in 2001 (following the attacks on the United States on 11 September 2001) also raised an important issue: the right of self-defence against attacks by non-State actors. In my view, the use of force against Iraq in March 2003, on the other hand, though politically and legally the most controversial,<sup>11</sup> involved no great legal issue. As the UK Attorney General's now public advice of 7 March 2003 indicates, for the United Kingdom, the legality of the invasion turned solely on whether it had been authorised by the Security Council. It is clear that the Security Council may authorise the use of force. The only question was whether it had done so. That issue ultimately turned on the interpretation of a series of Security Council resolutions.<sup>12</sup> Whatever one's view on the merits, these cases illustrate that the United Kingdom Government gives careful consideration to the relevant questions of the international law on the use of force.

An important issue, not often mentioned, that was squarely raised in the Attorney General's advice of 7 March 2003, is how strong the legal basis has to be before a State embarks upon a use of armed force. The Attorney General said:

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

<sup>8</sup> (2002) 41 I.L.M. 1478.

<sup>9</sup> Under the heading "Vulnerabilities", in section 3, is a bullet point reading: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."

<sup>10</sup> For an earlier case, see G Marston, "Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government" (1988) 37 I.C.L.Q. 773.

<sup>11</sup> Many, including UN Secretary-General Kofi Annan, and the Legal Department of the Russian Ministry of Foreign Affairs ("Legal Assessment of the Use of Force against Iraq" (2003) 52 I.C.L.Q. 1059), said that the use of force against Iraq in March 2003 was unlawful. Many, but by no means all, international law academics considered it illegal. Some were moved to write to the newspapers: M Craven, "We are Teachers of International Law" (2004) 17 Leiden J. Int'l L. 363.

<sup>12</sup> For the legal justifications of the UK, USA and Australia, see their respective letters to the President of the Security Council: S/2003/350, S/2003/351 and S/2003/252. UK legal position: Attorney General's Written Answer to a Parliamentary Question, 17 March 2003, *Hansard*, 646 HL Debs., WA 2, and FCO Paper "Iraq: Legal Basis for the Use of Force" (2003) 73 B.Y.I.L. at 792-796 and (2003) 52 I.C.L.Q. at 811-14; "Attorney General's advice to the Prime Minister of 7 March 2003" (2005) 54 I.C.L.Q. 767; U.K., H.C., "Review of Intelligence on Weapons of Mass Destruction" (Butler Review, July 2004, HC 898), at paras. 366-387; Information Commissioner's Enforcement Notice of 22 May 2006, addressed to the Legal Secretariat to the Law Officers, Annex 6 (Legality of Military Action in Iraq: Disclosure Statement made by the Cabinet Office and the Legal Secretariat to the Law Officers), to be published in (2006) 76 B.Y.I.L. US legal position: W Taft/T Buchwald, "Preemption, Iraq, and International Law" (2003) 97 A.J.I.L. 557 (without the usual disclaimer). Australian legal position: "Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq, 18 March 2003" (2003) 4 Melbourne J. Int'l L. 178-182.

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

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

How strong a legal basis is required before a State resorts to armed force is ultimately a policy question rather than one for Government legal advisers. But lawyers can and should advise on the risks of acting on the basis of a ‘reasonable’ or ‘arguable’ case, for example the risk of domestic and international proceedings, including perhaps even criminal proceedings.

Another important but little discussed point is the issue of proof of the relevant facts. At least after the event, a State which has used armed force may be required to demonstrate that the facts as known to it prior to the use of force were such as to justify the resort to force under the circumstances.<sup>13</sup> This can raise difficult issues where proof relies on intelligence.<sup>14</sup>

Both these issues—the strength of the legal basis, and the question of proof—could become critical in the United Kingdom in light of the Government’s recent proposal to make provision for the House of Commons to approve ‘significant, non-routine deployments of the Armed Forces into armed conflict’.<sup>15</sup>

As indicated above, contrary to the views of some other commentators, this writer believes that Governments do take the rules of international law on the use of force seriously. A more important question, and one which is addressed in the rest of this article, is whether there are significant shortcomings in the traditional body of rules on the use of force by States. Is the law as it is, the law as it ought to be? Are existing rules adequate to meet current threats, especially from terrorist groups and weapons of mass destruction?

