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The Legality and Legitimacy of Unilateral Armed Intervention in an Age of Terror, Neo-Imperialism, and Massive Violations of Human Rights: Is International Law Evolving in the Right Direction?

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The Legality and Legitimacy of Unilateral Armed Intervention in an Age of Terror, Neo-Imperialism, and Massive Violations of Human Rights: Is International Law Evolving in the Right Direction?

J.-G. CASTEL

INTRODUCTION

When the United Nations was created in 1945, its main purpose was to deal with threats to international peace and security in order to prevent states from waging aggressive wars. Today, especially since 9/11, terrorism, the spread of weapons of mass destruction, and internal conflicts involving massive violations of human rights are some of the new challenges confronting this organization. The Security Council, which is charged with the maintenance of international peace and security, has not been very consistent and quick in addressing these issues. As a result, when it has failed to authorize collective action, some states have resorted to unilateral military action to respond to real state and human security needs. Such action has prompted the international community to reconsider the international law rules applicable to these new challenges. This article considers whether a state or a coalition of states without UN authorization may or must take military action against another state sponsoring terrorism or depriving its nationals of their internationally recognized human rights.

WEAKNESS OF INTERNATIONAL LAW WHEN CONFRONTED WITH AN IMPERIAL POWER

International law is a body of rules, processes, and institutions derived from international agreements and customary practice developed over the centuries governing international society. By

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restraining the conduct of states and adjusting their respective jurisdictions, it insures systemic international stability and the coexistence of equal independent sovereign states with different values, concepts, and beliefs. International law also promotes cooperation in various domains of human activities in order to achieve certain fundamental common goals — for instance, the protection of human rights — and providing a moral dimension. Today, international law is evolving in such a way that solidarity and cooperation have become more important than coexistence.

However, although world solidarity and cooperation have increased considerably, especially since the end of the Cold War, and most states consider that they belong to a true international community, sharing a common destiny that creates obligations that cannot be ignored, state sovereignty is still alive and well. As a result, states, especially powerful ones, do not bear well outside constraints and often resort to unilateral action that may not be in conformity with the dictates of international law. This is particularly true with respect to the type of neo-imperialism practised by the United States.

After the Cold War ended, the international community hoped that a new world order would emerge that would emphasize greater political, social, and economic cooperation based on international law and international institutions. Unfortunately, the threat of terrorism has forced some states and especially the United States¹ to pursue their national security interests with vigour. To counter this threat, the United States has embarked upon a full-scale transformation of the international order, by force if necessary, sometimes in disregard of the long-term interests and expectations of the international community.

Throughout the history of the United States, Americans have at times been isolationists and at times interventionists. Today, interventionist tendencies prevail, as there is no security in isolationism. It is evident that the United States has an exceptional role to play in human rights crises by virtue of its founding principles, its moral ideals, and its status as sole remaining superpower. However, it must be able to transcend its national interest in favour of these universal moral ideals, just as power must be combined with principle. This is not easily achieved as realism is the central tenet of the national interest and there always exists a state of tension between this interest and moral obligations.

¹ S. Talbott and N. Chandra, eds., *The Age of Terror* (2001).

Whereas during the Cold War, US policy was defensive, now it is largely offensive in order to maintain American political, economic, and cultural hegemony on a global scale. As President Bill Clinton's secretary of state, Madeleine Albright, stated,² the United States is the indispensable nation endowed with unique responsibilities and obligations. The United States wants to shape a new global order in its own image that will preserve and expend its *imperium*. This new form of imperialism does not seek territorial gains but to create an open and integrated international order based on the principles of democratic capitalism guaranteed and enforced by the United States.³ Current American reliance on military power to set things right has reached a new height as the US defensive perimeter now encompasses the whole world. The war on terrorism, which began on 9/11, is really a war to preserve and advance the strategy of openness, free trade, and globalization, thereby ensuring US hegemony.

President George W. Bush has not changed the goals set by his predecessors. After his re-election, he declared that in the future he is still prepared to act unilaterally and to use military power if necessary, as in Afghanistan and Iraq in order to ensure American security and continued prosperity. On 1 December 2004, in a keynote speech delivered in Halifax, he declared: "There is only one way to deal with enemies who plot in secret and set out to murder the innocent and the unsuspecting. We must take the fight to them. We must be relentless and we must be steadfast in our duty to protect our people."⁴ These goals comprise the promotion of peace, freedom, and democracy as well as the protection of human rights around the world on the ground that liberal democracies do not wage war against one another. The United States will achieve them by persuasion or by force even if it involves the removal of dictators and non-democratic regimes that stand in the way. It will also maintain the right to resort to anticipatory or preventive self-defence if it finds itself threatened in any way, especially by terrorism.

Many states and individuals are opposed to this approach on the ground that it is contrary to international law in so far as intervention constitutes an unjustified interference in the internal and external affairs of states that is prohibited by the Charter of the United

² "If we have to use force, it is because we are America. We are the indispensable nation," quoted by A.J. Bacevich, *American Empire* (2003) at x.

³ *Ibid.* at 3.

⁴ *Globe and Mail*, 2 December 2004, at A11.

Nations (UN Charter).⁵ Only with the approval of the Security Council, pursuant to Chapter VII of this UN Charter, could intervention be justified or when it takes place within the strict confines of self-defence. Thus, unilateral armed intervention motivated by the non-democratic form of government of the target state is not an exception to the principle of non-intervention.

The dilemma faced by the United States is to reconcile a concern for moral principles and international law with the imperatives of national and international power to pursue the national interest. What is good for General Motors may not be good for the whole world! International law is foremost an instrument of international politics, which it serves in order to create a modicum of stability and predictability in international relations either directly or through international organizations. Thus, when a state believes that a rule of international law is contrary to its national or international interests, its natural tendency is not to reject it but to re-interpret it in a way that supports such interests or to deny its application to the situation at hand. In the absence of a superior authority whose decision is binding, and although all states are deemed to be equal, the temptation to do so is much greater when the state is a powerful one and the other members of the international community are weak or dependants. This is particularly true today in light of American neo-imperialism.⁶ As George Orwell⁷ wrote in the book *Animal Farm: A Fairy Story*, all animals are equal but some are more equal than others! This attitude on the part of powerful states is a persistent factor that weakens international law. A democracy without values turns into open or thinly disguised totalitarianism.

Another weakness of the present system is that there can be no objective determination of the conduct of a state. As the Permanent Court of International Justice stated in the the *Steamship Lotus* case,⁸ “[i]nternational law governs relations between independent states. The rules of law binding upon states therefore emanate from

⁵ Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7 (amended in 1965, 1968, and 1973) [UN Charter].

⁶ Noam Chomsky, *Hegemony or Survival: America's Quest for Global Dominance* (2003); T. Roszac, *La menace américaine* (2004). On American national interest, see Condoleezza Rice, “Campaign 2000: Promoting the National Interest” (Jan./Feb. 2000) 79 *Foreign Affairs* 47.

⁷ George Orwell, *Animal Farm: A Fairy Story* (1945) at 90 and Ch. X.

⁸ *The Steamship Lotus*, [1927] P.C.I.J. Series A, No. 10, p. 18.

their own free will." Being the creators of the norms, it is for them to interpret these norms according to their national and international interests. They decide for themselves if their actions are in conformity with international law. This determination is essentially subjective since they are judge and party.⁹

A further difficulty arises from the emergence of new categories of superior norms of international law such as *jus cogens*, which comprises rules that are peremptory, permitting no derogation, and the breach of which constitutes an international crime,¹⁰ for instance, the principle of the UN Charter prohibiting the use of force¹¹ and genocide¹² and obligations *omnium erga omnes* incurred by all states towards the international community in general, for instance, in the field of human rights.¹³ How and by whom are their existence and scope to be determined?

