Public International Law

Contemporary Principles and Perspectives

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incurred.[141] For personal injury to a national, compensation lies for medical expenses, loss of earnings and moral damage.[142] These statements are very general and the measure of damages very much depends on the primary obligation breached and the circumstances of the case.[143] Equitable considerations and proportionality also play a role.[144]

The flexibility of compensation is demonstrated by the jurisprudence on nationalizations. Where a state expropriates the property of a foreign national, there is no general customary rule of 'prompt, adequate and effective' compensation (the so-called 'Hull formula'), as developing states have long considered that expropriation during non-discriminatory large-scale nationalizations for a public purpose do not oblige states to pay full compensation. Appropriate compensation must take into account the state's right to permanent sovereignty over its resources.[145]

7.5.6 Satisfaction

The third remedy is satisfaction (Article 37 of the Articles). Satisfaction may consist of an acknowledgement of the breach, a formal apology or another appropriate modality, such as an inquiry into the causes of an incident or the prosecution of individuals.[146] Assurances and guarantees of non-repetition may also have the effect of producing satisfaction. Sometimes the ICJ has considered that its condemnation of the responsible state is adequate satisfaction.[147] Satisfaction may not be out of proportion to the injury or be humiliating.[148] Importantly, satisfaction may not amount to punitive damages, a remedy of deterrence not known to international law.[149]

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[141] ILC Commentary to Article 36, [2], [21]. See, e.g., *Amoco International Finance Corp. v Iran* (1987) 15 Iran-US Cl Trib 189.

[142] ILC Commentary to Article 36, [16].

[143] Ibid., [7]ff.

[144] Shelton, above note 107, 838; ILC Commentary to Article 36, [7].

[145] Resolution on Permanent Sovereignty over Natural Resources 1962, GA Res. 1803 (XVII), GAOR, 17th sess., Supp. 17, 15, [4]; Charter of Economic Rights and Duties of States 1974, GA Res. 3281 (XXIX), (1975) 14 ILM 251, Art. 2(c). The 'Hull formula' is stated in *Anglo-Iranian Oil Co* (*United Kingdom v Iran*) (*United Kingdom v Iran*) [1952] ICJ Rep 93, Memorial submitted by the United Kingdom, 105–6.

[146] ILC Articles, above note 4, Art. 37(2); ILC Commentary to Article 37, [5].

[147] See, e.g., *Corfu Channel* case, above note 21, 35.

[148] ILC Articles, above note 4, Art. 37(3).

[149] *Velásquez Rodriguéz v Honduras*, Judgment of 21 July 1989, Inter-Am Ct H R (Ser. C) No. 7 (1989), [38].

Satisfaction is particularly suited to remedy moral damage that is not financially assessable, as demonstrated by the *I'm Alone* case discussed above.[150]

7.6 INVOCATION OF STATE RESPONSIBILITY

Central to international law is the mechanism for holding states accountable for their internationally wrongful acts. The Articles rightly define 'invocation' narrowly – that is, as the commencement of proceedings before an international court or tribunal.[151] This ensures that states do not have to show standing for protests or similar expressions of *opinio juris*.

7.6.1 The Injured State

A state is entitled as an 'injured state' to invoke the responsibility of another state if the obligation breached is owed to

(a) that state individually; or
(b) a group of states including that state and the breach
    (i) specially affects that state; or
    (ii) radically changes the position of all the other states to which the obligation is owed with respect to the further performance of the obligation (Article 42 of the Articles).

This formulation follows Article 60 of the Vienna Convention on the Law of Treaties, and similar considerations apply.[152] An example of sub-paragraph (b)(ii) would be one state claiming sovereignty over an unclaimed area of Antarctica contrary to the Antarctic Treaty. The position of all parties to the Treaty would be radically changed.[153]

An injured state loses the right to invoke responsibility if it has explicitly waived the claim or, by reason of its delay, it can be inferred that it validly acquiesced in the claim's lapse (Article 45).[154] In the *Boeing*

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150 See discussion above at section 7.5.3.
151 ILC Commentary to Article 42, [2].
152 ILC Commentary, Article 42, [4]. See Chapter 2 for more detailed treatment of these concepts in the context of the law of treaties.
153 ILC Commentary to Article 42, [14].
154 *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (Preliminary Objections) [1992] ICJ Rep 240, [32]. The considerations for waiver are similar to those for consent: see discussion above at 7.4.1.

case,[155] the Iran-United States Claims Tribunal imputed acquiescence to Iran for its three-year delay in bringing a claim against Boeing, given that it had 'ample opportunity' to bring such a claim if it had so desired.[156] Conversely, in *LaGrand*[157] Germany brought its claim on the eve of execution of its second national on death row, more than 15 years after the United States' breaches commenced. Thus, both humanitarian considerations and the behaviour of the parties have a bearing on acquiescence.[158]

7.6.2 The Non-injured State

A 'non-injured state' may invoke responsibility where the obligation breached is owed to

(a) a group of states including that state, and is established for a collective interest of the group (such as collective defence), or
(b) the international community as a whole (Article 48(1) of the Articles).

Article 48(1)(b) reflects the principle that *erga omnes* obligations, including but not limited to *jus cogens* norms, can be invoked by any state.[159] In such a case, a non-injured state can seek cessation and assurances and guarantees of non-repetition.[160]

Under the Articles, where a state commits a serious (that is gross or systematic) breach of *jus cogens*, all states have a duty to cooperate to end the breach through lawful means.[161] This duty is admittedly a progressive development.[162] The other consequence is that states shall not recognize as lawful a situation created by such a breach, nor render aid or assistance in maintaining that situation.[163] In the *Israeli Wall* case,[164] the ICJ declared:

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155 *The Boeing Company et al. v Iran et al.* (1986) 6 Iran-US Cl Trib Rep 43.
156 Ibid., 50.
157 *LaGrand* case, above note 106.
158 Abass, above note 82, 222.
159 See Chapter 2 on the definition and nature of *erga omnes* obligations and *jus cogens* norms.
160 ILC Articles, above note 4, Art. 48(2)(a).
161 Ibid., Art. 41(1).
162 ILC Commentary to Article 41, [3]; but see *Israeli Wall* case, supra note 101, [159]. This is similar to the emerging 'responsibility to protect' principle discussed at section 7.8.
163 ILC Articles, above note 4, Art. 41(2).
164 *Israeli Wall* case, above note 100.

> Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall . . . They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.[165]

7.6.3 Plurality of Injured or Responsible States

Where several states are injured by the same wrongful act, each may separately invoke responsibility.[166] Similarly, where several states are responsible for the same internationally wrongful act, the responsibility of each may be invoked.[167] This rule does not apply where states commit different wrongful acts causing the injury, such as where one state aids or assists another to commit a wrongful act.[168]

An important procedural rule is that responsibility cannot be invoked if a *necessary* step in the claim is a finding of a wrongful act by a non-party to the proceedings. In the *East Timor* case,[169] Australia acquired certain East Timorese submarine resources under a treaty with Indonesia. Portugal claimed that Australia had breached its *erga omnes* obligation not to infringe the East Timorese people's right to self-determination. The Court dismissed the claim, as it would have had to pronounce on the lawfulness of Indonesia's claim to East Timor.[170]

7.6.4 Countermeasures

International law distinguishes between reprisals (forcible unlawful responses), countermeasures (non-forcible unlawful responses) and retorsions (unfriendly but lawful responses). Reprisals are prohibited. However, in a decentralized system such as international law countermeasures are tolerated as a self-help mechanism provided strict requirements are observed.

An injured state may take countermeasures that comprise non-performance of obligations it owes to the responsible state, provided

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165 Ibid., [159].

166 ILC Articles, above note 4, Art. 46; *SS 'Wimbledon'* case [1923] PCIJ (Ser. A) No. 1, 4, 20.

167 ILC Articles, above note 4, Art. 47; ILC Commentary to Article 47, [2].

168 ILC Articles, above note 4, Art. 16; see discussion above at section 7.3.5.

169 *East Timor* case (*Portugal v Australia*) [1995] ICJ Rep 90.

170 Ibid., [37]. See also *Monetary Gold Removed from Rome in 1943* (Judgment) [1954] ICJ Rep 19, 32.

resumption of the obligation is possible.[171] Thus, in the *Hungarian Dams* case[172] Czechoslovakia's irreversible step of diverting the Danube, taken in response to Hungary's treaty breaches, was not a lawful countermeasure.[173] As the object of countermeasures is to induce the responsible state to cease its wrongful conduct,[174] they must be terminated as soon as the responsible state has complied or if the dispute is pending before a competent court or tribunal.[175]

Secondly, Article 51 of the Articles requires countermeasures to be 'commensurate with the injury suffered', in view of the gravity of the wrongful act and the importance of the rights in question.[176] Couched in the positive, this requirement is harder for an injured state to satisfy than the formulation in the *Air Services* case,[177] in which France wrongfully refused to allow a change of gauge in London on Pan Am flights from the US west coast. The Arbitral Tribunal held that the United States' suspension of all Air France flights to Los Angeles was 'not clearly disproportionate' as it had 'some degree of equivalence with the alleged breach'.[178] Hence, proportionality remains an unsettled area.[179]

Before taking countermeasures, the injured state must notify the responsible state of its decision and offer to negotiate, but it can dispense with this requirement if urgent countermeasures are necessary to preserve its rights.[180]

7.7 THE STATE'S DIPLOMATIC PROTECTION OVER ITS NATURAL AND JURISTIC PERSONS

Following the jurisprudence of Vattel[181] the Permanent Court of International Justice stated in *Mavromattis*:

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171 ILC Articles, above note 4, Art. 49.
172 *Hungarian Dams* case, above note 16.
173 Ibid., [87].
174 ILC Commentary to Chapter II of Part Three, [4].
175 ILC Articles, above note 4, Arts 52(3) and 53.
176 *Hungarian Dams* case, above note 16, [85].
177 *Air Service Agreement of 27 March 1946* (*United States v France*) (1978) 18 RIAA 417.
178 Ibid., [83].
179 Bederman, above note 9, 821–2.
180 ILC Articles, above note 4, Art. 52(1); ILC Commentary to Article 52, [3].
181 Emerich Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués a la conduite et aux affaires des Nations et Souverains* (Washington, DC: Carnegie Institution of Washington, 1916), Bk II, Ch. vi. See generally C. Amerasinghe,

> a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[182]

Following decolonization, disagreements between states paralyzed legal development in this area. Developed states considered there was an international minimum standard for the treatment of aliens, while developing states denied that aliens could be treated more favourably than nationals.[183] Equally divisive was the question of permanent sovereignty over natural resources[184] and whether to jettison the fiction that the state sues on account of injury to itself.[185] Therefore it was only in 2006 that the ILC produced, and the General Assembly took note of, its Draft Articles on Diplomatic Protection.[186] However, the Draft Articles deal only with the procedural rules relating to nationality of claims and exhaustion of local remedies.[187]

Some substantive rules have developed. Generally, a state can freely choose to refuse entry to an alien or set conditions on entry, including refusing them civil rights such as the right to vote.[188] Expulsion, however, must not be arbitrary, discriminatory or in breach of the expelling state's obligations.[189] A state may also sue for a denial of justice committed against its national – the action here is founded on the malfunctioning of the state's judicial system.[190]

Diplomatic Protection (Oxford: Oxford University Press, 2009) Oxford Scholarship Online.

[182] *Mavromattis Palestine Concession* case (*Greece v United Kingdom*) (Jurisdiction) (1924) PCIJ Rep (Ser. A) No. 2, 12. See also *Administrative Decision No. V* (*United States v Germany*) (1924) 7 RIAA 119.

[183] See *Neer Claim* (*United States v Mexico*) (1926) 4 RIAA 60.

[184] See discussion above at section 7.5.5.

[185] Mohamed Bennouna, 'Preliminary Report on Diplomatic Protection' [1998] II(1) *Yearbook of the ILC* 309 [2]; John Dugard, 'First Report on Diplomatic Protection', UN Doc. A/CN.4/506 (2000), [17].

[186] GA Res. A/Res/61/35 (4 December 2006).

[187] See Chapter 9.

[188] See, e.g., Brownlie, above note 32, 520 (and the cases cited therein). This may not be true in the specialized field of refugee law.

[189] *Rankin v Iran* (1987), above note 68, [22]; cf Malcolm Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008, 6th edn), 826. This includes constructive expulsion: *International Technical Products Corp. v Iran* (1985) 9 Iran-US Cl Trib Rep 18.

