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Humanitarian Intervention: Genocide, Crimes against Humanity and the Use of Force

Steven Haines¹

The fact of genocide long preceded the word coined to describe it.² It also continues long after the coming into force of the international convention intended to eliminate it.³ Given the millions that have died or suffered through genocide, it is a sad fact that only a fraction of the perpetrators of the crime have ever been brought to justice. Just under a million were massacred in Rwanda. Over 100,000 suspects have been identified. Fewer than 10,000 have been prosecuted in Rwandan courts, and the International Criminal Tribunal for Rwanda has had just 74 brought before it to date. We have a long way to go before we can say with confidence that the

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- 2 The term 'genocide' was coined by Raphael Lemkin in a book he wrote in 1944 (R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for World Peace, 1944)). Within two years the term had been accepted to the point at which it was used in indictments at Nuremberg.
- 3 1948 Convention of the Prevention and Punishment of the Crime of Genocide.

perpetrators of all acts of genocide will be punished. Prevention is likely to be better and more effective than the cure.

This was certainly what the leaders of NATO thought in 1999. In the spring of that year, the Alliance waged a 78-day air campaign against Serbia, the rationale for which was the need to prevent atrocities of a genocidal nature and intensity being committed by Serbs against ethnic Albanians in the province of Kosovo. After the experience of Rwanda and Srebrenica, opting to do nothing was not a serious option for the Alliance. Something had to be done to prevent a further genocide. Humanitarian intervention was NATO's response.

The law seemed not to allow for this. Only the Security Council can authorise intervention and was unlikely to do so because one of its permanent members – Russia – would not allow it. NATO intervened anyway, with member states asserting the legitimacy of their action. Were they indeed right to do so? This question remains important 10 years after Kosovo because extreme crimes against humanity continue to be committed. Be it ethnic cleansing in the Darfur region of Sudan, the reckless and wanton destruction of the Zimbabwean economy, or the deliberate prevention, by the military government, of foreign aid reaching disaster victims in Burma, man-made or exacerbated humanitarian catastrophe remains a feature of the international system.

To answer the question – is humanitarian intervention lawful or legitimate? – we need to understand something of the nature of international law and how it has developed to date, especially that part of it relating to the use of force.

The Changing Bases of International Law

The history of international law, since the birth of the modern Westphalian state system in the seventeenth century, has been characterised in particular by a struggle for supremacy between the Natural Law and Positive Law traditions. The former regards the international legal system as the product of a 'top down' process while the latter sees it as fundamentally 'bottom up'.

In the Natural Law tradition there is an acceptance that even ruling sovereigns must acknowledge their obligation to be bound by certain principles established by some form of higher authority. In the pre-Westphalian era, Natural Law had a religious basis (and flowed from God) but, from the seventeenth century onwards, it was increasingly determined by resort to human reason.⁴ The legitimacy of resort to force (the *jus ad bellum*) was determined by reference to the Christian doctrine of Just War.⁵

4 A shift most notably associated with the work of the seventeenth-century Dutch lawyer Hugo de Groot (or Grotius), who came to be described as the father of modern international law.

5 The development of Just War doctrine has recently been subjected to an extremely thorough and powerful analysis (A. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge:

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In the Positive Law tradition, the principal assumption is that the source of international law, which governs relations between states, is the will of those sovereign states themselves.⁶ States acknowledge no higher law than that by which they have themselves agreed to be bound. Agreement is demonstrated either by practice (customary law) or by formal agreements (treaty law). The practice of states, driven by the need for security, influenced the development of the law, with the legitimacy of the use of force determined by the needs of interest rather than justice.⁷

The influence of both the Natural and the Positive Law traditions has always been in evidence, with neither prevailing to the total exclusion of the other. Nevertheless, from the seventeenth century onwards, Natural Law declined as Positive Law gained the ascendant. Positive Law's rise to undeniable pre-eminence was simply a consequence of political developments and realities within a Europe increasingly governed by balance of power and *raison d'état*. Neither the waning influence of religion nor the waxing influence of reason within the Natural Law tradition could either prevent its decline or stem the eventual rise of Positivism.

The demands of balance of power politics gave rise to the perception that warfare was merely an instrument of state policy in pursuit of national interest. By the time of the Napoleonic Wars, sovereigns believed that they had an unrestrained right to go to war, when, where and for whatever reason associated with the needs of the balance of power – and that the demands of military necessity overcame any moral or legal limits on the conduct of hostilities.⁸ This attitude is reflected in the

Polity Press, 2006)) in which it is argued that there are Natural Law, Positive Law and Realist influences within modern Just War. This leads to the assertion that the *jus ad bellum* in particular has always been subject to Just War thinking. In other words, Just War has not suffered decline or ascent; it has merely changed in character over time, with different influences brought to bear upon it. While acknowledging Bellamy's excellent analysis, this author prefers, on balance, the narrower view that Just War is a Natural Law (and largely a religious based) doctrine whose influence was greatly undermined as Natural Law itself changed in character and suffered decline.

- 6 Jean Bodin, the sixteenth-century philosopher most closely associated with the emergence of sovereignty as a defining feature of states, regarded it as indivisible; sovereigns were answerable to no higher authority in relation to the conduct of political affairs (see J.H. Franklin, 'Introduction', in J. Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Cambridge: Cambridge Texts on the History of Political Thought, Cambridge University Press, 1992), pp. ix–xxvi, xiii). Grotius concurred, and noted the power of the sovereign 'that is called Supreme, whose acts are not subject to another's Power so that they cannot be made void by another human Will', quoted in Hugo Grotius, *The Rights of War and Peace, Book I*, ed. by R. Tuck (Indianapolis: Liberty Fund, 2005), p. 259. Grotius is here, of course, stressing the lack of any temporal power above that of the sovereign.
- 7 See S.C. Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005). To quote Neff, at p. 170: 'Positivism was ... a thoroughly unspeculative philosophy, rooted in the brute facts of real life as they actually stood, rather than in the wispy ideals of theologians or in the "metaphysical" subtleties of natural lawyers.'
- 8 Bellamy, *Just War*, p. 89.

claim made famous by Clausewitz that war is simply 'a continuation of political intercourse carried on with other means'.⁹

Clausewitz also famously rejected the view that international law could provide a significant restraint on the use of force.¹⁰ In the first substantive paragraph of his great work *On War* he stated that: 'Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.'¹¹

The nineteenth and early twentieth century was the high period of Positivism in international law. It complemented Realism, frequently regarded as the default approach to international politics, which seems to come fully into its own in historic periods of multi-polar interstate rivalry that are conducive to balance of power politics.¹² International law evolved in Europe in a manner consistent with the ebb and flow of great power politics. The political climate was not conducive to the development of Natural Law. Positive Law was pre-eminent and gave rise to a legalist approach – and to the acceptance of a legalist paradigm relating to the use of force which privileged sovereignty and the twin principles of political independence and territorial integrity above all else.¹³ It did so by eventually outlawing aggression and stressing the norm of non-intervention.