The consequences of the violations of international law norms and rules are also uncertain as each state is free to decide what should be done if its rights have been infringed. In doing so, political considerations are paramount, which explains why some states escape sanctions for violating international law. With the emergence of a single superpower, resort to armed unilateral action without the approval of the United Nations when the national or international interests of that power are at stake raises the question of its legality and legitimacy under international law. The legality and legitimacy of the 2003 unilateral armed intervention in Iraq by the the United States and its allies, without the approval of the United

⁹ The International Court of Justice (ICJ) deals with legal disputes only with the consent of the parties or in an advisory manner at the request of the United Nations. See Statute of the International Court of Justice, available at <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> at Articles 36, 38, and 65.

¹⁰ See Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331 1969 (in force 1980) at Article 53.

¹¹ UN Charter, *supra* note 5 at Article 2 (4). Note that other principles found in the Charter cannot be contradicted by customary international law rules unless such rules are *jus cogens*.

¹² Convention on the Prevention and Punishment of Genocide, 1948, 78 U.N.T.S. 277 (1951) [Convention on Genocide].

¹³ *Barcelona Traction, Light and Power Co. (Second Phase) (Belgium v. Spain)*, [1970] I.C.J. Rep. 3, paras. 33–34. Self determination is a right *erga omnes*, Advisory opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, available at <<http://www.icj-cij.org/>> at para. 88, citing *East Timor (Portugal v. Australia)*, [1993] I.C.J. Rep. 90, para. 29 and advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. Rep. 226, para. 79.

Nations, illustrates the dilemma that the international community faces today since the reasons given for such intervention were both self-defence and the violation of human rights. Does such armed intervention constitute a desirable evolution of international law or has international law been eroded by it?

NON-INTERVENTION: THE BASIC RULES AND PRINCIPLES

Intervention consists of any act by one state or a group of states that attempts to interfere or interferes by force or by other means in the internal or external affairs of another state. The basic rules and principles of international law governing intervention are enshrined primarily in the UN Charter, which codifies the principle of non-intervention based on the sovereign equality of states.¹⁴ Article 2(4) of the Charter declares that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” Paragraph (7) of the same article states that “[n]othing 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; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” This principle, which applies to the United Nations as an organization, extends *a fortiori* to all member states in their relations with other states. The exception to the prohibition enables the Security Council to take military action against a state to maintain or restore international peace and security provided the Security Council has first determined that there exists a threat to the peace, a breach of the peace, or an act of aggression.¹⁵ In principle, the Security Council can only intervene in matters related to international peace and security.

Unilateral armed intervention, which is prohibited by Article 2(4) and (7) of the UN Charter, except in very limited circumstances (for instance, by the lawful exercise of the right of self-defence

¹⁴ UN Charter, *supra* note 5 at Chapter 1 “Purposes and Principles” and Chapter VII “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” See also G.M. Lyons and M. Mastanduno, eds., *Beyond Westphalia? State Sovereignty and International Intervention* (1995).

¹⁵ UN Charter, *supra* note 5 at Article 39. Article VIII of the Convention on Genocide, *supra* note 12, may be an exception to this requirement.

pursuant to Article 51)¹⁶ and by customary international law, presupposes effective institutions and the proper implementation of Chapter VII. When the system of collective security fails, states may be inclined to resort to unilateral armed intervention on their own initiative. Other international documents such as the 1965 UN Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,¹⁷ the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations),¹⁸ and the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe¹⁹ reiterate the same principles.²⁰

INTERVENTION IN IRAQ

DESERT STORM 1990–91: STATE VERSUS STATE-ARMED AGGRESSION

When, on 1 August 1990, Saddam Hussein's army entered Kuwait, Iraq clearly violated Article 2(4) of the UN Charter. The next day, the Security Council condemned Iraq's invasion and demanded the immediate and unconditional withdrawal of its forces.²¹ Iraq did not comply and, on 8 August, announced the annexation of Kuwait. This action was immediately declared illegal, null, and void by the Security Council.²² On 29 November 1990, the Security Council

¹⁶ UN Charter, *supra* note 5 at Article 51: "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."

¹⁷ UN Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, Res. 2131, UN Doc. A/RES/213 (XX)/Rev. 1, reprinted in (1966) 60 Am. J. Int. L. 662.

¹⁸ UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 1971, UNGA Res. 2625 (XXV), UNGAOR, 25th Sess., Supp. No. 28 at 121, UN Doc. A/8028/ [Declaration on Friendly Relations].

¹⁹ Final Act of the Helsinki Conference on Security and Cooperation in Europe, 1 August 1975, reprinted in (1975) 14 I.L.M. 1292.

²⁰ The charters of a number of regional organizations contain similar rules. See, for example, Charter of Organization of American States, 1948, as amended, Can. T.S. No. 23, 1990, at Article 18.

²¹ Resolution 660, UN Doc. S/RES/ 660 (2 August 1990).

²² Resolution 662, UN Doc. S/RES/ 662 (9 August 1990).

authorized the use of force in order to reverse the invasion unless Iraq evacuated Kuwait before 15 January 1991.²³ Since Iraq failed to comply with this resolution by the appointed time, Operation Desert Storm began on 17 January 1991. The UN military operation was led by the United States. Kuwait was liberated and victory was declared on 27 February 1991. As a member of the United Nations, the United States had to support the action taken against Iraq. The intervention did not violate international law since the United States was acting in compliance with the resolutions of the Security Council pursuant to Chapter VII of the UN Charter.

SECOND GULF WAR: 2002–3: THE IMPACT OF THE AGE OF TERROR

Pre-emptive, Anticipatory, or Preventive?

In the fall of 2002 and in the winter of 2003, the United States argued before the Security Council that there was evidence that Iraq had not complied with UN Security Council Resolutions 687²⁴ and 1441,²⁵ ordering it to destroy the weapons of mass destruction (WMD) that it was supposed to possess, and that there was a danger that some of these weapons would be supplied to Al-Qaida and other terrorist groups to be used against a number of states, especially the United States. Thus, military action was necessary to force compliance. The Security Council did not believe the Americans and was not prepared to authorize the use of force, which was possible pursuant to Resolution 1441, paragraph 13, which states “that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.” The Security Council relied on the opinion of Hans Blix, the UN chief weapons inspector who reported that the inspection, which had resumed after an interruption of four years ordered by Saddam Hussein, was now proceeding smoothly, and although no WMD had yet been found, more time was necessary before concluding that Iraq was in breach of its obligations.

As a result of this lack of support by the Security Council, the United States withdrew its proposed resolution authorizing the use of force to secure compliance and, acting outside the United Nations, organized the Coalition of the Willing, which included the

²³ Resolution 678, UN Doc. S/RES/678 (29 November 1990).

²⁴ Resolution 687, UN Doc. S/RES/687 (3 April 1991).

²⁵ Resolution 1441, UN Doc. S/RES/1441 (8 November 2002).

United Kingdom, Spain, Italy, Australia, and others. The 2003 campaign to depose Saddam Hussein was short and successful.