[190] *Azinian v Mexico* (1999) ILR 121, 1, 23–4. For the rules on expropriation of foreign property, see above at section 7.5.5.

7.8 CONCLUSIONS

In one sense, when the ILC Articles were finalized in 2001, their relevance was already in question as a result of the burgeoning of the personality of non-state actors. That very year, the Al Qaeda attacks on the US set in motion a chain of events that seem to be changing the face of international law. Concepts such as state responsibility for harbouring or supporting terrorists, the (non-)consequences of a 'legal black hole' in Guantánamo Bay and atrocities by private military contractors in Iraq all post-dated this area's most influential text.

Now, world leaders and scholars are talking of states as having a 'responsibility to protect' the populations of other states where their own state is unable or unwilling to do so.[191] This is partly the old wine of the aspirational concept of humanitarian intervention in new bottles.[192] However, when the President of the United States speaks of the coalition against Libya as those 'who have chosen to meet their responsibilities to defend the Libyan people', this is more than idle rhetoric – it constitutes emerging *opinio juris*.[193]

Attribution is one area where the Articles (and the ICJ) appear to be bogged down in Cold War thinking. Although excessively liberal attribution could result in oppressive supervision by states of their nationals, the current 'effective control' test allows states to support insurrection movements and terrorists in full knowledge of human rights and humanitarian law violations, as long as the state does not specifically direct them to commit such violations.

Some may say that the fragmentation of international law and the proliferation of self-contained regimes have relegated the general rules on state responsibility to the status of gap filler.[194] However, the existence of a web of overarching rules undoubtedly brings stability to the international system; the Articles are and continue to be relied upon as authority for the role of state responsibility, and they no doubt set a useful foundation for the development of this important area of international law.

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191 See discussion in Chapter 8, section 8.6.1.

192 See Chapter 8, section 8.4.

193 Barack Obama, Remarks by the President in Address to the Nation on Libya, Speech of 28 March 2011 at National Defense University, Washington, DC, available at http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya (accessed 30 May 2011).

194 Daniel Bodansky and John Crook, 'Symposium: The ILC's Responsibility Articles: Introduction and Overview' (2002) 96 *American Journal of International Law* 773, 774.

8. International law and the use of force

For much of history, a state could generally resort to warfare as a legitimate method of pursuing its international agenda against other states.[1] In this environment, it was widely accepted that the conquest of territory by an aggressive state could bestow title.[2] Whilst some diplomatic constraints might have operated on a decision to resort to war, the use of force was considered to be an essential element of statehood.[3]

Since the end of the First World War, the right of a state to use armed force has been extensively curtailed. International organizations – most notably the League of Nations and the United Nations – thereafter have sought to prohibit the use of force, without limiting the right of states to act in their own or collective self-defence.[4] Despite some extraordinary success in developing an almost universal system of collective security under the United Nations, the use of force in a variety of expressions remains a profound presence both within and between states. Indeed, from the end of the Second World War, there have been over 300 internal and international armed conflicts. Because of its devastating impact on people and international relations, the use of force remains one of the most important areas of international law.

This chapter will explore the development of the prohibition on the threat or use of armed force by states, its different applications and exceptions. It will start by examining the meaning and content of force and developments in its prohibition – in custom and under the UN Charter. The use of force in circumstances involving invitation and intervention will then be considered, including peacekeeping and enforcement actions

[1] Stanimir Alexandrov, *Self-Defense against the Use of Force in International Law* (The Hague; London: Kluwer Law International, 1996), 19.

[2] Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 729.

[3] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2005, 4th edn), 73.

[4] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), 10–11, 138.

and the authority of regional organizations. This chapter will also consider the authority of the UN Security Council to authorize the use of force in response to an act of aggression or threat to the peace, and the complex and developing doctrines of humanitarian intervention and the responsibility to protect. There are several traditional exceptions to the use of force in the post-UN Charter era. With the unlikely but possible exception of the doctrine of humanitarian intervention, only self-defence and action sanctioned by the Security Council remain as genuine exceptions, and these will be explored. As with all topics considered in this book, the use of force in international law will also be examined in the context of contemporary developments and events.

8.1 DEVELOPMENT OF THE LAW ON THE USE OF FORCE IN INTERNATIONAL LAW

8.1.1 Early Attempts to Regulate the Use of Force

In relative terms, the prohibition on the use of force as a viable tool of international relations is a very modern concept. Whilst there have been numerous attempts to regulate the use of force, the notion of a global approach to prohibiting unprovoked military aggression is unique to the twentieth century.

Ancient civilizations were often prepared to resort to war against rival groups or societies to settle disputes or to pursue strategic interests.[5] This often included access to resources or the conquest of territory under the control of another group. The consequences of warfare between societies were often brutal; survivors on the losing side would often be enslaved as part of the victor's attempts to destroy the vanquished society.[6]

The Romans had several requirements that needed to be satisfied before they would commit to warfare. Before engaging in a military campaign, Roman leaders would often seek the approval of the college of fetiales. This religious body would then assess whether the proposed war was in accordance with the implied commands of the gods. The Roman scholar, Cicero, wrote that, until a formal declaration of war had been made, no war could be considered just.[7]

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[5] Brownlie, above note 2, 5.

[6] Michael Morgan, *Classics of Moral and Political Theory* (Indianapolis, IN: Hackett, 2005), 835.

[7] Elizabeth Asmis, 'A New Kind of Model: Cicero's Roman Constitution in De Republica' (2005) 126(3) *American Journal of Philology* 377, 387.

8.1.2 Early Religious Doctrines

The early Christian Church initially refused to accept that war could, in any circumstances, be morally sanctioned. Because of this belief, Christians were forbidden from joining any army until 170 AD.[8] The Christian scholar, St Augustine, was vehemently opposed to wars of conquest, and defined the concept of just war in the following vague terms:

> Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further that kind of war is undoubtedly just which God himself ordains.[9]

Of course, what 'God himself ordains' was and is invariably a matter of human contrivance and the prescription of a just war theory clearly opened a floodgate of aggressive wars waged by churches and their leaders.[10] Such 'just war' notions would come to plague moral and legal debate about the right to use force and in what circumstances – evidenced by its vague content being hijacked by all sides in the so-called 'war on terror' and even in currently developing conceptions of a responsibility to protect.[11] Early scholars of Islam also wrote of religious doctrines which contained guidance on acceptable reasons to resort to war.[12] These reasons included punishment for apostasy, defence of land or self, and authorized warfare against societies not of the Islamic faith.[13]

8.1.3 The Age of Enlightenment

Historically, the most progressive attempt to regulate the use of military force occurred during the Age of Enlightenment, also known as the Age of

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[8] C. John Cadoux, *The Early Christian Attitude to War* (London: Hedley Bros. Publishers Ltd, 1919), 96.

