

**The Use of Force on Humanitarian Grounds: Illegal but
Legitimate?**

by

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Abstract

This master's thesis critically addresses the legality of armed interventions by states, who, for the most part, defend their actions based on authority from the UN in the form of UN Resolutions. This thesis also investigates, in particular, uses of force that lack a clear legal authority. It then explores the issue of legitimate, that is, justifiable, uses of force as part of the decentralised system of international law enforcement.

The issue that is discussed considers whether an 'illegal' opposition force can in fact have some legitimacy. That is, can a use of force be justified even though it stretches the boundaries of international law, in particular an enabling UNSC Resolution.

The predominant justification that is analysed is the role of humanitarian intervention. The legitimacy of this doctrine is evaluated through its positive and negative aspects.

This thesis considers the aforementioned issues both in general terms, and with respect to UN Resolutions against Iraq, Afghanistan and Libya treated as case studies. The evaluation of these studies adds to and detracts from the legitimacy of armed intervention.

Finally, my thesis makes various suggestions for reform of this system with respect to a number of the difficulties it identifies with the practice of decentralised law enforcement.

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Abbreviations

EU – European Union

HIL – Hegemonic International Law

R2P – Responsibility to Protect doctrine

UK – United Kingdom

UN – United Nations

UNGA – United Nations General Assembly

UNMOVIC – United Nations Monitoring, Verification and Inspection Commission

UNSC – United Nations Security Council

US – United States (of America)

Introduction

This thesis is concerned with the use of force by states in response to aggression from another state. It will consider states uses of force in situations where the action is beyond that permitted by the Security Council. It will examine in detail the force used by a 'coalition of willing' states against Iraq, Afghanistan and Libya, and question whether the action was strictly legal.

At the time this thesis was due to be presented, the issue of legality versus legitimacy once again came to the fore. There is presently a use of force in Syria to counter ISIL forces without UNSC authorisation. The US and UK are particularly keen to stress a legal right to use force based on self-defence. This claim of self-defence is founded upon the threat to Iraq. The inherent right of self-defence is unquestionable; however, it is questionable whether this right extends to striking targets inside Syria in order to defend Iraq.

This thesis will thus consider that if a use of force is illegal in international law, can this use of force can still have legitimacy - that is 'able to be defended with reasoning'.¹ Did the use of force that was illegal have a justifiable reason for being used?

Legitimacy would suggest that certain uses of forces can be justified in particular circumstances. It is therefore a concept which shares a realist perspective. Arguably legitimacy in the international sphere is concerned with what states regard as appropriate conduct. This is a subjective test based on the views and attitudes of states. It is related to the value patterns of states and hence their subsequent actions.² This would bring together the fact that international treaty law is both written and adhered to by states; customary international law is also a product of established state practice. There is no separation of the powers. Thus only states can provide "legitimacy" for a breach of international law. Importantly, 'legitimacy does not necessarily equal legality.'³ This will be discussed further throughout this thesis.

¹ Oxford English Dictionary 9th edition.

² Peter G Stillman, 'The Concept of Legitimacy', [1974] 7 Polity 32, 42. Stillman refers to legitimacy being the 'objective compatibility between the value patterns of the relevant systems and the results of governmental output.' However, legitimacy in the sense of state patterns and subsequent output is more subjective.

³ *ibid* 34.

The issue of “legitimacy” will be discussed in terms of the claimed need for armed intervention when current international law is insufficient and as such cannot provide an excuse for the action. Such a discussion is vital, because, as Wheeler claims: ‘there are few works that explicitly interrogate the idea of legitimacy at the international level. The reason for this neglect is the general acceptance of the assumption that the international realm is governed by considerations of power and not legitimacy.’⁴ At this point it is important to note that legitimacy is based on what the majority view as legitimate or justifiable behaviour. It would not always be possible to gain a unanimous consensus. This is particularly true where an aggressor state is involved and does not believe that retaliation is just. For example, in 1990 when Iraq invaded Kuwait believing that Kuwait had stolen petroleum and furthermore, that Kuwait was actually a province of Iraq; Iraq would be unlikely to consider the use of force justifiable in repelling their troops.

The imbalance of states power will be considered in the opening chapter by means of a discussion of the different schools of thought in international law. Realists, for example, consider ‘power politics’ to be at the forefront of international relations. On the other hand, strict positivists will question the relevance and role of ‘power politics’ within strictly legal analysis and dictate that the law is only that stated as such.

A literature review will be used to address the schools of thought on international law; to examine current thoughts on States use of force in interstate hostility and how questions of legitimacy may arise with respect to such use.

In terms of methodology, the following chapters will consider the international law on armed force initially from a legalistic approach, moving onto contextual approaches. Once the doctrinal framework is discussed, the fourth chapter will consider legitimate justifications for those uses of force which cannot be termed as ‘strictly legal.’ These particular methodologies have been chosen as they best exemplify how a use of force that could be considered by some to be illegal may be considered justifiable or legitimate in the same circumstances by another. The final chapter will conclude the thesis, incorporating broad reforms.

⁴ Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 4.

The use of 'illegal' force in the case-studies to be considered stems from the inherent problems concerned with the authorisation to use force under Chapter VII UN Charter. The UN can only authorise the use of force, it is not able to enforce its will. 'Reliance has to be placed on consent, consensus, reciprocity and good faith.'⁵ The Charter system is also restricted by: the veto, the inability to establish formal mechanisms for collective action, and the rejection of limited collective security.⁶ Thus it is the responsibility of states to develop international law. This is reflected in the way that states typically engage in the use of force when they have a concrete interest in the aggressor state(s) involved. Brunnee and Toope reiterate this in a harsher context emphasised by realist analysis: 'the constant abuse of [international] law is served up to suggest that international law is fundamentally flawed, that it can never be more than a mask for power relationships.'⁷ A key issue is whether this negative realist view has to be accepted, or whether there still remains at least some scope for international law to regulate the use of force in ways that are principled, rather than opportunistic, and which enhance doctrines of international legality and the rule of law even in contexts where this does serve the material interests of the nation states involved in the endorsement action.

⁵ Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 1118.

⁶ Anthony C Arend and Robert J Beck, *International Law & the Use of Force* (Routledge 1993).

⁷ Jutta Brunnee and Stephen J Toope, *Legitimacy and Legality in International Law-An Interactional Account* (Cambridge Studies in International and Comparative Law 2010) 3.

CHAPTER ONE

Theoretical Frameworks Relating to International Law and Relations

The authors writing in this area approach the topic of international law from differing interpretive perspectives. It is the nature of their underlying approach that dictates, or at least significantly shapes, their starting point and hence ultimate views in the international arena. I will show below that realists, for example, place a greater emphasis on the transnational political contexts of international law; these authors examine the implications of using force against an aggressor state and as such the consequences of these actions. By contrast, legalists are only interested in what the law currently is (whether X use of force falls inside or outside prevailing legal tests contained in legal doctrine).

This chapter will conclude with applying the different schools to the examples of Iraq, Libya and Afghanistan, explaining how the viewpoint of an author, such as legalist, realist, *et al* can change their perspective on whether they view any particular use of force as legitimate or justified.

Before discussing substantive issues, it is useful at the outset to define key terms in order to clarify the scope of this project. International law comprises a system of rules, and principles governing the international relations between sovereign states and other institutional subjects of international law,⁸ for example the United Nations, and regional blocs, such as the EU and the African Union. The relevant international law measures concerning the use of force are UN authorisations contained in Chapter VII of the UN Charter and self-defence, which is preserved under Article 51 of the Charter.

Legalism/Positivism

Legalism is perhaps the most straightforward view for those who have been schooled in a traditional and conventional legal education shaped by legal positivism. For legalist scholars there is a viable law / politics dichotomy. Law is absolute. There is no justification for

⁸ Mark Dixon, *Textbook on International Law* (6th edn, Oxford University Press 2007) 3.

breaching law. The law is stated as such and thus legalism has similarities with legal positivism albeit more constrained. Legalism is concerned only with what the law is; there is no scope for acting within the 'spirit' of any legislation. It is a technical exercise concerned solely with the letter of the law. In this view, authors suggest that only positive law laid down by constitutionally authorised legislators / legislative mechanisms is valid law and the proper object of strictly legal analysis.⁹ Positivists in a similar vein would argue that this is the most rational way of ordering society.¹⁰ Positivism in a slightly broader sense aims to ensure that the law follows a determinate and more or less certain framework laid down in advance, so that its operation is predictable. Thus the key difference is that legalism has no concern for the application of the law. For both, the key distinction is between "what is" the law, as opposed to "what ought to be the law." Hence, for legalists and positivists, legality comes from the source of law, not how effective or meritorious the action is. For a law on the use of force to be valid it must have a clear constitutional authority as recognised by the existing legal system. In common with realists, legal positivists such as Hans Kelsen would reject theories of international law which employ terms like "rights of mankind" or "justice," unless and until these are embedded in concrete legal doctrines.¹¹ Under the influence of legal positivism, legalists restrict their attention to legal rules enacted by the state, and exclude all law that cannot be traced back to the statute books or to the decisions of the courts.¹² For those studying the use of force against states, there is no analytically relevant belief in a higher, 'natural law'; the law is simply applied to the facts "as they are," it could be described as a 'technical' exercise. Positivists and legalists do not question the extent to which the law is effective as this is not a doctrinal question.¹³ Therefore legalists and positivists would not address any justifications for the use of force beyond what is clearly stated as permissible, and hence legal, through the enabling Resolution. These theorists would not address the morality of using armed force to prevent humanitarian suffering or the political implications, such as the veto, that may prevent the UNSC from releasing an enabling Resolution.

⁹ H L A Hart, *The Concept of Law* (Clarendon Press, 2nd edn, 1994); Kelsen H, *Pure Theory of Law* (M Knight tr, Berkeley: University of California Press 1967).

¹⁰ *ibid.*

¹¹ W B Stern, 'Kelsen's Theory of International Law' [1936] 30 *The American Political Science Review* 736-741.

¹² Hans J Morgenthau, 'Positivism, Functionalism and International Law,' [1940] 34 *The American Journal of International Law* 260-284.

¹³ *ibid.*

For positivists, Resolutions are to be read narrowly in a strict manner. It is presumed that there is a clear, literal, interpretation of the law that alone is binding. Positivism would not consider whether the use of force proposed was within the 'spirit' of the resolution - in the sense of purpose or policy or moral implications. Corten recognises the limitations of this strict interpretation of the law. He argues: 'certain problems cannot be resolved by reliance on positivist styles of legal appraisal.'¹⁴ This statement is easily reconciled with the extra-legal use of force as State practice is not always in line with a strictly positive approach. The action in Iraq from 1998 (which will be discussed later) clearly encompassed a more realist interpretation through its reliance on a 'continuing' authority to use force as opposed to a clear legal right to do so.

Zolo states 'within the international community there is currently a trend to legitimize 'humanitarian interference', even in its military form.'¹⁵ This is reiterated by authors including, in a vaguely positive vein, Chesterman *et al*¹⁶ who discuss how the UK sought authorisation to use force in Iraq (2003). However, in the absence of such authorisation, the UK government was still prepared to take action. Chesterman *et al* propose that it is a psychological barrier which ensures that states seek authorisation.¹⁷ This supposes that States want to be seen as following international law and as such will seek to find a justification even if it expounds the boundaries of current international agreements.

Brunnee and Toope make a broad claim stating the 'strong majority of states and commentators reaffirm the view that the correct legal framework to deal with terrorist violence is international and national criminal law, not the inter-state use of force.'¹⁸ This perspective is certainly legalistic and – from a realist perspective at least - perhaps naïve.

Roberts suggests two doctrines about a possibly *expanded* right of states to use force: the doctrine of humanitarian intervention, and the doctrine reserving a right to act pre-

¹⁴ Oliver Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' [2006] 16 *European Journal of International Law* 803-822.

¹⁵ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 68.

¹⁶ Simon Chesterman, Thomas M Franck and David M Malone, *Law and Practice of the United Nations- Documents and Commentary* (Oxford University Press 2008) 71.

¹⁷ *ibid*, see also Mark Dixon, *Textbook on International Law* (6th edn, Oxford University Press 2007) 11 'states suffer from a 'psychological barrier against breaking international law.'

¹⁸ Jutta Brunnee and Stephen J Toope, *Legitimacy and Legality in International Law-An Interactional Account* (Cambridge Studies in International and Comparative Law 2010) 279.

emptively against emerging threats.¹⁹ However, he recognises that this is extra-legal and as such does not agree with such uses of force. Also influenced by legalism, Shaw cannot reconcile an emerging doctrine of humanitarian intervention with article 2(4) of the Charter. He states: 'unless one either adopts a rather artificial definition of the 'territorial integrity' criterion in order to permit temporary violations or posits the establishment of the right in customary law'²⁰ then the doctrine is dubious. Roberts' legalistic approach to state intervention criticises the extra-legal use of force as: 'challenging the twin normative principles of non-intervention and the sovereign equality of states as enshrined in the UN Charter.'²¹ Without clear authorisation to use force he assumes that any action is not legally valid. His emphasis is on the strict legality of any use of force, rather than its explanation. Similarly, Shaw reiterates that pre-emptive action would be beyond what is currently acceptable in international law.²² There is clearly no legal basis from which this could develop. Nevertheless, he makes some suggestion as to what could possibly be acceptable from a legalist perspective: 'distinguishing anticipatory self-defence, where an armed attack is foreseeable, from interceptive self-defence, where an armed attack is imminent and unavoidable so that the evidential problems and temptations of the former concept are avoided without dooming threatened states to making the choice between violating international law and suffering the actual assault.'²³ This theory also helps to lend legitimacy to some uses of force, and reiterates that Shaw's overall approach aims to be in some sense objective. Whilst he would like to follow the legalistic approach he remains receptive to the legally unjustified use of force in certain unspecified circumstances. Overall he appears to modify strict legalism as he appreciates that law may need adaptation in order to be effective.

Linked to positivism and legalism is a stance of proceduralism. Proceduralism, as the name suggests, sees that procedures or rules are carried out as described. The proceduralist approach assumes the law should work effectively without the need for adaptation. This line of thought is similar to legalists, in that the law should be applied as it is. However, what is

¹⁹ A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century*, (Lynne Rienner Publishers, Inc.2004) 133.

²⁰ Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 1156.

²¹ A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century*, (Lynne Rienner Publishers, Inc.2004) 133.

²² Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 1140.

²³ *ibid* 1139.

different, is that proceduralists assume that the law is effective when it is applied in a technically correct manner. They do not consider that there may be flaws, or power politics that inhibit the application or use of the rules or procedures. Proceduarlism is tied to a procedural form of rationality where the procedures themselves are followed for their own sake, and justice is defined purely in these terms of a right to have the correct procedure followed, such as due process. 'Procedural accounts of international legitimacy are predicated on the assumption that the test of legitimacy is state practice.'²⁴ Dixon finds that 'the Security Council's action [under Article 42] in response to Iraq's invasion of Kuwait in 1990 is the most effective action undertaken so far and the most widely supported. However, 'the UN has not lived up to expectations after Iraq [1990].'²⁵ Dixon's view is sceptical. He finds the initial action a success due to the legal nature of Resolution 678, and the use of force achieving its main objective, the expulsion of Iraq from Kuwait. However, his view argues that the use of force after the expulsion of Iraqi troops from Kuwait is not inherently legal. He suggests that it is based on power politics: 'there is one law for the weak, and another law for the strong.'²⁶ He is proceduralist in his approach assuming that the UNSC should have the ability to work effectively. It should be able to yield results without 'coalitions of the willing'. Dixon is a partial realist in that he recognises the determination of international law by international relations and politics. He also appreciates the merits of the US led invasions of Afghanistan and Iraq; however he is not at ease with entirely unauthorised state action: that is, legally unregulated power politics.

Realism

Hans Morgenthau refers to realism as a form of functionalism involving the: 'search for the psychological, social, political and economic forces which determine the actual content and working of legal rules and which, in turn, are determined by them.'²⁷ Realism criticises the positivist view as being too narrow and strict.

'The fundamental concept underpinning the realist school of thought is that states are mutually self-interested actors that, in situations where they must choose a particular course of action out of multiple alternatives, will engage in a cost-benefit

²⁴ Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 21.

²⁵ Mark Dixon, *Textbook on International Law* (6th edn, Oxford University Press 2007) 331.

²⁶ *Ibid* 332.

²⁷ Hans J Morgenthau, 'Positivism, Functionalism and International Law,' [1940] 34 *The American Journal of International Law* 260-284.

*analysis of each option. To realist scholars, states will inevitably make the only 'rational' choice.*²⁸

The realist argument suggests that there is governance through law, but a wider meaning can be discovered; international law is not a standalone subject, it is a dependent subset of international relations and international politics. Realists interpret such law to achieve pragmatic effects, but should reject 'just-war' theory.²⁹ For realists, if an act can be defended through either reason or in terms of pragmatic state interests, then it has some validity. In terms of UNSC Resolutions, realists would argue that if the wider aims and objectives of the Resolution were met, then the use of force could be permitted. Zolo adds to this by arguing effectiveness should not be solely on the immediate outcome; 'it should also gauge the impact it has had and may have in the near future on the regional and international political balance of power.'³⁰ Realism could also be described as a form of pragmatism, interpreting the law in terms of a device to achieve practical and extrinsic results, rather than the fulfilment of abstract principles such as a universalistic interpretation of the rule of law. Janzekovic for example states: 'realists are people whose interest is focused on things they consider to be actual or real as distinguished from abstractions.'³¹

Morgenthau, is a key representative of the realist school of thought, or to be more precise a political realist. Political realists 'think in terms of interest defined as power.'³² That is, they seek to discover how a policy underlying a legal doctrine could affect the power of the nation.³³ There is thus a close consideration of power politics, and the instrumental use of international law as a weapon within the conduct of transnational politics. 'One cannot understand what is at stake in an armed conflict involving the leading world powers (and hence, the reasons and objectives of the conflict) without analysing the long-term dynamics of 'global power'.³⁴ Overall, political realists consider what the consequences of each alternative action are, and, how does each alternative impact upon the States quota of 'political' power. Building on from this perspective, political realists contest overly grand

²⁸ Gideon Boas, *Public International Law – Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 18.

²⁹ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 88.

³⁰ *ibid* 134.

³¹ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 43.

³² Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (5th edn, New York: Alfred A. Knopf 1978) 4-15.

³³ *Ibid*.

³⁴ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 54.

and lofty concepts such as ‘internationalism or humanitarianism / humanitarian intervention’ as they suggest these apparently ‘morally positive’ terms are covertly politicised and deployed selectively as weapons in pursuit of power politics. For example, why should a country choose to provide humanitarian assistance to one country and not another? If these terms are to be valid then they need to be applied universally. For example, states were quick to intervene in Kosovo in 1999, but there has been little action presently in Syria (pre-ISIL attacks) and Israel which could be considered as equal humanitarian catastrophes to Kosovo.

Morgenthau finds that the problem with legalistic and positivistic approaches to international law and the social sciences more generally is a form of dogmatism. He refers to the ‘tendency to stick to their assumptions and to suffer constant defeat from experience rather than to change their assumptions in the light of contradicting facts.’³⁵ He is referring here to the difficulties with a legalist or positivist view in applying international law that reduces it to legal doctrine alone, which then takes on an absolute status however unrealistic it is in particular contexts of application. Morgenthau suggests that positivism does not work in a changing society: ‘it was the general attitude of the internationalists to take the appropriateness of the devices for granted and to blame the facts for the failure.’³⁶ He assumes positivism is outdated as adopting an empirical approach to international law and relations; realism however has proved itself to be more pertinent. Carl Schmitt could also be described as a political realist. He has been reported by Dyzenhaus as suggesting that legitimacy, or in other words, justifiability, will always assert itself over legality. ‘His (Schmitt) is a highly political conception of law in which law and morality are the products of a battle for political supremacy between hostile groups.’³⁷ In his book ‘The Concept of the Political’, Schmitt discusses the idea of a world state that embraces the entire globe and humanity, as not being a political entity and could only loosely be called a state. He suggests that a global organisation ‘means nothing else than the utopian idea of total de-politicization.’³⁸ This would seem to assume that if the UN or states were to appeal to humanity, as in appeals to “humanitarian intervention” they would somehow lose

³⁵ Hans J Morgenthau, ‘Positivism, Functionalism and International Law,’ [1940] 34 *The American Journal of International Law* 260-284.

³⁶ *ibid.*

³⁷ David Dyzenhaus, *Legality and Legitimacy – Carl Schmitt, Hans Kelsen and Hermann Heller on Weimar* (Oxford University Press 2003) 2.

