THE USE OF FORCE AND IT'S LEGITIMACY IN INTERNATIONAL LAW.

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DECLARATION

I ASHABA RINAH hereby declare to the best of my knowledge and belief that this is my original piece of work and that it has never been submitted for the award of any in credential to any university or college or published as whole or part.

I further declare that all my material sited in this proposal which is not my own has been fully acknowledged.

Signature: ..... Date: 25th / 06/19

ASHABA RINAH

APPROVAL

This is to certify that this research report entitled "a critical analysis on the law use of force in international law, is illegal but legitimate."

MR. KAHAMA DICKSON

(SUPERVISIOR)

Signature .....

Date 25/6/19

DEDICATION

I dedicate this research to my family especially my parents thank you for all the support rendered to mi throughout the entire course

May God bless you all abundantly

ACKNOWLEDGEMENT

Above all, I recognize the wisdom and protection of the Almighty God who has helped mi through this struggle of academics. Special thanks goes to my parents for their endless support may God richly reward them. Thanks goes to my friends, my families and well-wishers for their prayers all along. Special thanks goes to all lecturers in the department of law of Kampala International University. My supervisor **Mr. Kahama Dickson** for the support in this research report and most importantly academic encouragement he rendered to me May God bless him.

LIST OF ABREVIATIONS

UNSC	United Nations Security Council
ISIL	Islamic State of Iraq and the Levant
UN CHARTER	United Nations Charter
UK	United Kingdom
UN	United Nations
WMD	Weapon of Mass Destruction
NATO	North Atlantic Treaty Organization

LIST OF STATUTES

UN Charter of 1945

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INTRODUCTION

CHAPTER ONE

1.0 Background

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 authorization. The US and UK are particularly keen to stress a legal right to use force based on self-defense. This claim of self-defense is founded upon the threat to Iraq. The inherent right of self-defense is unquestionable; however, it is questionable whether this right extends to striking targets inside Syria in order to defend Iraq.

1.1 Problem statement

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. Furthermore, the relation between force and law is a very complicated one. We except from law the ability to exclude force in interpersonal relationship, because in that way we can guarantee an order of justice; but law needs force to realize such order. Law needs force to realize itself, because as Von Jerhing says: "A rule of law without coercion is self-contradictory, it is a fire that does not burn, alight that does not shine" 1. Dealing with law is dealing with force, but not every kind of force can achieve stature of law. A raw force, a force that has no limits in its realization cannot be considered as a legal one.

1.2 Research questions and objectives

[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. This will 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.' This will be discussed further throughout this thesis.

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.' At this point it is important to note that legitimacy is based on what the majority view as legitimate or justifiable behavior. 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

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[1] Peter G Still man, 'The Concept of Legitimacy', [1974] 7 Polity 32, 42. Still man 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.

question the relevance and role of 'power politics' within strictly legal analysis and dictate that the law is only that stated as such.

1.3 Literature review

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.

1.4 Methodology

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.'[2] 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.

The use of 'illegal' force in the case-studies to be considered stems from the inherent problems concerned with the authorization to use force under Chapter VII UN Charter. The UN can only authorize the use of force, it is not able to enforce its will. 'Reliance has to be placed on consent, consensus, reciprocity and good faith.'[3] 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. 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 emphasized 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.'[4] A key issue is whether this negative realist view has to be accepted, or whether

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[2] Nicholas J Wheeler, Saving Strangers Humanitarian Intervention in International Society (Oxford University Press 2000)

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

[4] Jutta Brunnee and Stephen J Toope, Legitimacy and Legality in International Law-An Interactional Account (Cambridge Studies in International and Comparative Law 2010)

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. .

1.5 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, 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 authorizations 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 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 authorized 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 recognized 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.[5] 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.[6] 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.[7] 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.

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

[5] 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).
[6] ibid.
[7] W B Stern, 'Kelsen's Theory of International Law' [1936] 30 The American Political Science Review 736-741.

or policy or moral implications. Corten recognizes the limitations of this strict interpretation of the law. He argues: 'certain problems cannot be resolved by reliance on positivist styles of legal appraisal.'[8] 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.'[9] This is reiterated by authors including, in a vaguely positive vein, Chesterman *et al*[10] who discuss how the UK sought authorization to use force in Iraq (2003). However, in the absence of such authorization, the UK government was still prepared to take action. Chesterman *et al* propose that it is a psychological barrier which ensures that states seek authorization. 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.' 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-emptively against emerging threats.[11] However, he recognizes 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' then the doctrine is dubious.

