

## Essay

# An essay on the necessity for universal outlawing of use of force in the 21st century

Graham Nicholson

Hidden Words Bookshop, P. O. Box 1010 Kuranda Qld 4881 Australia.

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The essay addresses what is argued to be a pressing need for the introduction of binding law, applicable at all levels of human society, in the form of a ban on the use of force as a method of conflict resolution. It is envisaged that the proposed legal ban would operate at both the national and international levels and would be given the force of a peremptory norm or *ius cogens*, applicable to and binding on all governments, bodies, groups and individuals, with a legal force that overrode any international, regional, national or sub national law. It would be expressed to be subject to the narrowest of exceptions, being only those cases that are genuinely necessary in the public interest, for example, under an accepted system of international collective security or in aid of the internal police power to ensure peace and good order, and then only if the degree of force is appropriate and reasonable in all the circumstances and is not in breach of fundamental human rights (other than the right to self-determination or any other right that asserts there is an associated right to use force in aid). The essay notes that there is already a patchwork of both international and national laws that seek to ban or restrict the use of force at various levels, or which condemn the use of force, but it argues that now is the time to express that ban in a comprehensive, consistent, coherent and universal manner applicable at all levels of human society and in all circumstances. In the 21<sup>st</sup> century, any continuing acceptance of the legitimacy of the use of force in any situation is said to be incompatible with the notion of a civilized global human society and can only be described as being barbaric. In a world still torn by violent conflict notwithstanding the rush to globalization, this is arguably the most pressing need of the age. This paper takes the view that it is time to put such a general legal prohibition into the law of the world. The essay accepts that merely introducing such a general legal ban will not in itself prevent the continuing use of force where the actors are intent on breaching that new law. The essay makes it clear that such a ban cannot, by itself, be a panacea for resolving all conflict. But it is argued that such a ban would have a profound effect on global thinking about the need for a peaceful world and may gradually lead to a change in emphasis and approach on the part of the main actors. It would place a heavy onus on any entities seeking to use force to justify their actions, which in time may facilitate refinement of methods and institutions for prevention of the use of force and improvement of methods of peaceful resolution of conflict; nor is it argued in the essay that it would be easy to reach agreement on the terms of any such general ban. The impediments to implementation are discussed in the essay and are seen as being huge and deep seated. But then all contrary arguments will ultimately be seen for what they really would be – against the best interests of the planet as a whole and all humanity in seeking a future world of peace, prosperity and security; one in which the expectation is that conflicts will be resolved by peaceful, lawful and fair means. The interests of universal justice must ultimately demand this result, because the arbitrary contest of opposition might can never equate with justice. And the very exercise of consultation in an effort to seek such agreement can be expected to have beneficial side effects. Ultimately it is argued that humanity will be driven to accept that the use of violence and brute strength as a means of human conflict resolution is incompatible with this modern global age and the establishment of a united and peaceful world civilization. The introduction of the proposed general legal ban would arguably be a huge step in that direction.

**Key words:** Universal, international, national, legal, ban, use of force, conflict resolution, peremptory norm, collective security, global, human society, peace, non-violence, world civilization, world law.

*"It is my conviction that nothing enduring can be built on violence."* - Mohandas Karamchand Gandhi

*"In this, the cycle of Almighty God, violence and force, constraint and oppression, are one and all condemned."* - Baha'u'llah

## INTRODUCTION

Many more people are coming around to the view that humanity should have a non-violent future on this planet and that all disputes should be settled by non violent means. It is an idea which, in the 21<sup>st</sup> century, should be within our grasp, as the world comes ever closer together as a global society. But then the idea that the use of physical force<sup>1</sup> in human societal relations should be outlawed and be made illegal is not new. Many national governments have been making great efforts for centuries to implement this legal principle, with effect within their own national boundaries. The very rise of the concept of the “sovereign” state was largely premised upon the need to maintain order within state boundaries and to minimize the use of violence within those boundaries. In most states today, the use of force to resolve differences within state boundaries is, as a general rule<sup>2</sup>, contrary to their domestic law, having been replaced by various mechanisms for domestic conflict resolution. Arguably, the unjustifiable use of force within national borders is the antithesis of modern civilised behaviour. On any reasonable point of view, it should be unlawful and be recognized by the relevant domestic law as being unlawful.