Legality

When a state sponsors terrorist acts or aids terrorist groups in any way to further its or their goals against other states or their nationals, this action constitutes a violation of Article 2(4) of the UN Charter and the 1970 Declaration on Friendly Relations.²⁶ It is also an act of aggression according to the 1974 definition of aggression.²⁷

If attacked by a terrorist act perpetrated or sponsored by a state, a victim state can respond in self-defence²⁸ until the Security Council becomes seized of the matter, pursuant to Article 39 of the UN Charter and authorizes collective enforcement action.²⁹ Collective security is the basis upon which the Security Council has the right to deal effectively with acts of international terrorism. Should a state be threatened by a terrorist act, the customary international law right of individual or collective self-defence also comes into play.

In order to establish the legality of unilateral intervention without UN approval and in the absence of an actual armed attack by Iraq on the United States, the United States and its allies relied on a variation of the customary international law right of pre-emptive self-defence against a threat of imminent attack. The doctrine of pre-emptive self-defence has its origin in the *United Kingdom v. United States* case (*Caroline* case).³⁰ It also finds support in *Military and Paramilitary Activities in and against Nicaragua* (*Merits*),³¹ where the

²⁶ Declaration on Friendly Relations, *supra* note 18.

²⁷ GA Resolution 3314, 14 December 1974, reprinted in (1974) 13 I.L.M. 710 at Article 3(g). "The sending by or on behalf of a state of armed bands, irregulars, or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to acts listed above or its substantial involvement therein."

²⁸ UN Charter, *supra* note 5 at Article 51.

²⁹ SC Resolution 748, UN Doc. S/RES/748 (31 March 1992), with respect to Libya.

³⁰ *United Kingdom v. United States* (1837), 2 Moore 409 [*Caroline* case].

³¹ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (*Merits*), [1986] I.C.J. Rep. 14, at paras. 187–93 [*Military Activities in Nicaragua*]. See also UN SC Resolution 1368, UN Doc. S/RES/1368 (12 September 2001), and SC Resolution 1373, UN Doc. S/RES/1373 (28 September 2001), which reaffirm the inherent right of individual or collective self-defence. Note that the latter resolution recognizes that acts of terrorism constitute

International Court of Justice expressed the view that customary international law on the use of force exists independently of Article 2(4) of the UN Charter. Therefore, pre-emptive self-defence exists outside Article 51 of the UN Charter, which only deals with self-defence against an actual armed attack until the Security Council takes action. The customary international law right of pre-emptive self-defence is the inherent and natural right of a state to act for self-preservation in the face of a serious and imminent or proximate threat to its national security and territorial integrity (for instance, troops of a hostile country are massed at the borders ready to attack). As opposed to Article 51 of the UN Charter, no actual armed attack need to have taken place before pre-emptive self-defence can be used. However, fundamental to the exercise of the right of pre-emptive self-defence, the intervention must be born out of necessity and the level of force must be proportional to the harm it seeks to redress. In other words, the response must not be unreasonable or excessive.³²

The variation added by the United States to the customary international law of pre-emptive self-defence is *anticipatory* or *preventive* self-defence against states sponsoring terrorism. As one aspect of the so-called Bush doctrine,³³ it purports to allow a state, without

a threat to international peace and security without ascribing these acts to a particular state. This is a new approach to the concept of self-defence. Does it mean that where a state without sponsoring terrorism fails to take appropriate measures on its territory to prevent the occurrence of terrorist acts in another state, the latter state would be able to intervene to make up for this deficiency? Per Justice Kooijmans in a separate opinion to the advisory opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, I.C.J. No. 131, at paras. 35–36, available at <<http://www.icj-cij.org/>>. The court held that a state has no right to use force in self-defence against terrorist attacks that are not imputable to a foreign state. See also SC Resolution 1566, UN Doc. S/RES/1566 (8 October 2004), at para. 1: “acts of terrorism ... by whomsoever committed.”

³² *Military Activities in Nicaragua*, *supra* note 31 at para. 176; and advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. Rep. 226, paras. 37–50.

³³ Speech by George W. Bush, White House, 17 September 2002, available at <<http://www.whitehouse.gov/nsc/print/nssall.html>> at 1. The new policy was fully delineated on that day in a National Security Council text entitled *The National Security Strategy of the United States of America*, available at <<http://www.whitehouse.gov/nsc/print/nssall.html>> at chs. III and V. See also J. Record, “The Bush Doctrine and War with Iraq” (Spring 2003) *Parameters*: U.S. Army War College Quarterly 4–21.

prior approval of the Security Council, to act in anticipatory self-defence, not just pre-emptively against an imminent or proximate threat but preventively against a non-imminent or non-proximate but still real threat. Its rationale rests on a definition of the threat to a state based on a combination of "radicalism and technology," that is, political and religious extremism joined by the availability of WMD. Thus, the second Iraqi war became part of the war on terrorism. In light of the lack of action by the Security Council, the United States, as the intended victim of terrorism, was free to decide for itself that security problems justified armed intervention.

Having experienced 9/11, the United States and its allies argued that Saddam Hussein was now an evil *terrorist* since, allegedly, there was proof that he was prepared to supply Osama bin Laden and other Al-Qaida terrorists with WMD to be used against America on its territory. President Bush maintained that the nexus between terrorist organizations of global reach, states sponsoring terrorism, and WMD makes small or impoverished states and even small groups of individuals dangerous adversaries. A good example is Al-Qaida, a non-governmental terrorist organization, which is not subject to international law since it is not a state. Therefore, the Cold War concepts of deterrence and containment are irrelevant against such organizations.

Since the attacks by terrorists in the United States and elsewhere before the intervention by the Coalition of the Willing, as a result of a message by Al-Qaida aired on Al Jazeera, were perceived as potential and even imminent, they required an urgent response. Thus, the United States and its allies had to resort to anticipatory or preventive self-defence against Iraq and its chief villain Saddam Hussein even though he had not attacked the United States and was not planning to do so directly in the future. The concept of imminent threat relevant to pre-emptive self-defense had to be adapted to the capabilities and objectives of today's adversaries. The United States maintained that it must be able to reach potential threats to its security at their source before they could cause harm to the homeland or to the country's interests in the world. To defend itself, the United States and its allies had to eliminate Saddam Hussein to prevent him from supplying terrorists with WMD to be used presently or in the immediate future against the United States. In this way, the United States could overcome the legal limitations imposed by international law on pre-emptive self-defence since there was a lack of convincing evidence of imminent direct attack by Iraq against the United States.

The Bush doctrine, which states that in the case of an imminent or anticipated attack by a terrorist group such as Al-Qaida, acting as the agent, surrogate, or proxy of Saddam Hussein, a state unilaterally can resort to pre-emptive or anticipatory-preventive self-defence and intervene by force against the state that supplied the weapons to the terrorist group, is not yet sanctioned by international law.

Legitimacy

The use of military force by the Coalition of the Willing must be not only legal but also legitimate. Precautionary principles of legitimacy must be met before intervening. Although the threatened harm to the intervening states may have justified *prima facie* the use of military force, it is not clear that its primary purpose was to thwart the threat of terrorism. Securing Iraqi oil resources may have been more important. In addition, not all non-military options for meeting the threat in question had been explored before resorting to military action as a last resort since Iraq was willing to cooperate with the UN inspectors on the destruction of WMD. In response to this willingness, the Coalition of the Willing stated that based on past experience such inspections would not be effective. Finally, although the military action was proportional to the threat and was successful in meeting it, the consequences of the intervention seem to be worse today than the consequences of inaction.