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

that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.<sup>16</sup>

It seems that, in the view of the Heads of State and Government, the rules on the use of force in the Charter (and in customary international law), when properly interpreted

<sup>13</sup> As Sir Franklin Berman put it: “[...] only the State itself can assess the threat it faces and how to respond. This is, however, emphatically not to say that the State’s own assessment is, as it were, final and binding; nor is it to say that, just because it is self-defence, it somehow escapes the possibility of objective judgement after the event[...].” (*supra* note 1, at 14).

<sup>14</sup> The same difficulty may arise when a State seeks to persuade the Security Council to act. These issues are addressed in S Chesterman, “Shared Secrets: Intelligence and Collective Security” (2006) Lowy Institute Paper No. 10, Lowy Institute for International Policy.

<sup>15</sup> See the consultation document *The Governance of Britain, War powers and treaties: Limiting Executive powers*, October 2007 (CM 7239).

<sup>16</sup> General Assembly res. 60/1, para. 79. This followed similar statements by the Secretary-General’s High-level Panel in its report *A more secure world: our shared responsibility* (A/59/565), paras. 185-203; and by the Secretary-General in his report *In larger freedom: towards development, security and human rights for all* (A/59/2005), paras. 122-126.

and applied, are adequate to meet new challenges. What is needed are not new rules, but political will on the part of States, including members of the Security Council and potential troop-contributors. The 2005 World Summit Outcome thus offered a response to a debate that took off after 9/11 questioning the effectiveness, the relevance, and even the existence of rules of international law on the use of force.<sup>17</sup> The response of the UK Government to the Foreign Affairs Committee in July 2004 was along similar lines:

In the Government's view, the right approach is to continue to seek to build a political consensus on the circumstances in which it is appropriate to resort to military action within the current legal framework rather than seeking to change existing rules of international law on the use of force. Existing rules are sufficiently flexible to meet the new threats we face. The role of the Security Council is central to that process. Seeking to develop the rules of international law other than on a case-by-case basis would be very difficult, and probably unsuccessful.<sup>18</sup>

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

Before turning to the question of self-defence against transnational terrorist groups, a word should be said about expressions such as 'war against terrorism' or 'global war on terror'.<sup>19</sup> These are generally used in a non-legal sense. (Politicians use the rhetoric of war in all kinds of contexts, far removed from the reality of armed conflict.) When asked whether the use of the term 'war against terrorism' meant that the United Kingdom was legally at war, the UK Government responded that:

The term "the war against terrorism" has been used to describe the whole campaign against terrorism, including military, political, financial, legislative and law-enforcement measures.<sup>20</sup>

The United States has recently gone on record in a somewhat similar sense. The State Department Legal Adviser, John B Bellinger III, said:

The phrase 'the global war on terror'—to which some have objected—is not intended to be a legal statement. The United States does not believe that it is engaged in a legal state of armed conflict at all times with every terrorist group in the world [...]. When we say that there is a 'global war on terror,' we primarily mean that the scourge of

<sup>17</sup> See, for example, Prime Minister Blair's March 2004 Sedgefield speech, in which he said "It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do about it, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe [...]. This may be the law, but should it be?" The Foreign Affairs Committee asked the Government to set out its response to the Prime Minister's question: see U.K., *Response of the Secretary of State for Foreign and Commonwealth Affairs to the Seventh Report* (Cm 6340) of September 2004, response to recommendation 63. For earlier consideration of these issues by the Foreign Affairs Committee, see its U.K., H.C., "Foreign Policy Aspects of the War against Terrorism", Cm1196 in *sessional papers* (2002) and U.K., H.C., "Response of the Secretary of State for Foreign and Commonwealth Affairs", Cm5739 in *sessional papers*, vol. 2 (2002-2003). See also the evidence of Daniel Bethlehem, Philippe Sands, and Jutta Brunnée/Stephen Toope to the Foreign Affairs Committee of the British House of Commons in 2004: Seventh Report of the Foreign Affairs Committee in U.K., H.C., "Foreign Policy Aspects of the War Against Terrorism", in *sessional papers* (2003-2004).

<sup>18</sup> Letter from the Parliamentary Relations and Devolution Department, Foreign and Commonwealth Office, 5 July 2004.

<sup>19</sup> I do not here consider the definition of terrorism: for a recent study, see B Saul, *Defining Terrorism in International Law* (2006).