³⁸ Carl Schmitt, *The Concept of the Political* (The University of Chicago Press 1996) 55-57.

credibility. He suggests those who invoke humanity are trying to cheat.³⁹ Schmitt is arguing that the word 'humanity' is used for a different meaning; that is, in order to intervene for other, less favourable motives. Zolo appeals to this perspective in saying: 'to qualify a war as 'humanitarian intervention' is a typical ploy for self-legitimization by those who wage that war.'⁴⁰ However Zolo is keen to suggest that one does not have to accept this. He argues the word 'humanity' could be used to degrade the foe.⁴¹

Morgenthau's realism has since influenced other writers. Michael Byers⁴² in his article on terrorism also writes from a political realist perspective. He discusses state action as an interaction between international politics and international law. He considers that the US purposefully chose to use self-defence as the rhetorical / ideological basis for their action in Afghanistan for political and legal gain. He assumes that the US chose this claimed basis to refrain from restrictions that might otherwise be imposed by a UNSC Resolution. Byers is particularly critical of the US position, suggesting that: 'the US may now be employing similar legal strategies in an effort to develop or extend a right of anticipatory self-defence against terrorist acts.'⁴³ His writings suggest the US acts only for its own collective gain and appeals to legality only selectively whenever this suits its ulterior purposes. However, it could be argued that the US has at least some support for its actions. The UNSC has not condemned in any official capacity, the US led war in Afghanistan; and US troops in Afghanistan have been supported by troops from the UK. Furthermore, international law is a product of states themselves, thus if custom leads to the development of anticipatory action for self-defence it can be assumed that this is because it is accepted as so.

Robert Gilpin has applied political realist theory to contemporary American policies in the Middle East⁴⁴ and is critical of the politics surrounding the 2003 invasion of Iraq.⁴⁵ His article supports the view that the war in Iraq does not have a sound basis in international law. He does not support a realist view and maintains that the law should be read from a positivist perspective.

³⁹ *ibid* 54.

⁴⁰ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 38.

⁴¹ *Ibid* 39.

⁴² Michael Byers, 'Terrorism, the use of Force and International Law after 11 September,' (2002) 16 *International Relations* 155.

⁴³ *ibid* 162.

⁴⁴ Robert Gilpin, 'War is too important to be left to ideological amateurs' [2005] 19 *International Relations* 5.

⁴⁵ *ibid*.

John Mearsheimer is the leading proponent of offensive realism. Offensive realism maintains that states are not satisfied with a given amount of power, but seek hegemony for their security interests because the anarchic makeup of the international system creates strong incentives for states to seek opportunities to gain power at the expense of competitors.⁴⁶

Ago⁴⁷ suggests that too strict a reliance on words (of international law doctrine) is what can lead to errors. He suggests that positive law is a barrier to the useful application of international law and that 'language' should not be strictly applied as an end in itself; words should be interchangeable. This is similar to the UK and USA's argument on the continuing authority of UN Resolutions.

Realism and the use of force

In considering the efficacy of UN Resolutions there is a supportive realist view, in that the law should be concerned with practical consequences. White is of the opinion that Article 41 sanctions are usually inadequate without the threat or use of military force.⁴⁸ Typically, non-military sanctions have been criticised for their harsh humanitarian consequences and ineffectiveness in achieving results, as a consequence of this frustration states engage in military action. For example, Iraq in the early 2000's had failed to comply with previous resolutions,⁴⁹ and the coalition feared that this non-compliance would continue. The lack of any significant and/or desired result of the non-military sanctions imposed against Iraq was thus cited as one of the reasons for the need to use force in the country based on Resolution 1441; albeit that Resolution 1441 was not a clear authorisation to use force. Nevertheless 'economic sanctions [may] have their limitations, but the use of military force is no panacea either.'⁵⁰ Thus there is argument to support the claim that non-military sanctions are for the most part inadequate, hence states use of armed force in order to attain results. Nevertheless, the use of military action is also seen as having its faults, and an aim of this thesis is to discover whether the use of military force can be effective in attaining results.

⁴⁶ John Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton & Company 2001).

⁴⁷ Roberto Ago, 'Positive Law and International Law' (1957) 51 *The American Journal of International Law*, 691-733.

⁴⁸ Nigel D White, *The United Nations System-Toward International Justice* (Lynne Reinner 2002) 160.

⁴⁹ Resolution 1441 (2002).

⁵⁰ David Cortright and George Alopez, *The Sanctions Decade- Assessing UN Strategies in the 1990s* (Lynne Reinner Publishers 2000) 15.

In a broad claim, Shaw states: 'There is no unified system of sanctions in international law in the sense that there is in municipal law, but there are circumstances in which the use of force is regarded as justified and legal.'⁵¹ He describes these circumstances as being self-help actions or Security Council sanctions.⁵² Shaw is dubious as to the existence of 'international law' per se due to its lack of a regulatory framework. He assumes the international legal order exists because states feel the necessity to be bound by their own agreements; his argument is based on the consensus (the majority creating new norms and the acceptance by other states of such new rules) and the consent of states in creating binding obligations.⁵³ Shaw is of the opinion that law and politics can never completely separate, and hence UNSC regulation will only be forthcoming when it does not have a detrimental effect to any of the permanent five members. Overall, Shaw takes an unbiased approach to the use of force. He empathises with the coalition of the willing justifications but also reiterates the omission of any explicit mandate from the UN. However, more specifically, his presumption that UNSC regulation will depend upon the interests of the permanent five members is a political realist approach. For Shaw, the use of force in any given circumstance is dependent upon the political power of those states involved.

Roberts⁵⁴ broadly political realist view is that it is the different power-political interests of states, and their different visions of how the world should be ordered, that affect how they interpret the "legality" of certain types of intervention.

Dixon discusses a variety of situations in which states have made claims that the use of force is lawful if intended to achieve certain 'approved purposes.'⁵⁵ These purposes are: reprisals; protection of nationals at home and abroad; terrorism and the use of force; humanitarian intervention; self-determination and national liberation movements; and hot pursuit. Whether this claim of lawfulness is correct is open to debate. It is dependent on an expanded version of self-defence, or because the use of force does not precisely violate Art. 2(4) if interpreted literally. States have also claimed that new customary rules have developed since 1945.⁵⁶ None of these explanations may grant the use of force a legal

⁵¹ Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 4.

⁵² *ibid.*

⁵³ *ibid.* 10.

⁵⁴ A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century*, (Lynne Rienner Publishers 2004) 136.

⁵⁵ Mark Dixon, *Textbook on International Law* (6th edn, Oxford University Press 2007) 321.

⁵⁶ *ibid.*

basis; however they could lend a hand to describing it as legitimate. Therefore, Dixon takes a more pragmatic view of states use of force. He is more concerned with the legitimacy aspect of action; if a use of force can be justified for 'good' reasons then it can in certain circumstances be considered acceptable. Dixon assumes that states will always justify a use of force that they perceive to be legitimate even if it is for 'other purposes' and beyond the scope of a legalist approach. In essence, states will act as realism suggests, in that those states who agree with a particular use of force will inevitably 'find' a justification for its use. This suggests that democratic or constitutional states value legitimacy over legality, presuming of course, that those justifications are genuinely held beliefs.

In sum, realists are more pragmatic than legalists or positivists. Fundamentally, they are receptive to a broader interpretation of the law. They can appreciate the practical difficulties of applying a strict legalist approach and would generally support the 'extra-legal' use of force to achieve a pragmatic benefit.

Constructivism

A potentially viable alternative to realism is constructivism. 'Whereas realism assumes that the interests of states are fixed and exogenous, constructivism views the interests and identities of states as endogenous and constituted through interaction with other states on the basis of shared norms.'⁵⁷ For constructivists, changes in history and society affect how a state perceives international law. The importance in constructivist theory is the meaning of the object. 'For example, a nuclear weapon in the United Kingdom and a nuclear weapon in North Korea may be materially identical but they possess radically different meanings for the United States.'⁵⁸

*'The belief that reality is socially constructed through selective interpretation relative to the concerns and interests of interpreters, leads constructivists to place a greater role on norm development, identity, and ideational power than the other major theoretical paradigms within international law.'*⁵⁹

⁵⁷ Gideon Boas, *Public International Law – Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 20.

⁵⁸ <http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0061.xml> accessed 5th June 2014.

⁵⁹ *ibid.*

This approach may, depending on the circumstances, consider the use of force against hostile states to have value. The key to this approach is the use of the phrase 'hostile' state. If a state is engaging in aggression or showing antagonism then their holding of weapons is likely to pose more of a threat than a state at peace. The use of force in Iraq can be taken as an example here. Iraq, throughout the 1990's and 2000's has acted in a belligerent way. It repeatedly failed to adhere to UNSC Resolutions, in particular Resolution 1441 which required Iraq to 'disarm'. Therefore, albeit the use of force in Iraq in 2003 could be termed 'illegal' in that the UNSC 'decided to remain seized of the matter'⁶⁰ this particular use of force could be seen as legitimate from a constructivist approach. If WMD were perceived as a real threat, then based on Iraq's history, constructivists would view this threat as outweighing the perceived value of adherence to the dictates of legalism.

Liberal cosmopolitanism

An alternative approach to realism is cosmopolitanism - an extension of classic liberalism. Liberal theory, for Boas, focusses on 'the relationship between the state and society.'⁶¹ Liberals look to the domestic politics of states to suggest how this will affect that states international policies. Therefore those more democratic states are more likely to be accepting of international policy as they see it as an extension of domestic policies than those states who could be termed less democratic and as such have different ideals of society.

'The cosmopolitan obtains to the cosmopolis: a harmonious and inclusive, universal order.'⁶² The cosmopolitan lawyer 'invokes aspirations to a system of law capable of purposefully sustaining order in the world on unified terms.'⁶³ 'Cosmopolitanism replaces the political authority of sovereign states (and their legacy) with the authority of universal norms.'⁶⁴ It could be argued that cosmopolitanism is idealistic, albeit well-intentioned.⁶⁵

'Liberal cosmopolitanism appears as a tendency within Kantian and neo-Kantian schools of legal and political theory to advance arguments founded upon the presumed validity of

⁶⁰ UNSC Resolution 1441 8 November 2002.

⁶¹ Gideon Boas, Public International Law – Contemporary Principles and Perspectives (Edward Elgar Publishing 2012) 19.

⁶² Geoffrey Gordon, 'The innate cosmopolitan tradition of international law', [2013] 2 Cambridge Journal of International and Comparative Law 906-934.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ Richard Beardsworth, Cosmopolitanism and International Relations Theory (Polity 2011) 1.

abstractly universal categories, including 'global justice', as key to the analysis of international law and international relations.⁶⁶ Liberal cosmopolitanism offers these 'abstractly universal categories' the same or higher status than existing law. 'Hence, the concrete rights of citizens provided for by historically specific and politically contestable constitutional arrangements and statutory measures of particular nation states, are relegated to a lower position on the assumed 'totem pole' of rights, and indeed earmarked for redundancy and substitution by cosmopolitan alternatives.'⁶⁷

This approach generates a negative reaction from the rival realist school. For example, Schmitt suggests liberal cosmopolitanism appeals to universal values like "humanity/humanitarian" as an imperialistic smokescreen for the pursuit of specific and down-to-earth interests in keeping with realistic tradition.⁶⁸ An example of the step forward from classical international law to cosmopolitan law is the war in Kosovo.⁶⁹ This, suggests Zolo, will lead 'to truly effective international institutions, such as an international Court of Justice endowed with binding jurisdiction, and a General Assembly of the United Nations composed not only of representatives of governments but also of direct representatives of the citizens of each state.'⁷⁰

It could be suggested that Beardsworth's⁷¹ distinction between: cultural; moral; normative; institutional; legal and political cosmopolitanism are all in fact elements of liberal cosmopolitanism. He refers to the 'fundamental' rights of societies in moral cosmopolitanism, and he himself links moral to normative. Institutional cosmopolitanism is concerned with 'practical' solutions, which Beardsworth links to 'global justice.' Again in defining legal cosmopolitanism he links it to moral cosmopolitanism. Legal cosmopolitanism 'aims to provide basic moral rights with international/global legal status and international law with moral foundation.'⁷² Finally political cosmopolitanism is again related to global justice but supplemented with 'political advocacy, political judgement and political leadership'⁷³ In terms of Beardsworth's' distinction it is the closest 'sub-section' to realism.

⁶⁶ Michael G Salter, 'Carl Schmitt: Law as Politics, Ideology and Strategic Myth' (Routledge 2012) 37.

⁶⁷ *ibid.*

⁶⁸ Carl Schmitt, *The Concept of the Political* (The University of Chicago Press 1996) 54-57.

⁶⁹ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 79.

⁷⁰ *ibid.*

⁷¹ Richard Beardsworth, *Cosmopolitanism and International Relations Theory* (Polity 2011) 23-47.

⁷² *ibid.* 37.

⁷³ *ibid.* 40.

Beardsworth's development of these sub categories of liberal cosmopolitanism is too intricate for this thesis and hence liberal cosmopolitanism will be referred to as a whole.

Two other forms of cosmopolitanism can be distinguished; innate and constitutional. 'Innate cosmopolitanism stands for the proposition that the world as a whole represents a phenomenon with interests and even a will of its own, and is capable of establishing a foundation for universal norms under international law.'⁷⁴ This is linked to the establishment of rules based on continued state practice. Constitutional cosmopolitanism examines 'possibility or reality of a world constitution.'⁷⁵

Linked to (cosmopolitan) liberalism is the concept of Natural Law theory.

Beardsworth would argue the link is very tight: 'all cosmopolitan thought is moral.'⁷⁶ Natural law uses reason to decide legal rights. It is a view that certain rights or values are inherent in or universally recognizable by society. Natural law theory has resonance with realists in that the law is not a strict exercise in applying facts to legal rules. However, natural law goes beyond realism. It considers that there are universal standards of right and wrong based on nature or reason. Naturalists would believe positive law should bend.⁷⁷ Zolo addressing this perspective argues: 'in cases where positive law is inadequate and international institutions prove powerless, a superior normative level, ethics, comes into play, imposing the duty to intervene by force of arms outside or even against the explicit provisions of law.'⁷⁸ This is in stark contrast to legalists who believe there is nothing higher than self-interpretations of state authority. Natural law theorists believe that there is a higher or divine authority, above the positive law. As an example, human rights would be considered not only to be a legal duty embedded in specific positive doctrines, but to be, say, a universal duty to protect civilians. 'Human rights must be considered *ius cogens*; that is, rights that are valid and enforceable in every corner of the globe.'⁷⁹ From this perspective, state sovereignty here is not absolute – as tends to be the case in realist approaches; higher rights can be forcefully protected. Zolo summarising the cosmopolitan perspective states: 'Kosovo was a success for international ethics and justice... Europe and the United States had a moral, even more than

⁷⁴ Geoffrey Gordon, 'The innate cosmopolitan tradition of international law', [2013] 2 Cambridge Journal of International and Comparative Law 906-934.

⁷⁵ *ibid.*

⁷⁶ Richard Beardsworth, *Cosmopolitanism and International Relations Theory* (Polity 2011) 29.

⁷⁷ *ibid.* 18.

⁷⁸ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 67.

⁷⁹ *ibid.* 66.

a legal, right to prevent a revival of the horrible crimes of World War II.⁸⁰ Walzer is a natural law theorist. Action can be justified if it 'shocks the moral conscience of mankind.'⁸¹ The key to this theory is 'justification.' If action is not taken in pure aggression, and there are genuine reasons for intervention then this is for the greater good. This is qualified by Walzer in presuming that there is no alternative.⁸² Janzekovic is also a supporter as he discusses action which could be morally just; response to aggression, a pre-emptive strike against imminent or likely aggression, and a response to the threats against the lives and well-being of citizens of other states.⁸³ Therefore the use of force against Iraq in response to their aggression towards Kuwait, under this description, could be justified by natural law. It could also be used to describe the action against Libya as protecting citizens, and could certainly be a possible justification for intervention in the present situations in Syria and Israel.

It is apparent from the different philosophies of law, that there is a tension between interpretations of the implications of strict legality on the one hand, and broader notions of moral / political legitimacy on the other. Positivist theory is in complete opposition to any thoughts on legitimate action that extend beyond a legalistic and literal interpretation of existing substantive doctrine and procedural rules. A clear authorisation to use force is in keeping with the concepts of positivism. For positivists, as long as there exists a sovereign jurisdiction, what that jurisdiction decides is law. However, when thinking in terms of international law and the United Nations, the UNSC consists of only five permanent members, and each one of those holds the power of veto. Therefore, the concept of democracy within the UNSC is dubious. Those writers who appeal to strict legality do not consider the question of five countries controlling law enacted in the name of the whole world or "humanity". However, when states suggest during their reasoning for engaging in the use of force that they are acting "within the spirit" of the resolution, this is much closer to natural law theory and perhaps realism. Natural law theorists are not at ease with the undemocratic nature of the UNSC, and suggest that in addition to states, non-state actors should also be involved in law making. Zolo suggests that: 'law alone will [not] bring about international peace and justice.'⁸⁴ Furthermore, for realists, the effectiveness of action has a

⁸⁰ *ibid.*

⁸¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (London: Allen Lane 1978) 107.

⁸² *ibid.*

⁸³ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 50 citing Fotion and Elfstrom, *Military Ethics Guidelines for Peace and War*.

⁸⁴ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 68.

substantial impact. In brief, pacifists would object to the use of military force on the assumption that physical force creates more problems than it tries to solve, and that it is morally wrong anyway to use directed force.⁸⁵ However, Zolo writes that for cosmopolitans, the Kosovo war could be viewed as a pacifying mission which made use of arms, but did so with the consensus of the international community.⁸⁶

In considering these outlooks, what is apparent is that world peace, order and stability should be the dominant factor regardless of the legal approach.⁸⁷ This author argues that an ideal position is one located somewhere between realism and natural law, cosmopolitanism being the optimal doctrine. The advantages of natural law are that the 'spirit' of the resolution and humanitarian intervention can be used to lend legitimacy to action that is urgently required. Following a strict legal approach can often be impractical, and could lead to legally authorised inaction in dangerous situations of on-going genocide, for example. However, in parts, natural law can go too far in devaluing state sovereignty and suggesting non-state actors become a part of the law-making process.

To better meet expectations of international law the UNSC could benefit from reform to become a more workable place for creating binding international regulations. This author would suggest in particular reform of the UNSC and voting procedures in order to increase democracy within the international arena. Realism is a key attitude, and the ideology of pragmatism and utilitarian effectiveness, divorced from idealistic utopianism are in keeping with the author's own thoughts. Subsequently, the doctrines of humanitarian intervention and responsibility to protect could be integrated within international law, and hence states would have an obligation to act in all situations coming within the definitions, this would hopefully result in more consistency when invoking humanitarian doctrines.

INTERPRETING THE USE OF FORCE IN IRAQ AS AN ILLUSTRATION OF THE IMPLICATIONS OF DIVERGENT PERSPECTIVES

⁸⁵ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 43.

⁸⁶ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 79.

⁸⁷ David Dyzenhaus, *Legality and Legitimacy – Carl Schmitt, Hans Kelsen and Hermann Heller on Weimar* (Oxford University Press 2003) 9.

The legality and legitimacy issues surrounding the use of force against Iraq (but also in general) form an important debate as 'the fabric of orderly relations between nations, the health of the human rights norm and the struggle for a better world are built on respect for international law.'⁸⁸ Therefore, as in all legal systems, there must be adherence to international law. If there is not, then those relations will break down.

In March 2003, when the United States and the UK took further military action against Iraq, the two governments relied on one main legal rationale: Iraq's failure to implement certain UN Security Council resolutions and the coalition's continuing authority to use force based in particular on Resolutions 678, 687, and 1441.⁸⁹ In this aspect, Roberts finds legality in the use of force, he is of the opinion that the resurrection of previous resolutions is acceptable if the use of force is aimed at achieving the goals set out in those resolutions. Roberts is certainly practical in his outlook, he does not follow the strict legality route but rather finds legality in the *wider context* of the resolutions. He assumes in the Iraqi context that the use of force was necessary in order to rectify Iraq's non-compliance with cease-fire agreements. In contrast, Brunnee and Toope suggest that the Council had decided that the use of force was not required. 'The Council had already determined that there had been a breach of peace and security by Iraq, (Resolution 1441) and the council was therefore within its power to take action.'⁹⁰ As the UNSC had not taken any further action, except requesting states to give support to UNMOVIC and deciding to remain 'seized of the matter'⁹¹ there is credibility to Brunnee and Toope's argument. These authors have a legalistic approach. They suggest 'the Council's refusal to adopt an authorising resolution actually showed the Council members' adherence to the criteria of legality, even in the face of extreme pressure from some of its most powerful members.'⁹² Accordingly, if the UNSC wanted states to use force, they would have authorised it. White is also legalistic in his approach to the use of force. Without a clear UN authorisation to use force he is of the opinion that the use of force cannot be justified. He is particularly strict in his view of states'

⁸⁸ Ramesh Thakur, *The United Nations, Peace and Security* (Cambridge University Press 2006) 223.