Although Saddam Hussein's WMD ambitions were a potential and probably an inevitable threat rather than an imminent one, potential threats must be addressed by the international community. When they materialize, as in North Korea or Iran today, the crisis that is caused is much more dangerous than the crisis looming. The difficulty is how to deal with the latter. By allegedly waging war by proxy against the United States, Iraq should not have been able to avoid being the target of anticipatory-preventive self-defence.

In its 2 December 2004 report entitled *A More Secure World: Our Shared Responsibility*, the UN High-Level Panel on Threats, Challenges and Change recognizes that "if there are good arguments for preventive military action with good evidence to support them, they should be put to the Security Council, which can authorize action if it chooses to ... [I]n a world full of perceived potential threats, the risk to the global order and the norm of non intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed

action, to be accepted. Allowing one to so act is to allow all.”³⁴ The panel rejects unilateral action in favour of collective action authorized by the Security Council in cases of perceived potential threats. For this reason, it is against rewriting or reinterpreting Article 51 of the UN Charter. In light of the present state of international law, one cannot escape the conclusion that the intervention by the Coalition of the Willing was illegal and illegitimate unless anticipatory-preventive self-defence is considered to be a logical evolution of the customary international law of pre-emptive self-defence.

UNILATERAL HUMAN RIGHTS INTERVENTION

The United States and its allies also argued that military intervention is legitimate and morally justified when a state treats its people in such a substandard way that they are denied their fundamental human rights, including democratic rights, and the protection of these rights can only be assured from the outside. In the case of Iraq, it was clear that Saddam Hussein was a dictator who had a long record of massive human rights abuses and that any move against him could be morally justified. Human rights considerations outweighed the reasons against intervention.³⁵ Armed intervention to force a state to respect human rights has now become the primary official justification by the Coalition of the Willing since, so far, no WMD or links with Al-Qaida have been found. However, it is a doctrine that is not yet well established under international law except when non-military humanitarian assistance is requested by a state as a result of physical calamities such as earthquakes, floods, famine, and epidemics.

Legality and Legitimacy

When a state exercises its jurisdiction, it must be not only in the interest of its people but also in the interest of the international

³⁴ UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UNGA Doc. A/59/565, at paras. 190–92 [*More Secure World*]. See also Kofi A. Annan, Speech to the UN General Assembly, 23 September 2003, available at <<http://.unausa.org/aboutus/annan092303.asp>>.

³⁵ The concern is with the violation of human rights, for instance, the violation of rights found in the International Covenant on Civil and Political Rights, (1966), 999 U.N.T.S. 171, and not with the violations of international humanitarian law in the case of armed conflict as in the 1949 Geneva Convention IV (civilians) (1950), 75 U.N.T.S. 287, or in cases of humanitarian assistance in the case of natural disasters or epidemics.

community as a whole. A state has the responsibility to protect its people. State sovereignty must yield to international obligations; it is not absolute and unconditional. In this context, human rights intervention is the threat to use force or its use by a state, a group of states, or an international organization for the purpose of protecting the nationals of the targeted state from widespread deprivation of internationally recognized human rights by that state and without its consent.

Is the threat or use of force for the purpose of protecting and enforcing human rights lawful under international law as an exception to Article 2(4) and (7) of the UN Charter whether the intervening states are acting with or without the express authorization of the United Nations? Although a modern doctrine of human rights intervention is slowly emerging,³⁶ the right to intervene forcibly and unilaterally for human rights reasons without obtaining the consent of the targeted state or that of the Security Council or collectively with the approval of the Security Council is still a very controversial subject. The UN Charter does not expressly recognize the right to use force to protect the people of a state from their own government or in the event of an overall breakdown in governmental authority, even in the face of genocide.³⁷

The first legal objection to such a type of intervention is based on Article 2(4) of the UN Charter, which, as already noted, prohibits any type of intervention except as provided for in Chapter VII of the Charter. In other words, even when a state has abused its sovereign powers by violating the basic human rights of the people within its borders, it should not be liable to any type of intervention by another state or group of states. If we consider forcible collective human rights intervention by the United Nations under Chapter VII as an exception permitted by the UN Charter, the Security

³⁶ See in general P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993); K. Tomasevsky, *Responding to Human Rights Violations 1946–1999* (2000); S. Hoffmann, *The Ethics and Politics of Humanitarian Intervention* (1996); Don Hubert and Rob McRae, *Human Security and the New Diplomacy* (2002); S.D. Murphy, *Humanitarian Intervention* (1996); M.S. Klimow, *Moral Versus Practical: The Future of US Armed Intervention* (1996); O. Corten and P. Klein, *Droit d'ingérence ou obligation de réaction?* (1992); C. Scott, "Interpreting Intervention" (2001) 39 Can. Y.B. Int. L. 333; P. Garigue, "Intervention-Sanction and 'droit d'ingérence' in International Humanitarian Law" (1993) 48 Int. J. 668; and M. Toufayan, "Deployment of Troops to Prevent Impending Genocide: A Contemporary Assessment of the UN Security Council's Powers" (2002) 40 Can. Y.B. Int. L. 195.

³⁷ However, see Convention on Genocide, *supra* note 12 at Article VIII.

Council must still determine authoritatively whether in the particular situation the human rights violations constitute a "threat to the peace or breach of the peace or act of aggression."³⁸ Recent events in various parts of the world, for instance, in Iraq, Liberia, Somalia, Bosnia-Herzegovina, Kosovo, Afghanistan, Rwanda, East Timor, and Darfur, have clearly indicated that the consideration of human rights tragedies that could trigger Chapter VII is an important element in the maintenance of peace and security. At the time of drafting Chapter VII, human rights intervention was not envisaged. Its purpose was to deal with classic interstate conflicts and international security. However, in some cases, human rights abuses can become a threat to, or a breach of, the peace without a transnational nexus justifying the measures under Chapter VII. Unlike Article 33 of Chapter VI,³⁹ Article 39 in its opening words does not speak of "international" peace and security but simply of a "threat to the peace, breach of the peace," although its closing words refer to "measures to maintain or restore international peace." Thus, Chapter VII could also be used to address internal violence and unrest that threaten the peace within a state as well as genocide.⁴⁰ Article 2(4) aims to protect the territorial sovereignty and political independence of a state, which is not the case with respect to human rights intervention since the intervening state does not seek to deprive the targeted state of its territorial or political attributes.

A second legal objection to human rights intervention is based on Article 2(7) of the UN Charter, which prohibits intervention in the domestic affairs of a state. Although the early practice of the United Nations was to interpret broadly the words "within the domestic jurisdiction" so as to include human rights within such jurisdiction, thus preventing the Security Council from taking action against a member of the UN for violating human rights recognized by the UN Charter,⁴¹ this is no longer the case. The United Nations has since admitted that, in some instances, individuals may become subjects of international law and has adopted numerous international covenants, charters, and declarations dealing with human

³⁸ UN Charter, *supra* note 5 at Article 39.

³⁹ *Ibid.* at Chapter VI, which deals with the pacific settlement of disputes.

⁴⁰ Convention on Genocide, *supra* note 12 at Article VIII, which does not refer to international peace and security.