<sup>20</sup> Written Answer by the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office (Baroness Amos) in the House of Lords (Hansard, 22 Nov 2001: Col. WA 153).

terrorism is a global problem that the international community must recognize and work together to eliminate.<sup>21</sup>

Article 51 of the Charter provides that:

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

It thus recognises the inherent right of self-defence under customary international law. It is sometimes suggested that this right of self-defence, as recognised in the Charter, is too restrictive for the modern age. The 2002 *National Security Strategy*, with its references to preventive action, may reflect this view. Such suggestions overlook, or at least downplay, the potential role of the Security Council in authorising States to use force preventively to avert terrorist threats.

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

Some question whether the right of self-defence is at all available in response to attacks by non-State actors, such as transnational terrorist groups. Yet immediately after the terrorist attacks of 11 September 2001, on 12 September the Security Council adopted Security Council resolution 1368 (2001), recognising 'the inherent right of individual and collective self-defence in accordance with the Charter.' Just over two weeks later, the Council adopted Security Council resolution 1373 (2001), which likewise reaffirmed 'the inherent right of individual and collective self-defence as recognized by the Charter of the United Nations'. While some have tried to argue the contrary, it is difficult to read these resolutions as doing other than recognising the right of self-defence in response to attacks by non-State actors. In any event, State practice, including the practice of the members of the North Atlantic Treaty Organization,<sup>22</sup> the members of the Organization of American States<sup>23</sup> and others,<sup>24</sup> strongly supports such a right. This is notwithstanding the International Court of Justice's curious pronouncement in the *Wall* advisory opinion<sup>25</sup> and its (possibly significant) silence in *Armed Activities on the Territory of the Congo* case.<sup>26</sup> Since terrorists frequently operate from outside the State in which attacks take place, the question arises whether the right of self-defence may be exercised against terrorists located in another State, and if so under what conditions. Some have suggested that such action is only permissible if the State concerned bears international responsibility for the acts of the terrorists. The question of State responsibility for terrorist acts is important, but such responsibility is neither necessary nor sufficient for force to be used in self-defence.<sup>27</sup> A recent Chatham House study, which developed a set of Principles on the Use of Force in Self-Defence, concluded that such action

<sup>21</sup> Available online: Armed Conflict With Al Qaeda? <<http://www.opiniojuris.org>>

<sup>22</sup> (2001) 40 I.L.M. 1267.

<sup>23</sup> *Ibid* at 1273.

<sup>24</sup> ANZUS; Russian Minister for Foreign Affairs, Replies to questions from Al Jazeera TV, 10 September 2004, cited in Wood (2005), *supra* note 2 at 87.

<sup>25</sup> *Supra* note 4 at paras.138-139.

<sup>26</sup> *Supra* note 4. Uganda did not claim that it had been subjected to an armed attack by the armed forces of the DRC; the claimed attack came from a rebel group called the Allied Democratic Forces (ADF). There was no satisfactory proof of the direct or indirect involvement of the DRC Government in these attacks by the ADF.

<sup>27</sup> For attempts to grapple with the possible relevance in this area of the rules of State responsibility, see T Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006), and H Hofmeister in this volume of the *Year Book*.

could be taken where the territorial State is itself unable or unwilling to take the necessary action.<sup>28</sup>

The question whether the Charter recognises a right of anticipatory self-defence remains controversial, among States as among writers. During the Cold War, the USSR and its friends seemed to take the position that action in self-defence was only lawful if an armed attack had actually been launched. The United States, the United Kingdom and some allies maintained the *Caroline* approach, that is, that force may be used in self-defence in the face of an imminent attack.<sup>29</sup> The International Court of Justice has not yet taken the opportunity to address the matter.<sup>30</sup> The end of the Cold War, and the new threats, have not yet led to general agreement among States on the question of anticipatory self-defence. In some respects, new divisions have emerged (in part as a result of language in the US *National Security Strategy* of 2002 referring to 'preventive' action). Yet overall States are perhaps somewhat closer in their view of the law than before. However, while States often seem to agree on the legality of specific actions, the adverse reaction of many to the categorical affirmation of a right of anticipatory self-defence in the High-level Panel's report *A More Secure World* and in the Secretary-General's report *In Larger Freedom* illustrated the risks of engaging in abstract debate, as opposed to adopting a case-by-case approach.<sup>31</sup> United Nations General Assembly resolution 60/1 (the 2005 World Summit Outcome) made no mention of the question of anticipatory self-defence.