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

[9] 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.

[10] Malcolm N Shaw, International Law (6th edn, Cambridge University Press 2008) 1156.

[11] 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.

Roberts legalistic approach to state intervention criticizes 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 authorization 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.[12] 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-defense, where an armed attack is foreseeable, from interceptive self-defense, 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[13] 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 proceduarlism. 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 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.' 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

[12] Malcolm N Shaw, International Law (6th edn, Cambridge University Press 2008) 1140.
[13] ibid 1139.

supported. However, 'the UN has not lived up to expectations after Iraq [1990].' Dixon's view is skeptical. 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.' 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 recognizes 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 unauthorized 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.' Realism criticizes 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 analysis of each option. To realist scholars, states will inevitably make the only 'rational' choice'

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. 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.' 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.'

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.' That is, they seek to discover how a policy underlying a legal doctrine could affect the power of the nation. 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'. 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 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.' 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.' 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.' 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.' 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 credibility. He suggests those who invoke humanity are trying to cheat. 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.' 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.

Morgenthau's realism has since influenced other writers. Michael Byers 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.' His writings suggest the US acts only for its own collective gain and appeals to legality only selectivity 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 East[14] and is critical of the politics surrounding the 2003 invasion of Iraq.[15] 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.

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.

Ago[16] 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. 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, 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 authorization to use force. Nevertheless 'economic sanctions [may] have their limitations, but the use of military force is no panacea either.'[17] Thus there is argument to support the claim that non-

[14] Danilo Zolo, Invoking Humanity – war, law and global order (Continuum 2002) 38.
[15] Ibid 39.
[16] Michael Byers, 'Terrorism, the use of Force and International Law after 11 September,' (2002) 16 International Relations 155.
[17] Robert Gilpin, 'War is too important to be left to ideological amateurs' [2005] 19 International Relations 5.

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.

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.'[18] He describes these circumstances as being self-help actions or Security Council sanctions.[19] 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. 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.

Roberts 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[20].

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.' 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

[18] Malcolm N Shaw, International Law (6th edn, Cambridge University Press 2008) 4.
[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 2004) 136.
[20] Mark Dixon, Textbook on International Law (6th edn, Oxford University Press 2007) 321.

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. None of these explanations may grant the use of force a legal 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 that 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.' 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.'

'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.'

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' 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, focuses on 'the relationship between the state and society.' 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.' The cosmopolitan lawyer 'invokes aspirations to a system of law capable of purposefully sustaining order in the world on unified terms.' 'Cosmopolitanism replaces the political authority of sovereign states (and their legacy) with the authority of universal norms.' It could be argued that cosmopolitanism is idealistic, albeit well-intentioned.

'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 abstractly universal categories, including 'global justice' , as key to the analysis of international law and international relations.' 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.

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. 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.

It could be suggested that Beardsworths 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. Finally political cosmopolitanism is again related to global justice but supplemented with 'political advocacy, political judgment and political leadership' In terms of Beardsworths' distinction it is the closest 'sub-section' to realism.

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.' This is linked to the establishment of rules based on continued state practice. Constitutional cosmopolitanism examines 'possibility or reality of a world constitution.

Linked to (cosmopolitan) liberalism is the concept of Natural Law theory. Beardsworth would argue the link is very tight: 'all cosmopolitan thought is moral.' 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. 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.' 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.' 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 a legal, right to prevent a revival of the horrible crimes of World War II. Walzer is a natural law theorist. Action can be justified if it 'shocks the moral conscience of mankind.' 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. 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. 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.' Furthermore, for realists, the effectiveness of action has a 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. 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.

In considering these outlooks, what is apparent is that world peace, order and stability should be the dominant factor regardless of the legal approach. 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 authorized 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.

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

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.' 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. 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.' 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' 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.' 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 use of force, and would not find legitimacy without

indisputable legality. 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. 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. 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. 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 within the exclusive competence of the UNSC. 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. From this perspective they would criticize 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.' 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.' 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.

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

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. 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.'

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.' 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 Gaddaffi where 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 Gaddaffi, 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.

1.8 Chapter Overview.

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

2.1 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, 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. 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 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. 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. 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. Given our aims, a useful starting point is to consider international regulations governed by the UN Charter.

2.1.1 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. 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.[21] 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.

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. 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'.' 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

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

theorists who may argue that there is a moral obligation or divine right to ensure world peace through forceful means.