⁸⁹ A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 140.

⁹⁰ Jutta Brunnee and Stephen J Toope, *Legitimacy and Legality in International Law-An Interactional Account* (Cambridge Studies in International and Comparative Law 2010) 321-322.

⁹¹ UNSC Resolution 1441 (2002) Point 14.

⁹² Jutta Brunnee and Stephen J Toope, *Legitimacy and Legality in International Law-An Interactional Account* (Cambridge Studies in International and Comparative Law 2010) 321-322.

use of force, and would not find legitimacy without indisputable legality.⁹³ Lobel & Ratner argue that for states to take military action there must be a clear and unambiguous mandate in the form of an authorisation to use force.⁹⁴ The resurrection of previous resolutions did not achieve this. These authors follow a strict legalist interpretation of international law. They consider a legalistic approach of the law to be absolute. They assume the UNSC will authorise the use of force if required. However, a contrary argument would suggest that with the threat of the veto, UNSC authorisation may not be as easy a task as they assume. Resolution 1441 was intended as a final opportunity and it was provided that serious consequences would follow Iraq's failure to comply. The UNSC did confirm that Iraq's failure to comply with Resolution 687 was a threat to international peace and security. Nevertheless, whether this amounts to a justification in international law for the UK and US to use force in the face of the opposition of other Security Council members remains controversial.⁹⁵ Members of George W. Bush's administration variously suggested that military action was necessary and justified. This was because of the urgent need for an end to the repression of the Iraqi people, for regime change, for preventive war to stop a possible future threat, and for anticipatory self-defence against an imminent threat.⁹⁶ Despite that, legalists would argue that none of the reasons listed are in fact strictly legal. When action was taken in 2003 there was no clear UN mandate, but could the aims listed above give the use of force a legitimate basis? If UNSC action was unforthcoming, do the ends justify the means? The US claimed the military intervention had the purpose of ensuring implementation of previous UN Security Council resolutions. As depicted here, there can be controversy when any interpretation other than legalism is used. This thesis seeks to address whether any justification other than pure legalism can be acceptable; in particular the realist attitude towards the use of force and the morality of humanitarian intervention.

Importantly, it is not for the member states to determine the objective that the Council seeks to achieve in conferring the mandate. As Berman finds, this must remain squarely

⁹³ Nigel D White, 'The Legality of the Threat of Force Against Iraq' [1999] 30 *Security Dialogue* 75.

⁹⁴ J Lobel and M Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to use force, cease-fires and the Iraqi inspection regime' [1999] 93 *American Journal of International Law* 124.

⁹⁵ *ibid.*

⁹⁶ A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 139.

within the exclusive competence of the UNSC.⁹⁷ Therefore, even if one is not a strict legalist, it is only the interpretation of the mandate, not the mandate itself that should be questioned. Berman assumes that the problems concerning force stem from the 'authorisation model.' That is, the Council authorising states to use force through resolutions, rather than the model envisaged in Article 43. This 'authorisation' model allows states to interpret the Resolution to their own gain. It is paramount, that the main aims and objectives of the UNSC are met, even if other non-UNSC issues are on states agenda. What could be problematic then is where the 'other' goal takes over. It is arguable that this has been the case with the *prolonged* use of force in Iraq.

Brunnee and Toope consider the war in Iraq to have led to one of the biggest mass protests in history. They suggest that the underlying reason for this was a sense that the planned invasion broke the rules of international law.⁹⁸ From this perspective they would criticise political realism. They state: 'the constant abuse of [international] law is served up to suggest that international law is fundamentally flawed, that it can never be more than a mask for power relationships.'⁹⁹ Here they assume that states only engage in the use of force for their own political gain. Thakur elaborates by saying: 'No one disputed the abhorrent nature of Saddam Hussein's regime, but many questioned the circumstances governing the use of force.'¹⁰⁰ Nevertheless, if Saddam Hussein's regime can be described as 'abhorrent' then there is an argument to suggest that the repression of this kind of regime, if needs be through the use of force, should at least be legitimate. This highlights the difference between legalism on the one hand, and liberal cosmopolitanism, natural law approaches on the other.

THE USE OF FORCE IN AFGHANISTAN & LIBYA AS A SECOND ILLUSTRATION OF DIVERGENT PERSPECTIVES

⁹⁷ F Berman, 'The authorization model: Resolution 678 and its effects,' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 158.

⁹⁸ Jutta Brunnee and Stephen J Toope, *Legitimacy and Legality in International Law-An Interactional Account* (Cambridge Studies in International and Comparative Law 2010) 1.

⁹⁹ *ibid* 3.

¹⁰⁰ Ramesh Thakur, *The United Nations, Peace and Security* (Cambridge University Press 2006) 3.

There is less academic international law literature on the use of force in Afghanistan and Libya, primarily as these are more recent examples of states use of force.

Resolution 1368 (Afghanistan) was not a direct authorisation to use force, albeit this is not specifically required for the initiation of a self-defence action. However, by recognising the right of self-defence in this context, the UN helped to clarify that there was an international legal basis for the subsequent US-led intervention in Afghanistan.¹⁰¹ The initial action was clearly in response to aggression, the UNSC Resolution was welcomed but not essential, nevertheless this Resolution adds nothing to the prolonged action against Afghanistan. The initial response to aggression was against a terrorist group, not a state. However, it would seem that this is within the boundaries of international self-defence law. 'There is no reason to limit a state's right to protect itself to an attack by another state. The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right.'¹⁰² Therefore, this response is legalistic. What is problematic is: 'the right to take action against the state that is the presumed source of such attacks, since it must be conceded that an attack against a non-state actor within a state will inevitably constitute the use of force on the territorial state.'¹⁰³ This action would fall foul of a legalistic interpretation; however realists and cosmopolitans alike would be able to justify the use of force as within the spirit of self-defence. If the terrorists inhabit a state, then to use the doctrine of self-defence a defendant state must be permitted to enter another state which is harbouring terrorists.

The armed force used against Libya in 2012 has some media coverage in national newspapers, but limited academic coverage. Hence this is an area that this thesis will research in more depth.

Resolution 1973 (2011) did not permit ground troops in Libya, or the removal of Gaddafi through forceful means. What ensued were Special Forces on the ground and a claim that it was impossible to protect civilians without the toppling or possible assassination of Gaddafi. The bombing raids carried out by Britain on civilian targets in order to reach Gaddafi where

¹⁰¹ A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 137.

¹⁰² Elizabeth Wilmschurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (ILP WP 05/01, Chatham House 2005) 12.

¹⁰³ *ibid.*

not strictly permitted within Resolution 1973. Therefore, this use of force would be criticised from a legalist perspective. However, the issue to be discussed here is whether an 'illegal' opposition force can in fact have some legitimacy. If, as it was suggested, it was impossible to protect Libyan citizens without removing Gaddafi, then perhaps force used beyond the enabling resolution can be justified if its aim was to meet the overall objective of the resolution. Can a use of force beyond the enabling Resolution ever be justified? From a political realist perspective, the use of force would be termed as an inevitability of the power politics of the intervening states; from a liberal cosmopolitan, the use of force would be held in higher regard as preventing a humanitarian catastrophe.

Conclusion

This chapter has highlighted that those authors who are positivist or legalist in nature will not accept claims of 'legitimacy' for the use of force other than in terms of existing legal rules. If a use of force is illegal in the technical sense then it will remain illegal, regardless of the reasons for intervention or the outcomes. Those with a realist, cosmopolitan or natural law outlook will find it easier to reconcile uses of force with legitimacy based on factual circumstances. Blatant aggression will never be legitimate by any school of thought, but if the use of force met the wider terms of the Resolution as in Libya 2011, or prevented humanitarian suffering as in Kosovo in 1999 then these latter ideologies could find favour. The underlying perspectives of these different schools needed to be established as they help to explain the divergent positions taken in practice.

The limitations of each perspective are also detected in analysing the outcomes of any use of force. Legalists will never move beyond a strict interpretation of international law. As this chapter has identified, legalists would not view the prolonged force in Kosovo and Libya, for example, as legal. Realism and cosmopolitan theorists might see the use of extra-legal force as legitimate in certain circumstances if the justifications are valid. Realists accept power politics as motivation if it achieves a desired result; whereas liberal cosmopolitans would accept the use of force to achieve 'global justice'. However, the problem here as opposed to legalist thought is that the use of force remains illegal.

The next chapter will investigate the use of force against states in more detail. It will consider the legal framework within which international law operates. It will identify what

can be termed “strictly legal” through a legalist approach and the problems that can arise in light of such an interpretation. This will lead on to Chapter three which will discuss the extent to which states operate within the legal framework and hence Chapter four will deliberate the arguments in support of and against the justifications for legitimate or extra-legal force.

Chapter Two

Towards Identifying the Framework of Legal Doctrine

This chapter will explain the specifically legal position in relation to inter-state use of force. It will begin with the traditional theories of any use of force and then consider the legal framework of the UN Charter itself. Following this, my analysis will consider the status of self-defence and UN authorisations to use force. This discussion will answer the question: when can the use of force be used legally? Finally, this chapter will address questions and issues of interpretation arising in relation to the use of force and the criteria for recognising such deployments as legal.

This chapter examines a legalistic approach to international law in considering the use of force against those classified as ‘aggressor’ states. That is those states which have engaged in the first act of aggression against another state. It will discuss what action is clearly a part of international law, and subsequently what problems can be identified in regards to interpreting international law. This chapter will discuss doctrinal legal research which can be defined in simple terms as research which asks what the law is in a particular area,¹⁰⁴ in terms of its technical meaning and scope and as part of the doctrine of “lawyers’ law.” The law is understood here as a self-referential system of technical rules. The main aim of this methodology is to *describe and elucidate* a body of legal doctrine comprised of a system of cases, rules, principles and basic axioms.¹⁰⁵ A legalistic approach refers to what it takes to be the well-established rules and procedures in a given area of legal doctrine, presumed to exist in a self-contained realm of “lawyer’s law”, that provides the resources for international regulation. The rigidity of a legalistic approach will be identified, and the outcomes of the application of this approach to the inter-state use of force.

In keeping with this methodology, there will be no attempt to place this aspect of international law doctrine in a wider political, moral or policy context, to analyse the factors behind its emergence or possible reform, or issues over its concrete application and

¹⁰⁴ Mike McConville and Wing H Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 18.

¹⁰⁵ *ibid.*

institutional enforcement, as these are reserved for the law in action approach, not legalistic doctrinal analysis.

Legalism is one version of legal analysis; it is law in its strictest sense. Later there will be consideration of contextual approaches to interpreting the law on the use of armed force, this will address law in action and law as a social phenomenon. However, this chapter's doctrinal analysis is important for developing subsequent arguments relating to the extra-legal use of force in some circumstances. It will be used as a preliminary tool for creating the possibility of later considering the extent to which states follow the rules and principles of international law, which of course presupposes that one has already clarified the meaning and scope of such measures. The narrowly legalistic focus of this chapter thus sets the scene of the thesis, and enables debate to develop in subsequent chapters along wider, more contextual lines. The broad principles of international relations and the law will be discussed here, and later applied to case-studies.

Viewed from a legalistic perspective, international law is primarily formulated by international agreements, which create rules binding upon the signatories, and customary rules, which are basically state practices recognised by the community at large as laying down patterns of conduct that have to be complied with.¹⁰⁶ International law governs relations between nation states who – [*in theory*] voluntarily consent to be bound by treaties through which they gain international rights and responsibilities in respect to other nation-states.¹⁰⁷ International law is horizontal (not vertical) in nature. States create the law, and choose to obey or disobey it. In theory, all states are “equal subjects”; with no one state possessing authority over the others. However, the UN has been vested with a form of sovereign power to maintain peace and security, and prevent the use of force. Neither the UN, nor any other international organisation, is a world legislature in a wider sense. Viewed in liberal terms presupposing a sharp law / politics dichotomy, the UNSC is a political and not a judicial body.¹⁰⁸ Given our aims, a useful starting point is to consider international regulations governed by the UN Charter.

¹⁰⁶ Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 6.

¹⁰⁷ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 9.

¹⁰⁸ Mike McConville and Wing H Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 200.

Charter Regulations

Historically, the decision to go to war was left to the discretion of states, one state could declare war against another state, with any justification, without the threat of legal interference; but following the secularisation of international law and the emphatic rise of national sovereignty, the term 'just war' no longer had a legal founding. War was then permitted subject to the declarations made in The Hague 1889, which regulated specific aspects of warfare. On this issue, there was no "higher authority" than the states themselves. In many but not all respects, the UN Charter involves a modification of the traditional framework. It is a body above the state, created by treaty, and agreed to by states. As the UN is founded in treaty law, there ought to be no violation of its founding rules.

The UN was founded in 1945 after the conclusion of the Second World War in order to prevent the atrocities of war occurring again. This new international organisation would manage international conflict, something which its predecessor *The League of Nations* created on 10th January 1920 had failed to do, with respect to post WW1 conflicts, such as the Italian invasions of Ethiopia in October 1935. Initially, in 1945 fifty states met in San Francisco to draft the UN Charter. Its rules are generally regarded as rules of international law from the perspective of *both* treaty law and customary law.¹⁰⁹ That is, customary international law is made up of rules that come from a general practice accepted as law; treaty law is an agreement in a formal document such as the UN Charter. Like any treaty, it is legally binding on all parties that have ratified the document. Those provisions of the Charter, therefore, that impose obligations relating to the use of force constitute binding treaty law for those states.¹¹⁰ Furthermore, it has been suggested that both members *and non-members* of the UN have come to regard particular norms embodied in the Charter to be binding customs.¹¹¹ If states perceive UN norms to be authoritative and as such generally conform to them in their "state practice", then there is argument to suggest these norms have become incorporated into customary international law applicable even to non-members.

¹⁰⁹ Anthony C Arend and Robert J Beck, *International Law & the Use of Force* (Routledge 1993) 29.

¹¹⁰ *ibid* 30.

¹¹¹ *ibid*.

The theory behind the establishment of the UN was that the experience of the Second World War could not be allowed to re-occur. Allowing certain states to use force to alter violently the existing political and territorial *status quo* was not acceptable. Force was not to be used to gain territory, to change the government of another state or to right a past wrong.¹¹² Arguably, the current situation in the Middle East could be described as Western states attempting to change governments and right past wrongs, through forceful means if necessary. Indeed there is worrying evidence that suggests President Bush wanted to achieve just this. Prior to the adoption of Resolution 678, 'Bush saw a Council authorization of force as an opportunity to institute a 'new world order and a long era of peace'.¹¹³ Instituting a new world order is clearly outside the realms of the Resolution, indeed outside the realm of the UN Charter and a realist interpretation. It would only be those natural law theorists who may argue that there is a moral obligation or divine right to ensure world peace through forceful means.

Charter Framework

Included within the main aims of the UN Charter are; the maintenance of peace and security (Article 1) and the prohibition on the use of force, except in certain circumstances (Article 2(4)).

State sovereignty is fundamental within the UN Charter. It must be protected in pursuit of the main aims of the Charter, primarily the maintenance of peace and security. Art. 2(1) states: 'The Organization is based on the principle of the sovereign equality of all its Members.' The *Lotus Case* (1927) PCIJ Ser. A No. 10 explains state jurisdiction stating: 'it [a state] may not exercise its power in any form in the territory of another State.'

Furthermore, Art. 2(7) declares: '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 or shall require the Members to submit such matters to settlement under the present Charter.' However this is qualified with the statement: 'but this principle shall not prejudice the application of enforcement measures under Chapter VII.' Chapter VII of the Charter permits the UNSC to 'take such action by air, sea, or land forces as may be

¹¹² Anthony C Arend and Robert J Beck, *International Law & the Use of Force* (Routledge 1993) 34.

¹¹³ J Cockayne & D M. Malone, 'The Security Council and the 1991 and 2003 Wars in Iraq', in V Lowe, A Roberts, J Welsh and D Zaum (eds), *The United Nations Security Council and War – The Evolution of Thought and Practice since 1945* (Oxford University Press 2010) 387 citing George H W Bush, 'Address before the 45th Session of the United Nations General Assembly in New York, New York', 1 Oct. 1990.

necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.¹¹⁴ When acting in response to ‘the existence of any threat to the peace, breach of the peace, or act of aggression.’¹¹⁵ Therefore state sovereignty is a restricted right. It is granted in the Charter but can be withdrawn. Peace and security may have priority over state sovereignty if Chapter VII requirements are met. States also limit their sovereignty by signing treaties. If this was not the case, then there would be little point to having them. Controversially, the protection of human rights inevitably requires interference in the internal affairs of a state.¹¹⁶

The exceptions to the prohibition on the use of force by states are in accordance with the Charter provisions contained in Chapter VII. Chapter VII is concerned with the use of force in circumstances where there has been a threat to the peace, breach of the peace or act of aggression. Chapter VII has long been the focal point of many a debate surrounding issues of interpretation. A key problem is the lack of definition in the Charter of which acts fall within the categories, such as “use of force.” It does not limit the ability of the UNSC to interpret any act as being one of satisfying the section. Hence, given this elasticity of meaning, the range of acts falling within such categories has broadened.

The onus is on the Security Council to decide whether there has been such a “threat” or “act” (Article 39), and, if so, it can “authorise” the use of armed force under Article 42. When utilising the Charter provisions in this way, the UNSC will almost always cite approvingly the principles contained in Article 2(4).

Under the Charter, states also retain the ability to act in self-defence under Article 51.¹¹⁷ States’ use of force against any other State is therefore regulated by international law. States can only legally use force if there is a clear authorisation from the UN, or there is a justification for self-defence. Self-defence is permitted to protect territory from an armed attack against an aggressor State. For example, the initial use of force against Iraq in 1990 by

¹¹⁴ UN Charter Chapter VII, Article 42.

¹¹⁵ UN Charter Chapter VII, Article 39.

¹¹⁶ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 83.

¹¹⁷ Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

the coalition of 34 nation states codenamed Operation Desert Shield was clearly a case of self-defence to expel Iraqi troops who entered Kuwait using force.

UN authorisation is usually found in UNSC Resolutions. However, the UNGA also has the power to conclude recommendations through Resolutions. The UNGA acting under the Uniting for Peace Resolution (GA Res. 377 (V) (1950)), can recommend that members of the UN take appropriate collective measures. This includes the use of armed force when necessary to restore international peace and security, when the UNSC is unable to make such a decision because of the use of the veto by a permanent member. However, a detailed consideration of UNGA authority is beyond the scope of this thesis.

Self-Defence

In terms of international legal doctrine, states can legally embark upon armed force when acting in self-defence, that is, when a state has been the victim of an unprovoked military attack (aggression). There is no question that a state has the right to defend its territory against those identified as 'aggressors.' Self-defence is located in customary and treaty law. Custom defines self-defence as a response to an immediate and pressing threat, one which cannot be averted, and that it is proportional to such threat.¹¹⁸ Self-defence is also preserved by Article 51 of the Charter. There is, however, some debate as to the validity of anticipatory or pre-emptive self-defence where no act of aggression has yet taken place but is feared and anticipated; this will be discussed in more detail in Chapters Three and Four.

Article 51 of the UN Charter does not discriminate between individual or collective self-defence - where a country comes to the aid of another under attack. Either approach is permitted. However, such acts of defence must be in direct response to an armed attack.

*'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.'*¹¹⁹

¹¹⁸ Mark Dixon, *Textbook on International Law* (6th edn, Oxford University Press 2007) 315.

¹¹⁹ Article 51 UN Charter.

The wording of the Article implies that an attack is under way, and as such the aim of further uses of force is to repel it. 'Once the attack is over, the legal justifications for the use of force must be different.'¹²⁰ It is an exculpatory defence for the conduct; the defending state was not at fault - as opposed to an excuse which concerns some culpability of the defendant.¹²¹ Furthermore, action taken under this auspice must be reported to the UNSC, and must not inhibit the authority and responsibility of this body to maintain or restore "international peace and security."