9 C. von Clausewitz, *On War*, ed. and trans. by M. Howard and P. Paret (Princeton, NJ: Princeton University Press, 1984), p. 87.

10 He did at one point highlight the need for proportionality in the conduct of war, stressing in particular the imperative for military forces to concentrate their efforts on attacking military targets. However, while this might be interpreted as supportive of the *jus in bello* legal principle of proportionality, it was essentially a pragmatic and practical appeal reflecting the principle of war relating to the economy of effort, rather than a morally based call for humanitarianism. He argued that the killing of prisoners or the destruction of cities should be avoided because good generals recognised that to do such would not be an intelligent or an effective use of force, but merely a 'crude expression of instinct'. Clausewitz, *On War*, p. 76.

11 Clausewitz, *On War*, p. 75. It is not known to what extent Clausewitz was aware of the writings of legal philosophers, but his view certainly chimes well with that of Bynkershoek, for whom all forms of force were lawful. If restraints were applied to the application of force they were applied out of charity and not as a result of any legal obligation.

12 Whether one examines the relations between the city states of Ancient Greece or of Renaissance Italy, or the great powers of seventeenth, eighteenth and nineteenth-century Europe, one sees circumstances that lend themselves well to Realist interpretations of politics and strategy. See M. Sheehan, *The Balance of Power: History and Theory* (London: Routledge, 1996), in particular Chapter 2 at pp. 24–52.

13 Leo Kuper provides an excellent quote that neatly conveys the positivist and legalist approach based on strict assumptions about state sovereignty, political independence and territorial integrity. Henry Morgenthau was US Ambassador in Turkey between 1913 and 1916. Deeply concerned about the massacre of Armenians, he favoured intervention. Nevertheless, he was profoundly frustrated by legalism. As he stated in his memoirs: 'Technically, of course, I had no right to interfere. According to the cold-blooded legalities of the situation, the treatment of Turkish subjects by the Turkish government was purely a domestic affair.' *Ambassador Morgenthau's Story*

The Use of Force and the Legalist Paradigm

The catastrophic outbreak of war in the summer of 1914 ended what many in Europe had assumed was a century of peace and stability.¹⁴ The end of the war that followed was only achieved by the involvement of the United States – essentially, the European great power system had proved itself incapable of further effective self-regulation. When war ended, US President Woodrow Wilson proposed a radically new approach to international politics that would see even the great powers reduced in military capacity to the point where unilateral aggressive war would be untenable. Force would still be a feature of the system, but only in the sense that collective enforcement would be possible through the decision-making process of a global organisation responsible for managing the system.¹⁵ The League of Nations failed to live up to Wilson's ideal but it certainly did change things to a degree. The Covenant of the League of Nations, from which the League drew its authority, was the first multilateral attempt formally to challenge the legitimacy of resort to war. Liberal notions that war could be reduced in importance within the international system gained ground. Today, it is generally believed that war should no longer be relied upon routinely to maintain equilibrium between the great powers. This is the essence of the legalist paradigm.

Michael Walzer, in his classic treatment of Just War, outlines the following six propositions as forming the essential elements of this paradigm:

1. There exists an international society of independent states;
2. This international society has a law that establishes the rights of its members – above all, the rights of territorial integrity and political independence;
3. Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act;
4. Aggression justifies two kinds of violent response: a war of self-defence by the victim and a war of law enforcement by the victim and any other member of international society;
5. Nothing but aggression can justify war;
6. Once the aggressor state has been repulsed it can also be punished.¹⁶

(1918), pp. 328–9, quoted in L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (Harmondsworth: Pelican, 1981), p. 161.

- 14 Appearances can be deceptive, however. There were 14 wars between great powers in Europe between 1815 and 1914, most notable of which were the Crimean War of 1853–56 and the Franco-Prussian War of 1870–71. What was absent was general, multilateral, great power war on the scale of the Revolutionary and Napoleonic Wars. See S. Halperin, *War and Social Change in Modern Europe: The Great Transformation Revisited* (Cambridge: Cambridge University Press, 2004), p. 6.
- 15 See M. Wight, *Power Politics* (ed. by H. Bull and C. Holbraad) (Harmondsworth: Penguin, 1979), in particular Chapter 19 on the League of Nations, pp. 200–15.
- 16 M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn (New York: Basic, 2000), pp. 58–63.

The paradigm reflects the objective of liberals in the Wilsonian mould to rid the international system of the worst excesses of war. It is encapsulated in the Covenant, the Kellogg-Briand Pact and the UN Charter. It is principally about the maintenance of order within the international state system. Order is an essential prerequisite for the pursuit of justice but the order one creates tends to determine the level of justice that is achievable. The legalist paradigm privileges interstate justice; it does little or nothing for the advancement of either individual or cosmopolitan notions of justice.¹⁷ This seems odd when one appreciates that the UN Charter, the principal documentary source of the legalist paradigm, certainly advances more than merely interstate justice. Importantly, it introduces human rights, thereby giving scope for the provision of justice to the individual.

The Emergence of Human Rights and the Re-Emergence of Natural Law

Before the Second World War, there was no international human rights law. Indeed, the prevailing legal view at that time was that sovereign states could act almost with impunity within their own territories.¹⁸ The Holocaust changed this. It raised human rights to an unprecedented level of concern and resulted in a significant human rights input to the UN Charter. The statesmen who signed the document articulated their concern in the preamble to the *Charter* in which 'fundamental human rights', 'justice and respect for the obligations arising from treaties and other sources of international law' were prominent.¹⁹

Once the UN was functioning as an organisation, genocide, crimes against humanity and human rights in general were quickly placed on its agenda. An early UN General Assembly resolution gave birth to the Genocide Convention, which was followed by the Universal Declaration of Human Rights.²⁰ The combined

17 To use Hedley Bull's categorisation of justice in world politics. See H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edn (Basingstoke: Palgrave, 2002), pp. 75–82.

18 Although one should stress that this was merely the prevailing view and not one universally supported. For an account of the historical antecedents of international human rights law see H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996), pp. 59–116. See in particular in Steiner and Alston at pp. 113–15 the extract from L. Henkin, *International Law: Politics, Values and Functions*, 216 *Collected Courses of Hague Academy of International Law* 13 (1989), vol. I: 208.

19 It actually took the efforts of a small group of consultants employed by the US government to advise on the drafting of the Charter to achieve mention of human rights within it. See S.C. Schlesinger, *Act of Creation: The Founding of the United Nations* (Boulder, CO: Westview, 2003), p. 124.