[9] St Augustine, cited in Brownlie, above note 2, 5.

[10] For a discussion of St Augustine's development of the just war doctrine and its implications on the laws of war, see Christopher Greenwood, 'Historical Development and Legal Basis', in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford; New York: Oxford University Press, 1995); Leslie C. Green, *Essays on the Modern Law of War* (Dobbs Ferry, NY: Transnational Publishers, 1985).

[11] For a discussion of the 'Responsibility to Protect' doctrine, see below section 8.6.1.

[12] Youssef Aboul-Enein and Sherifa Zuhur, *Islamic Rulings on Warfare* (Carlisle Barracks, PA: Strategic Studies Institute, US Army War College, 2004), 2.

[13] Ibid., 5.

Reason. In an intellectual and philosophical movement that spread across Europe in the eighteenth century, the Enlightenment questioned religious and traditional values, including the validity of powerful European nations resorting to warfare to resolve disputes with rival states.

One of the most prominent philosophers during the Age of Enlightenment on the prevalent use of warfare was Jean-Jacques Rousseau. The Age of Enlightenment is particularly significant, as the concepts espoused by Rousseau and other influential philosophers eventually formed the basis of customary international law on the use of force. Whilst not seeking to prohibit the use of force outright, the Age of Enlightenment cast doubt over the validity of European powers declaring war to advance strategic interests or obtain territory.

After the French Revolution of 1789, the National Assembly drafted a new French Constitution, which was reluctantly approved by King Louis XVI. Despite its very short operation, this document was a progressive statement about the legality of unprovoked warfare. Title VI of the 1791 Constitution contained a significant statement: 'The French nation renounces the undertaking of any war with a view of making conquests, and it will never use its forces against the liberty of any people.'[14] Chapter III of the Constitution outlined a process which had to be followed before the King of France could declare war on another nation, and severely restricted the King's ability to conduct a declared war without the approval of the National Assembly.[15]

8.1.4 Early Twentieth Century

Numerous endeavours were made to regulate the use of force before the outbreak of the First World War. Beginning with the Hague Conventions of 1899 and 1907, states attempted to develop laws to govern the resolution of disputes and to prohibit aggressive nations from resorting to force as an integral aspect of diplomatic relations.[16] Despite the vague wording of the Conventions, the treaties represented an extraordinary multilateral approach to the regulation of armed force.[17] These early international

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[14] The Constitution of 1791 (entered into force 3 September 1791), Title VI.

[15] Ibid., Chapter III, Section 1, Art. 2.

[16] Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008), 63; Corneliu Bjola, *Legitimising the Use of Force in International Politics: Kosovo, Iraq and the Ethics of Intervention* (London; New York: Routledge, 2009), 45, 47.

[17] Donald Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (Oxford: Oxford University Press, 2005), 485.

agreements encouraged states to denounce warfare as a readily available tool of diplomatic relations and established an international consensus – first enunciated in the Hague Conventions, and later enshrined in the Geneva Conventions of 1949 – that the use of force should be both restricted and regulated. Whilst a prohibition on resorting to war in all circumstances was not outlined, the notion of reducing the reliance of states on the use of force is not a concept that is unique to the United Nations system.

8.1.5 The League of Nations

In the aftermath of the First World War, the newly established League of Nations made a concerted attempt to restrict the use of force in international relations. The Covenant of the League of Nations (1919) imposed procedural constraints on states in order to reduce the possibility of resorting to war.[18] Whilst the Covenant sought to reduce the likelihood of warfare, the use of force remained permissible if certain prescribed conditions were exhausted.[19] The clear intention of the drafters was to reduce the reliance of states on force as a method of dispute resolution.[20] As Article X dictates, states had an obligation to respect the territorial integrity and political independence of other states. Most importantly, however, is Article XVI, which specifies that a state will have committed an act of war if it resorts to force without satisfying the preconditions contained in the Covenant.[21]

Despite the clear attempt to reduce the reliance on armed force, the Covenant fell far short of prohibiting states from resorting to war in all circumstances.[22] To address this issue, the Sixth Assembly of the League of Nations on 25 September 1925 passed a resolution stating that a war of aggression constitutes 'an international crime'.[23] While the provisions of the Covenant of the League of Nations represented an important

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[18] Bjola, above note 16, 45–7.

[19] Rosalyn Higgins, 'The Legal Limits to the Use of Force by States: United Nations Practice' (1962) 37 *British Yearbook of International Law* 269, 272.

[20] J.L. Brierly, *The Law of Nations* (Oxford: Clarendon Press, 1963, 6th edn), 408.

[21] Covenant of the League of Nations (opened for signature 28 April 1919, entered into force 10 January 1920) LNTS, Art. X.

[22] Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi, *Public International Law: An Australian Perspective* (Oxford: Oxford University Press, 2005, 2nd edn), 226.

[23] Resolution of the Sixth Assembly of the League of Nations, 25 September 1925.

development in the endeavour to proscribe the use of force by states, a more significant regime concerning the use of force emerged in this period. The General Treaty for the Renunciation of War (1928) (commonly referred to as the Kellogg-Briand Pact)[24] is a multilateral treaty that remains in force to the present day.[25] When it first entered into operation in 1928, the Pact applied almost universally, as only four states had not ratified or assented to it before the outbreak of the Second World War.[26]

The Kellogg-Briand Pact has been recognized as the background to customary international law regarding the prohibition on the use of force.[27] Its key provisions are contained in Articles I and II, which contain two critical elements for prohibiting the use of force. First, states are not to have recourse to war to resolve international disputes.[28] Second, states have an obligation to settle disputes exclusively by peaceful means.[29] When combined with the provisions of the League of Nations Covenant, the Kellogg-Briand Pact operated as the predominant set of regulations concerning the prohibition on the use of force between 1928 and the outbreak of the Second World War in 1939. Far from being simply an aspirational document, the Kellogg-Briand Pact was invoked on several occasions between 1928 and 1939.[30] In 1929, the United States of America cited it to condemn the hostilities between China and the Soviet Union, and again in 1931 when referring to the conflict between China and Japan.[31] The League of Nations also referred to the Pact when condemning the Soviet operations in Finland, beginning in November 1939.[32]

Despite widespread support for the Pact, the treaty clearly did not have the desired impact of dramatically reducing the use of armed force by states; it was not effective in preventing conflicts such as the Japanese invasion of Manchuria in 1931 or other events leading to the outbreak of

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[24] General Treaty for the Renunciation of War as an Instrument of National Policy (opened for signature 27 August 1928, entered into force 4 September 1929) LNTS.