⁴¹ UN Charter, *supra* note 5 at Articles 55.c (respect and observance of human rights by members) and 56 (cooperation of members with the United Nations for the achievement of the purposes of Art. 55.c).

rights. How can violations of human rights be considered a domestic matter when such rights create obligations *erga omnes* and some of them such as genocide are *jus cogens*?⁴² To overcome the prohibition of Article 2(7), it is sufficient to show that human rights crises do not fall "essentially within the domestic jurisdiction of any state." They are the concern of the international community as a whole. Of course, for each state, the scope of the reserved domain of non-intervention is variable. It depends upon the international human rights obligations it has accepted unless they are *jus cogens*. Today, Article 2, paragraphs (4) and (7), can no longer be considered to be obstacles to UN intervention for the protection of human rights. National sovereignty cannot be invoked to immunize a state or a dictator such as Saddam Hussein and others from international sanctions.

International law has evolved in the right direction by enabling the Security Council to resort to enforcement measures under Chapter VII. It took such action in 1991 to protect the Kurds and the Shiite Moslems in Iraq,⁴³ although no direct collective armed intervention took place. At that time, most members of the Security Council were of the opinion that the Kurds' situation was a threat to international peace and security.⁴⁴ As then, Secretary General Javier Perez de Cuellar wrote in his annual report on the work of the United Nations, which was presented to the General Assembly in September 1991, Article 2(7) can no longer be regarded as a protective barrier behind which human rights can be massively or systematically violated with impunity: "What is involved is not the right of intervention but the collective obligation of states to bring relief and redress in human rights emergencies. It seems beyond question that violations of human rights imperil peace."⁴⁵ However, he added that international action for protecting human rights must be based on a decision taken in accordance with the UN Charter. It must not be a unilateral act. Therefore, if one accepts this view, the Coalition of the Willing was in breach of international law.

⁴² See notes 10–13 in this article.

⁴³ SC Resolution 688, UN Doc. S/RES/688 (5 April 1991), (1991) 30 I.L.M. 858.

⁴⁴ See also East Timor, SC Resolution 1264, UN Doc. S/RES/1264 (15 September 1999); Somalia, SC Resolution 794, UN Doc. S/INF/48 (3 December 1992) (partial armed intervention).

⁴⁵ *Annual Report on the Work of the United Nations*, Doc. A/46/1, GADR 46th Sess., Suppl. No.1, ST/JPDI/1168. See also Kofi A. Annan, "Two Concepts of Sovereignty," *The Economist*, 18 September 1999.

Another question left unanswered is whether intervention to restore or establish democracy is part of human rights intervention?⁴⁶ Trying to change the political situation directly is dangerous since human rights intervention lacks the mandate to alter the fundamental causes of inhumane conditions. Yet, why should the root causes of human rights intervention, for instance, Saddam Hussein, be left in place? Is it wrong to support or establish a democratic system of government in another state against an illegitimate regime? At the present international law does not support this type of intervention.⁴⁷

Although the principle of non-intervention should not be lightly cast aside, it appears that Chapter VII provides a good legal justification for forcible collective intervention by the Security Council when there are serious questions concerning the violation of human rights and humanitarian law, the need for humanitarian assistance, and perhaps a lack of democracy. The protection of human rights abolishes the distinction between the domestic and international jurisdiction of states. A state derives legitimacy in part from its citizens. If it denies them their fundamental rights, the constraint against external intervention no longer applies.

If the Security Council is incapable or unwilling to deal with the issue of gross violations of human rights, for instance due to a veto, the UN General Assembly could act pursuant to the Uniting for Peace Resolution precedent.⁴⁸ Regional and sub-regional organizations could also take action pursuant to Chapter VIII of the UN Charter. These international bodies would add legitimacy to the intervention as they would be less suspect of serving any particular national agenda.

HUMAN RIGHTS INTERVENTION AS AN INDEPENDENT DOCTRINE OF CUSTOMARY INTERNATIONAL LAW

Where action by the United Nations or a regional or sub-regional organization has been solicited and rejected, may a state or a group

⁴⁶ This was one of the reasons given for the US intervention in Panama in 1989. See also Article 21 of the Universal Declaration of Human Rights (free elections), UN Doc. A/810 (1948). However, see Declaration on Friendly Relations (freedom to choose political system), *supra* note 18; and *Military Activities in Nicaragua*, *supra* note 31 at paras. 206 and 209.

⁴⁷ See, for example, *Military Activities in Nicaragua*, *supra* note 31 at paras. 202–9.

⁴⁸ Uniting for Peace Resolution, 1951, GA Res. 377 (V) UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 at 10. The resolution does not authorize intervention

of states, such as the Coalition of the Willing, unilaterally intervene in another state to protect human rights? In other words, is there a customary international law right to intervene by force for human rights reasons whether or not collective security fails to function? Since Article 2(4) of the UN Charter imposes a virtually all-embracing ban on the use of force with the exception of self-defence in Article 51, it would seem that resort to human rights intervention without UN approval pursuant to Chapter VII is not possible. However, as already mentioned, the International Court of Justice (ICJ) in the *Nicaragua* case⁴⁹ was of the opinion that there exists a customary law on the use of force independent of Article 2(4). Thus, it is arguable that there is also a customary international law right of intervention in the case of massive and systemic violations of human rights by a state, which is independent of Article 2(4) and (7) of the UN Charter. The right coexists with Article 2(4) and (7), just as the customary right of pre-emptive self-defence coexists with Article 51. Therefore, customary human rights intervention is not linked with collective security under Chapter VII.⁵⁰

Human rights intervention as an independent doctrine of customary international law and as an adjunct to Chapter VII could perform a function that this chapter does not cover, for instance, in the case of intra-state massive human rights abuses that do not involve threats to international peace and security. In most cases, however, it is likely that customary intervention would only take place in the absence of UN intervention pursuant to Chapter VII. The costs of the intervention would be borne by the intervening states and not by the United Nations. As for the nature of the intervention, it would have to comply with the criteria of the *Caroline* case.⁵¹

When comparing both mechanisms, one cannot fail to notice that the fact that Chapter VII provides a legal basis for the Security Council to intervene does not guarantee that the intervention is legal as there is a lack of substantive standards as to what constitutes a threat

itself but only recommends action to the General Assembly. See also UN Charter, *supra* note 5 at Article 11 (maintenance of international peace and security); Article 13 (assisting in the realization of human rights and fundamental freedoms); and Article 14 (measures for the peaceful adjustment of any situation).

⁴⁹ *Military Activities in Nicaragua*, *supra* note 31.

⁵⁰ Note that unilateral human rights intervention has taken place on a few occasions, for instance, India in East Pakistan (1971), Vietnam in Cambodia (1978), and Tanzania in Uganda (1979).

⁵¹ *Caroline* case, *supra* note 30.

to international peace and security. It is also subject to the veto⁵² that makes intervention selective and uneven. Financial constraints may also prevent intervention except in the most shocking cases. Even if the Security Council were the exclusive authority to approve armed human rights intervention, it would not be able to manage the crisis without the economic and military support of a few major powers, which raises serious questions about the legitimacy of the whole process. On the other hand, armed intervention pursuant to a customary international law right of human rights intervention, coexisting with Article 2(4) and (7) of the UN Charter and not linked with collective security, would not be subject to the veto, and its legality and justification could be challenged before the ICJ, which is not the case with respect to Security Council resolutions. Judicial review of the decisions of the Security Council is a controversial matter. The principle is that the ICJ is not generally empowered to overrule or undercut decisions made by the Security Council under Articles 39, 41, and 42 of the UN Charter to determine the existence of any threat to the peace, breach of peace, or act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security. In the 1998 preliminary objections to the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamhiriya v. United States of America)*,⁵³ the majority of the court side-stepped the judicial review issue. However, on previous occasions, the court had stated that it does not possess powers of judicial review or appeal in respect of the decisions taken by the Security Council.⁵⁴

By developing an independent doctrine of human rights intervention under customary international law that is not linked to international peace and security, international law would recognize the intrinsic value of human rights and be free of the shackles of Chapter VII, which must not be the sole legal basis for such type of

⁵² See the incapacity of the Security Council to act with respect to Kosovo because of the potential use of the veto by China and the Russian Federation as a result of which the North Atlantic Treaty Organization (NATO) intervened.