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

The concept of what constitutes an 'imminent' armed attack will develop to meet new circumstances and new threats [...]. It must be right that States are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.<sup>32</sup>

<sup>28</sup> E Wilmshurst, "The Chatham House Principles of International Law on the Use of Force in Self-Defence" (2006) 55 I.C.L.Q. 963. To the same effect, see Bellinger, *supra* note 21: "As a practical matter, [...] a state must prevent terrorists from using its territory as a base for launching attacks. As a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defence to address that threat."

<sup>29</sup> Berman suggests (*supra* note 1, at 12) that because Article 2.4 of the Charter prohibits the threat of force 'it simply has to follow [...] that the law of self-defence allows a forcible response to an unlawful threat—so long as the response meets the requirements of necessity and proportionality.' There is no necessary equivalence between the prohibition in Article 2.4 and the right of self-defence recognized by Article 51. If the right of self-defence is not to become unduly broad, it is better to keep to the language of imminent attack.

<sup>30</sup> The Court expressly left the question open in *Nicaragua* (ICJ Rep. 1986, 103, para.194). It did so again in *Armed Activities on the Territory of the Congo*, *supra* note 4, para.143; however, in that case, after saying that the prohibition against the use of force was 'a cornerstone of the United Nations Charter' and citing Article 2.4, the Court continued: 'Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council' (para.148).

<sup>31</sup> The High-level Panel's report *A more secure world*, *supra* note 16, para. 188 (cited below at note 33), and the Secretary-General's report *In larger freedom*, *supra* note 16, para. 124, each took it as given that the right of self-defence extends to an imminent attack. Perhaps not surprisingly, this proved controversial. During the General Assembly debate on *In Larger Freedom* in April 2005, a number of statements were made, including on behalf of the Non-Aligned Movement countries, denying a right of anticipatory self-defence: see C Gray, "A Crisis of Legitimacy for the UN Collective Security System?" (2007) 56 I.C.L.Q. 157 at 163-164.

<sup>32</sup> Hansard, 21 April 2004, cols. 370-371. William H Taft IV, when State Department Legal Adviser, made similar remarks on a number of occasions. For example, on 27 October 2004 he said that '[t]he right of self-defence could be meaningless if a state cannot prevent an aggressive first strike involving weapons of mass



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

It is [...] the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive attack against a threat that is more remote.<sup>33</sup>

It is sometimes suggested that the requirement of imminence no longer has any application in the case of terrorism, and especially terrorism that may involve weapons of mass destruction. It could be subsumed into the requirement of necessity. But that would conflate two requirements that are traditionally considered separately, and could lead down a slippery slope towards a generalised right to take preventive action. Maintaining the traditional terminology may have some importance, both in itself (it should not be too easy to justify the use of force), and to promote general agreement on the rules.

The application of the imminence criterion can be difficult in practice. A classic example is the Israeli attack on a nuclear plant in Iraq in 1981. On 7 June 1981, Israel bombed a research centre near Baghdad, destroying the Osirak nuclear reactor which, it was said, was developing nuclear bombs that would have been ready for use against Israel in 1985. The Security Council, after extended debate,<sup>34</sup> unanimously and strongly condemned 'the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.'<sup>35</sup> The debate focused on the necessity of Israel's actions. It was agreed that Israel had failed to exhaust all peaceful means for resolution of the matter. Israel had also failed to produce evidence that it was threatened with an imminent nuclear attack.

The Chatham House Principles have something to say on the matter.<sup>36</sup> Principle D says that 'the criterion of imminence must be interpreted so as to take into account current kinds of threat' and that:

- (a) Force may be used only when any further delay would result in an inability by the threatened State effectively to defend against or avert the attack against it.
- (b) In assessing the imminence of the attack, reference may be made to the gravity of the attack [e.g. WMD], the capability of the attacker [e.g. possession of WMD], and the nature of the threat, for example if the attack is likely to come without warning.

The commentary, after referring to the *Caroline* formula, notes that in the context of contemporary threats 'imminence cannot be construed by reference to a temporal criterion only, but must reflect the wider circumstances of the threat.' A key element is whether 'it is

destruction. The right of self-defense must attach early enough to be meaningful and effective, and the concept of "imminence" must take into account the threat posed by weapons of mass destruction, the intentions of those who possess such weapons and the catastrophic consequences of their use' (2004) *Digest of United States Practice in International Law* 971.