20 See the account of the UN's role in the advancement of human rights in P. Kennedy, *The Parliament of Man: The United Nations and the Quest for World Government* (London:

effects of war and genocide had prompted a substantial review of the nature of the human condition and focused jurisprudential attention on individual rights at the expense of absolutist notions of sovereignty. This massively significant development has served fundamentally to shift international law back along the Natural Law/Positive Law axis, towards the former and away from the latter.²¹

After 1945 the new universal human rights system developed apace. The equally new notion of *jus cogens*, or peremptory norms of international law, which cannot be breached under any circumstances, included crimes against humanity and genocide. Significantly, this was acknowledged in 1970 by the International Court of Justice, when it recognised that states could no longer expect to act with impunity within their borders if their domestic actions breached *jus cogens*.²²

If states grossly abuse their own citizens' human rights, is there a lawful means by which others can intervene to prevent and punish? While it is encouraging that today there is something called international human rights law, for it to be truly influential there has to be some means of enforcing it. If something profoundly dreadful is happening within a state, it would seem reasonable for others to intervene to stop it. It is the United Nations that has the leading role within the legalist paradigm to resort to the use of force in such circumstances. With the emergence of human rights considerations and the shift back towards a Natural Law approach, the law relating to the use of force and the role of the UN in legitimising it has revived interest in Just War.

Penguin and Allen Lane, 2006), Chapter 6, pp. 177–205. See also Genocide Resolution (General Assembly Resolution 95(I)) and the Universal Declaration of Human Rights 1948 (General Assembly Resolution 217A(III)).

- 21 Although the idea of human rights certainly sits more comfortably within the Natural Law tradition, it should be stressed that Positivism emphatically does not exclude them. Responsible liberal-minded states will help to develop human rights law at the international level through both their practice and their willingness to be bound by formal agreement (treaty law), in the Positivist tradition. It is, nevertheless, the case that the actual practice of many states is inconsistent with treaty law, even that to which they have become party. They may argue a difference of interpretation of the words of treaty commitments. However, others may regard the actions of such states as an affront to human reason – hence the renewed relevance of the Natural Law approach.
- 22 *Jus cogens* is a body of overriding principles (peremptory norms) of international law, established in customary law and not amenable to being set aside in treaty law (see Vienna Convention on the Law of Treaties Article 53). There is some controversy as to which principles are included within *jus cogens* but the least controversial are the rules prohibiting the aggressive use of force, those prohibiting genocide and crimes against humanity, the principle of racial non-discrimination, and the rules prohibiting piracy and the slave trade. It was *jus cogens* to which the ICJ referred in Barcelona Traction (Barcelona Traction Case, ICJ Reports, 1964, p. 6). For the views of a distinguished contemporary publicist see, for example, the discussion in I. Brownlie, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003), pp. 488–90.

The UN Charter and the Just War Doctrine

The Just War doctrine was the core of the traditional *jus ad bellum* governing resort to force. The doctrine stated that war could be waged legitimately by states, but only if it met certain essential criteria. The first was that the decision to use force could only be made by a legitimate authority: a ruling king or prince. Today this is generally assumed to mean a sovereign state, or a collection of sovereign states. Second, war must be waged for a just cause, such as for reasons of self-defence in response to aggression or for the purpose of righting a wrong or rectifying an injustice. Closely linked to this is the requirement for war to be waged for a morally defensible purpose or right intention. Fourth, war must be the ultimate resort, with all other remedies either most unlikely to succeed or having been tried and found wanting.²³ Fifth, there must be a reasonable chance of success. Without that, war might be futile and lead to unnecessary suffering. Six, the principle of proportionality must be applied in order that the likely good to be achieved is estimated to exceed the harm that will undoubtedly be done in waging war. Seven, war must be declared. Finally, war must be waged in accordance with the rules of combat (or *jus in bello*) in order that it is not deemed immoral or inhumane.²⁴

The UN Charter, following the Covenant of the League of Nations and the 1928 Kellogg-Briand Pact, is assumed to have outlawed war and then rendered Just War doctrine redundant. However, what is most remarkable about the UN Charter is the extent to which it reflects Just War doctrine. The arrangements incorporated in it effectively codify what had previously been a set of rules forming either a part of customary law or a set of general principles governing states' resort to force.

To emphasise this let us examine the evidence. First, granting the UN the authority to apply military sanctions against transgressor states institutionalised the collective sovereign authority to wage war. In terms of just cause, the inherent right of self-defence was enshrined in Article 51 and the ability to rectify an injustice was contained in the general provisions on sanctions in Chapter VII. War as the ultimate resort is reflected in the essential trinity of sanctions: diplomatic, economic and military, with the latter applied if the former two either 'would be inadequate or ... proved to be inadequate' (Article 42 of the Charter). The prospect of success and the need for proportionality are conditions to be weighed and decided upon by the Security Council. The need for a declaration of war is covered by UN Security

23 It is a common misperception that war must be a last resort, implying that all other means of persuasion must be tried first. This has never been the case. If other means would be manifestly ineffective, war may well be the legitimate first resort – but still the ultimate. This is reflected in Article 42 of the UN Charter.

24 These eight criteria by which a decision to go to war may be judged just are not universally accepted. The seventh – the need for a declaration – is frequently not included. As an example see M.R. Amstutz, *International Ethics: Concepts, Theories and Cases in Global Politics* (Lanham, MD: Rowman and Littlefield, 1999), p. 101 for a checklist of criteria in which this criterion is not included. There is a common myth that wars before 1945 were declared but after that date were not. This is not the place to debate this issue and, for the sake of argument, we include the need for war to be declared.

Council resolutions announcing the intention to embark on enforcement. Finally, the modern law of war (or international humanitarian law) owes its origins to the traditional *jus in bello*. War, while regrettable, is to be conducted in accordance with international law. This in itself is recognition of war's continuing relevance within the international system. It is often forgotten that the UN, by virtue of its powers under Chapter VII of its Charter, is a coercive organisation. Far from rendering Just War obsolete, the UN Charter declares its relevance and potential legitimacy within the international system. The modern version of the doctrine will determine the legitimacy of intervention.

Intervention or Non-Intervention?

Intervention is defined in international law as 'the forcible or dictatorial interference of a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state'.²⁵ It is *prima facie* unlawful. In the UN Charter, Article 2(7) states that not even the UN itself is to 'intervene in matters which are essentially within the domestic jurisdiction of any state ...'. This seems to preclude intervention, even at the behest of the Security Council. Is this indeed the case? As Vincent stresses in his classic study of non-intervention, there can be both Naturalist and Positivist arguments both ways – in favour of and against intervention.²⁶ The orthodoxy in both, however, is that non-intervention is the norm, with intervention only justified exceptionally. This is related to political independence and territorial integrity, themselves linked to sovereignty. All are recognised within the UN Charter and reflected in the legalist paradigm.