In the twentieth century, much thought was also given to doing much the same as between states at international law, and some important milestones in this direction were achieved (Green, 2000)<sup>3</sup>. The applicable restrictions are contained in the United Nations Charter and in other multilateral agreements, in declarations and resolutions of international fora and in customary international law (Ronzitti, 2002). In more popular parlance there may be a belief that as a result of these developments there is already a fairly comprehensive legal ban on the use of force at the international level, applicable to all nations, entities and peoples. Thus, to pick just one example, it is said that as regards inter-state relations, international law has now outlawed aggression and the use of force, states being duty-bound, according to the provisions of Article 2 of the United Nations Charter, to “*settle their disputes by peaceful means in such manner that international peace and security are not endangered*”<sup>4</sup> (Symonides and Singh, 1996). The year 2000 Millennium Forum, in its Declaration, stated – “*It is a*

*world where peace and human security, as envisioned in the principles of the Charter of the United Nation, replace armaments, violent conflict and wars.*”<sup>5</sup> The United Nations General Assembly has taken other steps in support of non-violence, such as the proclamation of the Decade for the Promotion of a Culture of Peace and Non-Violence for the Children of the World 2001 to 2010<sup>6</sup>, and the Declaration on the Elimination of Violence against Women<sup>7</sup>. A previous Secretary-General of the United Nations, Kofi Annan, has said that “*Nonviolence is the first article of my faith. It is also the last article of my creed*”. One could have thought from such statements that the world was heading towards a new era of non-violence, peace and security, with the law in the vanguard.

But such reassuring assumptions, laudable as they may be, are largely divorced from the reality on the ground, and have been further badly damaged by dramatic world events over recent decades. There have been, and still are, many violent challenges to states and to their governments both within their own borders and beyond, often involving the use of organized force. No country is immune. And the states and state organs themselves have often been the perpetrators of the unreasonable use force when it has suited their purposes. Violent challenges to states now regularly occur in many places around the world following the global export of the western concept of the “sovereign” state. There have been violent challenges based on political, territorial and economic differences, on the struggle for power and influence, on racial, ethnic, religious and other forms of distinction, on ideological and on other grounds. In many cases those challenges have spilt over national borders to threaten the peace and security of the wider world. And at the international level, despite the evolution of the United Nations Organization, the development of international human rights and humanitarian law, the events surrounding the collapse of the Berlin Wall, the huge effort that has gone into investigating and trying to implement improved, non-violent conflict resolution practices and other important factors, violence continues to pervade the global scene. Often in recent decades the violence has tended to manifest itself in different forms, away from traditional wars between states, into forms such as independence struggles and into acts of organized terrorism, or into conflicts between states and other non-state entities having the capacity for organized violence (Cochrane, 2008). The legal and institutional systems of the world have frequently proved to be grossly inadequate or deficient in the face of the violence. There seems on the

<sup>1</sup> The words “force” and “violence” are used interchangeably in this essay. The word “force” is not used in the sense of economic, political or other forms of coercion falling short of the threat or actual use of physical force.

<sup>2</sup> With appropriate exceptions, such as in self-defense, or properly in aid of the state police power.

<sup>3</sup> It is said that the first attempts directed at criminalizing war followed the defeat of Napoleon in the early 19<sup>th</sup> century. The idea that international disputes should be settled peacefully has a much longer history, but attempts to devise techniques and institutions with this objective is said to be a more recent phenomenon, much of what exists today having been created in a period of little more than 100 years – Merrills, J G. (1993) *International Dispute Settlement*. Camb UP, in particular at 230.

<sup>4</sup> Of course the authors were speaking in a general sense and it is not intended to criticise them.

<sup>5</sup> United Nations General Assembly, 54<sup>th</sup> session, agenda item 49 (b), A/54/959.

<sup>6</sup> 10 November 1998, Resolution A/RES/55/47.

<sup>7</sup> 20 December 1993, Resolution A/RES/48/104.

face of it to be no foreseeable end to the use of violence as a means of conflict resolution in world affairs. It is not necessary in this essay to catalogue the tremendous suffering and damage done by this widespread use of violence, because the improvements in global communications have created a wide awareness of this fact. But this essay poses the question whether this destructive and highly undesirable feature in world affairs must inevitably continue into the future. Is it not possible, it is asked, for human beings in this modern age to so rearrange their affairs and attitudes whereby conflict resolution takes place without resort to violence?<sup>8</sup>

This essay takes a quite different approach to what can or might be done about the prevalence of violence in human society. There have been plenty of learned discussions and publications about the need to improve the means for preventing or mitigating this high level of violence, extending from the local level right up to the international level. For those who see this in terms of a global phenomenon, the problems of reformatory implementation often seem to run up against issues of national sovereignty and the principle of the non-interference in the domestic affairs of states. The centrality of state-sovereignty in the debate often seems to them to impede further progress towards a non-violent global society. Those that advocate or support this state-centered approach, on the other hand also encounter impediments to human progress given the limitations of this approach in an increasingly interdependent world. The pressures to avoid and prevent the use of mass violence are huge, and the number of opponents to the use of force and violence in the world seems to be increasing, but unfortunately they are still not sufficient to achieve that result. Many people proclaim the need for a non-violent world, but of them, many do not appear to believe that it is achievable. In the end it is a matter that is essentially one of the strength of human attitudes and beliefs.