<sup>33</sup> See, to the same effect, Cm 6340 (*supra* note 17), response to recommendation 65; and para. 3 of the Attorney General's advice of 7 March 2003, in which he said: '[...] there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognized in international law.' The High-level Panel expressed it well at para. 188 of its report: 'Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened. Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.'

<sup>34</sup> S/PV. 2280-2288.

<sup>35</sup> Security Council resolution 487 (1981) of 19 June 1981.

<sup>36</sup> See *supra* note 28.

believed that any further delay in countering the intended attack will result in the inability of the defending State effectively to defend itself against the attack. In this sense necessity will determine imminence.’

Professor Lowe suggests that:

If self-defence is regarded not as a crystallized legal rule but rather as an acknowledgement of a legal principle that States are entitled to take the measures necessary to deal with situations of clear and present danger, it is reasonable to interpret it flexibly. If the notion of ‘self’ is broadened to enable defensive action to be taken by any one among a number of potential targets, and the notion of imminence is broadened (or perhaps simply understood) to encompass action taken at the last opportunity that is certain to exist to take defensive measures, that strikes me as a reasonable and principled development of the right.<sup>37</sup>

This would accord the right of individual self-defence to any number of ‘potential targets’, and so the proposition is very wide. The ‘potential target’ should surely have to demonstrate that it was at grave risk of being the target. That said, the ‘last opportunity’ approach has some attraction. It is a stringent test, and all the other requirements for self-defence would apply, including proportionality and necessity.<sup>38</sup> The ‘last opportunity’ criterion may be determinative in the sort of case Lowe posits in his article (a band of terrorists with a biological weapon, who are about to disperse), but when the threat comes from a State, alternatives to the use of force, including negotiation and sanctions, may remain even as the last realistic opportunity to use force passes.

### III. HUMANITARIAN INTERVENTION AND ‘RESPONSIBILITY TO PROTECT’

The British Government was a leading proponent of an exceptional and strictly limited right of States to use force to avert an overwhelming humanitarian catastrophe—not, it should be noted, a general right of humanitarian intervention.<sup>39</sup> The claim was first made in relation to the establishment of the safe havens in northern Iraq in the Spring of 1991.<sup>40</sup> It was ‘the underlying justification of the No-Fly Zones’ in northern and southern Iraq.<sup>41</sup> And it was restated in the following terms in 1998 in connection with the events unfolding in Kosovo:

There is no general doctrine of humanitarian intervention in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council’s express authorisation when that was

<sup>37</sup> A V Lowe, “ ‘Clear and Present Danger’: Responses to Terrorism” (2005) 54 *I.C.L.Q.* 185 at 192. See also A V Lowe, *International Law* (2007) 275-80; T D Gill, “The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy”, in M Schmitt and J Pejić eds., *International Law and Armed Conflict: Exploring the Faultlines* (2006); and, for a non-lawyer’s view, T Taylor, “The End of Imminence” (2004) 27 *The Washington Quarterly* 57.

<sup>38</sup> The British Government said in response to the Foreign Affairs Committee of the House of Commons that ‘the principle of proportionality in the law of self-defence does not relate to the relative scale of the action on each side. Rather it requires that the action taken in self-defence should be proportionate to the aim of removing the threat. It might be the case, for example, that a proportionate response in self-defence to an imminent attack with WMD by a terrorist group could be a small-scale conventional attack, if this were sufficient to remove the threat’: Cm 6340 (*supra* note 17), response to recommendation 65.

<sup>39</sup> S Murphy, *Humanitarian Intervention: the United Nations in an evolving world order* (1996); C Greenwood, “Humanitarian Intervention: The Case of Kosovo” (1999) 10 *Finnish Y.B.I.L.* 141 (reproduced in C Greenwood, *Essays on War in International Law* (2006), 593); S Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (2001).

<sup>40</sup> (1992) 63 *B.Y.I.L.* at 827-828.