2.1.2 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 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.' When acting in response to 'the existence of any threat to the peace, breach of the peace, or act of aggression.' 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.

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. 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 authorization from the UN, or there is a justification for self-defence. Self-defense 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 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.

2.1.3 Self-Defence

In terms of international legal doctrine, states can legally embark upon armed force when acting in self-defense, 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. 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.'

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.' 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. 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.' 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.

2.1.4 UNSC authorization

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 –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.' If action is necessary to achieve a UNSC objective then this would be within the legality of international law. Blokker 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.[22] 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

[22] 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.

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 decentralized 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 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.[23] These arguments clearly fall outside the strict legality doctrine, and thus will be debated at more length in the next Chapter.

2.1.5 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?' 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. 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

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

documents to match with the world order 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. 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.

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. 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. 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-defense 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? 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.

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.

In *CND v UK,* 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?'

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

2.1.6 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 the international community of a reasoned basis for using force threatens Charter interests and values, rather than supporting and advancing them.'[24] 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

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

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,[25] 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.

[25] 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.

CHAPTER THREE

3.1 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 Briand Pact refers to the 'necessary reaction against the use or threat of force. 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.' 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.

3.2 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 the 'piratical' vessel within US territory.' 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.' 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. The threat must also be both imminent and extreme,

and involve impending destruction. 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* 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. Controversially, maintaining a rule against anticipatory action would 'protect the aggressor's right to the first stroke.' Furthermore, Article 51 does not 'impair the inherent right of individual or collective self-defence.' Inherently, customary law permitted anticipatory uses of force. Brownlie 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.' It must be remembered that Brownlie was writing over fifty years ago and hence Cortens argument is perhaps the more plausible in the current context. The proliferance of WMD and terrorist 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 in 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." 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.' 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 been launched against them. 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. 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. 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. In light of the above commentary, this could be a welcomed addition.

3.3 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.' An example of this is the ethnic cleansing by Serbian forces in Kosovo, 1999. In August 2014 a 'humanitarian crises' was described in Iraq. 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). 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.*

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

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.

In *Nicaragua163* 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.

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.

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 intervention when justifying its

actions in Northern Iraq in 1991 and Kosovo in 1999. 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. 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. 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.' 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. 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. 'Realists argue that intervention [in Kosovo] was ultimately about upholding the credibility of NATO.' 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 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.' 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.' Which he rightly assumes are values of the UN.177 However, Article 52 refers specifically to the 'pacific settlement of disputes'. If a dispute cannot be rectified pacifically 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." 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 used to gather consensus for war, which almost inevitably will have harsh consequences on both sides.

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.' It is this selectivity and thus unreliability of intervention that makes humanitarian rhetoric sound one-sided, hypocritical or even false.

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.

3.4 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.

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.' 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.' This doctrine is closely linked to humanitarian intervention, they certainly overlap. It endorses similar ideas about protecting the citizens of hostile governments and states.

3.5 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.

It is arguable that state intervention to protect nationals is a form of self-defence. This is seen as the 'better view'. 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 Charter and the non-legal nature of the protection of nationals. States could interpret the protection of nationals as 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 it's 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). 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. On the other hand, the support Israel received from advocates highlights the 'persuasive power of a well-presented and demonstrated case.'

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. 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 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.

3.6 Iraq 1990-1998

3.6.1 Brief modern historical account

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.

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. 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. Therefore the initial action against Iraq in 1990 has a clear, sound basis in international law and does not need further discussion.

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. 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? 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. Resolution 949 again condemned the Iraqi action, but again stated that the UNSC remain 'actively seized of the matter.' The UNSC once again had the opportunity to legalize any use of force, but decided against. Iraq pulled back its army in this instance rendering the debate moot; 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 without UNSC authorisation and both challenged humanitarian intervention. 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.

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'?

3.7 Libya 2011

3.7.1 Brief modern historical account

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 1973 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. Ulfstein & Christiansen argue Paragraph 4 of Resolution 1973 is directly linked to the protection of 'civilians and civilian populated areas ….. including Benghazi.' They assert 'the mandate does

not authorize military measures to protect the whole population or the entire geographical territory of Libya.

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 Gaddaffi was the *only* way to ensure civilian protection, then perhaps it would be logical to conclude that it was within the aims of the resolution and hence legal without further discussion. Furthermore, the Resolution does state 'including' therefore it is arguable that it is not limited to Benghazi.

3.8 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. 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 Gaddaffi. Regardless of any underlying state 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 Gaddaffi,

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. 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 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.

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