⁵³ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamhiriya v. United States of America)* (preliminary objections), (1998), 37 I.L.M. 587 at paras. 46–50.

⁵⁴ *Advisory Opinion with Respect to Namibia*, [1971] I.C.J. Rep. 16, at 45.

intervention irrespective of whether or not collective security mechanisms are functioning effectively. Thus, it would be a progressive step if the international community were to adopt a doctrine of customary intervention and restrict Chapter VII to interstate conflicts, as it was intended originally, since you cannot extend the mandate of the Security Council to deal with every human rights issue as one of international peace and security.

New Developments and Suggestions for the Future

The existence of, or the need for, a customary right of human rights intervention is not addressed by the International Commission on Intervention and State Sovereignty, which concentrated on the UN Charter and the role of the Security Council in this area of protection and enforcement of human rights. In its 2001 report entitled *The Responsibility to Protect*, the commission dealt with the question of “when, if ever, it is appropriate for states to take coercive — and in particular — military action, against another state for the purpose of protecting people at risk in that other state.”⁵⁵ The report is intended to provide precise guidance for states faced with human rights protection claims in other states. It acknowledges that the primary responsibility rests on each state to protect its population from harm and that the secondary responsibility rests on the international community to act where that state is unable or unwilling to protect its people or is the perpetrator of the harm in question. The report goes on to state that, “[w]here a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”⁵⁶

Such responsibility embraces three different expectations:

1. *The responsibility to prevent*, by addressing both the root causes and the direct causes of internal conflict and other man-made crises putting populations at risk. Prevention is the most important dimension of the responsibility to protect before any intervention is contemplated.

⁵⁵ International Development Research Centre, *The Responsibility to Protect*, December 2001, available at <<http://www.idrc.ca>> at foreword [*Responsibility to Protect*].

⁵⁶ *Ibid.* at synopsis (1) Basic Principles B.

2. *The responsibility to react*, with appropriate measures that may include coercive measures such as sanctions, international prosecution, and, in extreme cases, military intervention. Such types of intervention are only warranted when there is serious and irreparable harm occurring to human beings or that is imminently likely to occur, such as a large-scale loss of life that may amount to genocide or a large-scale "ethnic cleansing."
3. *The responsibility to rebuild* after military intervention.

When military intervention takes place, it must meet several precautionary principles:

1. *Right intention*. The purpose of the intervention must be to halt or avert human suffering, no matter what other motives intervening states may have.
2. *Last resort*. Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored.
3. *Proportional means*. The scale, duration, and intensity of the planned military intervention (as in the case of self-defence) should be the minimum necessary to secure the defined human protection objective.
4. *Reasonable prospect of success*. There must be a reasonable prospect of success in halting or averting the suffering that has justified the intervention, with the consequences of the action not likely to be worse than the consequences of inaction.

With respect to authorization of any military operation, the report states that the United Nations is the only organization with the universally acceptable authority to validate such operations.⁵⁷ Within the United Nations, only the Security Council can authorize military intervention for the protection of vulnerable populations. The task is not to find alternatives to the Security Council as a source of authority but rather to make the Security Council work much better than it has in the past. In order to validate any human rights intervention by a state or coalition of states, the authorization of the Security Council must be sought before any military action is carried out. The Security Council must deal promptly with any request, and its permanent members must agree not to apply

⁵⁷ *Ibid.* at para. 6.12; and UN Charter, *supra* note 5 at Article 24 (responsibility of the Security Council for the maintenance of peace and security).

their veto power in matters where their vital interests are not involved. Should the Security Council reject a proposal or fail to deal with it in a reasonable amount of time, the report suggests that the matter be referred to the UN General Assembly meeting in an emergency special session under the Uniting for Peace Resolution⁵⁸ or to the relevant regional or sub-regional organization under Chapter VIII of the UN Charter, subject to their seeking subsequent authorization from the Security Council.⁵⁹

What if these international bodies fail to discharge their responsibilities? It is doubtful and unrealistic to expect that when they fail to act, a state or a coalition of states, such as the Coalition of the Willing, will not take unauthorized action and undertake military operations in conscience-shocking situations that cry for immediate intervention. The report raises this issue, but it is not clear whether military action outside the United Nations is legal as a last resort. It merely recognizes that this possibility should prompt the Security Council to act in order not to damage the credibility of the international organization.⁶⁰

Although, undoubtedly, the primary responsibility to deal with human rights crises rests with the United Nations, one should not rule out unilateral armed action based on a customary right of intervention to meet the gravity and urgency of the situation, provided the intervening states fully observe the necessary precautionary principles governing military intervention. It would seem that the intervention by the Coalition of the Willing in Iraq observed some of these principles, although the principles of last resort and of reasonable prospect of success were not fully met.

Unilateral armed intervention could be justified even in the absence of UN or regional or sub-regional approval in cases of urgency when the reasons for withholding approval are not weighty and there is ample evidence that the cause and the motives of those who would intervene are morally justified. However, who will determine whether the cause is just and whether the intervener has no other motive than the enforcement of what is right? This decision could be made by an impartial body, such as the ICJ, which would make it on an expedited basis. The violation of human rights must cause irreparable injury, and the intervention

⁵⁸ Uniting for Peace Resolution, *supra* note 48.

⁵⁹ For example, Liberia in 1992, Sierra Leone in 1997, and NATO in Kosovo in 1999. Note that NATO is not a regional organization.

⁶⁰ *Responsibility to Protect*, *supra* note 55 at para. 6.36.

must cause less damage to the targeted society than would inaction. The goal is to stop the wrongdoing and protect the victims, not attack the whole nation. Therefore, the methods used to achieve these goals must be subject to the principle of proportionality as in the case of self-defence.

It is suggested that armed human rights intervention by a state or group of states primarily for the purpose of protecting the nationals of the targeted state from widespread deprivation of their internationally recognized human rights should be possible without the authorization of the targeted state or the international community in very urgent situations. Critics maintain, however, that powerful states are often tempted to use a dubious general customary international law right to intervene forcibly to fight terrorism or to protect human rights as an excuse for meddling in the affairs of less powerful states. Only the United Nations, they say, should be able to authorize action on behalf of the entire international community instead of a select few, since such action might not be conducted for the right reasons or the right commitment to the necessary precautionary principles that are applicable. Unfortunately, unilateral action is generally motivated by a narrow set of economic or other interests and ideological goals. It does not provide a degree of predictability, which is most important in international relations. For instance, although American security concerns and human rights abuses were the two official legal and moral justifications for intervening in Iraq for the second time, the real reason for intervening probably was to secure the supply of oil for the American economy. In the first Gulf war, the United States wanted to protect the oil resources of Kuwait and Saudi Arabia. In the second Gulf war, it was Iraqi oil resources that had to be secured. In both instances, the national interest of the United States dictated its course of action.