[25] Brierly, above note 20, 409.

[26] Ian Brownlie, 'International Law and the Use of Force by States Revisited' (2001) 21 *Australian Yearbook of International Law* 21, 23.

[27] Brownlie, above note 2, 730.

[28] Brierly, above note 20, 409.

[29] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005, 2nd edn), 300–301.

[30] Brownlie, above note 2, 731.

[31] Ibid.

[32] Ibid.

the Second World War.[33] It is, however, recognized as forming the basis for the international norm that the threat or use of military force, and resulting territorial acquisitions, are unlawful. Importantly, the Pact was essential for the establishment of the crime of aggression and was the basis of the International Military Tribunals in Nuremberg and Tokyo.[34]

8.2 THE UNITED NATIONS AND THE POST-WAR SYSTEM OF COLLECTIVE SECURITY

The prohibition on the use of force underpins the United Nations system.[35] In the aftermath of the Second World War, the drafters of the UN Charter sought to restrict the use of force to very limited circumstances, and exclude any right to take unprovoked and aggressive action against a foreign state.[36] Brownlie describes the rationale for the prohibition on the use of force under the UN system:

> The security scheme based upon the primary role of the Security Council is not an abstract scheme but reflects the international consensus that individual States, or a group of States, cannot resort to force (for purposes other than self-defence) except with the express authorization of the United Nations.[37]

8.2.1 The Meaning of 'Force' and 'Threat of Force'

The UN Charter refers to the concept of 'force', as opposed to 'war'.[38] This is significant because force encompasses a much broader range of conduct, and there is no requirement for a state to make a formal declaration of war for it to be in breach of the prohibitions on the use of force. Article 2(4) of the UN Charter prohibits the use and threat of force, except in specifically designated circumstances, and emphasizes the requirement for states to settle their differences by peaceful means:

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[33] Ibid.

[34] See Justice Robert Jackson, 'Opening Statement for the Prosecution', Nuremberg Trials Proceedings, 21 November 1945, 144–5; available at http://avalon.law.yale.edu/imt/11-21-45.asp.

[35] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press for the Council on Foreign Relations, 1979, 2nd edn), 135.

[36] Oscar Schachter, *International Law and Theory in Practice* (Dordrecht; London: Martinus Nijhofff, 1991), 106–7.

[37] Brownlie, above note 2, 746.

[38] Charter of the United Nations, Art. 2(4).

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The most blatant use of force is an invasion or attack by the armed forces of a state upon the territory of another state.[39] This includes any military occupation, however temporary, and any attempt to forcibly annex the territory. States are prohibited from bombarding the territory of other states with any form of weaponry and this extends to targeting assets of a foreign state, such as ships or aircraft outside territorial borders. The concept of force applies to the practice of blocking access to ports or attempting to prohibit passage to and from airfields, and incorporates conduct such as preventing supplies, such as food and medical supplies, from reaching another state, whether by land, sea or air.

A state can be in breach of the general prohibition on the use of force even if the territorial sovereignty of another state is not breached.[40] The International Court of Justice in the seminal *Nicaragua* case, held that a state is not permitted to place its own territory at the disposal of another for the purpose of preparing for an attack against a third state, nor to provide weapons, funding or training to opposition groups or mercenaries in a foreign state.[41] In that case, the US had provided assistance to the Nicaraguan rebel forces (the *contras*) with the apparent intent of destabilizing the Nicaraguan government – actions deemed by the Court to constitute a use of force, even though the US had not committed any ground troops or large-scale military resources.[42]

A state that threatens the use of force will also have violated the prohibition on the use of force. This was confirmed by the International Court of Justice in its Advisory Opinion on the threat or use of nuclear weapons.[43]

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[39] Definition of Aggression, GA Res 3314 (XXIX), UN GAOR, 29th sess (1974) Art. 3.

[40] Gabriella Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law' (2010) 41 *Netherlands Yearbook of International Law* 45, 47.

[41] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) [1986] ICJ Rep 14, 93 ('*Nicaragua* case').

[42] Ibid., 135.

[43] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 ('*Nuclear Weapons* (Advisory Opinion)'). For a discussion of the facts of this case and its relevance to self-defence, see discussion below at 8.5.2.

In that case, the Court was called upon to determine whether 'the threat or use of nuclear weapons in any circumstance is permitted under international law'.[44] In determining this issue, the Court stated:

> If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.[45]

8.2.2 The Meaning of 'Against the Territorial Integrity or Political Independence'

At times it has been argued that a particular use of force by a state has not violated the territorial integrity or political independence of another state, and therefore was not in breach of Article 2(4) of the UN Charter. An often cited example of this was Israel's armed incursion on the territory of Uganda for the purpose of rescuing its nationals from an Air France plane that had been hijacked by two Palestinian and two German nationals and rerouted to Entebbe. Uganda reacted angrily, forwarding a letter to the President of the Security Council seeking Israel's condemnation for its act of aggression.[46] Although the matter was debated vigorously before the Security Council, no agreement could be reached and no resolution passed.

There was considerable support, including from the US and UK, for the proposition that, in circumstances where the nationals of a state are at risk, a state may intervene militarily to rescue them and that such an incursion would not be a violation of the territorial integrity or political independence of that state. This was rejected by a number of other states in debates before the Security Council who viewed the actions of Israel, whatever justification it might have, as a clear violation of Article 2(4). As Thomas M. Franck has noted:

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[44] Ibid., [20].

[45] Ibid., [47].

[46] Letter dated 5 July 1976 from the *Chargé d'Affaires* of the Permanent Mission of Uganda to the United Nations, addressed to the President of the Security Council (S/12124).