In *Perpetual Peace*, Immanuel Kant argued that non-intervention allowed people in a democratic society to work out for themselves the domestic political arrangements that would best suit them and allow them to determine the norms by which they wished to be governed.²⁷ People have the right to choose. J.S. Mill argued that it would be a grave mistake to export a way of life to a people who were not yet adequately prepared to live in that manner. Liberal democratic society (for it is that which both Kant and Mill were envisaging) cannot be imposed but must develop from within. Even intervention to introduce a democratic form of government could lead, ironically, to a form of tyranny if it were opposed and

25 From Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law Volume I: Peace (Introduction and Part I)*, 9th edn (London: Longman, 1996), p. 104.

26 R.J. Vincent, *Nonintervention and International Order* (Princeton, NJ: Princeton University Press, 1974). See in particular Chapter 2, pp. 20–44.

27 See Preliminary Article No. 5 (No nation shall forcibly interfere with the constitution and government of another) in I. Kant, *Perpetual Peace and Other Essays*, trans. by T. Humphrey (Indianapolis: Hackett, 1983), p. 109.

consequently had to be imposed by force.²⁸ These arguments for non-intervention lead to the conclusion reached in the legalist paradigm – that intervention is *prima facie* aggression and a breach of *jus cogens*.

How does one counter non-interventionist arguments with liberal justifications for intervention? Michael Walzer, while recognising the pre-eminence of the non-interventionist approach, acknowledges three possible situations in which intervention might be justified: secession; civil war; and humanitarian intervention.²⁹ We will pass by the first two of these and concentrate on that which is the focus of this chapter: humanitarian intervention.

The Past Practice of Humanitarian Intervention

The orthodox claim underpinning humanitarian intervention is that if there is evidence of an impending or actual humanitarian catastrophe – particularly one that is man-made – states have a right (but, importantly, not an obligation) to intervene in another state to protect those under threat. While non-interventionism prevailed during the high period of legal Positivism, and was adopted as the legalist norm thereafter, there were instances in the nineteenth century of humanitarian intervention that defied this trend. In particular, there was a series of interventions to protect Christian groups within areas of Turkish rule. Britain, France and Russia intervened in Greece between 1827 and 1830 following massacres of Greek Christians by Turks, the eventual outcome of which was Greek independence. In 1860, six thousand French troops intervened in what is now Lebanon to protect Maronite Christians from persecution by the majority Muslim population in the area. In 1877, Russia intervened in Bosnia, Herzegovina and Bulgaria, again to protect the interests of Christian minorities. Away from Europe, the US intervened in Cuba in 1898, 'in the cause of humanity and to put an end to the barbarities, bloodshed, starvation and horrible miseries now existing there', to quote President McKinley's message to Congress. He went on to say: 'It is no answer to say this is all in another country, belonging to another nation [Spain], and therefore none of our business ...'³⁰

In the interwar years, the record of the League in crisis response in Europe and elsewhere, including the early stages of what came to be known as the Holocaust, was unimpressive to say the least. In 1938, a leading British international lawyer was prompted to reach the following reluctant conclusion:

28 See the discussion in M.W. Doyle, *Ways of War and Peace* (New York and London: W.W. Norton, 1997), pp. 394–6.

29 Walzer, *Just and Unjust Wars*, as n. 15, Chapter 6 on 'Intervention', at pp. 86–108.

30 Examples and the McKinley quote taken from F.K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, 1999), pp. 44–54.

... in practice we no longer insist that States shall conform to any common standards of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilised society is now deemed to be no obstacle to diplomatic friendship. This means in fact that we have abandoned the old distinction between civilised and uncivilised states.³¹

After the Second World War several interventions had significant humanitarian dimensions: the Congo (1964); the Dominican Republic (1965); East Pakistan (1971); Cambodia/Kampuchea (1978); and Uganda (1979). Both the Congo and Dominican Republic interventions were what are these days described as non-combatant evacuation operations, in which states intervene to rescue their own citizens under threat. The East Pakistan, Cambodian and Ugandan interventions were, however, markedly different. All involved large-scale invasions following massive humanitarian crises involving crimes against humanity, and all resulted in changes of regime in the countries concerned. None was mandated by the UN. Significantly, none was justified by reference to a perceived right of humanitarian intervention either – although the UN Charter rules were acknowledged, with arguments based on self-defence deployed in all cases.³²

Humanitarian Intervention in the 1990s

The 1990s saw a substantial increase in military operations, many fully mandated by the UN but some not. Immediate post-Cold War examples of humanitarian intervention include: Liberia (1990–95); Northern Iraq (1991); Somalia (1992–95); Bosnia (1992–95); Rwanda (1994); and Haiti (1994). All set the scene for the NATO intervention in Kosovo (1999).

Liberia was authorised by the Economic Community of West African States (ECOWAS) and not by the UN. The ECOWAS Monitoring Group (ECOMOG) deployed for over two years before the UN Security Council adopted a resolution retrospectively endorsing ECOWAS's efforts.³³ This was an example of collective humanitarian intervention without prior UN approval; it set an important precedent.

In the wake of Iraq's defeat in the 1991 Gulf War, Britain, the US and France imposed no-fly zones in both Northern and Southern Iraq to protect minority groups within Iraq from persecution by the Ba'athist regime. These were not approved by

31 Professor H.A. Smith in *The Listener* (26 January 1938), quoted in Abiew, as n. 29, p. 57.

32 T.M. Franck, 'Interpretation and Change in the Law of Humanitarian Intervention', in J.L. Holzgrefe and R.O. Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), pp. 204–31, at pp. 216–19.

33 UNSCR 788 (1992).

the Security Council. UN Security Council Resolution 688 (1991) condemned the Iraqi repression of minorities but notably did not provide a specific mandate for further military action.

After 1991, the UN became more involved. In December 1992, a Chapter VII mandate provided for the use, in Somalia, of 'all necessary means', a phrase that became synonymous with approval to use whatever military force was necessary to achieve the objectives of an intervention. The US-led force UNITAF intervened and successfully conducted Operation Restore Hope. Subsequently, however, the situation deteriorated markedly following the deployment of UNOSOM II. In Mogadishu in October 1993, US forces suffered heavy casualties, with 12 killed, 75 wounded and six missing in action. UNOSOM II's mandate expired in March 1995; it was not renewed and UN forces withdrew. Overall, the UN operations in Somalia were a failure.