In the report *A More Secure World: Our Shared Responsibility*, the UN High-Level Panel on Threats, Challenges and Change endorsed "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council, authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."⁶¹ The panel remarked that the effectiveness of the global collective security system depends ultimately not only on the legality of the decisions made but also on

⁶¹ *More Secure World*, *supra* note 34 at para. 203.

the common perception of their legitimacy.⁶² Agreed guidelines should be adopted, which go “directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be.”⁶³ Thus, in deciding whether to authorize or endorse the use of military force, the Security Council should consider at least the following five basic criteria of legitimacy: the seriousness of the threat; the proper purpose of the military action; last resort; proportional means; and the balance of consequences. The panel believed that taking these into account would minimize the possibility of individual member states by-passing the Security Council.⁶⁴

WHAT SHOULD BE THE POSITION OF CANADA?

The difficulty with the “war on terror” is that the enemy is invisible and its tentacles reach across national boundaries. Terrorism does not involve interstate conflicts unless it is state sponsored. Similarly, violations of human rights rarely involve interstate conflicts. However, the absence of interstate conflicts does not mean that terrorism and massive violations of human rights do not endanger the peace and security of mankind. New strategies and tactics are needed. Is Canada prepared to contribute to their formulation and implementation? Canada should not restrict itself to the role of peacemaker or peacekeeper. Canada must collaborate with the United States and other states in the pursuit of common interests. It must continue to support the war against terrorism and be prepared to take an active part in the worldwide protection and enforcement of human rights. Canada must understand that the United States is often interested in quick results, whether or not they can be achieved with UN support. It is to the credit of the United States that in the Security Council its representatives argued at length before intervening in Iraq. Cheap knee-jerk anti-Americanism is not the answer in view of the importance of good

⁶² *Ibid.* at para. 204.

⁶³ *Ibid.* at para. 205.

⁶⁴ *Ibid.* at paras. 205–7. See also Scott, *supra* note 36 at 366–67, who favours the adoption by the UN General Assembly of a declaration as to when and how legitimate humanitarian intervention should take place with or without Security Council backing and the creation of a special committee of the General Assembly meeting in informal sessions to deal with humanitarian crises that are on an alert list so as to pass judgment should the Security Council fail to act in accordance with the criteria set out in the declaration.

Canada-United States relations.⁶⁵ In a unipolar world, it is better to exercise influence on the United States through a close friendly relationship than to adopt a confrontational attitude. The interests of Canada in the world are best served by such a close relationship, as it is not productive to chart a foreign policy course that conflicts with the one adopted by Washington. This position does not mean that Canadian foreign policy must be in step with American foreign policy. We can disagree when our views are different but let us do it in a civilized manner. Our relationship with the United States must be based on mutual respect, common values, and the pursuit of common interests.

Canada must promote human security and protect individuals from violence and repression wherever they are, and it should even resort to military intervention *if absolutely necessary*. However, as a general rule, UN authorization should be sought first since this body can confer greater legitimacy to intervention than a coalition of states acting outside of it. When it is not possible, Canada should be willing to act unilaterally or as part of a coalition of states to uphold the principle of protection provided precautionary principles are followed. Canada must be uncompromising about human rights on the international stage as it was in Kosovo in 1999 as part of the North Atlantic Treaty Organization and as it has been recently in the Darfur region of Sudan.

Precautionary principles that are relevant to military operations in the case of human rights intervention are equally relevant when dealing with international terrorists and those who harbour them. In both situations, action should always be exercised in a principled way that, as noted previously, embraces the principles of right intention, last resort, proportional means, and reasonable prospects of success. Before resorting to unilateral armed intervention, non-coercive measures must be exhausted. Every effort must be made to develop strategies encouraging peace-building activities. Preventive diplomacy is most important. Incentives to eliminate the conditions that have given rise to the abuses should be offered to the abusive state. Once intervention has taken place, the perpetrators of the human rights abuses must be brought to international criminal justice.

Canada must encourage the international community to adopt norms that trigger armed intervention and that dictate by whom,

⁶⁵ See in general J. Welsh, *At Home in the World, Canada's Global Vision for the Twenty-First Century* (2004).

since it would be better to do this in a multilateral convention than to leave it to customary international law. Violations of human rights that prompt intervention should be clear and well documented by the UN Commission on Human Rights on an expedited basis⁶⁶ or by a UN-appointed Commission of Inquiry.⁶⁷ This procedure would avoid any suspicion of ulterior motives on the part of the intervening states.

It is to Canada's credit that it has sponsored the creation of the International Commission on Intervention and State Sovereignty, which produced the report *The Responsibility to Protect*. The recommendations contained in this report⁶⁸ are supported by the Canadian government, which is trying to persuade the international community to adopt them.⁶⁹ Achieving this goal would probably require enlarging the mandate of the Security Council by amending Article 39 of the UN Charter, specifically giving it the power to authorize intervention in a state with military action or peacekeepers in the case of massive violations of human rights, even when international peace and security are not endangered. Such an amendment would be in keeping with the preamble and Article 1 (3) of the UN Charter, which refer to the respect for human rights as one of the goals of the organization. As already mentioned, the UN High-Level Panel on Threats, Challenges and Change supports resort to the Security Council when dealing with the collective international responsibility to protect.⁷⁰

CONCLUSIONS

What should be done when a state supports terrorism and is willing to supply WMD to terrorist groups or when it violates the fundamental human rights of its people and the United Nations is incapable or unwilling to confront it? Recent intervention in Iraq

⁶⁶ See, for example, UN Economic and Social Council Resolution 1235 (XLII), 6 June 1967.

⁶⁷ As in the case of the Darfur region of Sudan. See SC Resolution 1564, UN Doc. S/RES/1564 (18 September 2004) at para. 12; and *Report of the International Commission of Inquiry on Darfur to the Secretary General*, 27 January 2005, and *Report of the Secretary General*, 31 January 2005, Doc. S/2005/57.

⁶⁸ *Responsibility to Protect*, *supra* note 55.

⁶⁹ See Prime Minister Paul Martin at the Francophonie summit in Ouagadougou in Burkina Faso in November 2004. The Canadian government is preparing a review of Canada's foreign policy to be released in 2005.

⁷⁰ *More Secure World*, *supra* note 34.

reveals evolving attitudes on the part of some states with respect to the use of force in anticipatory-preventive self-defence or in protecting human rights. Yet, post-Cold War interventions do not demonstrate a ready acceptance of a general right of unilateral armed humanitarian intervention. Although some countries and individuals have expressed disapproval of US action in the second Gulf War as another example of its unilateral interventionist imperialist approach to world affairs, one must acknowledge that only America has the power and the resources to defend the international community against terrorism and to sanction massive violations of human rights on which there is more or less universal agreement.

The better approach, as suggested by Canada and the UN panel, is to obtain the authorization of the UN Security Council, pursuant to an amended Chapter VII or construed broadly beyond the concept of a breach of, or threats to, international peace and security to cover massive violations of human rights. This authorization would lend a degree of legitimacy to armed intervention and allow for sharing the costs and risks. It would also reduce suspicion that an intervening state may be furthering a self-serving agenda. The issue is not to by-pass the Security Council but rather to make it work better. However, as the recent events in the Darfur region of Sudan and, before that, in Rwanda and other places have demonstrated, wide support has not been forthcoming.⁷¹ Thus, in certain extreme circumstances, unilateral armed intervention by a state or coalition of states without UN approval should be legal and legitimate, provided that the protection of human rights is the dominant motive. The intervention should be driven by altruistic motives to address the suffering of a foreign people and not primarily to further the economic gain or geopolitical security interest of the intervening state.