Self-defence is an essential but still problematic element of international law doctrine. It is necessary, as one could not imagine not being able to repel an aggressor; however the limits of a legalist approach to self-defence can be broken. Fletcher & Ohlin state: 'the right of states to come to each other's aid is freighted, in international law, with concerns about covert aggression, or coming to the aid of another and then remaining as the occupier of the defending country.'¹²² Therefore there is the possibility of an over-use of this concept by states, using it for their own political gain. Iraq is perhaps the best example here. In the initial aftermath of the Iraqi invasion of Kuwait in 1990, the collective action could be described legally as "collective self-defence." However, it is unlikely that this argument could extend beyond the expelling of Iraqi troops from Kuwait and restoring the previous *status quo*. Self-defence by its very name does not permit regime change.

From a positivist perspective, the initial justification for self-defence was the repelling of Iraqi forces from Kuwait. Once this was achieved, any reference to self-defence would be redundant and hence illegal.

UNSC authorisation

Under the Charter, States are authorised to use force when there is a clear enabling Resolution from the UNSC. In order for such a Resolution to be concluded, the UNSC must make a decision under Article 39 of the Charter, under which there must have been a "threat to the peace," "breach of the peace" or "act of aggression." If an affirmative answer is deemed to exist, then the UNSC can issue binding Resolutions under Article 41 (non –

¹²⁰ M G. Kohen, 'The use of force by the United States after the end of the Cold War, and its impact on international law', in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2008).

¹²¹ Adapted from A Roberts, 'Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?' in P Alston and E Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 193.

¹²² George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 64

military sanctions) and Article 42 (military sanctions). When acting in accordance with a UN Resolution duly enacted under this provision, states' use of force will be legal. Controversies appear in this category of 'legal' uses of force when states push the boundaries of the enabling resolution such as the 'continuing authority' theory of Resolution 678.

Historically, the original idea in the UN Charter under Article 43 was that the UN would have a standing army. This army would be at the disposal of the UN to carry out the terms of an enabling Resolution. However, following the failure to conclude such agreements which would have created such a force, states enforce UN Resolutions through a decentralised system. It has become a recognised and legal use of the Charter to enable 'coalitions of the willing' to act on behalf of the UN. The use of force in Iraq has been provided predominately by the UK and US, who have (or have not in some cases) acted as a coalition with UN approval through an enabling resolution.

When reading a UN Resolution, it is now established practice that the term 'all necessary means' is an authorisation for states to use force. Be that as it may 'the term 'all necessary means' is as much a limiting factor as a validating effect: action taken under the authorisation really has to be demonstrably 'necessary' for the achievement of the purpose laid down.'¹²³ If action is necessary to achieve a UNSC objective then this would be within the legality of international law. Blokker¹²⁴ argues that such delegation still needs to respect the authority and overall responsibility of the UNSC for maintaining peace and security. In contrast to Blokker's argument, this phraseology does not seem to have inhibited States in finding the necessary authority to act. The use of force in Iraq has consistently been cited as being within *the spirit* of Resolution 678. However, 'being within the spirit' in the sense of falling within the scope of the underlying purpose, would be deemed insufficient from a legalist approach. As in Iraq, the use of force is far beyond what was anticipated by the UNSC; and hence legalists will assure us of its illegality.

The decentralised system and lack of interpretive guidelines leaves the gates open for a varied interpretation of UN Resolutions by states. The argument put forward by the USA and UK governments for continued action in Iraq is based on the 'continuing' theory of the

¹²³ David M Malone, *The UN Security Council- From the Cold War to the 21st Century*, (Lynne Rienner Publishers 2004) 158.

¹²⁴ N Blokker, 'Is the Authorisation Authorised? Powers And Practice Of The UN Security Council To Authorise The Use Of Force By 'Coalitions Of The Able And Willing,' (2000) 11 *European Journal of International Law* 541.

enabling Resolutions. Resolution 678 was cited as the legal basis for the airstrikes of January 1993, on the grounds that the violation of Resolution 687 re-triggered the original mandate given to Coalition states. The UK repeated this claim in February 1998. However, although not without ambiguity, Resolution 678 of November 1990 related to the initial use of force against Iraq carried out in 1991. Arguably, any *subsequent* threats or uses of force needed to be mandated afresh.¹²⁵ Furthermore, in 2003, the USA and UK once again relied on the resurrection of Resolutions 678 and 687 - combined with Resolution 1441 - to commence military operations against Iraq.¹²⁶ These arguments clearly fall outside the strict legality doctrine, and thus will be debated at more length in the next Chapter.

Problems of Interpretation

There has been considerable academic debate over the interpretation of the meaning and scope of provisions relating to the use of force. Firstly, the Charter does not define what should or could constitute a 'threat or use of force.' Is this purely *armed* force, or can it be interpreted more broadly? Secondly, as suggested by Arend & Beck: 'what is a use of force against the 'territorial integrity' or 'political independence' of another state, or 'inconsistent with the Purposes of the United Nations?'"¹²⁷ These broad statements are not further clarified within the Charter, and it is the responsibility of individual states to interpret their meaning and scope in concrete situations.

Arguably a rigid interpretation of 'territorial integrity' and 'political independence' could allow a violation to have not taken place unless a portion of the State's territory is permanently lost.¹²⁸ From a broader view, it could be argued that any use of force without justification on another states' territory is an illegal use of force for the purposes of this definition. Furthermore, it would be a hard task to calculate all purposes either consistent or inconsistent with the UN unless the section is referring to those specifically listed in the Charter. The UN is constantly evolving, producing documents to match with the world order

¹²⁵ 'The Legality of the Threat of Force Against Iraq' [1999] 30 Security Dialogue 75.

¹²⁶ Discussed by Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) chapter 22; S. Chesterman, T M. Franck & D M. Malone, *Law and Practice of the United Nations* (Oxford University Press 2008) 74; A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 139.

¹²⁷ Anthony C Arend and Robert J Beck, *International Law & the Use of Force* (Routledge 1993) 36.

¹²⁸ Yoram Dinstein, *War Aggression and Self-Defence* (5th edn, Cambridge University Press 2012) 89.

at a particular point in time. Therefore, one would have to codify all the documents to present day to establish a full list of consistencies or inconsistencies.

Additionally, there is much controversy as to the issue of *pre-emptive self-defence*. Must a state wait until an attack has actually been launched before being in a position to protect itself? If self-defence is an inherent right and the purpose of the Article was not to restrict the pre-existing customary right, can it ever be extended if state practice conforms? A rigid, legalist interpretation would suggest that until the Charter is amended to reflect such a change then not, but on a broader, realist, interpretation if state practice would establish a new customary law permitting pre-emptive or anticipatory self-defence then it would be possible. Finally, the requirements for states to engage in acts of *collective* self-defence are not clear.¹²⁹ Article 51 permits collective action, but does not specify any limits. Therefore, this could be described as a creative ambiguity that leaves wide discretionary options open for States to interpret the provisions in their favour.

The term “aggression” is used in the UN Charter, it refers to an ‘act of aggression’ and ‘preventing or stopping aggression’ but it does not have a specific definition not even under International Criminal law post Nuremberg. The closest identification is that detailed in UNGA Res 3314 (XXIX) (14 December 1974) which states:

‘Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.’

This definition is broad but corresponds with the main aims of the UN Charter detailed in Article 2. The UNSC has on many occasions used the term aggression to seem to mean ‘with a use of force’ and this would be consistent in linking the definition provided above with the aims of the UN as a whole. However, this is the authors own interpretation of the issue, and highlights the difficulties that any academic or member of the UNSC would have in coming to a firm conclusion.

¹²⁹ Anthony C Arend and Robert J Beck, *International Law & the Use of Force* (Routledge 1993).

The threat or use of force is also problematic. Does this encompass pure 'aggression' or could knowledge that a state is preparing an attack, be encompassed? The text of the Charter specifically refers to 'international relations.' Hence, any internal use of force is not covered. This is perhaps a limiting factor, as it would be wise to allow states to come to the aid of one involved in civil war. The South Sudanese conflict beginning in 2011 already has a death toll at over 15,000.¹³⁰ The prohibition on the use of force is contained in both treaty and customary law, therefore the breadth of interpretation is wide, ranging from a fixed treaty based rule to a more flexible customary rule. Furthermore, Corten describes how both rules can have a flexible or restrictive nature.¹³¹ Therefore, a legalist approach in this regard could interpret the law across a wide spectrum as custom is as much a part of international law as treaties. What is further problematic, is whether a 'new' custom, is accepted as custom throughout the globe.

Strikingly, self-defence prior to the Charter was not defined. It was frequently referred to, but rarely sufficiently explained. Therefore, the extent to which self-defence could be utilised was unclear. It was assumed that if a state was attacked, it had the right to defend itself, but the parameters of the right were uncertain. Article 51 gives some restriction to the right by defining it as a response to an 'armed attack.' However, the exact limitations of the right can still be problematic. Armed attack is not defined further, therefore leaving open a gap for interpretation. Arend & Beck suggest, 'is this different to an act of aggression' found in Chapter VII?¹³² The solution has not been decided but it would be sensible to apply the definition from 1974 for its definitive nature.

Sovereignty is the intentional independence of a state that has the power to execute all necessary measures within its own borders to govern itself without fear of lawful foreign intervention. It could be considered the traditional lynchpin of international law and international relations. Therefore, any State using force, even against another deemed a hostile state, as falling into the status of an outlaw of humanity, can come under scrutiny when doing so without clear legal authority.

¹³⁰ http://www.nytimes.com/2014/01/10/world/africa/new-estimate-sharply-raises-death-toll-in-south-sudan.html?_r=1 ; <http://www.acleddata.com/?s=sudan> accessed 20th August 2104.

¹³¹ Oliver Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' [2006] 16 European Journal of International Law 803-822.

¹³² *ibid.*

Prior to 1945, the use of force was perfectly lawful and title to territory acquired through conquest was quite common. This, in effect, was a right to war. However, from the moment an “aggressive” use of force became unlawful (after the adoption of the Charter) it has been impossible for a state to acquire title to territory by conquest. For example, whether or not Iraq had a valid claim to parts of Kuwait’s territory, it could not obtain sovereignty over it by force of arms.¹³³

In *CND v UK*¹³⁴ the UK House of Lords had the opportunity to clarify the extent to which Resolution 1441 (2002) permitted the use of force beyond the enabling Resolution. CND sought judicial review as to whether the resolution authorised States to take military action in the event of non-compliance with the terms of the resolution by Iraq. This case declared that *a decision to go to war cannot legally be challenged*. Lord Justice Brown stated: ‘The court is unequipped to judge such merits or demerits and where in any event respect is properly due to the democratically elected government which is answerable politically for its actions.’ The House of Lords refused to consider judicial review: ‘How could our assumption of jurisdiction here be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?’¹³⁵

This case shows the continuing power of doctrines of state sovereignty and prerogatives that fall outside the realm of judicial review and legal challenge.

Conclusion

The analysis in this section has highlighted the problems inherent in a legalist analysis. That is, the rigidity of such a doctrine and how it faces challenge once the nature and scope of interpretative issues are properly appreciated. If one follows a legalist perspective then the law is unable to adapt to changing situations. What was envisaged when the UN Charter, may be obsolete or unworkable – such as Article 43 arrangements, and thus it would be wise to leave the option for a wider interpretation of the law. It would be sensible to allow interpretations of international law to reflect the changing degrees of consensus of states and the aims and objectives of the UNSC. WMD were not on the agenda when the UN Charter was written, this is clearly a huge development within the world states. ‘To deprive

¹³³ Mark Dixon, *Textbook on International Law* (6th edn, Oxford University Press 2007) 161.

¹³⁴ *CND v UK* [2002] EWHC 2777.

¹³⁵ *ibid.*

the international community of a reasoned basis for using force threatens Charter interests and values, rather than supporting and advancing them.¹³⁶ Therefore a strict positivist position is unwelcome in the contemporary era. Without adaptation of international law to meet modern needs, the outcome would be that many uses of force would be 'illegal' and therefore warrant sanctioning; with or without the ability of the UNSC to do so.

This Chapter has explained the meaning and scope of legal rules in "their strict sense" as legalism dictates. However, given its limitations, the next Chapter will look at law in action. How is the law on armed force applied in practical situations, and how could this be is beneficial for the international community? It will seek to identify pragmatic solutions in preference to a rigidly, positivist approach. It will consider the issues raised by the application of rules and principles to real cases of armed conflict from a contextual perspective upon international law. In order to discuss these viable options, the questions that will be considered are: What was the reason for intervention? Why was military force the only option? And what did the military force hope to achieve? These questions could all have an effect on the legitimacy of any use of force. If the use of force which does not fit neatly into one of the legal provisions relating to armed force meets the wider aims and objectives of a previous Resolution on the situation or the aims of the UNSC,¹³⁷ then there could be a claim for 'legitimate' use of the force. In a sense was it 'morally' right to use force in the hostile state, this will be considered in Chapter Four.

¹³⁶ A D Sofaer, 'On the necessity of pre-emption' [2003] 14 European Journal of International Law 209, 225.

¹³⁷ For example, the maintenance of peace and security.

Chapter Three

Do states act legally - or not - when using force?

This Chapter will discuss the legality, or the absence of such, in states use of armed force through the use of case studies. The intention is to establish whether states act within the ambit of the most viable interpretation of relevant international law when using force against an aggressive or hostile state.

This chapter will now consider the justifications given by states when engaging in armed force and as such the legality of those justifications. This chapter will conclude with an evaluation of the force used in Iraq, Afghanistan and Libya. The next chapter will continue with a discussion of the wider legitimacy of those actions which are technically 'illegal'.

There is firstly an important distinction to be made, that is the difference between jus ad bellum – the lawfulness of war, and jus in bello – the proper conduct of warfare regulated by the laws and customs of war including war crimes offences. This thesis is concerned mainly with the former, the jus ad bellum, although the concept of “aggression” that forms part of the latter will have some relevance. Is there a strict legal rule for any given use of force? And, if not, what are the wider justifications used by states?

As the major “subjects” of international law, States need to represent the international order because the order is itself an interstate-state in which treaty-making and custom are key sources. The role of states in ratifying treaty law and their actions that amount to customary international law are the main sources of law. Therefore, it is paramount that they adhere to the principles and rules of international law. International law recognises two exceptions to the prohibition on the use of force, action authorised by the UN Security Council under Chapter VII of the UN Charter and self-defence contained in Article 51.

In reality, state sovereignty is not as clear cut as the wording of the Charter would suggest. In a literal sense, no intervention is permitted, except in applying Chapter VII. However, the idea of “humanitarian intervention” could provide an avenue for not respecting sovereignty in its entirety. If an intervention has good cause or legitimate justifications but is not strictly legal should derogation from state sovereignty be permitted? An example is the current

action in the Middle East. This use of force is supposedly designed to make the countries safer, and expel 'rogue' governments. Nevertheless 'no matter how big or small, superpower or rogue regime, each state's sovereign 'privacy' is, at least in principle, to be protected.'¹³⁸ Boas argument is questionable as he uses the qualifying phrase 'in principle' therefore suggesting that at some point it may be acceptable to intervene. This author would argue that 'that point' is where there are justifications on the grounds of humanity.

The real problem with the idea of state sovereignty is the difference in equality of states. All states *should* be equal under traditional theories of international law. However, the size of armies, nuclear and chemical weapons and ultimately power all lead towards a sense of inequality. Furthermore, the current UNSC consists of five *permanent* members who ultimately have hierarchical power over all other states. The inequality of states inevitably supports a realist interpretation of international law which suggests international law is a part of international relations. Political realism in particular accepts that states will act as politics dictate thus acknowledging that those more powerful states can yield authority over weaker states that do not have the ability to have a substantial influence in the international arena.

The UNSC can legally authorise the use of military action by states through Chapter VII of the UN Charter. Article 42 is the authorising section, which states:

'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

Individual and collective self-defence are a legal exception to the prohibition on the use of force, now contained within Article 51 of the UN Charter. Article 51 uses the term 'armed attack.' Therefore, a state is only permitted to act under Article 51 if there has already been a *state-sponsored* strike: that is, an "act of aggression" or "use of force" from another state. This is in contrast to the rule pre 1945; Brownlie writing in 1963 in reference to the Kellogg-

¹³⁸ Gideon Boas, *Public International Law – Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 320.

Briand Pact refers to the ‘necessary reaction against the use or threat of force.’¹³⁹ It would seem that the mere ‘threat’ of force such as military preparations on a state border has been deliberately omitted from the UN Charter.

States might try to justify their intervention under one of the headings discussed below. This would not automatically make the action lawful in a legalist sense; however supporters of realism and natural law theory could find legitimacy in the use of force with good justifications. Chapter VII action and self-defence are undoubtedly lawful; the other justifications are not as clear. This chapter will now consider each justification and its legal status in detail, continuing with an evaluation of the force used in Iraq, Afghanistan and Libya. The next chapter will continue with the morality of those actions which are technically ‘illegal’.

Interestingly, Roberts questions the terminology ‘technically’. ‘Unilateral uses of force are not illegal because they breach a technical rule; they are illegal because they breach a fundamental Charter obligation.’¹⁴⁰ The “illegal” nature of the use of force can be vast, ranging from the NATO action in Kosovo which had no basis in international law, to the action in Libya 2011 - which merely went beyond Resolution 1973 in order to bring about a desired result supported by the UN. Therefore ‘technically’ in this thesis refers to those uses of force which might be illegal but which are still within the spirit or objectives of the agreed use of force. Furthermore, ‘technically illegal’ action in Kosovo was not condemned, nor were sanctions applied. Therefore, this author would argue that even though NATO applied an illegal use of force, it did not ‘breach a fundamental Charter obligation.’

Whereas Chapter two considered solely the legal element of uses of force in principle and on paper, this thesis now considers the use of force in action.

Anticipatory self-defence

Historically, it was generally assumed that customary law permitted anticipatory action in face of imminent danger. The Caroline Case of 1837 is an example of this where it was argued: ‘A necessity of self-defence and self-preservation, gave them the right to destroy

¹³⁹ *ibid* 241.

¹⁴⁰ A Roberts, ‘Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?’ in P Alston and E Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 186.

the 'piratical' vessel within US territory.¹⁴¹ The key terms being 'self-preservation' and 'necessity,' which could be assumed here to permit anticipatory action when there is a known threat against the security of the state. However, in order to strike first the necessity of self-defence must be: 'instant, overwhelming, leaving no choice of means and no moment for deliberation.'¹⁴² Necessity must also be determined in light of the circumstances; there must be no other reasonable alternative to avoiding the threat other than armed force.¹⁴³ The threat must also be both imminent and extreme, and involve impending destruction.¹⁴⁴ It is the use of the word 'impending' that suggests anticipatory action is permissible. It does not require an attack to have taken place.

Presently, the issue of anticipatory action is perhaps redundant. It has been debated at length in international law scholarship and cases. Hence, the founders of the UN Charter could have taken the opportunity to address it, if they had so wished. This would assume that it was purposefully omitted from the text. However, increasingly it has become questionable whether there is a customary law right of states to engage in *anticipatory self-defence*. The text of Article 51 '*armed attack*' would suggest a negative answer to the question. The ICJ in the *Nicaragua*¹⁴⁵ case did not take the opportunity to specify the content of the customary rules referred to in Article 51; in particular, whether it included the old rule providing for a right to anticipatory self-defence.¹⁴⁶ Controversially, maintaining a rule against anticipatory action would 'protect the aggressor's right to the first stroke.'¹⁴⁷ Furthermore, Article 51 does not 'impair the inherent right of individual or collective self-defence.' Inherently, customary law permitted anticipatory uses of force. Brownlie¹⁴⁸ does not agree, giving a vague reasoning that any argument to the contrary is either unconvincing or based on inconclusive pieces of evidence. By contrast, Corten argues 'a strict reading of Article 51 is no longer tenable in the face of modern terrorism and aggression.'¹⁴⁹ It must be remembered that Brownlie was writing over fifty years ago and hence Corten's argument is perhaps the more plausible in the current context. The proliferation of WMD and terrorist

¹⁴¹ A D Sofaer, 'On the necessity of pre-emption' [2003] 14 European Journal of International Law 209-226.

¹⁴² The Webster Formula: http://www.judicialmonitor.org/archive_spring2009/generalprinciples.html accessed 28th August 2014.

¹⁴³ A D Sofaer, 'On the necessity of pre-emption' [2003] 14 European Journal of International Law 209-226.

¹⁴⁴ K. R. Stevens, *Border Diplomacy* (University Alabama Press 1989) 35.

¹⁴⁵ *Nicaragua v United States of America*, ICJ, 27 June 1986, in ICJ Reports 1986.

¹⁴⁶ Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 359.