<sup>41</sup> Attorney General’s advice of 7 March 2003, para. 4.

the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.<sup>42</sup>

A more elaborate statement of the criteria was set out in a note of 7 October 1998, circulated by the United Kingdom within NATO:

- (a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring urgent and immediate relief;
- (b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;
- (c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.<sup>43</sup>

There is in Baroness Symons' Answer (though not in the note for NATO) a double reference to the Security Council. But is it essential, under the doctrine enunciated by Baroness Symons, that the Security Council has pronounced on the matter? In his article in the 2006 volume of this *Year Book*, Sir Franklin Berman suggests that it is. He draws a distinction 'between the use of force in the protection of purely national interests, and the use of force in the common interest', and concludes that States may, provided that the 'conditions and limitations' are properly weighed, use force unilaterally on condition that they do so 'in pursuit of purposes the Council itself has already laid down.' In the course of developing his argument, Sir Franklin remarks that:

The common assumption has been that what was being put forward [by Baroness Symons] represented a devious attempt to give operative force to non-binding Security Council resolutions; or that it was an illegitimate way of constructing the grant by the Council of implied authority to act. Neither of those could be further from the truth [...]. What the commentators missed was that this element, one of several in a compound argument, was not being advanced as a positive empowering factor in its own right, but in a purely negative sense; in other words, it was there to make plain that the States in question were precisely not claiming for themselves the right to lay down the purposes of the international community in whose name they were acting, but were operating in aid of common purposes laid down by the only duly authorised organ, the Security Council.<sup>44</sup>

This suggests that for the Security Council to lay down the common purpose is a necessary, but not sufficient, condition for States to act unilaterally. Yet there is surely a risk that, if this were accepted, the Council's work could be inhibited because of fears that if it laid down a 'common purpose' this could be interpreted as indirectly sanctioning the unilateral use of force.

<sup>42</sup> Baroness Symons, *Hansard HL Debs.*, WA 139-40, 16 November 1998: B.Y.I.L., 69 (1998), 593. The Foreign Affairs Committee of the House of Commons, after taking evidence from international lawyers, including Professors Brownlie, Chinkin, Greenwood and Lowe (Memoranda in I.C.L.Q., 49 (2000), 876-943), concluded 'that, at the very least, the doctrine of humanitarian necessity has a tenuous basis in current international customary law, and this renders NATO action legally questionable': Conclusion (18) of the Fourth Report of the Foreign Affairs Committee, Session 1999-2000.

<sup>43</sup> Quoted by A Roberts, "Nato's "Humanitarian War" over Kosovo" (1999) 41 *Survival* 106: (1999) 70 B.Y.I.L. at 571-572.

<sup>44</sup> See *supra* note 1 at 15-16.

The Attorney General's advice of 7 March 2003 says that '[t]he doctrine [of a right to intervene to avert an overwhelming humanitarian catastrophe] remains controversial'.<sup>45</sup> Has State practice now developed to the point where a right to intervene to avert an overwhelming humanitarian catastrophe can be said to have been established in customary international law, despite the silence of the United Nations Charter and in the face of the general prohibition on the use of force?

In 1991, the United Kingdom's legal position on intervention was a somewhat isolated one. In earlier cases which might have been seen as humanitarian interventions (India-East Pakistan 1971; Vietnam-Cambodia 1978; Tanzania-Uganda 1979), the States concerned justified their actions on other grounds, primarily self-defence.<sup>46</sup> NATO's Kosovo operation could have been a major element of State practice (though in fact it was less than clear-cut, since many participating States—including the United States—were not at all explicit as to the legal basis for their actions). Yet however much the development of a right to intervene on humanitarian grounds may have been welcomed in some quarters, it is difficult to demonstrate that State practice since the safe havens in northern Iraq in 1991, or since the intervention over Kosovo in 1999, has moved in the direction of those claiming the existence in law of such a right. The claim has not secured much 'traction'. There are no examples of States seeking to rely on it since 1999. The High-level Panel's report *Our common future* of 2004, and the Secretary-General's report *In larger freedom* of 2005, did not mention such a right. The ensuing General Assembly debate in April 2005 offered no support; those who addressed the question of humanitarian intervention saw it as a matter to be decided upon, if at all, by the Security Council, not one where unilateral action was permitted. There was no hint of a unilateral right in the 2005 World Summit Outcome. In the final analysis, it may be preferable to view the claims made in 1991 and 1999 as based on some exceptional defence or justification of necessity, such as is found in domestic legal systems, rather than on a positive rule of law.