> The opposition of so many states, in this instance, thus illustrates the depth of fear of opening the door, however narrowly, to unilateral use of force, even where the justification for intervention is strong. But the considerable support Israel aroused also demonstrates the persuasive power of a well-presented and demonstrated case.[47]

Examples of conduct that challenges the meaning of territorial integrity or political independence in the use of force by states can be cited, much depending on the balance of power in the Security Council and the political realities of the day.[48] Interesting contemporary examples revolve around justifications for the use of force by powerful states that engage natural law conceptions of international law; humanitarian intervention and the evolving doctrine of the responsibility to protect have recently been evoked to justify the use of force in non-traditional contexts. The NATO bombing of Serbia in 1999 and the war on Iraq were justified, more or less convincingly, on these grounds. Just where the line in respect of a state's territorial integrity or political independence is to be drawn is increasingly difficult to determine. The fact that the US would not even acknowledge any incursion on Pakistan's territorial sovereignty when it sent in forces to attack and kill Osama bin Laden in 2011 further entrenches confusion about the limits of international law to regulate strongly supported political objectives, particularly where force is being employed by one of the 'Great Powers'.[49]

8.3 INVITATION AND INTERVENTION

8.3.1 Non-international Armed Conflicts

The UN Charter clearly contemplates an international system that is primarily concerned with diplomatic relations between states.[50] States can be held accountable for their actions and subjected to punitive measures if they do not comply with the rules of international law.[51] Examples include

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[47] Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), 85.

[48] Ibid., see Chapter 6 generally.

[49] For a discussion of humanitarian intervention, see below section 8.4. For a discussion of the responsibility to protect doctrine, see below section 8.6.1.

[50] Fernando Tesón, 'Collective Humanitarian Intervention' (1996) 17 *Michigan Journal of International Law* 323, 324.

[51] Richard Falk, 'Humanitarian Intervention after Kosovo', in Aleksandar Jokic (ed.), *Lessons of Kosovo: The Dangers of Humanitarian Intervention* (Peterborough, ON: Broadview Press, 2003), 43.

condemnation resolutions, economic sanctions and the use of force as a last resort to alleviate a threat to international peace and security.

However, the UN Charter does not contain an explicit procedure for the resolution of conflicts that are wholly contained within a single state, for the simple reason that (traditionally, at any rate) what occurs within a state's borders are its internal concerns and not a matter of international law. Unless a situation involves two or more states, Article 2(7) of the Charter appears to prevent the UN, outside of Security Council enforcement action under Chapter VII, from taking any coercive action:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.

For example, the international community cannot forcibly intervene to mitigate the effects of a widespread famine or cholera epidemic if the crisis is confined to a single state.[52] Whilst there may be a moral imperative to intervene, the concept of state sovereignty prevents collective action without the consent of the affected state.

This prohibition on international action when a crisis or conflict is contained within a single state can cause widespread frustration. The failure of the UN to intervene to prevent the Rwanda genocide stands as the modern example *par excellence*. To overcome this prohibition without expressly encroaching on a state's sovereignty, states have at times – and selectively – developed legal justifications to intervene in, and to mitigate the impact of, humanitarian crises. Examples include the doctrine of humanitarian intervention (and possibly, more recently, the doctrine of the responsibility to protect), delivery of humanitarian aid and the role of regional organizations.

8.3.2 Delivery of Humanitarian Aid

The provision of humanitarian aid is an integral function performed by various actors in the international community. Traditionally the domain of powerful states, the task of providing vital aid to war-torn and devastated civilian populations is now shared between a number of bodies, including the UN, individual states and non-government organizations. The importance of delivering humanitarian aid is enshrined in Article

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[52] John Kabia, *Humanitarian Intervention and Conflict Resolution in West Africa* (Farnham, UK; Burlington, VT: Ashgate Publishing, 2009), 9.

1(3) of the UN Charter as one of the fundamental purposes of the UN – namely 'to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character'.[53]

A useful definition of humanitarian aid is provided by the Principles and Good Practice of Humanitarian Assistance ('Stockholm Principles'). The following definition was endorsed in 2003 by a group of 17 major donors of humanitarian aid, including the US:

> The objectives of humanitarian action are to save lives, alleviate suffering and maintain human dignity during and in the aftermath of man-made crises and natural disasters as well as to prevent and strengthen preparedness for the occurrence of such situations.[54]

Humanitarian aid can include a wide variety of measures for the purpose of providing assistance to an affected population. In addition to the provision of emergency food and water supplies, humanitarian aid can include medical supplies, temporary shelters and sanitation equipment.[55] The stated aim of humanitarian assistance is to ensure a return to sustainable livelihoods and to strengthen the capacity of affected communities to prevent and mitigate future crises.[56] The Stockholm Principles explain that humanitarian aid must focus on long-term development, in addition to short-term emergency relief.[57] These Principles have guided national policies on the provision of aid since their inception in 2003. The Principles declare that aid must be provided impartially and solely on the basis of need, without discrimination between affected populations. In addition, humanitarian aid must be provided without the impression of favouring one side in a conflict, and cannot be compromised by political or military objectives.[58]

The provision of humanitarian assistance to a civilian population is

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[53] Charter of the United Nations, Art. 1(3).

[54] Principles and Good Practice of Humanitarian Donorship (endorsed in Stockholm on 17 June 2003) ('Stockholm Principles'), Art. 1.

[55] United Nations Peacekeeping Operations: Principles and Guidelines, available at http://www.peacekeepingbestpractices.unlb.org/pbps/library/capstone_doctrine_eng.pdf

[56] Stockholm Principles, above note 54, Art. 9.

[57] Ibid.