Bosnia also proved problematic. The complex mixture of Muslim and Serb communities provided a recipe for extremely bloody ethnic violence. Bosnian Serbs, supported by Serbia itself, pursued a policy of ethnic cleansing. The UN authorised a protection force (UNPROFOR) in February 1992 but provided an inadequate mandate for the circumstances. By August of 1992 it was obvious that something more was required and a Chapter VII mandate was provided. The operation in Bosnia became more robust until finally the imposition of a no-fly zone and NATO's bombing of Serb positions achieved a breakthrough. Negotiations for a ceasefire and eventual peace agreement produced the Dayton Accords in December 1995.

The Rwandan genocide of 1994 provides graphic evidence of the potential consequences of a lack of intervention. There was a UN-authorised force (UNAMIR) in Rwanda throughout the period in which genocide was committed. Initially 2,700 strong, it was reduced to a skeleton force of 270, while the genocide was in progress, in order to reduce the risk to UN personnel. A French intervention, code-named Operation Turquoise and authorised by the Security Council, was mounted in June 1994; it had some positive impact but overall did little to prevent the continuation of an appalling massacre. Rwanda was not an example of non-intervention (that would have been predicated on the principle that what Rwandans got up to was their own business and not that of the international community). The principles underpinning humanitarian intervention were clearly acknowledged – and then, disgracefully, absolutely nothing was done to give effect to them.

In July 1994, the Security Council authorised a US-led multinational force (MNF) to intervene in Haiti to restore the democratically elected government of President Jean Bertrand Aristide. This was successful and was replaced by a UN force (UNMIH) in March 1995. This was a fully authorised humanitarian intervention with a specific Chapter VII mandate from the Security Council.

By the mid-1990s, therefore, there had been a number of military operations that had indicated a significant degree of practice in relation to humanitarian intervention. Until the 1990s, even advocates of humanitarian intervention had fallen short of claiming that the right of humanitarian intervention was well

established and recognised in international law.³⁴ In 1986, the British Foreign and Commonwealth Office (FCO), in a review of the law relating to intervention, had concluded that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal'.³⁵ This comment might be dismissed as a fine example of diplomatic double-speak – but it reflected the legal reality at the time and the FCO's reticence was entirely understandable. Once we examine the situation in the 1990s, however, we detect a shift in opinion. By 1993, following the experience of Liberia and Northern Iraq and while the crises in Somalia and Bosnia were being played out, one of Britain's leading international lawyers specialising in the law relating to the use of force felt able to comment: 'It seems that the law on humanitarian intervention has changed, both for the United Nations and for individual states. It is no longer tenable to assert that whenever a government massacres its own people or a state collapses into anarchy, international law forbids military intervention altogether.'³⁶

Kosovo

The decision by NATO leaders to use force against Serbia in the spring of 1999 has to be seen against the backdrop of previous experience, especially that during the immediate past. NATO took action without a UN Security Council mandate because, while humanitarian intervention was viewed as an imperative, a UN mandate was impossible against a certain Russian veto. The interventions in Liberia and Northern Iraq set important precedents for further actions without specific UN Security Council approval. The Liberian intervention by a significant regional organisation was especially significant in this respect. The Northern Iraq precedent was important as it had involved three NATO members breaching strict UN law; having done so once before, it was easier for them to do so again. Nevertheless, while Liberia and Northern Iraq were important, their significance

34 Claims that a pre-existing customary right of humanitarian intervention had survived the coming into force of the UN Charter in 1945 were unconvincing, given both the absence of any obvious practice during the League of Nations era and the reluctance of states to rely on humanitarian arguments to justify interventions in the later stages of the Cold War.

35 See UK Foreign Office Policy Document No. 148 in D.J. Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet and Maxwell, 1998), pp. 917–18 (previously published in *British Yearbook of International Law*, vol. 57 (1986) and quoted in I. Brownlie and C. Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', in *International and Comparative Law Quarterly*, vol. 49, pt 4 (October 2000), pp. 878–905, p. 888). In fact, the FCO document is deeply sceptical about the existence of any customary right of humanitarian intervention.

36 C.J. Greenwood, 'Is there a right of humanitarian intervention?', *World Today* (February 1993), pp. 34–40 (emphasis added).

pales in comparison with the profound impact of events in Rwanda – and closer to home, in Bosnia, especially the massacre in Srebrenica.³⁷

By the end of January 1999, over 200,000 Kosovar Albanians had been either deliberately driven from their homes or rendered homeless by Serb military action. On 15 January, 45 Albanian civilians were massacred in the town of Racak. This massacre in particular focused minds in NATO capitals. It was seen, very simply, as a sign of what might well transpire unless the Milosevic government in Belgrade could be persuaded to withdraw Serbian forces from the province and restore the autonomy it had enjoyed until it had been withdrawn exactly 10 years earlier. The NATO response was to invite both Serbia and the Kosovar Albanians to send delegations to talks at Rambouillet. Belgrade demonstrated its disinterest in these talks by continuing to bombard villages in Kosovo with the result that by mid-March a further 60,000 Kosovo Albanians had been rendered homeless. At the talks, NATO attempted a compromise that assured Belgrade continuing sovereignty over Kosovo in return for provincial autonomy and the insertion of a NATO military force to ensure compliance. Belgrade rejected this solution and, in so doing, prompted NATO to resort to force.³⁸

Given the extent of ethnic cleansing and killings from January to March 1999, it was not unreasonable to assume that a major crime against humanity, probably genocide, was about to be committed by Serbia against Kosovar Albanians. Indeed, there had already been a major crime against humanity committed by March 1999. The question was just how much more serious that crime would become if the Serbs were left to their own devices. The fear was that they intended forcing all Kosovar Albanians out of Kosovo, leaving it as a purely Serbian province and a fully integrated part of Serbia proper.

NATO's intervention divided legal opinion, no better demonstrated than in the contrasting views of the distinguished group of British international lawyers invited to give evidence to a Parliamentary enquiry into Kosovo, the report of which was published in 2000.³⁹ A brief justification had been provided by the Secretary of State

37 Some have argued that the NATO claim that ethnic cleansing or genocide was a significant risk was simply a smokescreen to allow the Alliance to act for other, un-stated, reasons. This argument is rejected here. The author was serving on the Central (Policy Area) Staff in the UK Ministry of Defence at the time and is in no doubt whatsoever that the motive for intervention was directly related to the humanitarian and other consequences of what was regarded as a high risk of ethnic cleansing, particularly following the massacre at Racak in January 1999.