¹⁴⁷ Ian Brownlie, *International Law and the Use of Force* (Oxford University Press 1963) 276-77.

¹⁴⁸ *ibid*

¹⁴⁹ Oliver Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' [2006] 16 European Journal of International Law 803-822.

groups could mean that anticipatory action is not only a possibility but is an essential element of modern international law. Chemical warfare may mean that time is of the essence, and a state simply cannot wait for an attack to be launched, if it does so, it will be not be a state in a position to repel the attack.

Brownlie uses the terms anticipatory and preventive interchangeably in his text. Yet this is in itself problematic as it would appear there is no significant distinction between the two. Anticipatory self-defence would suggest that an attack is foreseeable, a preventive use of force is to destroy the possibility of an attack. The two categories are closely related, but there is some distinction. Preventive action would suggest that an attack is only a potential, thus leading this argument to be weaker than anticipatory action which would imply that there is evidence to suggest an attack is likely. Although not identical neither is clearly identified as legal within the UN Charter.

If armed force is launched before the attack is 'imminent,' then there must be a determination of the certainty of attack; and there must be a consideration of questions of "proportionality."¹⁵⁰ The 'defendant' state must have a degree of confidence that armed force is to be used against them, however, at what level? WMD were identified as the reason for using force in Iraq. Yet the claims were still ill-founded. Therefore, one cannot be entirely certain of an attack until that attack has been launched. In addition, any force used to repel an 'impending' attack must be proportional. If the attack has not been launched, the amount of armed force needed may not be clear. Furthermore, if the 'proof' of attack is ill-founded, could self-defence from the defending state be considered "aggression" which the initiator state could then lawfully respond to with military force? It is a problematic circle. Fletcher & Ohlin reiterate this by stating: 'If every state prosecuted its strategic interests by launching pre-emptive attacks, the world would indeed collapse back into a state of nature.'¹⁵¹ This is an interesting insight, and suggests that if every state responded to 'ideas' by launching attacks then the world would become a place of lawlessness.

Terrorism is a use of force that has led to states wanting to take pre-emptive action. The dangerousness of WMD means that a state may not have time to wait until an attack has

¹⁵⁰ Ian Brownlie, *International Law and the Use of Force* (Oxford University Press 1963) 259.

¹⁵¹ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 57.

been launched against them.¹⁵² Accordingly, is it possible that preventive or anticipatory self-defence now needs to be addressed by the UNSC and incorporated into the UN Charter? Since August 1990 there has not been a determination of the existence of a breach of the peace by the UNSC. Instead, it has identified a 'threat to the peace'. Could this lead to a doctrine of pre-emption being developed? To name but a few: Resolution 1973 (2011) of 17 March 2011, referred to the situation in Libya as a "continued threat to international peace and security." In 2008 and 2009 the Council also determined that the situations in Afghanistan, Lebanon, the Sudan and Darfur continued to constitute threats to international peace and security.¹⁵³ In 2004-2007 the Council identified certain generic threats to peace and security, such as the proliferation of weapons of mass destruction and the proliferation and illicit trafficking of small arms and light weapons.¹⁵⁴ This is important because such identifications of 'a threat to the peace' are key arguments in the development of anticipatory self-defence as a legal doctrine. If the UNSC are prepared to accept a "threat", then they must also identify when such a threat can be avoided. Arguably, it would be absurd to suggest that a threat is real, but that nothing can be done until that threat is launched, particularly with reference to WMD.

The concept of anticipatory self-defence was supported by the UN High-Level Panel on Threats, Challenges and Change. This panel is clear that the threat must be *imminent* and nothing short of this should suffice. The report appears to give support to the position that a state can use force to prevent an imminent attack on its own territory.¹⁵⁵ In light of the above commentary, this could be a welcomed addition.

Humanitarian Intervention

Another argument used by states for intervening with armed force is that of humanitarian intervention. Humanitarian intervention is the use of military force on the territory of a state, without that states consent, and with the goal of protecting innocent victims of large-scale atrocities. 'The issue of humanitarian intervention arises in cases where a government has turned the machinery of the state against its own people, or where the state has collapsed into lawlessness.'¹⁵⁶ An example of this is the ethnic cleansing by Serbian forces in

¹⁵² John Janzkevic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 102.

¹⁵³ http://www.un.org/en/sc/repertoire/2008-2009/Part%20VII/08-09_Part%20VII.pdf p.9.

¹⁵⁴ http://www.un.org/en/sc/repertoire/2004-2007/04-07_11.pdf p.943.

¹⁵⁵ Gideon Boas, *Public International Law – Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 334.

¹⁵⁶ Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 27.

Kosovo, 1999. In August 2014 a ‘humanitarian crises’ was described in Iraq.¹⁵⁷ Civilians trapped on a mountain top with limited to no food and water supplies, prompted the USA to enter the country for the third time with armed force.

‘Humanitarian intervention’ has a long history. Three European powers, England, France and Russia intervened in Greece in 1827 to stop massacres by Turkey, and France intervened again in Syria in 1860 to stop the killings of Maronite Christians. Various European powers intervened in defence of Christians also in Crete (1866-1868), the Balkans (1875-1878) and Macedonia (1903-1908).¹⁵⁸ As Brownlie states:

*‘The classical writers on the law of nations stated in very general terms that a war to punish injustice and those guilty of crimes was a just war. By the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention existed.’*¹⁵⁹

This theory links a ‘just’ war with that of a humanitarian war. The two ideas could be linked but are not necessarily so. A ‘just’ war could extend far beyond the realms of humanity by a state seeking ‘justice’; this would share beliefs with natural law theory. Zolo also argues that ‘humanitarian interference’ could be ‘another incarnation of the doctrine of just war: an intolerable ethical and legal swindle, or, at best, an irresponsible self-delusion.’¹⁶⁰ In contrast, humanity taken by itself is not as broad as Zolo might suggest. The use of force to protect citizens may be termed ‘just’ in that it is the right action to take, but this does not mean that it will revert back to the historical idea of engaging in a ‘just war.’

This second point made by Brownlie acknowledges more closely the link to ‘humanitarianism’. However, as with the present day, there is no further definition of the extent of the parameters of waging such a ‘humanitarian’ war.

A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable

¹⁵⁷ Telegraph Newspaper 27th August 2014.

¹⁵⁸ Ramesh Thakur ‘Humanitarian Intervention’ in *The Oxford handbook of the United Nations*, eds. Thomas G Weiss and Sam Daws (Oxford University Press 2007) 392.

¹⁵⁹ Ian Brownlie, *International Law and the Use of Force* (Oxford University Press 1963) 338.

¹⁶⁰ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 87.

to action by any state which was prepared to intervene. The doctrine was inherently vague.¹⁶¹

Brownlie offers no further explanation. In one respect, his idea is clear: humanitarian suffering warrants action, but the extent to which action is permitted is not. This theory is largely replicated in the present day. There is no succinct definition and no clear legal boundaries when it is not authorised by the UNSC.¹⁶²

In *Nicaragua*¹⁶³ the ICJ ruled against humanitarian intervention under specified conditions whilst recognising it had a legal basis in the remainder if pursued consistently and in a principled way: 'If the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of another state, it must be limited to the purposes hallowed in the practice of the Red Cross, and above all be given without discrimination' (paragraph 2). The practice of the Red Cross is to deliver food, water, shelter and medical aid. The Red Cross does not adhere to the practice of armed force stating that it should only 'sound the alarm' and will not use force to bring an end to hostilities.¹⁶⁴

This case shows the two-sided nature of humanitarian intervention. Predominately, the argument against humanitarian intervention is its inconsistent nature. Without a clear doctrine it is not applied consistently and the political realist would assume that this is because of the intent of the powerful states to realise only their own politically defined national interests. However, the morality of intervention in states persecuting citizens is obvious.¹⁶⁵

Humanitarian intervention can be based on a wider reading of Article 2(4) that acknowledges the necessity of temporary violations to territorial sovereignty to prevent the loss of life.¹⁶⁶ The UK explicitly claimed to be acting under the doctrine of humanitarian

¹⁶¹ Ian Brownlie, *International Law and the Use of Force* (Oxford University Press 1963) 338.

¹⁶² The UNSC has authorised 'humanitarian' action, an example of which is Resolution 837 (Somalia) which authorised that UNITAF troops could use "all necessary measures" to guarantee the delivery of humanitarian aid in accordance to Chapter VII of the United Nations Charter.

¹⁶³ *Nicaragua v United States of America*, ICJ, 27 June 1986, in ICJ Reports 1986.

¹⁶⁴ http://www.icrc.org/eng/assets/files/other/527-532_ryniker-ang.pdf accessed 29th August 2014.

¹⁶⁵ Ramesh Thakur 'Humanitarian Intervention' in *The Oxford handbook of the United Nations*, eds. Thomas G Weiss and Sam Daws (Oxford University Press 2007) 392 'When a particular state either is unwilling or unable to fulfil its responsibility to protect or is itself the perpetrator of crimes or atrocities; or where populations living outside a particular state are directly affected by actions taking place there. The fall back responsibility requires that in some circumstances action must be taken by external parties to support populations that are in jeopardy or under serious threat.'

¹⁶⁶ *ibid* 38.

intervention when justifying its actions in Northern Iraq in 1991 and Kosovo in 1999.¹⁶⁷ However the argument in support of the establishment of safe havens and no-fly zones [in Iraq] was based on Security Council Resolution 688. It was not adopted under Chapter VII UN Charter and did not include the phrase ‘all necessary means’ but did implicitly authorise a restricted use of force for protecting the Kurds and Shi’ites in Iraq.¹⁶⁸ Along similar lines, it was argued with respect to the North Atlantic Treaty Organization (NATO) intervention in Kosovo that the NATO bombardments could be justified on the basis of UNSC Resolution 1199 of 23 September 1998 (SCOR 53rd Year 13, Para. 16). This measure provides that the Council would consider additional measures if the ones provided for in UNSC Resolution 1160 of 31 March 1998 (SCOR 53rd Year 10) did not lead to the desired results, such as the defeat of violence and terrorism.¹⁶⁹ NATO also argued that the ethnic cleansing carried out by Serbian forces was a humanitarian catastrophe.¹⁷⁰ Arguably the clear pronouncement to be acting under UNSC resolutions weakens the reasoning for the emergence of the doctrine. This is because those states are not specifically referring to the doctrine, developing it into customary practice; rather they are more concerned with present law.

The US has been more cautious in its reasoning, referring repeatedly to ‘humanitarian concerns’ but never explicitly claiming the existence of a customary rule thus further weakening any potential argument. The USA also admitted (perhaps by accident) ‘that besides humanitarian reasons, the war had to do with the security, economic prosperity and international prestige of their countries.’¹⁷¹ Germany, gave its consent to the Kosovo intervention only on the condition that it was made clear that this was not a precedent for further action.¹⁷² Highly critical of the doctrine is the argument by Zolo that the USA must ‘invent’ new forms of legitimate uses of force in order to promote its hegemonic stability.¹⁷³ ‘Realists argue that intervention [in Kosovo] was ultimately about upholding the credibility of NATO.’¹⁷⁴ However, this argument is flawed; the action also restrained Milosevic’s action. The Independent Commission found the action to be illegal but legitimate by stating: ‘the

¹⁶⁷ Michael Byers, ‘Terrorism, the use of Force and International Law after 11 September,’ (2002) 16 *International Relations* 155.

¹⁶⁸ Vaughn Lowe and Antonios Tzanakopoulos, ‘Humanitarian Intervention’ (2010) *Max Planck Encyclopedia of Public International Law* <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306#law-9780199231690-e306-div1-1>> accessed 1st July 2014

¹⁶⁹ *ibid*

¹⁷⁰ <http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990323/debtext/90323-06.htm> accessed 28th August 2014.

¹⁷¹ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 39.

¹⁷² Michael Byers, ‘Terrorism, the use of Force and International Law after 11 September,’ (2002) 16 *International Relations* 155.

¹⁷³ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 57.

¹⁷⁴ Jennifer M Welsh, ‘Taking Consequences Seriously: Objections to Humanitarian Intervention in Jennifer M Welsh (eds) *Humanitarian Intervention and International Relations* (Oxford University Press 2006) 58.

Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.¹⁷⁵ It is arguable the action in Libya (2011) could be classified as 'illegal but legitimate' in that the use of force from a realist perspective restrained the rule of a dictator and liberated the civilian population thus achieving a pragmatic effect. However, no such declaration has been made, albeit there has been little question over the 'legality' of the use of force in this instance. Furthermore, any action that may be taken against Syria for the use of chemical weapons, without UNSC authority could fall into this category. Notably, no armed force since Kosovo has officially gained the title 'illegal but legitimate.'

Paust's view of the Kosovo intervention is interesting. He states that the action was legal under Article 52 of the UN Charter as 'they promoted peace, security, self-determination, and human rights in the area.'¹⁷⁶ Which he rightly assumes are values of the UN.¹⁷⁷ However, Article 52 refers specifically to the 'peaceful settlement of disputes'. If a dispute cannot be rectified peacefully then it must be referred to the UNSC. Therefore Paust's argument is flawed in this sense, as the intervention in Kosovo involved the use of armed force.

The legality issue of humanitarian intervention has not been confirmed. There is certainly no provision within the UN Charter for humanitarian intervention. Yet Zolo suggests that the right to employ armed force to counter acts of "aggression" threatening peace is being replaced by the principle or rhetoric of "the defence of human rights."¹⁷⁸ It could be a dangerous tool as states may use it as a self-serving instrument to authorise their own gains. On the other hand, it could be described as inhumane to leave citizens suffering in a state where their own governments could or did not want to help them. Nevertheless history has repeatedly evidenced such inaction. In a critical vein, humanitarian intervention is a phrase

¹⁷⁵ Independent Commission on Kosovo 2000 p. 4

¹⁷⁶ Jordan J Paust, 'Use of Military Force in Syria by Turkey, NATO, and the United States' [2013] 34 *University of Pennsylvania Journal of International Law* 431.

¹⁷⁷ Article 52 states: Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

¹⁷⁸ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 3.

used to gather consensus for war, which almost inevitably will have harsh consequences on both sides.¹⁷⁹

However, in practice, the realists are right to recognise that the appeal to HI is *a highly selective tool*. The Rwandan genocide of 1994 which is clearly a humanitarian catastrophe had no interest for intervention from states. The current problems in 2013 with Somali piracy have attracted attention because of the oil interests, however clear humanitarian interest does not always attract attention. 'The end of the U.S. war in Vietnam led [a] form of piracy, aimed at the mass migration of people from Vietnam. These pirate attacks were largely ignored by regional governments, which hoped to stem the flow of refugees.'¹⁸⁰ It is this selectivity and thus unreliability of intervention that makes humanitarian rhetoric sound one-sided, hypocritical or even false.¹⁸¹

In light of this arbitrary and self-interested selectivity, humanitarian intervention can be described as an: 'excuse or mitigating circumstance rather than an exculpatory defence.'¹⁸² It cannot be exculpatory as the intervening state still had the intention to intervene with armed force. There was a reason for the use of force, such as a humanitarian catastrophe, a very good reason, but this does not mean that the intervener did not intend it. It means the intervener had 'good' humanitarian motives for intervention. Therefore from natural law theory this excuse or justification for a particular use of force would almost certainly be deemed legitimate through its moral implications. Realists are also likely to argue in favour of the legitimacy of humanitarian intervention through its pragmatic effects; that is the relief of humanitarian suffering.

Responsibility to Protect

The responsibility to protect (R2P) in its present form has become a live issue since 2005 when it was unanimously adopted at the World Summit. Prior to this in September 2000 the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) to discuss the issue. The World Summit outcome was that R2P would now only apply to mass atrocity crimes (genocide, war crimes, crimes against humanity and ethnic cleansing), rather than human rights violations.

¹⁷⁹ *ibid* 38.

¹⁸⁰ <http://www.virginia.edu/colp/pdf/Piracy-and-Maritime-Crime-NWC-2010.pdf> p.223

¹⁸¹ Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 40.

¹⁸² A Roberts, 'Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?' in P Alston and E Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 192.

Presently only the UNSC is authorised to use this doctrine. It does not legalise unilateral intervention, therefore it is subject to the political dimensions of the Security Council. However, it has been suggested that the use of the veto should be restricted when the UNSC are discussing issues falling within this doctrine. The responsibility to protect involves the ideas of prevention, reaction and rebuilding. 'The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk.'¹⁸³ Arguably, military intervention is the most severe option, only warranted when there is: 'large-scale loss of life due to deliberate state action, neglect or inability to act, or a failed state situation; or large-scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.'¹⁸⁴ This doctrine is closely linked to humanitarian intervention, they certainly overlap. It endorses similar ideas about protecting the citizens of hostile governments and states.

Protection of nationals abroad

Legal scholars, as well as states, have long disagreed on the compatibility with the UN Charter of the so-called 'protection of nationals' doctrine. Unwelcomingly it is not legally defined but there are recommendations for its use. This doctrine suggests that states are allowed to forcibly intervene in other countries for the protection of their own endangered nationals abroad, subject to the following (cumulative) conditions: (i) there is an imminent threat of injury to nationals; (ii) a failure or inability on the part of the territorial sovereign to protect them and; (iii) the action of the intervening state is strictly confined to the objective of protecting its nationals.¹⁸⁵

It is arguable that state intervention to protect nationals is a form of self-defence.¹⁸⁶ This is seen as the 'better view'.¹⁸⁷ It could be assumed that it is seen in this way because of the legal nature of self-defence through customary law and the UN Charter¹⁸⁸ and the non-legal nature of the protection of nationals. States could interpret the protection of nationals as

¹⁸³ Ramesh Thakur, *The United Nations, Peace and Security*, (Cambridge University Press 2006) 256.

¹⁸⁴ *ibid* 258.

¹⁸⁵ Tom Ruys, 'The 'Protection of Nationals' Doctrine Revisited' [2008] 13 *Journal of Conflict and Security Law* 233.

¹⁸⁶ The interventions in Suez (1956), Lebanon (1958), Congo (1960), Dominican Republic (1965) to name but a few used this justification at least in part. See Christine Gray, *International Law and the Use of Force*, (3rd edn, Oxford University Press 2008) 157.

¹⁸⁷ *ibid*.

¹⁸⁸ Melina Sterio, 'Humanitarian Intervention Post-Syria: Legitimate and Legal?' *Cleveland-Marshall Legal Studies Paper No. 14-262* (15 January 2014). Examples of self-defence include the British government in Suez 1956; USA invasion of Grenada in 1983 and again in Panama in 1989. Examples of rescuing hostages include the Israeli intervention in Uganda to release hostages from a hijacked plane; and the US intervention in Iran to rescue hostages from the US Embassy.

an extension of the defence of the state through their citizenship. Realists would agree with the pragmatic results of using self-defence in this way. However, if international relations dictate that there is a doctrine of the protection of nationals, then it would make sense to implement that into international law to ensure clarity on the use of the doctrine. As it is from a legalist perspective it would seem to demonstrate the non-legal nature of such use of force.

The Israeli rescue of citizens from a hijacked plane on the territory of Uganda in 1976 (Operation Entebbe) was declared by the UK and USA as a legal use of force. Though only specifically referred to as self-defence by Western Germany, other European countries praised the action. The UK and USA declared that it was not a violation of the territorial integrity or political independence of Israel. The purpose of the intervention by Israel was to rescue its nationals from an Air France plane that had been hijacked by two Palestinian and two German nationals. However many other states rejected the idea and saw the action as a breach of Article 2(4).¹⁸⁹ This reiterates the idea that states are not in agreement about widening the scope of individual action. It reiterates the fears of expanding the resort to unilateral use of force, even when there is a justifiable reason for intervention.¹⁹⁰ On the other hand, the support Israel received from advocates highlights the 'persuasive power of a well-presented and demonstrated case.'¹⁹¹

This argument exemplifies the alarm of weaker states, but also the clear "humanitarian advantage" to allowing such use of force. Brownlie adds to the negative part of this argument, suggesting that forcible intervention to protect nationals is open to abuse, and is itself unlawful.¹⁹² This reiterates the problems with state assistance when it is in their national interest.

Despite this, in a similar vein to humanitarian intervention, it would be unwelcome to suggest that a state cannot protect its nationals who are experiencing harm abroad. Arguably, if a state uses force against another to protect nationals, then they are breaching the national sovereignty of the target state, which is a central normative element of the UN system. However, the doctrine only applies when the target state is at war, and therefore, particularly if the target state is the 'aggressor state,' it would be wise to permit a

¹⁸⁹ Gideon Boas, *Public International Law – Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 315.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.* 316; Thomas M Franck, *Recourse to Force: state Action against Threats and Armed Attacks* (Cambridge University Press 2002) 85.