The United States has, to this point, not embraced such a right.<sup>47</sup> It justified its actions to protect the Kurds in northern Iraq and the Shia in the south, and the NATO action over Kosovo, on 'a range of other factors'.<sup>48</sup> Michael Matheson, former State Department Deputy Legal Adviser, has explained the American position as follows:

the assertion by states or regional organizations of a *legal right* to carry out such "benign" uses of force on their own authority could create precedents for future interventions by others that might be destabilizing and dangerous. This is one of the main reasons the United States has never asserted the doctrine.

Matheson goes on to point out that:

But there is a much stronger legal and political basis for forcible humanitarian intervention under the authorization of the Security Council under Chapter VII or VIII.<sup>49</sup>

<sup>45</sup> Para. 4.

<sup>46</sup> Much was made, during the Kosovo debates, including before the International Court of Justice during the *Legality of Use of Force* cases, of a paper entitled *Is Intervention Ever Justified?* prepared in July 1984 by the Planning Staff of the Foreign and Commonwealth Office, extracts from which were published in (1986) 57 B.Y.I.L. 619. The paper suggested (at para. II. 22) that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal'.

<sup>47</sup> Remarks by the State Department Legal Adviser, William H Taft IV, on 27 October 2004: (2004) Digest of United States Practice in International Law at 971.

<sup>48</sup> (2004) Digest of United States Practice in International Law at 972. See also M Sapiro, "The Politics of International Law and the Law of International Politics: An American Perspective" (2005) 23 Wis. Int'l L.J. 49 at 55-58; J Stromseth, D Wippman and R Brooks, *Can Might Make Rights?* (2006) at 24.

<sup>49</sup> M Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (2006) at 139.

It is, in fact, along these lines that the United Kingdom and others have been working since shortly after Kosovo. Back in 2001, the British Government sought to promote criteria for the circumstances in which the Council should be ready to authorise the use of force in the face of an overwhelming humanitarian crisis.<sup>50</sup> This was an attempt to develop the underlying policy for Council action, not the law. The initiative did not lead to immediate results. Other initiatives followed, stimulated by concern at the unilateralism inherent in the Kosovo action. The most influential was the International Commission on Intervention and State Sovereignty, set up by the Canadian Government, whose 2001 report was entitled *The Responsibility to Protect*.<sup>51</sup> The Secretary-General's High-level Panel had plenty to go on. The Panel endorsed (at paragraph 203):

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

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

In paragraphs 138 and 139 of the 2005 World Summit Outcome, the Heads of State and Government noted that '[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.' They went on to say that 'the international community, through the United Nations' also had the responsibility to use appropriate peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations. The key passage then follows:

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

This sentence merits careful analysis. The first question is whether, by using the word 'responsibility,' the Assembly was asserting that either 'each individual State' or 'the international community, through the United Nations' has an international legal obligation to protect populations. The answer, surely, is 'no'. Although individual States have positive obligations under human rights law that would be encompassed in the concept of a 'responsibility to protect', it does not follow that 'responsibility to protect' amounts to a new international legal obligation, created by General Assembly fiat. So to claim might even limit acceptance of the political principle. States, particularly those who would bear the main burden of action, are unlikely to be willing to agree to a legal obligation to act to achieve objectives that may require huge resources and where, depending on the circumstances, success may be uncertain.<sup>52</sup>

<sup>50</sup> (2001) 72 B.Y.I.L. 695.

<sup>51</sup> *Report of the International Commission on State Sovereignty and Intervention: The Responsibility to Protect* (2001). This was preceded by a report by the Danish Institute for International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999).

<sup>52</sup> In any event, it is difficult to see how 'the international community, through the United Nations' could bear a legal obligation. The much invoked 'international community' is not a legal person, capable of bearing rights

As a political commitment, the passage on ‘responsibility to protect’ in the 2005 World Summit Outcome is potentially significant, and suggests that States have come quite far. As Simon Chesterman wrote, in his article in the 2006 volume of this *Year Book*:

the Secretary-General rightly called this aspect of the Outcome Document a “revolution in international affairs”. [...] The test of its relevance is not whether states are compelled to intervene in response to humanitarian crises, but whether it is harder to say “no”.<sup>53</sup>

Yet even as a political commitment the sentence in the World Summit Outcome is limited in scope. The Heads of State and Government said they were ‘prepared to take collective action’ (unspecified). Action is to be taken ‘through the Security Council’ and ‘in accordance with the Charter.’ Whether action is taken, and if so what, is up to the members of the Council. Action is to be taken ‘on a case-by-case basis.’ And the sentence is limited to protection against ‘genocide, war crimes, ethnic cleansing and crimes against humanity’.<sup>54</sup>