38 For an authoritative account of events in Kosovo in the period from January 1999 to the commencement of the NATO air campaign against Serbia on 24 March 1999, see Independent International Commission on Kosovo, *Kosovo Report* (Oxford: Oxford University Press, 2000), pp. 78–83. See also the account in A. Weymouth and S. Henig, *The Kosovo Crisis: The Last American War in Europe?* (London: Reuters, 2001), pp. 86–88).

39 *4th Report of the House of Commons Foreign Affairs Committee* (HC28-I) and Appendices (HC28-II) dated 7 June 2000. The written evidence of leading British based international lawyers, Ian Brownlie, Christine Chinkin, Christopher Greenwood and Vaughan Lowe were conveniently published in: A. Boyle, 'Kosovo: House of Commons Foreign Affairs

for Defence in a statement to the House of Commons the day after the air campaign commenced, which stated:

... that the Government was in no doubt that NATO is acting within international law and that the use of force ... can be justified as an exceptional measure in support of purposes laid down by the UN Secretary General, but without the Council's express authorisation, where that is the only means to avert an immediate and overwhelming humanitarian catastrophe.⁴⁰

The orthodox view in tune with the pre-existing legalist paradigm was expressed forcefully to the Committee by Brownlie, who regarded NATO's actions as unlawful and who argued that humanitarian intervention has no place in either customary law or in the UN Charter (except, of course, when authorised by the Security Council under Chapter VII).⁴¹ In stark contrast, Greenwood concluded that:

The NATO operation raised fundamental questions about the nature of modern international law and the values which it is designed to protect ... I believe that the resort to force in this case was a legitimate exercise of the right of humanitarian intervention recognised by international law and was consistent with the relevant Security Council Resolutions.⁴²

Between these two extremes, Lowe and Chinkin provided justification in law for the conclusion that NATO's action was at the same time both unlawful and legitimate. Lowe argued that 'there is no clear legal justification for the NATO action but it is desirable that such ... be allowed to emerge in customary international law'.⁴³ Chinkin did 'not consider that the accumulative effect is to bestow legality'. Nevertheless, she also concluded:

[While NATO's operation] does not fall under any of the doctrines of international law permitting the use of force, the cumulative effects of the arguments may be thought to be persuasive. The Security Council ... did not condemn it; humanitarian considerations were important and the subsequent Peace Plan has been made operational with Security Council authorisation

Committee 4th Report, June 2000', in *International and Comparative Law Quarterly*, vol. 49, pt 4 (October 2000), pp. 876-943.

40 Report, as n. 37, vol. II, p. 1.

41 See I. Brownlie and C. Apperly, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', in *International and Comparative Law Quarterly*, vol. 49, pt 4 (October 2000), pp. 878-905, at p. 904.

42 C. Greenwood, 'International Law and the NATO Intervention in Kosovo', in *International and Comparative Law Quarterly*, vol. 49, pt 4 (October 2000), pp. 926-34, at pp. 933-4.

43 V. Lowe, 'International Legal Issues Arising in the Kosovo Crisis', in *International and Comparative Law Quarterly*, vol. 49, pt 4 (October 2000), pp. 934-43, at p. 941.

... What is clear is that the NATO intervention is leading international law into new areas.⁴⁴

Given the extent to which the Security Council has been prepared to rule that humanitarian abuse poses a threat to international peace and security, the legalist paradigm has arguably been modified slightly in relation to intervention. Humanitarian intervention is certainly now permitted if the Security Council authorises it. When no mandate is likely, however, the legitimacy of intervention remains, on balance, ambiguous. Looked at from a Positivist perspective, neither treaty law nor customary law provides any evidence of a shift of sufficient magnitude to render unauthorised humanitarian intervention lawful. Nevertheless, if we accept that the Natural Law tradition has become more influential in recent years, especially in the light of the development of a universal human rights regime, might it be the case that the plight of large numbers of innocent victims ought to result in the privileging of individual rights over states' rights?

Rights or Responsibilities to Protect?

The idea that humanitarian intervention has as its basis the right of states to intervene when another state breaches its obligations to the wider international community by abusing its own citizens, is a Positivist approach that privileges the state over the individual. It is predicated on the assumption that individuals are merely objects of the law and not subjects endowed with their own rights and obligations. Arguably, since the emergence of international human rights law, this approach is becoming increasingly inappropriate, but it remains the principal way in which international law deals with the problem, nevertheless.

Following NATO's intervention over Kosovo and the legal controversy that was generated by it, a significant attempt was made to redraw the relationship between states and individuals. The Canadian government initiated an international commission to address the dilemma created by humanitarian crises. It was directly prompted by the controversy generated by Kosovo but its principal focus was to be on how the need for intervention in extreme circumstances of human rights abuse could be squared with the powerful norm of non-intervention, which itself reflected the most fundamental of all principles within the international state system: sovereignty.

The International Commission on Intervention and State Sovereignty (ICISS) was convened initially in 2000 and reported eventually to the UN Secretary General

⁴⁴ C. Chinkin, 'The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) Under International Law', in *International and Comparative Law Quarterly*, vol. 49, pt 4 (October 2000), pp. 910-25, at p. 925.

in December 2001.⁴⁵ Much of its report was to become especially significant in the context of Kofi Annan's UN reform agenda.⁴⁶

By far the most significant idea to come from the process was the concept of a 'responsibility to protect'. This first emerged at the ICISS's third round table meeting, in London in February 2001, when it was suggested that the notion of a right to intervene, while logical in a strictly legal sense, was singularly inappropriate when applied to the protection of human rights.⁴⁷ In some way there needed to be an acceptance that the international community had some degree of obligation relative to the human rights of individuals and communities being abused. While a right of intervention was inappropriate, it was also equally inappropriate to establish an obligation or duty to intervene, not least because that implied that the international community would have no choice but to resort to force as soon as a threshold of abuse had been breached. This degree of obligatory commitment is not something to which any responsible statesman would be prepared to subscribe. Nevertheless, there was general agreement within the round table that the right to intervene should be replaced by some degree of obligation or duty. The commissioners present (Gareth Evans, Mohamed Sahnoun and Michael Ignatieff) suggested that it might be helpful to think in terms of a 'responsibility to protect'.⁴⁸ This phrase caught on and was eventually used as the title of the commission's report, since when it has become something of a mantra within the human rights discourse.

45 ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (and Supplementary Volume) (Ottawa: International Development Research Centre, 2001).

46 The ICISS Report was studied by Annan and the Secretariat in New York and eventually passed to a High Level Panel convened by Annan to propose a way forward for UN reform. The Panel took the ideas from the ICISS and incorporated them in its own report (United Nations, *A More Secure World: Our Shared Responsibility – Report of the Secretary General's High Level Panel on Threats, Challenges and Change* (New York, 2004)). Annan then followed the High Level Panel's report with his own reaction prepared in advance of the UN summit in 2005 (United Nations, *In Larger Freedom: Towards Development, Security and Human Rights for All* (New York, 2005)).