¹⁹² Ian Brownlie, *International Law and the Use of Force* (Oxford University Press 1963) 301.

temporary derogation of sovereignty. One could assume from this argument that if protection of nationals is a humanitarian concern, and self-defence is not a legal possibility, then intervening states will nevertheless use force based on humanitarian grounds. The argument above in relation to humanitarian intervention would then be relevant here. It would be logical to assume that intervening states will always find a justification for action regardless of any legal basis.

In order to apply the law to factual circumstances there will be a case-study analysis. Iraq, Afghanistan and Libya have been chosen as the studies as they span the 1990's through to present day, this allows for a comparison across the decades. Iraq is well documented and sets the scene for the next generation use of force. This section will highlight the problems with a restrictive legalist approach to this area of law, and how states have begun to justify their actions from a realist or cosmopolitan perspective.

Iraq 1990-1998

The 1991 Gulf War was a war about restoration of Kuwaiti sovereign territory and continuing western access to oil reserves in response to an attack by Iraq.¹⁹³

The initial authorisation to use force against Iraq in 1990 was only the second time in which the UNSC 'authorised' states to take collective action on its behalf. The first time was the use of force against Korea in 1950.¹⁹⁴ Resolution 678 of 29 November 1990 authorised under Chapter VII, those member states cooperating with Kuwait to employ 'all necessary means' to uphold and implement Resolution 660. By 27 February 1991 the Iraqi forces were routed and Kuwait liberated. Once Iraq accepted all relevant Council Resolutions later that day, President Bush declared a cessation of hostilities.¹⁹⁵ Therefore the initial action against Iraq in 1990 has a clear, sound basis in international law and does not need further discussion.

¹⁹³ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 22.

¹⁹⁴ This action against Korea was the only use of force authorised by the UNSC during the Cold War in response to a breach of the peace by a state. The SC determined in Resolution 82 (1950) that North Korea had made an armed attack against South Korea and this constituted a breach of the peace. Resolution 83 (1950) recommended member states to 'furnish such assistance to South Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'. See also, Christine Gray, *International Law and the Use of Force*, (3rd edn, Oxford University Press 2008) 258-9.

¹⁹⁵ J Cockayne & D M. Malone, 'The Security Council and the 1991 and 2003 Wars in Iraq', in V Lowe, A Roberts, J Welsh and D Zaum (eds), *The United Nations Security Council and War – The Evolution of Thought and Practice since 1945* (Oxford University Press 2010) 388.

The no-fly zones imposed after the cease-fire in April and May 1991 and the attack against the country in 1998 do not have a clear (if any) legal basis. Western States, with the U.S at the fore, threatened the use of force against Iraq in February and November of 1998. The two states acted on these threats between 16 and 19 December 1998. The airstrikes proposed and carried out were directed solely at enforcing the disarmament provisions of UNSC Resolution 687 (1991) which Iraq had undoubtedly not complied with; however, this does not necessarily mean that such uses or threats of force were necessarily lawful.¹⁹⁶ The argument put forward by the coalition was a 'continuing' authority based on the non-compliance with Resolution 678. If this was the correct position, when would resolution 678 have become inoperative without an express statement from the UNSC?¹⁹⁷ This would seem to be a bizarre position. Resolution 678 cannot realistically be used as the legal basis for threats or uses of force subsequent to the formal ceasefire in Resolution 687. Resolution 687 stated that the UNSC: 'Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.' Therefore, the UNSC quite clearly affirm that they will be responsible for any future decisions concerning the situation in Iraq.

The UK and USA also interpreted Resolution 949 as giving them authorisation to use force in the event of further non-compliance by Iraq.¹⁹⁸ Resolution 949 again condemned the Iraqi action, but again stated that the UNSC remain 'actively seized of the matter.'¹⁹⁹ The UNSC once again had the opportunity to legalise any use of force, but decided against. Iraq pulled back its army in this instance rendering the debate moot;²⁰⁰ however it is important to note that the intention from the coalition was prominent.

The 'illegal' nature of the use of force is further exemplified by the failure of the USA and the UK to secure an enabling resolution against Iraq in June 1996 and again November 1997. The UNSC had ample opportunity to legalise the use of force and failed to do so. China and Russia may have been a threat to using the veto as they tend to support pro-sovereignty, they were not at ease with the way in which NATO action in Kosovo was implemented

¹⁹⁶ Nigel D White, 'The Legality of the Threat of Force Against Iraq' [1999] 30 Security Dialogue 75.

¹⁹⁷ *ibid.*

¹⁹⁸ J Cockayne & D M. Malone, 'The Security Council and the 1991 and 2003 Wars in Iraq', in V Lowe, A Roberts, J Welsh and D Zaum (eds), *The United Nations Security Council and War – The Evolution of Thought and Practice since 1945* (Oxford University Press 2010) 393.

¹⁹⁹ SC Res. 949 of 15 Oct. 1994.

²⁰⁰ J Cockayne & D M. Malone, 'The Security Council and the 1991 and 2003 Wars in Iraq', in V Lowe, A Roberts, J Welsh and D Zaum (eds), *The United Nations Security Council and War – The Evolution of Thought and Practice since 1945* (Oxford University Press 2010) 393.

without UNSC authorisation and both challenged humanitarian intervention.²⁰¹ However, is not the purpose of the UN to act on behalf of all states? If two states are willing to take coalition action if they cannot achieve what they want individually, then the role of the UN to authorise 'legal' armed force is weakened. 'Indeed, it is generally felt that the war for Kosovo speeded up the decline of the United Nations' authority and role, a process that had started in the early 1990s.'²⁰²

Resolution 1154 (2nd March 1998) appears to add to the 'illegality' of armed force. The Resolution did not contain the necessary phraseology to warrant armed force, and the last paragraph stated the Council will 'ensure implementation of the resolution.' It would seem apparent that the Council were to maintain in control, thus not authorising unilateral action.

In a different vein, the USA argued self-defence in terms of armed force against Iraq in June 1993. This was in response to a failed plot to assassinate President Bush. A similar argument was used in 1998 to justify missile attacks against Osama Bin Laden's training camps in Afghanistan and a Sudanese pharmaceutical plant, in response to the bombing of US embassies. Although the bombing of embassies and assassination attempts should not be seen as marginal, Article 51 requires an armed attack against a member state; therefore a wide reading of Article 51 would be required to encompass these acts.

In summary, the attacks on Iraq in the 1990's after the initial use of force to repel the armed attack, did not have a sound basis in international law, a legalist approach would not agree with the extended use of force. It is far reaching to assume that legality stems from a continuing authority of UN Resolutions, in particular as a result of the inability of the coalition to secure an authorising resolution. If the objective of the UNSC had been to allow the continued use of force, then the UNSC would have done so authoritatively. However, from a realist and natural law perspective the next chapter will consider whether this illegal use of force was practical and can be justified and if so, does it deserve the term 'illegal'?

Iraq 2003

In March 2003, when the United States and the UK once again used force against Iraq, they relied again on the "continuing authority" of Resolutions 678, 687, and 1441. An argument

²⁰¹ Ramesh Thakur, *The United Nations, Peace and Security*, (Cambridge University Press 2006) 218.

²⁰² Danilo Zolo, *Invoking Humanity – war, law and global order* (Continuum 2002) 81.

already advanced for the use of force in the 1990's. Resolution 1441 did not contain any automaticity for the use of force, nevertheless, both the US and UK engaged in unilateral interpretations of 1441 as permitting them to use force against Iraq. This was based on the concept of 'material breach' and Iraq facing 'serious' consequences' due to its non-compliance. The UK subsequently argued that Resolution 1441 signified that the SC endorsed its position that material breach of the disarmament provisions of UNSC Resolutions from 687 of 3 April 1991 to 1441 suspends the operation of the cease-fire Resolution 687, thus allowing states to use force under the open ended provisions of Resolution 678 of 29 November 1990.²⁰³ This was not however what it appears the UNSC had in mind. Resolution 1441 did not contain the authorising words 'all necessary means' which could have been included had the Council intended the use of force. In sum, Resolution 1441 did not offer a clear, unambiguous mandate to engage in force. Furthermore, the draft resolution presented by the UK, US and Spain on 24 February 2003 was blocked on 5 March by the Foreign Ministers of France, Germany and Russia.²⁰⁴ Therefore the use of force had not been contemplated by the UNSC.

Arguably if there was a belief, albeit a mistaken one of weapons of mass destruction (WMD) as long as it was genuinely held, this could raise an excuse for engaging in force. However, it is important to note that this is an excuse, not an authorisation to engage in armed force. Furthermore, to be an appropriate excuse once WMD and terrorist links were not found, the use of force should have ceased. What ensued was a: 'mantra of 'regime change' and an apparent sudden need for democracy in Iraq (as perceived by the coalition of the willing governments).²⁰⁵ This is against the rule in international law that one *cannot engage in armed force to secure regime change*. Therefore, the argument that a mistaken genuine belief could be an excuse is redundant in this case.²⁰⁶ However, Dinstein would question this argument. He states the lack of WMD is irrelevant. The 'material breach' was not confined to dismantling WMD, it was to 'cooperate fully with UN weapons inspectors.'²⁰⁷ Secondly weapons inspectors spoke of the breach, and thirdly legality or illegality must be judged at

²⁰³ *ibid.*

²⁰⁴ J Cockayne & D M. Malone, 'The Security Council and the 1991 and 2003 Wars in Iraq', in V Lowe, A Roberts, J Welsh and D Zaum (eds), *The United Nations Security Council and War – The Evolution of Thought and Practice since 1945* (Oxford University Press 2010) 401.

²⁰⁵ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 22.

²⁰⁶ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 173.

²⁰⁷ Yoram Dinstein, *War Aggression and Self-Defence* (5th edn, Cambridge University Press 2012) 323.

the time the action is undertaken.²⁰⁸ This argument gives more substance to the legitimate use of force when it is justified for profound reasons.

*'Washington had five great claims for the war on Iraq: the threat posed by WMD proliferation; the threat of international terrorism; the need to establish a beachhead of democratic freedoms and the rule of law in the Middle East; the need to bring Saddam Hussein to justice for the atrocities committed by his regime; and the duty to be the international community's enforcer.'*²⁰⁹

The UN has acknowledged such claims but the evidence for them was weak. Therefore, are these reasons legitimate claims to wage a moral war? Was the removal of Saddam beneficial to Iraq? Thakur advises that 'Saddam would have returned to his familiar game of cheat, deny, defy, retreat and live to cheat another day.'²¹⁰ Nevertheless 'Saddam had been successfully contained and disarmed and did not pose a clear and present danger to regional, world or US security.'²¹¹ Therefore there is argument to support his removal but the proportionality of the use of force to do this could be questioned. If the threat had been removed, it would be logical to suggest that a further use of force was not required. However, in order to suppress the claim that he would return to his usual ways or indeed to ensure he would not, he would have required indefinite detention or detention until he was rehabilitated. The practicalities of which are unknown.

A different, but interesting angle is the suggestion that the coalition action did not need another UNSC Resolution. The inability to secure an authorising resolution 'was regrettable from a political standpoint. But legally speaking, such an additional resolution was not required.'²¹² This logic does not require the Coalition to gain authorisation prior to the use of force. 'It was for the members of the Coalition to determine whether or not to resort to [the use of] force in response to the 'material breach' of the cease-fire.'²¹³ If accepted, then this would offer a legal basis for the use of armed force.

²⁰⁸ *ibid.*

²⁰⁹ Ramesh Thakur, *The United Nations, Peace and Security*, (Cambridge University Press 2006) 229.

²¹⁰ *ibid* 224.

²¹¹ *ibid* 225.

²¹² Yoram Dinstein, *War Aggression and Self-Defence* (5th edn, Cambridge University Press 2012) 323.

²¹³ *ibid* 323-4.

A vaguer argument is that 'both in 1991 and in 2003, the Coalition acted on the basis of the right of collective self-defence. The exercise of that right could not be terminated by a cease-fire.'²¹⁴ This point of view does not appear to have consensus among authors beyond the initial action to repel Kuwait in 1991. The right of self-defence is 'until the Security Council has taken measures necessary to maintain international peace and security.'²¹⁵ As the UNSC has repeatedly decided on the matter, this argument is weak.

From the argument created above, there was no clear UNSC authorisation to enter Iraq with armed force. This use of international law supports the realist view that a state with enough power can utilise the law in their own favour. The law is used as a smoke screen for States to engage in the action they wanted to. 'It is now beyond doubt, that both geo-strategic and domestic political considerations provided the principal motives for the [Bush] administration's decision to wage war against Iraq.'²¹⁶ If this position is correct, and argument has suggested it could be, then there is a danger that the international arena is moving towards hegemonic rule. Vagts states: 'A shift to HIL most specifically requires setting aside the norm of non-intervention into the internal affairs of states.'²¹⁷ It is arguable that this is the current situation in the Middle East. In Iraq, the removal of Hussein was to purport regime change, and the same could be said of Gaddafi in Libya. This confuses the argument, as regime change to secure a safe standard of living for civilians could be welcomed, in other words regime change as part of an intervention based on humanitarian intervention. However Dinstein's and Vagts' argument would suggest that there is a darker side to regime change. They argue there is a shift to hegemonic international law. The use of force by a hegemon may purport to be acting under humanitarian intervention when in fact this is only one of a number of reasons. 'The Bush Administration argues that in order to stop terrorism, Islamic nations must be transformed into more secular and democratic societies.'²¹⁸ This would seem to be against Article 2(7) of the UN Charter, and the non-intervention in the domestic affairs of States. If the change is for 'humanitarian' purposes, then realism, cosmopolitanism and natural law theory would suggest that there may be a

²¹⁴ *ibid* 325.

²¹⁵ Article 51 UN Charter.

²¹⁶ Robert Gilpin, 'War is too important to be left to ideological amateurs' [2005] 19 *International Relations* 5.

²¹⁷ D F. Vagts, 'Hegemonic International Law,' [2001] 95 *The American Journal of International Law* 843-848.

²¹⁸ Robert Gilpin, 'War is too important to be left to ideological amateurs' [2005] 19 *International Relations* 5.

valid argument, however, regime change, purely because it is different would not be acceptable.

This author would argue that a UNSC Resolution clearly stating that a use of force was permitted would have been ideal, but in the absence of such, prolonged armed force in Iraq was justified if its motives were dominated by humanitarianism. However it is impossible to prove what the dominating or influencing factor was, and as discussed, states may give one justification, but their intent was another. The “continuing resolution” argument is flawed in that the UNSC had the opportunity to assert authority, and did not. An argument based on self-defence is unlikely after the initial repelling of Iraqi troops, therefore a different reasoning is necessary. The most credible source of legitimisation for the use of force is that of humanitarian intervention. The suffering of citizens at the hands of Hussein meant that his removal was paramount. If the use of force achieved this goal, then it was a success.

What is problematic in this analysis is the state of Iraq in present day. Has the prolonged use of force in the country achieved the underlying objectives of the UNSC? It is arguable that this is not the case.

The country remains unstable, and citizens in 2014 are suffering at the hands of rebels. The removal of Hussein evicted one dictator, but the country has been unable to produce a democratic government in his place. Officials in the US are referring to the situation in Iraq as ‘humanitarian’²¹⁹ and perhaps this will be the start of a campaign to re-enter the country with humanitarian intervention as justification. If the aims of any ‘new’ uses of force are to prevent genocide (as reported) and to aid civilians, then it is likely that such uses of force will not be condemned. It is the wider ranging, political interests of the intervening state(s) that could be controversial.²²⁰ The news reports of today would suggest a third Iraq war is now likely.

Afghanistan from 2001

²¹⁹ The Telegraph, 27th August 2014.

²²⁰ See also John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 22: ‘Today Iraq is an ongoing disaster area. Poor, if not non-existent, post invasion or post-liberation planning, a lack of any real understanding of the politics and power dynamics within Iraq, the appalling treatment of those incarcerated in prisons such as Abu Ghraib and elsewhere, the practice of ‘Rendition’ where coalition forces send suspects to other states for interrogation. The list goes on.

*'Since the founding of the United Nations in 1945, International Law with regard to war has been defined by the UN Charter. Measured by this standard, the US-led war in Afghanistan has been illegal from the outset.'*²²¹

This is a broad claim, and one which can be disproven. In the initial aftermath, there is clearly a case for self-defence. The US was responding directly to an armed attack against their territory. The perpetrator was a terrorist group, not a state; however the argument is based upon the harbouring in Afghanistan of terrorist organisations, in this case, the Taliban.

From a political realist viewpoint, the US could have relied upon Resolution 1373 as authorising the use of force; however the argument to the contrary is that the US specifically chose not to act under the Resolution because it did not want to be restricted. The role of international politics dominated the decision of the US to act under self-defence.²²² It could be argued that the US did not want to be constrained by time or a particular aim, such as the capture of Bin Laden.²²³ In this view, the USA wanted to go beyond what would be authorised, and further their short term interests.²²⁴ If this is the correct position, one must be critical of any use of force that went beyond UN objectives without justification. Furthermore, 'the fact that China and Russia could also argue that Resolution 1373 authorizes the use of force probably explains why the US has not done so.'²²⁵ The suggestion is that the US has chosen not to rely on Resolution 1373 for fear *it could be used against them in the future by setting a precedent*. The use of self-defence as opposed to UN authorisation is ironic considering the wording of Resolution 1373.²²⁶

The continued use of force, beyond an initial action in self-defence, does not fit with a legalistic approach to international law. Perhaps the fault lies in the role of the UNSC. As conflict persisted, the UNSC in its role as maintainer of peace and security, should have passed a further resolution with clear aims and objectives. Possibly the UNSC feared a repeat of the Iraqi conflict, in that a 'continuing authority' argument would be raised by

²²¹ D R. Griffin, "Did 9/11 Justify the War in Afghanistan?" (2010) Global Research <http://www.globalresearch.ca/did-9-11-justify-the-war-in-afghanistan/19891> accessed 12th September 2013.

²²² Michael Byers, 'Terrorism, the use of Force and International Law after 11 September,' (2002) 16 International Relations 155, 156.

²²³ *ibid* 155.

²²⁴ See G Dorrnsoro, 'The Security Council and the Afghan Conflict in V Lowe, A Roberts, J Welsh and D Zaum (eds), *The United Nations Security Council and War – The Evolution of Thought and Practice since 1945* (Oxford University Press 2010) 465.

²²⁵ *ibid* 156.

²²⁶ Although not containing the accepted trigger 'all necessary means' the Resolution does refer to taking necessary steps to prevent terrorism.

those states engaging in armed force. However this could be curtailed by stating a clear end date within an enabling resolution.

President G W. Bush stated: 'We seek a just and peaceful world beyond the war on terror.'²²⁷ It is arguable this is against the UN Charter 2(4) in that it concerns the internal policies of a country, however it is also arguable that the Taliban was not a genuine government, as it was only recognised by Pakistan, Saudi Arabia and the United Arab Emirates. If as Griffin²²⁸ states, the Afghan government under Hamid Karzai was corrupt and incompetent, under natural law theory there could be a moral justification for entering the country with military force, but this would seem to be clearly in the realms of 'illegal but legitimate'. It is also based on proving that Hamid Karzai was in fact corrupt and incompetent.

Can the war in Afghanistan be a success? It is questionable whether this country is now any more stable since the war effort than it was previously. In the aftermath of the 9/11 attacks, there is an argument for the use of self-defence. However in 2014, 13 years later, has the span of time become too long for even a moral justification? In terms of legal doctrine, the US action in Afghanistan has resulted in the right of self-defence to include military responses against states which actively support or willingly harbour terrorist groups who have already attacked the responding State.²²⁹ This would seem logical, as a state failing to surrender known terrorists is clearly at fault.

The use of force in Iraq it would seem has set a precedent for the UNSC in authorising the use of force against Afghanistan. The lessons learnt by the UNSC in using open ended Resolutions which allowed states to argue for a 'continuing authority' to use force meant that the UNSC used different terminology in Resolution 1373 (Afghanistan); however due to the hegemonic rule of the USA, this resolution was set aside and self-defence was used as a justification. It would appear that the USA is in a position to control international law and regulations to fit with its current aims. The USA wanted to engage in the extended use of armed force against Afghanistan to capture bin Laden, and hence it created a seemingly

²²⁷ George W. Bush, State of the Union Address (29 January 2002), available at www.whitehouse.gov/news/releases/2002/01/20020129-11.html.

²²⁸ D R. Griffin, 'Did 9/11 Justify the War in Afghanistan?' (2010) Global Research <http://www.globalresearch.ca/did-9-11-justify-the-war-in-afghanistan/19891> accessed 12th September 2013.