[58] One example of how the Stockholm Principles have influenced the domestic practices of states can be found in the Australian Humanitarian Action Policy of January 2005, based on the principles of neutrality, impartiality and independence: see 'Humanitarian Action Policy of Australia' (AusAID) (January 2005) 4; available at http://www.ausaid.gov.au/publications/pdf/humanitarian_policy.pdf.

such a vital function that it is often exempt from UN sanctions regimes. The international community is often reluctant to deny assistance to desperate citizens when it is considering imposing restrictions on the ruling regime of a state. A contemporary example of humanitarian assistance being exempt from a sanctions regime is the no-fly zone imposed on Libya in March 2011. Paragraph 7 of UN Security Council Resolution 1973 contains a relevant exemption, and states as follows:

> 6. *Decides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians;
> 7. *Decides further* that the ban imposed by paragraph 6 shall not apply to flights whose sole purpose is humanitarian, such as delivering or facilitating the delivery of assistance, including medical supplies, food, humanitarian workers and related assistance.[59]

UN Security Council Resolution 1973 illustrates the clear intention of the international community to allow humanitarian assistance to continue to flow to the civilians of Libya, despite the imposition of sanctions on the regime of Muammar Gaddafi. Other examples, including the long-standing sanctions regime against Iraq before the 2003 war, reveal a lack of genuine concern on the part of the international community for the effect of sanctions on innocent civilians of a rogue regime.[60]

8.3.3 Regional Peacekeeping and Enforcement Actions

The UN Charter explicitly allows for the operation of regional peacekeeping and enforcement organizations.[61] Rather than simply relying on the Chapter VII authority of the Security Council, regional organizations can be granted a specific mandate to respond to an emerging threat to international peace and security.[62]

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[59] 'The Situation in Libya', SC Res. 1973, UN SCOR, 66th sess., 6498th mtg, UN Doc. S/RES/1973 (17 March 2011).

[60] 'Iraq-Kuwait', SC Res. 661, UN SCOR, 45th sess., 2933rd mtg, UN Doc. S/RES/661 (6 August 1990), and 'Iraq-Kuwait', SC Res. 687, UN SCOR, 46th sess., 2981st mtg, UN Doc. S/RES/687 (3 April 1991). These sanctions were not lifted until 15 December 2010 in a series of three resolutions: 'The Situation concerning Iraq', SC Res. 1956, UN SCOR, 65th sess., 6450th mtg, UN Doc. S/RES/1956 (15 December 2010); 'The Situation concerning Iraq', SC Res. 1957, UN SCOR, 65th sess., 6450th mtg, UN Doc. S/RES/1957 (15 December 2010); 'The Situation concerning Iraq', SC Res. 1958, UN SCOR, 65th sess., 6450th mtg, UN Doc. S/RES/1958 (15 December 2010).

[61] Charter of the United Nations, Arts 52, 53 and 54.

[62] Brownlie, above note 2, 737–8.

Examples of these regional organizations are the North Atlantic Treaty Organization (NATO) and the ANZUS Alliance (Australia, New Zealand and USA).[63] These organizations require their members to commit to take varying degrees of collective action should a fellow member be subjected to an armed attack.[64] As part of this commitment Member States often share intelligence resources and information, participate in joint military exercises and collaborate to establish regional security objectives.[65]

Article 52 of the UN Charter allows regional agencies to deal with 'matters relating to the maintenance of international peace and security as are appropriate for regional action', on condition that they act in accordance with UN purposes and principles and 'make every effort to achieve pacific settlement of local disputes' (with the encouragement of the Security Council) before referring them to the Security Council. Article 53 of the UN Charter enables regional agencies, where appropriate and with the authorization of the Security Council, to undertake enforcement action on behalf of the UN. In all activities undertaken or contemplated by regional agencies for the maintenance of international peace and security, the Security Council must be at all times kept fully informed.

8.4 HUMANITARIAN INTERVENTION

For an increasingly interventionist community of states, difficulties arise where a conflict or emerging crisis is contained within the borders of a single state. The prohibition contained in Article 2(4) of the UN Charter focuses on the threat or use of force against the territorial integrity of a foreign state.[66] The wording clearly contemplates a situation of conflict as and between states. This is because the framework of collective security envisioned under the UN Charter maintains a clear deference for the sovereignty of all states. No matter how big or small, superpower or rogue regime, each state's sovereign 'privacy' is, at least in principle, to be protected. However, there has developed in recent years something of a normative shift towards intervention by a powerful part of the international community in the internal affairs of a state, particularly where that state is engaged in or subjected to an internal upheaval that gives rise to a massive humanitarian crisis.

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[63] Security Treaty between Australia, New Zealand and the United States of America (ANZUS) [1952] ATS, No. 2, 131 UNTS 84, Arts IV and V.

[64] Anton, Mathew and Morgan, above note 17, 529.

[65] Ibid.

[66] Tesón, above note 50, 324.

Of primary significance to understanding the doctrine of humanitarian intervention is that it is military action taken by a collective of states *outside* a Security Council mandate, usually because one or more permanent members of the Security Council have threatened to veto any attempt to achieve Chapter VII authority for the use of force. The justification for such use of force has a ring of natural law to it, suggesting that the strictly positivist model of a sovereign equality of states is inadequate to protect a greater moral imperative to protect innocent civilians from the tyranny of its own leaders.

8.4.1 Sovereignty and Humanitarian Intervention

Humanitarian intervention concerns the forcible intervention within the sovereign territory of a state to prevent or mitigate the impact of a conflict or massive human rights violations. This course of action is mostly considered where a domestic government is an active participant (including mass arbitrary killings, forced expulsions and the deliberate targeting of ethnic groups[67]), but can also arise where a state is simply unable to protect its own citizens from gross violations of human rights.[68]

A permissive definition of the practice of humanitarian intervention is:

> The justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits which the sovereign is presumed to act with reason and justice.[69]

The concept of humanitarian intervention in response to gross and systematic breaches of human rights is fraught with legal and moral complexity. As examples like the crises in Somalia, Rwanda and Serbia/Kosovo illustrate, direct intervention in the domestic affairs of another state without consent is a controversial course of action, and no binding guidelines have yet been developed by the international community.[70] This is no doubt in part because such action is so demonstrably political, rather than based on legal doctrine.

Humanitarian concerns as the justification for the use of force are not a

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[67] Secretary-General Ban Ki-moon, 'Report of the Secretary-General: Implementing the Responsibility to Protect', UN GAOR, 63rd sess., UN Doc. A/63/677 (12 January 2009), [61].

[68] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (Final Report, December 2001) ('ICISS Report'), [6.11].

[69] Anton, Mathew and Morgan, above note 17, 541.

[70] See 8.3.1–8.3.3 above for specific examples.

new idea. From the Russian, British and French involvement in the Greek War of Independence in 1824 to Vietnamese intervention in Cambodia in 1978 and the NATO bombing of Yugoslavia in 1999, humanitarian concerns for the internal population of a state have long been used as excuses for the application of armed force against the sovereign territory of a state. As Brownlie has noted, any historical application of such a doctrine was 'inherently vague',[71] and often 'appeared as a cloak for episodes of imperialism, including the invasion of Cuba by the United States in 1898'.[72] The development of this practice into something of a coherent doctrine, if it is that, is a recent development.