What is significant, legally as well as politically, is that in the 2005 World Summit Outcome the General Assembly confirmed, in the most solemn fashion, that enforcement action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is within the remit of the Security Council. Such a position was already well established in the practice of the Council, and any remaining doubts should have been removed by the 2005 World Summit Outcome.<sup>55</sup> In fact, the Assembly, that is to say, the membership of the United Nations as a whole, went further. It clearly said that it expected the Security Council to take action in appropriate cases, and the Security Council itself has acknowledged this.<sup>56</sup> Having said that, the reasons given in January 2007 by certain members of the Security Council for opposing action over Myanmar do not augur well for the practical application of a ‘responsibility to protect’.<sup>57</sup>

#### IV. CONCLUSIONS

The overall conclusion is that existing rules of international law on the use of force, in particular as regards Security Council authorisation and self-defence, properly understood, are adequate to address current threats and do not contain significant shortcomings. Whilst by no means perfect, they are preferable to any alternative rules that could be agreed. Efforts radically to amend or reinterpret the rules are neither desirable, nor likely to succeed.<sup>58</sup> For practitioners in the field of international law, the world did not change in September 2001.

The collective security system established by the United Nations Charter, supported by the wider international system (including such bodies as the International Atomic Energy

and obligations. The United Nations is, but the language of the 2005 World Summit Outcome does not suggest that the Assembly intended to recognise some new international legal obligation upon the United Nations, as distinct from a political commitment.

<sup>53</sup> S. Chesterman, “Reforming the United Nations: Legitimacy, Effectiveness and Power after Iraq” (2006) 10 S.Y.B.I.L. 59.

<sup>54</sup> That does not preclude Council intervention in the event of grave violations of human rights not falling within these four categories, especially if they are comparable.

<sup>55</sup> It may be recalled that as recently as 1993, Professor Higgins wrote that “[n]otwithstanding the risk that unilateral intervention for humanitarian purposes is open to abuse, it is far from clear that such action can properly be authorized by the United Nations.” *Problems and Process: International Law and How We Use It* (1994), 254.

<sup>56</sup> Security Council resolution 1674 (2006) reaffirmed paragraphs 138 and 139 of the 2005 World Summit Outcome Document, as was recalled in Security Council resolution 1706 (2006) on Darfur.

<sup>57</sup> S/PV. 5619. China and Russia vetoed a modest draft resolution, not under Chapter VII, proposed by the UK and USA.

<sup>58</sup> One or a few States, however powerful, cannot change established rules of international law, Charter-based ones at that.

Agency), is in principle capable of responding to current and future threats, whether from overwhelming humanitarian catastrophes, 'rogue' States, transnational terrorist groups, weapons of mass destruction, or a combination thereof. This has already been demonstrated by robust Council action in the face of aggression and terrorist threats, as well as some effective action in the field of counter-proliferation. Where the Council cannot or does not act swiftly enough, the right of self-defence is there to protect States' interests. If the Council fails to act to prevent an overwhelming humanitarian catastrophe, States willing and able might exceptionally act anyway with an argument based on necessity.

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

Some may think this is to take an unduly rosy view of the Security Council. Yet experience suggests that collective decisions (whether for action or inaction) are usually better than unilateral ones. The alternative to reliance on the current rules would likely be a reversion to pre-Charter unilateralism, even to a pre-Covenant era. Would we really be more secure if present-day international legal restraints on the use of force by individual States were relaxed or dismantled?

What is needed is a broader consensus on the existing rules of international law on the use of force and on their application, as well as greater support for international institutions, and particularly for a Security Council that is effective and seen to be legitimate. Effectiveness depends upon the political will of the Members of the United Nations. It does not depend upon new rules, or upon Council reform. As for legitimacy, it is far from obvious that those whose constant refrain is to criticise the Security Council would be satisfied with any reform proposal that has been on the table. The importance of enlarging the Council should not be exaggerated. Considerable improvements—deserving of greater recognition—have been made over the last 20 years or so in its working methods and documentation. Unjustified criticisms of the Security Council may have an insidious impact on its perceived legitimacy. 'Demonisation' of the Security Council is not the most obvious way to promote multilateralism.