²²⁹ Michael Byers, 'Terrorism, the use of Force and International Law after 11 September,' (2002) 16 International Relations 155.

logical explanation for it. The result of which has been a war in Afghanistan without clear objectives. Bin Laden was killed some three years ago; yet the war is not over. One would assume that the current aims of armed force in the region are to restore peace and security, but it must be established whether this is something that can be achieved realistically. If it is so, then the UNSC would be best placed to legalise use of force in a resolution stating exactly what is to be achieved. If this is not the case, the claim of humanitarian intervention offers some reason for the use of force, but only in so far as protecting citizens, and obviously, Afghanistan is a state in need of more than this.

Libya 2011

In 2011 the world community condemned the violent suppression of civilians carried out by the Gaddafi regime. In UNSC/10180 the UNSC urged Libyan authorities to 'meet its responsibility to protect its population.' This represented the new found doctrine of R2P. The Libyan government did not react to this request. The UNSC then adopted Resolution 1973²³⁰ on March 17th which permitted states to use 'all necessary measures to protect civilians and civilian populated areas under threat of attack' the term universally understood as authorising the use of force. Arguably the NATO action to protect [Benghazi] civilians was clearly within the mandate; however operations aimed at overthrowing Gaddafi violated the mandate and were an illegal use of force.²³¹ Ulfstein & Christiansen argue Paragraph 4 of Resolution 1973 is directly linked to the protection of 'civilians and civilian populated areas ... including Benghazi.'²³² They assert 'the mandate does not authorize military measures to protect the whole population or the entire geographical territory of Libya.'²³³

However, if the overthrowing of Gaddafi was the only way to secure a lasting peace in the area, could there be legitimate reasons for the intervention, even if in the strictly technical sense the authority was not clear? This will be discussed in more detail in the next chapter. Was the use of force within the 'spirit' of the Resolution, the responsibility to protect and humanitarian intervention? If removing Gaddafi was the *only* way to ensure civilian protection, then perhaps it would be logical to conclude that it was within the aims of the

²³⁰ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973

²³¹ G Ulfstein and H F Christiansen, 'The Legality of the NATO Bombing in Libya' [2013] 62 International and Comparative Law Quarterly 159-171.

²³² *ibid.*

²³³ *ibid.*

resolution and hence legal without further discussion. Furthermore, the Resolution does state 'including' therefore it is arguable that it is not limited to Benghazi.

The action taken in the country, removing Gaddafi, whether one would see it as within or beyond the Resolution was a success in protecting citizens from an oppressive regime. Therefore this use of force would certainly have a legitimate claim, regardless of its legal status. It would be the strictest positivist who would not see the benefit in the removal of the Gaddafi regime for humanitarian purposes. Hence, from the cases discussed, Libya would seem to have a strong claim to legitimacy without clear legality.

Conclusions

The lack of a UN standing army and the Cold War has prevented the UN acting as envisaged. Faced with this problem member states have themselves taken action rather than relying on the UN to be effective in its role. In Afghanistan, this could be deemed true in the sense of realising longer term aims and objectives for the country, however a Resolution was passed, and states, in particular the USA chose to ignore it. Furthermore, in Iraq, the UNSC did act, and from this act, prolonged, un-envisaged uses of armed force have been a predominant feature of the country. Therefore, this may put reluctance on the UNSC to authorise open ended armed force, such as in Afghanistan. The result perhaps is that the UNSC must now deliver enabling resolutions with a clear mandate and clear time frame, in order to stem political interests taking over.

In some instances it could be argued that state intervention with a use of force has occurred because of the political interests of intervening states, their relative hierarchy of power and their world visions.²³⁴ In the case studies discussed, there are varying justifications given for intervention. For a legalist, these justifications would not be acceptable. However, from a practical point of view, if state interests lead to an intervention on humanitarian grounds then this could be a valid argument for legitimate action. The study of Libya highlights in particular where a use of force, which could be termed to be strictly outside legal regulation, in fact achieved what the aim of the enabling Resolution was; that is to restore some sort of civilisation through the removal of Gaddafi. Regardless of any underlying state

²³⁴ A Roberts 'The Use of Force' in David M Malone (eds) *The UN Security Council- From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 136.

self-interest in targeting Libya, a useful outcome was achieved in the first instance. However the present state of Libya is questionable, the removal of Gaddafi, albeit a dictator, has left the country without a stable government. Thus if humanitarian intervention was applied universally through a clear legal doctrine, international law could specify that any country targeted with the use of force to protect citizens must be left with some element of stability; and the state(s) who decide that humanitarian intervention is a necessary intervention would have the responsibility for providing that. This would be a welcomed addition to the doctrine, as humanitarian intervention cannot exist in a vacuum.

However, any exploitation of the words of an enabling Resolution, such as Resolution 678 and 1441 could weaken the UNSC as a forum for achieving compromise. The ongoing consequences of such could be catastrophic. If the UNSC is not workable, and states do not see it as such, then who controls the international order? This would be left to states themselves, without having the UN as a neutral body and mediator. The abuse of UNSC Resolutions could have led to a decrease in their adoption. The 'illegal' use of force in Libya, may be the driving factor behind no agreement being reached on the situation in Syria.²³⁵ Political realists would argue that it is the lack of any real state interest in Syria that has also led to the inaction. Interestingly, in recent months the situation in the Ukraine has taken over the interest from Syria. Once again, one of the power five, Russia, has an underlying interest in this situation.

It would be a sensible conclusion for States to be able to use a realist interpretation of international law and apply an extensive approach of interpretation to the facts as they perceive them to be. The conclusions on WMD may have been ill-founded, but if those predictions had of been real, the consequences of the use of WMD are unthinkable. To adopt the phrase 'it is better to be safe than sorry' would seem to fit well here. If the Iraqis were unwilling to comply with weapons inspectors then the use of force to prevent a potential catastrophe through WMD is welcome. Presuming that any use of force is not pure aggression, and is proportionate to any threat, a use of force which is within the realms of international law, and is widely supported, should not necessarily be considered illegal if it does not fit within a strict interpretation. Where a use of force is not clearly within the

²³⁵ G Ulfstein and H F Christiansen, 'The Legality of the NATO Bombing in Libya' [2013] 62 International and Comparative Law Quarterly 159-171.

boundaries of international law, and is illegal in a strict sense, can it still have some legitimacy if based on humanitarian motives? The next Chapter will consider those uses of force that break the confines of international law, and what is or should be the consequences of such a breach.

Chapter Four

Can legally unauthorised uses of force be considered legitimate under certain conditions?

The previous chapter established that not all uses of armed force presented are entirely legal regardless of the reasoning given by states. Therefore, in considering the justifications and excuses states have argued in pursuit of 'illegal' uses of force, can or should a use of force ever be considered legitimate if it stretches the boundaries of legality? And if it possible to render illegal uses of force legitimate, under what premise should it be done?

Importantly, to consider any use of force as legitimate it must be perceived by other states as legitimate,²³⁶ therefore it must be widely accepted as appropriate conduct. Usually a state embarking upon the use of armed force will search widely for a legal justification even if the argument is weak in order to find support for the action. In Iraq the coalition sought to base their action on the 'legality' of UNSC adopted Resolutions. In Afghanistan, the USA based their argument on the 'legality' of self-defence. However, as Chapter Three has shown these arguments do not always conform to a strict sense of legality or legalist theory. Kohen even suggests that USA policy is not concerned with strict legality.²³⁷ If this is the case then even legitimacy could be a weak argument if the reason for intervention is purely national interests. Nevertheless, the USA and any state engaging in the use of force will be required to justify its decision to the world community of states including the UN, therefore whether legal or not, there will have to be a reason for each specific use of force.

²³⁶ Peter G Stillman, 'The Concept of Legitimacy', [1974] 7 Polity 32, 35.

²³⁷ M G. Kohen, 'The use of force by the United States after the end of the Cold War, and its impact on international law', in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2008). Kohen states: 'the Bush, Powell, and Clinton doctrines were comprehensive explanations of overall United States policy regarding the use of force, irrespective of the matter of legality.' P.199 see also the *Public Papers of the Presidents of the United States. George Bush, 1992-93* (Washington, DC:USGPO, 1993), pp.2228 at 2230-31, where Bush states 'sometimes a great power has to act alone.'

If states pursue an 'illegal' use of force due to a belief in Council inaction²³⁸ then there is validity in considering whether it could be termed legitimate action; if the maintainer of peace and security is inept to do its job, then states may be justified from a realist and practical point of view in taking individual steps.

It could be argued that the failure of the UNSC to condemn what is, when viewed from a strictly positivist standpoint, 'illegal' action gives it some legal status not only in each particular case but also with possible precedent value.²³⁹ If this is the case then the UNSC could authorise the use of force retroactively, including armed force which is within 'the spirit' of the Resolution.²⁴⁰ This view is problematic as it undermines the law. In order to follow the rule of law, one must know what that rule is at the time the transgression takes place. If this was not the case then it would be impossible to know what the law was at any particular point in time. Corten argues: 'The fact that certain humanitarian interventions have not been condemned by the Security Council is testament to the legality of this type of intervention.'²⁴¹ However, not condemning a use of force is not necessarily the same as condoning it or making it legal. Perhaps a more suitable conclusion would be that such use of force is 'tolerated.'²⁴² Legalists would not recognise any retroactive legality and would not consider legitimacy as a viable alternative. They would require a form of law to set aside the UN Charter.²⁴³ However, from a realist and even greater a cosmopolitan perspective, there may be some broader justifications or legitimate reasons for engaging in strictly illegal uses of force. Hence this Chapter needs to consider possible alternative 'justifications' in more detail.

The remaining sections will consider various conceptions and models of legitimacy that could potentially provide a justification for uses of force that cannot rely upon strict legality for their justification.

²³⁸ Ruth Wedgwood, 'Unilateral Action in the UN System' [2000] 11 *European Journal of International Law* 349, 351: 'Council action comes late, lacks force, and focuses on 'neutral' humanitarian tasks that do not resolve a conflict.'

²³⁹ Jordan J Paust, 'Use of Military Force in Syria by Turkey, NATO, and the United States' [2013] 34 *University of Pennsylvania Journal of International Law* 431.

²⁴⁰ M G. Kohen, 'The use of force by the United States after the end of the Cold War, and its impact on international law', in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2008)

²⁴¹ Oliver Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' [2006] 16 *European Journal of International Law* 803-822.

²⁴² Ramesh Thakur, *The United Nations, Peace and Security*, (Cambridge University Press 2006) 216.

²⁴³ *ibid.*

Legitimacy supported through a creative interpretation and application of the purpose of norms of general principles of law

This model of legitimacy can be related to “the mischief rule” in the domestic UK law of statutory interpretation. It would suggest that although there is no specific and applicable legal rule to support the use of force, state practice in the area is consistent with this intervention. Those uses of force that were within the “spirit” of international law, as opposed to the actual “letter of the law,” would fit well here.

Dworkin develops the idea that law is not reducible to a system or series of technical rules but rather is based upon general principles of international regulation developed and applied by states themselves. He considers the view that if decisions are compatible with such principles of law, or at least with their implications, then they can be legitimate even where they are not directly backed by detailed rules or precedents. Dworkin considers the political legitimacy of states as key. ‘International law can help to provide a check against states that would abuse their own citizens, or can help compensate for the fact that states acting alone cannot solve global problems requiring coordination.’²⁴⁴ In this aspect he is taking a liberal cosmopolitan approach to international law. He accepts that the domestic policies of states can affect international law and relations. However his theory has been criticised as ‘ignor[ing] the crosscutting obligations that domestic political demands put on states and the potential that democratic political processes have to use international law as an instrument of change.’²⁴⁵

‘The UN Charter could be frustrated rather than advanced if there is too strict an interpretation’²⁴⁶ leading to a lawful non-intervention but one that does nothing to advance the role of international law. Kosovo could be an example of when respecting the prohibition on unilateral uses of force seemed to be a case of good law producing bad results. One example of this type of legitimacy is illustrated through the creative judicial deployments of the Martens Clause.

²⁴⁴ Adam S. Chilton, ‘A Reply to Dworkin’s New Theory of International Law’ [2013] 80 The University of Chicago Law Review Dialogue 105.

²⁴⁵ *ibid.*

²⁴⁶ See Thomas Franck, ‘Comments on chapters 7 and 8’ in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press 2008) 265.

The clause was introduced in the preamble to the 1899 Hague Convention II on the Laws and Customs of War on Land.²⁴⁷

There is no accepted interpretation of the Martens Clause, originally it was designed to provide residual humanitarian rules.²⁴⁸ At its most restricted, the Clause serves as a reminder that customary international law continues to apply after the adoption of a treaty norm. A wider interpretation is that it provides that something which is not explicitly prohibited by a treaty (is not *ipso facto* permitted). The widest interpretation is that conduct in armed conflicts is not only judged according to treaties and custom but also to the principles of international law referred to by the Clause.²⁴⁹ The Clause is centred on ideas of humanity and public conscience. It provides a backdrop of general principles to cover situations where strict rules are lacking. It allows for a greater reflection of human rights concerns. 'Where there already is some legal basis for adopting a more humanitarian position, the Martens Clause enables decision makers to take the extra step forward.'²⁵⁰

Taking the Martens Clause notion of legitimacy at its widest interpretation, in Iraq, the use of force in the 1990's could fit here. The failure of Iraq to comply with the disarmament conditions of Resolution 687 could provide a reason to engage in armed force under the grounds of humanity. If Iraq was clear in not wanting to disarm, then it could be assumed it had the intentions to use such weapons, resulting in risks to the civilian population.

Considering Iraq in 2003; the belief that WMD were posing a real threat, could lead to a rational use of the Clause again on the grounds of humanity. Furthermore, if customary action is still to apply after the adoption of a treaty, then the role of anticipatory self-defence would also be a justified and hence legitimate explanation.

In Libya, the use of force to remove Gaddafi would certainly be met by reasons of humanity and public conscience. It was morally right to remove the dictator to enable a safe

²⁴⁷ The clause states: 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.'

²⁴⁸ Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', [2000] 94 The American Journal of International Law 78, 79.

²⁴⁹ R Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', [1997] International Review of the Red Cross, No. 317. See also *ibid* 78-89.

²⁵⁰ Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', [2000] 94 The American Journal of International Law 78, 88.

regime to be put in place. As the use of force in Libya was most certainly within the 'spirit' of Resolution 1973, it is perhaps the easiest to be regarded as legitimate.

The use of force in Afghanistan is harder to reconcile with this doctrine. The use of force in this country was largely in pursuit of political aims. In a weak argument, the civilian casualties coincide with 'humanity.' However, these casualties were created by the use of force from states; they were not the reason for the intervention.

Legitimacy through Humanitarian Intervention and the Responsibility to Protect (Customary International law)

Humanitarian intervention both before and after the adoption of the UN Charter has not gained the status of established state practice to justify the use of force. Thus from a legalist perspective it is not permitted action. Though throughout the period academics have written in support of the concept.²⁵¹ Article 15 of the Covenant of the League of Nations stated: 'the members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.' This is a broad, perhaps unlimited standard; permitting the use of force based on states individual interpretations of what is just and right.²⁵² In the present day one could assume that the use of force for humanitarian purposes is still subject to states individual understanding of a situation.

If action is intended to prevent a humanitarian catastrophe then it could fall under this category. Former UN Secretary General Kofi Annan cautioned placing legality before legitimacy in cases of humanitarian crises.²⁵³ Regarding Rwanda, he asked the General Assembly in 1999: 'if, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?'²⁵⁴ This is a prime example of where it can be argued that an overwhelming obligation to forestall a humanitarian catastrophe should outweigh a specific legal rule to the contrary. This would seem to be self-evident, if a state can intervene to

²⁵¹ Vaughn Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' (2010) Max Planck Encyclopedia of Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306#law-9780199231690-e306-div1-1>> accessed 1st July 2014.

²⁵² George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 74.

²⁵³ Edward C Luck, *UN Security Council - Practice and Promise* (Routledge 2007) 54.

²⁵⁴ <http://www.un.org/News/Press/docs/errors/99999999.sgs7136.html>

prevent suffering, then the advantages are obvious; not as clear is the 'amount' of suffering which must be present. Could the doctrine be invoked to help 10 citizens, 100, 1000 or more?

The situation in Syria would be a good example of a current issue that would serve humanitarian intervention if it was an enforceable doctrine. The conflict is internal, therefore self-defence is not an option and the UNSC has been paralysed due to the threat of veto.

In *Yugoslavia v Belgium et al*²⁵⁵ Belgium argued that every state has a duty to intervene to prevent human disasters, and therefore every state must have a right to do so. Arguably, this is logical in that if states are obliged to prevent human disasters then it follows that they must have the corresponding right to enter a country with armed force to prevent such disasters. However, the solution to the extent of the catastrophe is still not answered. Exactly how many citizens need to be in danger for the use of force to be legal under this doctrine? There is no right answer to the question, arguably one life is valuable enough, however the risks to the interveners must also be assessed. This can only be done on a case-to-case basis.

A similar argument is 'whether the humanitarian crisis is legally sufficient to justify a violation of another state's territorial integrity on the basis of defense of others.'²⁵⁶ The wording is different, but the meaning is the same. Is the crisis 'enough' to warrant invading another states territory?

Another potential problem based on the lack of an exhaustive definition is 'whose moral values?' This must come from states themselves as they are the makers and enforces of international law and relations; but if humanitarian intervention is based on what is just and right, it could be possible for weaker states to have a dominant majority enforced upon them; particularly when linked to states individual interests. Furthermore, evidence would propose that the UNSC is inept to deal with humanitarian issues. 'The Security Council did not intervene in Rwanda where over one million helpless people were killed, it did very little to confront the Bosnian Serbs during the first three to five years of the Balkan's war, and it

²⁵⁵ CR 99/14 (May 10, 1999).

²⁵⁶ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 69.

refuses to address the conflicts occurring in Liberia or Chechnya.²⁵⁷ With this in mind, it is easy to see why states may take matters into their own hands when faced with this type of situation.

It is possible that subsequent state practice could result in a new interpretation of the Charter provisions that would permit intervention for humanitarian grounds or through the emergence of a new customary rule. This would require the general practice of states to be intervention when faced with humanitarian crises, and states accepting this as law.²⁵⁸ Possibly, the second element would fail as states may not want to be bound. However, if they do regard it as law; the 'reinterpretation' might, for example, require the reference to territorial integrity and political independence in Art. 2(4) to be read narrowly.²⁵⁹ For a new customary rule to emerge it would require the status of *jus cogens* as it would need to match the status of the prohibition on the use of force.²⁶⁰ Presently, state practice fluctuates; humanitarian reasons are invoked but usually alongside another justification such as self-defence or UNSC authorisation.²⁶¹ This is because states are reluctant to establish a new doctrine of humanitarian intervention, as with the example of Rwanda, intervention might then not only be permitted, 'but a state's failure to intervene might violate its international responsibilities.'²⁶²

'The genocide in Rwanda was clearly horrific, but Clinton was not interested in sending U.S troops to stop it. In fact, [US] administration officials were unwilling to even refer to events in Rwanda as "genocide" because they felt this might imply a duty to intervene.'²⁶³ The principle here is that for humanitarian intervention not to receive criticism it must be applied consistently. Furthermore, states can use humanitarian reasons but intervene for other 'state' related policies; and is the use of force the answer to a desperate humanitarian situation? In some circumstances it could be, as seen in Libya and the removal of Gaddafi. However, in other cases, such as Iraq, the outcomes are not as favourable. It could be assumed that presently states decide independently on a case-by-case basis when to

²⁵⁷ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 42.

²⁵⁸ Statute of the International Court of Justice: Article 38(1)(b) "evidence of a general practice accepted as law."

²⁵⁹ Vaughn Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' (2010) Max Planck Encyclopedia of Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306#law-9780199231690-e306-div1-1>> accessed 1st July 2014.

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

²⁶² George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 131.

²⁶³ *ibid.*

intervene with armed force. However, what is required is a universal application, regardless of state politics. This would ensure that arguments proposed for the intervention are genuine. A potential problem is that states may not vote in favour of a doctrine forcing them to act when they do not wish to; and if a state does not want to engage in a use of force and is compelled to act, it could be possible that it will not undertake to use of force as effectively as if it had chosen to act. Therefore the best possible answer is a defined doctrine where at least an element of motivation must be humanitarian and which permits states to act if they so wish but does not necessitate they must.