Humanitarian intervention highlights a clash of two fundamental principles of international law – namely the protection of innocent people reflected in the human rights and international humanitarian law regimes, and the foundational concept of state sovereignty. The independent authority of a state within its own domestic jurisdiction is reflected in Article 2(7) of the UN Charter.[73] On one level, the principle of sovereignty operates to protect weaker states from any undue influence that may be exercised by stronger states within the international community.[74] To this extent, each state has the right to determine its own economic, social and foreign policies without any uninvited interference from an external force. To protect this right, no state is permitted to aggressively breach territorial borders to forcibly alter the domestic practices of a sovereign nation.[75]

Practice in this area, however, seems to suggest an emerging view of sovereignty as no longer absolute.[76] Guided most recently by the repeated statements of former UN Secretary-General Kofi Annan, state sovereignty may be viewed as being affected by a demonstrable lack of respect for basic principles of human dignity.[77] A tempting argument might be

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[71] Brownlie, above note 2, 338.

[72] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn), 742.

[73] Thomas Weiss, *Humanitarian Intervention* (Cambridge, UK: Polity Press, 2007), 19.

[74] Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility* (London: Cameron May, 2005), 225. This seems also to be the tenor of Koskenniemi's argument: Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61.

[75] Kabia, above note 52, 9.

[76] John Janzekovic, *The Use of Force in Humanitarian Intervention: Morality and Practicalities* (Aldershot, UK; Burlington, VT: Ashgate, 2006) 143–4.

[77] Secretary-General Kofi Annan, 'Sovereignty and Responsibility', Speech delivered to the Ditchley Foundation, United Kingdom, 26 June 1998; Secretary-General Kofi Annan, 'In Larger Freedom: Towards Security, Development and

that a balance now exists between sovereignty and an obligation to respect human rights.[78]

This tendency toward eroding the traditional place of state sovereignty has not been accepted lightly.[79] Opposition to the practice of humanitarian intervention focuses on Article 2(7) of the UN Charter, which precludes interference by states in the internal affairs of another state, except where the Security Council is taking enforcement measures under Chapter VII of the UN Charter to ensure international peace and security. The central premise of Article 2(7) is that the UN does not have the authority to force a change or impose its will on the domestic affairs of any state.[80] This may include a prohibition on compelling a change of government or demanding amendments to budgetary spending. Article 2(7) is intended to protect states from undue external influence and to ensure that the functions of executive government can be performed effectively. It is premised on the foundational principle of the sovereign equality of all states that underpins modern international law, and is preserved under the United Nations system.

Opponents of humanitarian intervention argue that Article 2(7) constitutes an absolute prohibition on international interference in domestic matters, including a ruling regime's treatment of its own citizens.[81] On this view, an uninvited use of force within territorial borders would be an unacceptable breach of each state's unfettered domestic authority, and amount to an unprovoked act of aggression.[82] To this extent, a stringent interpretation of Article 2(7) must be maintained to prevent stronger states from violating the sovereignty of weaker states. Regarded in this way, any legal recognition of a right to humanitarian intervention may be open to abuse – what Franck refers to as the 'slippery slope' argument.[83]

Human Rights for All', UN GAOR, 59th sess., UN Doc. A/59/2005 (21 March 2005), [132].

78 Janzekovic, above note 76, 143.

79 Opponents of humanitarian intervention include Alan Kuperman, *The Limits of Humanitarian Intervention* (Washington, DC: Brookings Institution Press, 2001). A summary of arguments opposing humanitarian intervention is contained in Thomas Franck, 'Legality and Legitimacy in Humanitarian Intervention', in Terry Nardin and Melissa Williams (eds), *Humanitarian Intervention* (New York; London: New York University Press, 2006), 145; Aidan Hehir, *Humanitarian Intervention After Kosovo: Iraq, Darfur and the Record of Global Civil Society* (Basingstoke, UK: Palgrave MacMillan, 2008), 65.

80 Weiss, above note 73, 19.

81 Franck, above note 79, 145.

82 Hehir, above note 79, 65.

83 Franck, above note 47, 185.

On the other hand, as William Schabas has noted, genocidal atrocities and widespread killings have often been committed under the direction or with the benign complicity of the ruling regime of the state in question.[84] When considered in this light, the absolute opposition to external intervention may be short-sighted. At any rate, as history shows, if Article 2(7) does represent an absolute prohibition, then the principles of non-intervention and state sovereignty can be subject to abuse by oppressive domestic regimes.[85] Free from any fear of invasion, authoritarian governments can manipulate domestic policies to commit systematic human rights abuses against political opponents and the civilian population.[86]

If support for a broader doctrine of humanitarian intervention is to operate outside the rubric of ad hoc political responses generated by the Great Powers against rogue states,[87] then a compelling legal justification for humanitarian intervention should be made. One obvious response is to focus on the explicit exception contained within Article 2(7), that the protective domain of state sovereignty 'shall not prejudice the application of enforcement measures under Chapter VII'.[88] This means that the Security Council's authority to identify and respond to emerging threats to international peace and security is not curtailed by Article 2(7).[89] To this extent, Chapter VII contains the most relevant provisions when considering humanitarian intervention, rather than the 'chameleon'[90] Article 2(7). The role of the Security Council in responding to abuses of sovereignty certainly has greater legal merit than non-Council sanctioned humanitarian intervention. In this way, operationalization of ideas such as the responsibility to protect (as seen in the Security Council sanctioned intervention in Libya in 2011[91]) can be tested and developed within the

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[84] William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge; New York: Cambridge University Press, 2009, 2nd edn), 1.

[85] Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Ardsley, NY: Transnational Publishers, 2005), 193.

[86] Kabia, above note 52, 9; Secretary-General Kofi Annan, 'We the Peoples: The Role of the United Nations in the 21st Century', UN GAOR, 54th sess., UN Doc. A/54/2000 (3 April 2000), 48.

[87] See generally Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge; New York: Cambridge University Press, 2004).

[88] Charter of the United Nations. Art. 2(7).

[89] Tesón, above note 85, 280.

[90] Ibid., 287.

[91] 'The Situation in Libya', SC Res 1973, UN SCOR, 66th sess., 6498th mtg, UN Doc. S/RES/1973 (17 March 2011). The use of force against Libya is discussed in sections 8.3.2 and 8.6.1.