47 The author provided a paper to the ICISS which urged a shift from rights to obligations. Although he is a named contributor to the ICISS report, the paper did not form a part of the published report itself and was only published, in modified form, three years later as S. Haines, 'Genocide, Humanitarian Intervention and International Law', in M. Mason, ed., *Hudson Papers Volume II* (Ministry of Defence (Naval Staff) and Oxford University Hudson Trust, 2004).

48 See ICISS Report, Supplementary Volume, as n. 43, for a brief account of the London Round Table at pp. 358–361. Gareth Evans, one of the two co-chairmen of the ICISS, has recently given his own account of the process that led to the emergence of the notion of a 'responsibility to protect'. The commission had discussed the idea before the London Round Table. Support for it there and at subsequent round table meetings worldwide convinced the ICISS to champion the idea. See G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC: Brookings Institution Press, 2008), in particular Chapter 2, pp. 31–54.

Has 'responsibility to protect' had any effect on the law relating to the use of force? On one level (the theoretical) it arguably has but on another (the practical) it would not appear to have had any impact at all. The reason is that, while the ideas behind such a responsibility are certainly both attractive and persuasive, especially in liberal circles, it has not so far produced any significant shift in state practice in relation to humanitarian intervention. Indeed, while the 1990s were arguably the decade of humanitarian intervention, the decade since has been dominated by the terrorist attacks on New York and Washington in September 2001, the subsequent invasions of Afghanistan and Iraq and the so-called 'global war on terrorism'. Humanitarian intervention has taken a back seat. It is not that there have been no instances in which it might have been justified; humanitarian crises have certainly not reduced in number or intensity. But those states that have the capacity for such interventions, either alone or in coalition with others, have not been inclined to embark on them. The US and Britain, for example, have had serious preoccupations elsewhere that have effectively closed off the possibilities of intervention, particularly in the most obvious case – to prevent genocide in the Darfur region of Sudan. Unfortunately, state practice combined with *opinio juris* remains an important source of international law and a clear and persistent shift in practice is needed for the law to change by the influence of shifting practice.

The ICISS report's contents certainly progressed through Annan's UN reform process, which many hoped would result in significant changes in the way that the UN conducted its business. The ICISS's report, *Responsibility to Protect*, was an important influence on the Secretary General's High Level Panel on Threats, Challenges and Change (on which Gareth Evans, co-chairman of the ICISS, also served). The High Level Panel's own report (A More Secure World: Our Shared Responsibility) was used by Kofi Annan as an important source document for his own report prepared to inform the UN Summit in 2005 (In Larger Freedom: Towards Development, Security and Human Rights for All).

While all of this augured well for the prospect of reform, ultimately the reform process was stalled. The sorts of changes that would have been required fully to bring to fruition the sorts of developments many were advocating would ideally have required a change to the law of the UN Charter – effectively, formal substantive changes to the *Charter* and to the Security Council's constitution and procedures. Unfortunately, suggestions for reform were largely unsuccessful when it came to the world summit in 2005. The reform agenda was halted by the combined effects of Annan's rapidly declining authority (caused by his impending retirement and the so-called 'oil for food scandal') and US opposition most vocally obvious in the statements of US Permanent Representative to the UN John Bolton. The failure of Annan's UN reform agenda meant no change in treaty law (the UN Charter itself).

With no change to the relevant treaty law and no significant evidence of state practice to support a normative shift, the law on humanitarian intervention arguably remains precisely where it was in 1999. It is even possible to argue that the lack of practice since then actually challenges the conclusions of many international lawyers at the time that Kosovo was unlawful yet legitimate – and that the law

should and would develop in favour of humanitarian intervention; perhaps it should but it certainly has not done so as yet. Having said this, it would be wrong not to acknowledge at least one development that could ultimately come to be seen as significant in the development of a norm under the heading of 'responsibility to protect'. The UN General Assembly endorsed the idea in the 2005 World Summit Outcome document and the UN Security Council went on to quote 'responsibility to protect' in a 2006 UNSC resolution dealing with the protection of civilians in armed conflict.⁴⁹ These two documents may well have consigned the notion of a 'right of humanitarian intervention' to history, replacing it with a 'responsibility to protect' that can provide the justification behind a decision to intervene. If so the sovereign rights of states have given way to the rights of individuals under threat, generating a correlative obligation on the part of states. Hence the assertion that the theoretical underpinning for intervention has changed despite there having been no obvious practical consequence in terms of actual practice.

What now for the future of humanitarian intervention? It is by no means clear. For the moment there is no practical enthusiasm for human intervention amongst states despite there being no lack of humanitarian crises to provide opportunities for the international community to give meaning to a responsibility to protect. As this chapter is written, Sudan and Zimbabwe offer striking examples of just the sorts of crises to which such a responsibility might apply. The acceptance that other priorities have probably prevented action in these instances does not necessarily mean an end to the development of either the idea of responsibility to protect or the ultimate means of meeting that responsibility – humanitarian intervention. Assuming that there is scope for it to develop further in the future, there is one issue in particular that requires some attention – what ought to be the trigger for military intervention?

Genocide or Crimes against Humanity?

What degree of abuse of human rights would 'shock the conscience of mankind'? A particularly onerous and systematic breach of human rights will certainly constitute a 'crime against humanity'. This phrase clearly suggests something altogether more serious than the bulk of general breaches of the wide range of so-called 'human rights standards' existing today. Genocide is a particular form of crime against humanity, separately and deliberately defined in a convention devoted to it – the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – and assumed invariably to shock the conscience of mankind.

Unfortunately, 'genocide' is a problematic term. We instinctively understand what is meant by it but as soon as we try to define it we encounter difficulties.

⁴⁹ See 2005 *World Summit Outcome*, UN Doc. A/RES/60/1 (New York: United Nations, 24 Oct 2005), paras 138–140; and UN Security Council Resolution 1674 (2006) of 28 April 2006.