Just War Theory and Moral Legitimacy

Moral legitimacy has no real legal basis in international law. It is based on philosophical ideals. 'Realists [would] question the basic premise that morality has anything to do with military engagement in the first place and they question that this type of intervention in another state's affairs contravenes the notion of independent statehood.'²⁶⁴

In thinking about society, in the famous example, it is morally right for one to save a drowning baby from the lake, but it is not a legal requirement. There is no duty on an individual to act in such circumstances, and this could be transposed into the humanitarian intervention argument. Perhaps it is morally right for states to intervene to present humanitarian disasters. However, who decides that the situation is severe enough that intervention is required? In some cases it might be obvious, but others could be more marginal, where would the line be drawn in interfering with a state's sovereignty? Without boundaries, the 'slippery slope' argument is evident. It is this argument by which 'ad hoc mitigation rather than principled exception'²⁶⁵ would seek to address.

It has been suggested that there are three broad categories that could be used to morally justify military engagement. These are; response to "aggression," a pre-emptive strike against imminent or likely aggression, and a response to the threats against the lives and well-being of citizens of other states.²⁶⁶ Nevertheless these responses should be subject to proportionality in response to aggression and the long term and wide ranging consequences

²⁶⁴ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 43.

²⁶⁵ Thomas Franck 'Comments on chapters 7 and 8' in M Byers & G Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2008) 265.

²⁶⁶ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 50 citing Fotion and Elfstrom, *Military Ethics Guidelines for Peace and War*.

of initiating conflict.²⁶⁷ It could be argued that the armed force used against Afghanistan in 2001 was to protect the lives of citizens, it could also be described as a response to aggression. If the findings of WMD had been correct then the invasion of Iraq in 2003 could have fell within the category of imminent or likely aggression. One could assume that such use of force would be “proportionate,” i.e. response to terrorism and dangerous weapons. However, the consequences of initiating action could be more problematic. It would be an appropriate conclusion that neither Iraq nor Afghanistan are “safe” countries after the invasions, and civilian casualties in Iraq have reached 127,789 – 143,066.²⁶⁸ As of February 2014, at least 21,000 civilians are estimated to have died violent deaths as a result of the war²⁶⁹ in Afghanistan. The long term effects of action in these countries would not seem proportionate to moral arguments to use force.

Furthermore, ‘Although moral arguments may be successful in the court of world opinion, one cannot walk into the Security Council conceding that a course of action violates international law and expect to prevail.’²⁷⁰ It is clear that morality is not law.

Natural law theory is based on thoughts of right and justice.²⁷¹ Historically so long as a war was considered ‘just’, a country was entitled to pursue it. Walzer argues that ‘morality, at least, is not a bar to unilateral action, so long as there is no immediate alternative available.’²⁷² This statement in theory would seem sensible, however in practice is unworkable. It links back to the statements of whose moral values? Furthermore, who would judge that there is not a suitable alternative? Initially this theory died out in the 15th and 16th centuries, however in 1919 and with the Versailles Peace treaty there has been a return to this line of thought with the emergence of crimes against humanity and crimes of aggression.²⁷³

In order to win support, the U.S invasion of Iraq needed to be identified as a “just war.”²⁷⁴ Saddam Hussein was targeted independently conforming to the notion of discrimination

²⁶⁷ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 50.

²⁶⁸ <https://www.iraqbodycount.org/> accessed 24th August 2014

²⁶⁹ <http://costsofwar.org/article/afghan-civilians> accessed 24th August 2014.

²⁷⁰ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 134.

²⁷¹ R Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’, [1997] *International Review of the Red Cross*, No. 317.

²⁷² Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (London: Allen Lane 1978) 107.

²⁷³ See C Schmitt, *Writings on War* (Polity 2011) 125-232.

²⁷⁴ G-W Falah, C Flint & V Mamadouh, ‘Just War and Extraterritoriality: The Popular Geopolitics of the United States’ War on Iraq as Reflected in Newspapers of the Arab World,’ [2006] *Annals of The Association of American Geographers* 142-164.

prevalent in Just-war theory.²⁷⁵ Still, a war can only be 'just' if the claims in relation to it are truthful. Furthermore, Falah *et al* suggest that: 'Domestically, failure in war undercuts the authority of political elites.'²⁷⁶ Therefore, once a hegemonic state has engaged in warfare, there is pressure to continue with that act, even if arguments to the contrary appear; for example, the U.S claimed that they had reason to believe Iraq had in its possession weapons of mass destruction. Later evidence has suggested that this argument by the U.S was wrongful, but yet the use of force in the country was not stopped on disproving the claims. Nevertheless the continued use of force in Iraq was arguably based on defeating terrorism more broadly and Iraq's blatant non-compliance with UNSC Resolutions.

The US has engaged in the use of force to transform Islamic nations in their war against terror.²⁷⁷ It could be argued that this goes against the UN Charter Article 2(7) and the preservation of state sovereignty. If this is correct, then how far can 'moral legitimacy' be taken. If armed force is taken in pursuit of aims such as the one stated above then the claims of a moral justification are weak if there is no immediate threat to civilians. However this particular interpretation of the Bush regime could be criticised as being anti-American. It could be argued that the USA are trying to achieve global democracy and peace from terrorism, rather than specifically 'transforming' all Islamic nations.

In *R v Jones and others*²⁷⁸ at para. 37 Lord Hoffman in discussing the legal status of 2003 Iraqi war stated: 'Many people thought that it was morally wrong and contrary to international law.' 'Others thought that it was justified, necessary and lawful.' This is an example of the deep rooted problems in the idea of a moral legitimacy. States will likely act on their own moral values, which may or may not be universal. Additionally more democratic states would likely claim a right to intervene in oppressive regimes.²⁷⁹ This could then affect the fundamental principles of sovereignty, non-intervention, and non-use of force.²⁸⁰

²⁷⁵ Force can be morally justified if it can be employed in a discriminating manner. See John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 38.

²⁷⁶ G-W Falah, C Flint & V Mamadouh, G-W Falah, C Flint & V Mamadouh, 'Just War and Extraterritoriality: The Popular Geopolitics of the United States' War on Iraq as Reflected in Newspapers of the Arab World,' [2006] 96 *Annals of The Association of American Geographers* 142-164.

²⁷⁷ Robert Gilpin, 'War is too important to be left to ideological amateurs' [2005] 19 *International Relations* 5, 10.

²⁷⁸ *R v Jones and others; Aycliffe and others v Director of Public Prosecutions; Swain v Director of Public Prosecutions* [2006] UKHL 16, [2006] 2 All Er 741.

²⁷⁹ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 37.

²⁸⁰ Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 29.

Natural law theory and moral legitimacy have the broadest interpretation of international law. At present, these are not legal doctrines in a strict sense, however sensible the theory may be. Cosmopolitan theory is the closest to natural law rights, preserving that there can be a higher category of law protecting universal rights. If the doctrine of 'just war', morality and natural law rights were to be adopted as a part of international law, the use of force because it is right to do so would be permitted. This would encompass by default all uses of force related to humanitarian intervention. It would be unclear where the use of force 'for the greater good' would end. It would be pertinent to have a set of guidelines, without guidance, the breadth of any use of force could be vast.

If moral theory on the use of force were to become a legal doctrine it would address when to act, when not to act and how to act.²⁸¹ However the breadth of moral interpretations would ensure difficulties in coming to an exact agreement on these questions. Furthermore it goes beyond an 'authorisation' to act to demanding action. Although some crises may be obscene, a forced action is not likely to produce the best results. Therefore, the contemporary world is unlikely to see an emergence of a moral obligation to act.

Conclusion

Underlying these theories is the problem that even if the use of force can be justified, the infringement or transgression of the rule prohibiting the use of force remains intact.²⁸² Thus none of the justifications discussed would satisfy a legalist. The use of force is still "illegal". This "illegality" would not, however, worry a sophisticated realist, who would argue that 'in international politics states can always find a justification for their actions because the rules are sufficiently indeterminate.'²⁸³ Therefore, it is arguable whether there should be some development of international law to prevent illegal action if it is being permitted. On the other hand, if broadened, will the realms of international law be further stretched? It is not possible to answer this, but it is something worth considering.

²⁸¹ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 51.

²⁸² George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 34.

²⁸³ Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 9.

Any exacerbation of international law would weaken the role it has, and once it is weakened less justifiable uses of force may appear.²⁸⁴ However, importantly, for custom to 'change' the law, it must in some cases, break the law; what truly matters is state practice. If state practice is consistent and coherent, and without a world court to deliver justice for a technical breach, it is unwise to label uses of force illegal. Such a label questions the use of force, which if used for one of the circumstances detailed above has credibility. The use of force should only be questioned when it is sheer aggression, and in such an event is likely to quickly receive counter-force by an intervening state anyway. It is states who make international law, apply international law, and show respect for international law, therefore if the use of armed force is widely agreeable, surely it cannot be inherently illegal. 'International law does not exist in the abstract; rather it is what states make of it.'²⁸⁵ It is pertinent to note here that state politics may and likely will coincide with any explanation for armed force but should not be the sole reason for intervention.

The Martens clause is a useful tool to make sense of international law. It would be absurd for a state which could intervene to sit by and watch mass genocide or similar continue. It is also a principle which works effectively in domestic law. Again problematic for this principle is the lack of a world court to provide jurisdiction. In practice, perhaps it is one of the best options available, restrictive enough to prevent the floodgates of unilateral action being opened, whilst recognising the acceptability of the use of force in certain cases.

Humanitarian intervention could have a legitimate claim, along with the responsibility to protect – however, if authorised by the UNSC then the argument is redundant. These two doctrines can claim to be legitimate through the role of custom and increasing state practice. If state practice is consistent, then it would be safe to assume that it is legitimate, if not in the long term, legal action.

It is also important to remember that threats to international peace and security do not always come from states. Threats can come from terrorist groups and organisations, for example al Qaeda. Therefore, the UN needs to be able to respond effectively to situations in which it is not the state but a group of individuals residing within that state who are involved. The US action against Afghanistan would seem to imply that self-defence can be

²⁸⁴ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 134.

²⁸⁵ Oliver Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' [2006] 16 *European Journal of International Law* 803-822.

used as an argument to defend oneself against countries that harbour terrorist groups. Nevertheless a clear legal rule to represent this would be desirable.

Action taken outside the UN Charter will clearly be a breach of sovereignty. However it is questionable whether sovereignty should be restricted in cases of clear humanitarian crises. It is likely the moral argument in support of intervention to prevent human suffering will always be greater. What is troublesome is the clear “illegal” nature of what could be termed moral action. If states wish a certain morality to be a part of international law, then to incorporate it into international doctrine by customary practice would dissolve the argument of illegal but moral action.

‘The ‘illegal but justified’ approach seeks to have the best of both worlds where the action is justified under act-utilitarianism, but the rule is justified under rule-utilitarianism.’²⁸⁶ In practice, states can use force ‘illegally’ without sanction, but the ‘illegality’ of the use of force prevents an exacerbation of the rule.

²⁸⁶ A Roberts, ‘Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?’ in P Alston and E Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008) 204.

Chapter Five

Conclusion

– including some broad and brief suggestions for reform

When the UN fails to act in contexts where its Charter requires or implies that it should, or its actions do not in fact achieve the intended results, then faith in this body may be weakened. Therefore, it is essential for its integrity and vitality that the UN is willing and able to act in circumstances warranting its intervention. States would be deterred from taking matters into their own hands if there was a successful alternative of meeting global aims.

The preceding discussion in this thesis lends to the conclusion that illegal but clearly justified action, or what could be termed ‘legitimate’ action, in certain specified circumstances should, or at least can, be welcomed. It will also suggest some broad areas in which the UN could be sensibly reformed. As the maintainer of peace and security it would be unwise for the UN to engage ‘with incomplete and incremental change.’²⁸⁷ The UNSC needs ‘greater credibility, legitimacy, representation, effectiveness, and enhanced capacity and willingness to act in defence of the common peace.’²⁸⁸ Therefore there will be a brief discussion of some reforms that might meet these demands.

Possible reform proposals

In contemporary contexts, humanitarian intervention and responsibility to protect are becoming increasingly used as justifications for the use of force. The wars in Kosovo and Bosnia were both predicated upon these arguments, and some writers suggest that the war in Iraq was based on humanitarian motives. Those authors with humanitarian interests at heart have a general ethical approach and a moral vision. Therefore should a legal doctrine of humanitarian intervention be developed? The UNSC could develop a system for the

²⁸⁷ Ramesh Thakur, *The United Nations, Peace and Security* (Cambridge University Press 2006) xii.

²⁸⁸ *ibid* 302.

‘unauthorised’ use of force to be legal if it meets certain criteria within a humanitarian setting. A suggested criterion is: that there is a supreme humanitarian emergency; the use of force is the last resort and a positive humanitarian outcome will be achieved.’²⁸⁹ However, this reasoning is vague as the categories are sufficiently wide to make it easy for states to claim this argument. Furthermore, if the UNSC can identify these criteria for when humanitarian intervention is lawful, then it would be more sensible for the UNSC to authorise the use of force. The use of force would then be under central control, as opposed to unilateral state action with a potentially undefined mandate. Humanitarian intervention can be rejected by a philosophy of limits: limits on the consensus that exists internationally about the link between a state’s legitimacy and its protection and advancement of human rights; limits on the willingness of intervening states to engage in long-term efforts to address root causes; and limits on the degree to which it is taken in the name of the international community.²⁹⁰ This author does have humanitarian sympathies and would be supportive of the development of the doctrine. I would argue that the sensible use of force in specified humanitarian catastrophes would be desirable. However, it is unlikely that states will intervene without political interests and it is impossible to know what the dominating factor in pursuing armed force is.

My thesis argues that if the options are humanitarian suffering or illegal but legitimate use of force, then the latter should prevail. In the modern world, individuals should not be left to suffer under violent and oppressive governments. If humanitarian intervention was to become an exception to the prohibition on the use of force then it could help ensure that state practice was consistent, being a universally recognised doctrine. It could force states to act. This is an argument as to why states are not in favour of creating an established doctrine. What is evident is that: ‘the UN system needs to be ready, willing and able to confront humanitarian catastrophes wherever they occur.’²⁹¹ Humanitarian intervention would be a pragmatic solution to identifying and acting upon humanitarian catastrophes.

A different solution in response to the ineffectiveness of the UNSC to act in certain circumstances would be to remove the veto power and replace it with a voting majority or

²⁸⁹ Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 34.

²⁹⁰ Jennifer M Welsh, ‘Taking Consequences Seriously: Objections to Humanitarian Intervention in Jennifer M Welsh (eds), *Humanitarian Intervention and International Relations* (Oxford University Press 2006) 53.

²⁹¹ Ramesh Thakur, *The United Nations, Peace and Security* (Cambridge University Press 2006) 346.

majority plus one. This would prevent states from pursuing unilateral action for fear of the veto. It would also create a SC that had the ability to act when one of the permanent five had an individual interest in the situation. Furthermore, the adoption of a body such as a universal court, entrusted with providing substantive justice would offer an option for states to be held in account. The creation of an impartial world court that has the ability to bring its own charges would yield confidence in the international system. Presently the International Court of Justice aims to settle disputes brought to it by States. An effective law enforcer with the role of 'world police officer' would allow justice to be applied to initial acts of aggression and may therefore prevent or at least deter subsequent "illegal" uses of force.

An alternative view would be to use force less freely, whether UNSC initiated, and encourage non-compliant states to act within the realms of international law by making them donate aid or to have more favourable trading terms. Clarity also restricts excessive uses of force by removing any doubt as to what is permitted. UNSC resolution 1529 (2004) Haiti, offered a clear, limited mandate.

The UNSC could also retain greater control over 'coalitions of the willing.' It is important that action taken pursuant to Security Council authorisation conforms to the Council's objectives.²⁹² Therefore, the UNSC must ensure they stay in control of all operations which they authorise. An important means through which the Security Council can exert control over operations is by imposing a time limit upon them, at the end of which the authorisation conferred will cease.²⁹³ The UNSC has been burnt by resolution 678 and its continuing authority. Resolutions throughout the 2000's including UNSC Resolution 1484 (2003) DRC and 1529 (2004) Haiti have contained time limits at the end of which mandates will expire. This is not always the case, but it is increasingly common. However, this only restricts states relying on UNSC previous resolutions as justification; it does not prevent the unilateral use of force based on other justifications. Developing these ideas, there is a weak argument in support of conflict prevention. However, the problem with this argument in that efforts to

²⁹² Gary Wilson, 'The Legal, Military and Political Consequences of the 'Coalition of the Willing' Approach to UN Military Enforcement Action,' [2007] 12 Journal of Conflict and Security Law 295, 302

²⁹³ *ibid* 309.

resolve a conflict often threaten the prospects of one or more hostile parties, leading them to engage in acts of violence.²⁹⁴

As stated by Eisenhower in 1958, 'you cannot choose between [armed] force and law, you must choose law.' This is the argument central to my thesis. I would agree with Eisenhower in the use of force for pure aggression, but in cases of humanitarian intervention, I am more lenient. The use of force for humanitarian purposes should not be condoned as a legalist interpretation would insist, but instead encouraged through a realist perspective. 'Usually the right thing to do is to follow the law, but not always, especially in cases where law and morality conflict.'²⁹⁵ This is a realistic and sensible view. 'What moral value attaches to the rules of sovereignty and non-intervention if they provide a licence for governments to violate global humanitarian standards?'²⁹⁶ It would be a strange idea, that in order to protect sovereignty, citizens cannot expect help faced with a hostile government.

Against a realistic interpretation is the argument should legitimate, justifiable or moral action justify the risk to life of soldiers, when it is 'illegal' armed force? This argument centres on the utilitarian approach of protecting the greater number of people. Is it for the greater good? It must be assumed that there will be military casualties;²⁹⁷ these casualties are the most compelling argument against "legitimate" action as it involves risk to life.

However the risk to military personnel must be weighed against the humanitarian situation.

Therefore, if the response to aggression is grounded in well-justified claims of humanitarian intervention there should be no need to restrict action because it does not have a clear legal basis in international law. We talk about *justifications* for going to war, because the idea is that if a nation is attacked and subsequently defends itself, then it has not engaged in a wrongful act and therefore does not need an excuse. Its actions are justified.²⁹⁸ This distinction is an important one to make. We are not considering an excuse for 'illegal' action, we are thinking about an 'illegal' action being justified or legitimate, it is something that is clearly right to do.

²⁹⁴ A. Roberts (Sir), 'UN and Humanitarian Intervention', in Jennifer M Welsh (eds), *Humanitarian Intervention and International Relations* (Oxford University Press 2006) 95.

²⁹⁵ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 133.

²⁹⁶ Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford University Press 2000) 27.

²⁹⁷ John Janzekovic, *The Use of Force in Humanitarian Intervention – Morality and Practicalities* (Ashgate 2006) 138.

²⁹⁸ George P Fletcher & Jens D Ohlin, *Defending Humanity – When Force is Justified and Why* (Oxford University Press 2008) 82

This thesis has highlighted the 'illegal' nature of some uses of force; it has also agreed with the argument that 'illegality' should not necessarily restrict state action. Action by NATO in Kosovo was not only illegal but did not receive any condemnation let alone sanctions. Following a liberal cosmopolitan interpretation an ideological approach would be to write into international law, either purposefully or through custom, recent state practice. The use of humanitarian intervention is clearly an emerging norm, if states are to utilise it as such it should be applied consistently and not selectively. If a use of force is 'compatible with the value pattern of the society'²⁹⁹ then it should be termed 'legitimate' even if it could also be termed 'illegal' from a legalist approach. In practice, this author in taking a realist perspective suggests that it would be naïve to argue that states would ever prioritise strict legality over their political interests. State practice realises this view, and demonstrates the importance of states political legitimacy. The case studies presented throughout this study evidence that the most often cited use of extra-legal armed force is that of humanitarian interest. If the use of force prevents humanitarian suffering, albeit with other political motives, then it should not be at least termed 'legitimate'. The fact that it is selectively invoked is unwelcome but not altogether impractical. Of course this restricts some citizens receiving assistance but it also ensures other do. If the only other option available is no support, then selective enforcement action is the next best alternative.

International law is based upon diplomatic and consensual agreements between states. This coupled with the general presumption that sanctions are ineffective leads to a lack of enforcement in international law. This can only add to the belief that states will act as realism suggests. History has shown that little if any sanctions are imposed upon those states engaging in 'illegal but legitimate' action, therefore it would be sensible to assume that there is little in the way of deterrence.

The liberal expectation of universal justice and respect for legality is likely to remain illusional or relevant only in rhetoric.

²⁹⁹ Peter G Stillman, 'The Concept of Legitimacy', [1974] 7 Polity 32, 39.

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