Today, international law is moving forward by slowly overcoming the principle of state sovereignty in an attempt to be relevant to a post-Cold War world when the violation of human rights constitutes a threat to an orderly international society. Little by little, international law is adopting normative moral principles that promote values of human dignity and justice as well as systemic stability.

⁷¹ For instance, so far in the Darfur region of Sudan, the African Union has taken no military action against the government of Sudan to stop it from participating in gross violations of human rights. See the sources outlined in note 67 of this article.

Neither the lexicon of a just war nor that of terrorism seem to reflect accurately the current state of world affairs. If terrorists or massive violators of human rights cannot be brought to justice peacefully, resort to force may be the only effective response to apprehend them. However, when directing international efforts to eradicate terrorism or massive abuses of human rights, the United States must do so wisely, not as a hegemonic power but as a senior partner sharing in global power and working out problems through the United Nations whenever possible.

Above all, it is important that states not become like the terrorists and violators of human rights and weaken a just cause by the use of unjust means. They must work together to deal with the underlying causes of terrorism and human rights abuses. To eliminate both requires long-term action. Peace is gained by justice, not by the force of arms. Terrorism and human rights abuses can only be effectively challenged through a concerted multilateral collective approach and not through the politics of unilateralism. To gain support, allies must be defined more by shared interests than by shared values. Therefore, it is hoped that in the future, the United States will move towards global leadership rather than global domination and will fully support action by the United Nations, as it has done lately in the case of humanitarian assistance arising from the 26 December 2004 tsunami.⁷² By acting in this way, the United States will restore its credibility as an international presence for stability and security and give an ethical dimension to its imperial tendencies.

As US president Harry Truman declared when the United Nations was founded: "We have to recognize — no matter how great our strength — that we must deny ourselves the license to do always as we please."⁷³ This notion is more relevant now than ever before, as the United States remains the sole superpower in the world. Even though the unilateral military intervention in Iraq by the Coalition of the Willing, without the authorization of the United Nations, appears to be neither legal nor legitimate, it has had a positive effect by bringing to the fore the need to widen the mandate of the Security Council rather than letting it evolve by re-interpretation. As acknowledged by the UN high-level panel, a

⁷² See Z. Brzezinski, *The Choice, Global Domination or Global Leadership* (2004). With respect to unilateralism versus multilateralism, see R. Kagan, *Of Paradise and Power: America and Europe in the New World Order* (vintage ed., 2003-4) at 144.

⁷³ Quoted in *More Secure World*, *supra* note 34 at Part 4: "A More Effective United Nations for the Twenty-First Century" and synopsis at 64.

new international customary norm is emerging, which recognizes that there is a collective international responsibility to protect, exercisable by the Security Council to authorize military action as a last resort in the event of massive violations of human rights. Thus, international law is evolving in the right direction. Let us hope that this new emerging norm will soon become widely accepted and, when necessary, will be acted upon by all of the members of the United Nations.

Sommaire

L'intervention armée unilatérale face au terrorisme, au neo-impérialisme et aux violations massives des droits de l'homme: le droit international évolue-t-il dans la bonne direction?

L'intervention militaire unilatérale en Iraq par les États-Unis et ses alliés sans l'approbation du Conseil de Sécurité qui repose sur la légitime défense préventive contre la menace d'actes de terrorisme et sur la responsabilité de protéger la population iraquienne contre la violation massive des droits de l'homme par Saddam Hussein pose la question de savoir si cette intervention est compatible avec les données actuelles du droit international. Les principes de non intervention et de non ingérence énoncés aux paragraphes 4 et 7 de l'article 2 de la Charte des Nations Unies et qui ont leur source dans la règle de l'égalité souveraine des États conservent-ils encore toute leur force? Dans l'état actuel du droit international, il est clair que l'intervention américaine en Iraq n'est ni légale ni légitime. Seul le Conseil de Sécurité avait le droit d'autoriser une telle intervention en vertu du Chapitre VII de la Charte des Nations Unies à moins que l'intervenant invoque le droit de légitime défense reconnu par l'article 51 de cette Charte ou par le droit international coutumier strictement interprété. Quant au droit d'ingérence, le droit international coutumier évolue dans la bonne direction puisqu'il commence à reconnaître l'existence d'une responsabilité internationale de protection des personnes qui sont les victimes de violations massives des droits de l'homme. En effet, les droits de l'homme font naître à l'égard de l'État des obligations internationales qui conditionnent l'exercice de sa compétence territoriale. Il s'agit d'une conséquence directe de la singularité substantielle des droits de l'homme et de leur caractère objectif. Cependant, ici encore, l'intervention américaine devait être approuvée par le Conseil de Sécurité car seule l'organisation des Nations Unies a le droit de sanctionner les atteintes aux libertés fondamentales perpétrées à l'intérieur même d'un État.

Summary

The Legality and Legitimacy of Unilateral Armed Intervention in an Age of Terror, Neo-Imperialism, and Massive Violations of Human Rights: Is International Law Evolving in the Right Direction?

*With the end of the Cold War, the United States has emerged as the sole remaining superpower whose ambition is to create a new open and integrated world order based on principles of democratic capitalism. To ensure its hegemony, the United States is prepared to resort to military action with or without UN approval when its international and national security interests are at stake. The intervention in Iraq by the Coalition of the Willing is a good example of this policy and raises the question of its legality and legitimacy under contemporary international law. May or must a state resort to military intervention against a state sponsoring terrorism or depriving its nationals of their internationally recognized human rights? The so-called "Bush doctrine" of anticipatory or preventive self-defence against a state accused of supplying weapons of mass destruction to a foreign terrorist organization, which was one of the reasons advanced by the Coalition of the Willing for intervening in Iraq, meets neither the conditions laid out in Article 51 of the UN Charter nor those of customary international law. Thus, at the present stage of development of international law, the Bush doctrine is not even *lege ferenda*. It is not an extension of the customary international law right of pre-emptive self-defence. Only with the approval of the Security Council pursuant to Chapter VII of the UN Charter or when it takes place within the strict confines of self-defence, can armed intervention be legitimate.*

The second reason for intervening in Iraq given by the Coalition of the Willing is based on humanitarian considerations, which raises the question whether the protection of human rights can be assured from the outside. Here, international law is evolving in the right direction since the international community is prepared to adopt the concept of responsibility to protect, which justifies the use of force to protect and enforce human rights as an exception to Article 2(4) and (7) of the UN Charter. Again, such intervention is legal only when approved by the Security Council acting pursuant to Chapter VII on the ground that human right crises do not fall "essentially within the jurisdiction of any state." However, the international community, with the exception of the Coalition of the Willing, is not yet prepared to support a right of unilateral military intervention as a last resort when the Security Council is incapable and unwilling to do so. This includes intervention motivated by the non-democratic form of government of the targeted state. Although the primary responsibility to deal with

human right crises rests with the United Nations based on the responsibility to protect, it is argued that one should not rule out unilateral military action based on a customary international law right of intervention to meet the gravity and urgency of the situation provided the intervening state fully observes the necessary precautionary principles governing such type of intervention. The conclusion is that terrorism and human rights abuses can only be effectively challenged through a concerted multilateral collective approach not through the politics of unilateralism.