Attempts at interpreting what is and what is not genocide can produce apparently absurd conclusions. The actions of the Pol Pot regime in the 'killing fields' of Cambodia between 1975 and 1979, resulting in an estimated two million deaths, are not unambiguously genocide as defined in the Genocide Convention. Using that same definition, if an individual caused serious bodily or mental harm to just three or four people he may be personally guilty of genocide. The key determinant is intent and not the scale of humanitarian abuse. The intention must be to 'destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.⁵⁰ It is precise motive that distinguishes genocide in international law.⁵¹ As Schabas has noted: 'Where the specified intent is not established, the act remains punishable, but not as genocide. It may be classified as a crime against humanity or it may be simply a crime under ordinary criminal law.'⁵²

In 2005, the International Commission of Inquiry on Darfur submitted its report to the UN Secretary General. It had been expected to conclude that genocide was being committed. It concluded that there were indeed serious crimes against humanity and breaches of international humanitarian law being committed – but not genocide. Motive was the crucial issue. Nevertheless, the Commission went on to say that 'offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide'.⁵³

This conclusion is of some significance in the context of humanitarian intervention. It has been argued that a breach of the non-intervention principle can only be justified as a response to genocide, it being by far the most dreadful

50 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article 2. In the case of Cambodia there has been some hesitation about labelling the killing of almost two million Cambodians (over 20 per cent of the total population) as genocide. The killings were politically motivated and, although ethnic Vietnamese and Chinese as well as Muslims and Buddhists were included in the list of victims, in the main the killings were arguably not intended systematically to destroy a particular national, ethnic, racial or religious group – the strict requirement to meet the definition in the Genocide Convention.

51 Actual examples of convictions on charges of genocide and a subsequent successful appeal serve to illustrate this point. The International Criminal Tribunal for the Former Yugoslavia sentenced General Radislav Krstic to 46 years' imprisonment in its first genocide conviction in August 2001. This was for the killing of over 7,500 Bosniak men in Srebrenica in July 1995. One of Krstic's subordinate commanders, Vidoje Blagojevic, having been convicted in 2005 of complicity in genocide and sentenced to 18 years' imprisonment, had his sentence reduced to 15 years, in May 2007, after the Appeals Chamber ruled that the Trial Chamber had erred in convicting him of genocide as it was not clear beyond a reasonable doubt that he knew of the main perpetrator's genocidal intent; his convictions for crimes against humanity and violations of the laws and customs of war were upheld.

52 W.A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), p. 214.

53 Report of the International Commission of Enquiry on Darfur to the United Nations Secretary General (Geneva: United Nations, 25 January 2005), p. 4.

of crimes,⁵⁴ with a treaty law obligation to prevent and punish it.⁵⁵ Nevertheless, as the discussion of definition illustrates, 'genocide' may be an inappropriate label. If so, surely it would be wrong to rule out intervention simply because it cannot be labelled as 'genocide' despite it being manifestly obvious that something profoundly dreadful has occurred.

Definitional difficulties may prove politically useful, with an apparent lack of a clear-cut case of genocide providing an excuse for taking no action, despite profoundly serious crimes against humanity being committed. This was arguably the case in relation to Rwanda and, more recently, Sudan. The US government is reputed to have avoided official use of the term 'genocide' in relation to Rwanda, deliberately to avoid its obligations as a party to the Genocide Convention. In the case of Sudan, the International Commission's decision not to describe the humanitarian catastrophe in Darfur as genocide may have given both Britain and the US a convenient excuse for not providing forces for a military intervention (particularly convenient, given their preoccupation with demanding military operations in both Iraq and Afghanistan).

The term 'genocide' has arguably been rather unhelpful. Perhaps the International Commission's conclusion that there was little evidence of genocidal intent in Sudan may eventually prove more significant than it currently appears. It might come to serve to convince all concerned that it ought to be crimes against humanity, in all their forms, that are accorded the pre-eminent significance that, since 1948, has been granted to genocide alone.

Concluding Comments

International law is in a state of flux, as it always is. What we are witnessing at present, however, is a potential paradigm shift. Positive Law, having dominated the international legal system for most of the Westphalian era, is under mounting threat from a Natural Law revival. There is a causal connection between the emergence of international human rights law since 1945 and this potential shift. As with many causal connections, however, it is not always easy to determine which of the two sides of the equation is most responsible for the change.

While the universal human rights regime developed after 1945, it was during the 1990s that profound international concern about gross violations of human rights was able to influence decisions about intervention in sovereign states. Again, the precise nature of a causal relationship – between the incidence of UN authorised

54 The author himself tended to use genocide as the threshold test to justify humanitarian intervention, for precisely this reason. For such an argument, put to the ICISS in 2001, see S. Haines, 'Genocide, Humanitarian Intervention and International Law', in M. Mason, ed., *Hudson Papers Volume II* (Ministry of Defence (Naval Staff) and Oxford University Hudson Trust, 2004).

55 Genocide Convention, Article 1.

military operations and the end of the Cold War – is by no means entirely certain. The facts, however, do tend to speak for themselves. The pre-existing legalist paradigm on the use of force was under challenge. The key question was to do with the extent to which states could continue to argue that actions taken within their domestic jurisdiction remained their business and not that of the international community. When Article 2(7) of the UN Charter was drawn up in 1945, the prevailing view was strongly non-interventionist. It remains non-interventionist today, but there is a new interpretation being placed on the words 'essentially within the domestic jurisdiction of any state'. Something may well be within domestic jurisdiction, but arguably it may not be 'essentially' an exclusively domestic matter, as the ICJ stated in *Barcelona Traction*. That much is clear from UN practice and the Security Council's willingness to authorise humanitarian interventions during the 1990s.

Although the UN has legal personality itself, essentially it is the member states, individually or collectively, which have to meet their obligations resulting from international law. This is especially the case in relation to *jus cogens*. It is, arguably, simply not good enough for states to hide behind the inherent political shortcomings of an organisation that they themselves created, in order to avoid meeting their broader legal obligations. It is also regrettable that a willingness among a significant regional grouping of states to meet a substantial humanitarian obligation, must necessarily be thwarted by a single veto in the Security Council emanating from outwith that region. Some may argue that Article 103 of the Charter reflects such a suggestion. Certainly it obliges states to comply with their obligations under the Charter rather than with any other international obligations if there is a conflict between the two. This sanctions the precedence of the Charter over obligations arising from other agreements.⁵⁶ It certainly does not oblige states completely to ignore their other obligations, however.

Although we are far from the point at which we can claim that 'responsibility to protect' is a principle enshrined in international law, there is no doubt that this is one of the influences that is now being brought to bear on the existing paradigm for the use of force. A great many statesmen have talked about it in positive terms, although their words have not so far been turned into actions. It was even recently invoked by Pope Benedict XVI on his visit to the United Nations in New York on 18 April 2008.⁵⁷ Could it be that it becomes accepted as a principle of Natural Law and, if so, how will this influence both the legalist paradigm and future state practice?

If responsibility to protect does affect the paradigm and cause a shift, then the issue of threshold comes to the fore. 'Genocide versus crimes against humanity' implies a dispute about terminology. To the victims of either, each looks pretty much like the other at the point at which it is being committed.

56 See B. Conforti, *The Law and Practice of the United Nations* (The Hague: Kluwer Law International, 1996), p. 276.

57 See Vatican website: <http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html>.