There are calls for a new approach. For example, there is a growing body of literature concerning the cultivation of a culture of peace and of peace education. Serious consideration is being given to the prospects of abolishing war (Mendlovitz, 1999-2000) and in developing alternatives to war (Martinez, 2001). There are calls for a fresh approach to the concept of humanitarian intervention (Leopard, 2002) and for priority to be given to humanitarian concerns over combatants. The Kuala Lumpur Initiative to Criminalize War has held a number of conferences and other events in recent years. Advocates have advanced the cause internationally to prohibit violence against specific sections of humanity,

<sup>8</sup> More commentators are coming to the conclusion that it is possible to envisage a time when war both between and within states can be brought to an end, at least in certain circumstances. Cochrane is one of them – op. cit., at 2. The Old Testament prophecy in the Book of Isaiah certainly supports this conclusion. Many other religions state much the same – see, for example the Baha'i Writings.

such as against sex workers, gays, victims of honour crimes, etc. The approach in this essay is quite different in that it largely looks away, at least for the time being, from the multi-faceted international reformatory agenda that concentrates on incremental improvements to institutions and procedures or on new prohibitions and restraints limited to particular sections of humanity<sup>9</sup>. It does not ignore the fact that conflict is part of human society. Rather, it concentrates on the inherent offensiveness of the use of force and violence as a means of human conflict resolution, and on the necessary task of the global community working towards the universal legal principles that are required to outlaw completely this offensive feature of international human society. As a corollary, it looks at the necessary changes in attitudes and beliefs to support such a massive change. It argues that in the modern world, one needs to first get these legal principles right as a necessary preliminary step to the transition to a non-violent world. This paper asks, "*Is the use of force as a means of human conflict resolution legally justifiable in the modern world at any level?*" The answer is, or should be, immediately apparent. On any reasonable test in the contemporary global context, the application of brute strength cannot any longer be the measure. Given this response, this essay argues that the international community must, as a priority, begin work towards a comprehensive global legal ban on the use of force at every level. The very exercise in debating at length such a ban in the law of the world would be likely to raise questions in many peoples' minds as to the validity and reasonableness of past justifications for the use of force and violence and as to their contemporary relevance. This should in turn lead to major and widespread attitudinal change. From there, the on-the-ground reformatory agenda of practical measures can properly and progressively be implemented and be allowed to evolve to give effect to that ban.

It is of course too much to expect that any global legal changes could alone cause this actual use of force to suddenly disappear altogether across the planet, particularly in such a diverse world that is torn by so many divisions and which is still struggling to recognize its own oneness (Chimni, 2007)<sup>10</sup>. Any suggestion to the contrary would be to mistake the purpose lying behind the present proposal. A "utopian" or idealistic perspective can be a handicap when considering possible changes to the nature of the global order and to the attitudes of participants in that order. And contemporary studies into the causes and effects of violence at all levels of society suggest the need for holistic solutions. But at the very least there is usually an admission that the role of law is indispensable in this equation, even if it is not sufficient by itself (Burton, 1997). The rule of law cannot be dispensed within this modern age if civilization is to be

<sup>9</sup> This is not to argue that the advocacy of such improvements is of no value.

<sup>10</sup> Thus Professor Chimni stated that violence cannot be abolished by fiat.

maintained and developed. One does not dispense with the domestic legal prohibition on the use of violence just because it cannot be uniformly enforced within national boundaries. Why should this not also apply across or beyond those boundaries? The law should follow the principle, not the practice.

It is argued in this essay that it is not unreasonable in this modern age to expect that as a matter of the law of the world and of its member states, the use of violence should consistently be made illegal across the planet, both within, across and beyond national boundaries. In a seamless legal environment that had proper regard to the needs and legitimate expectations of all humanity, there should be no gap in the coverage of the law of the world in this respect, from the local up to the international level. If the use of violence is objectionable in all but the most limited and justifiable circumstances, then the law should say so. On this view, all forms of violence and the use of force at every level, where it cannot be clearly and reasonably justified except in the most extenuating of circumstances, should be made unlawful, regardless of who or what is the perpetrator.

But the fact is that in the twenty-first century, there are significant gaps in that total legal coverage. It is not correct to assert that, in all situations, in respect of all nations, entities and peoples in every location, the unjustifiable use of force is already unlawful or illegal. Many of these legal gaps exist because of the practice of states and of some other entities in interpreting existing exceptions to the legal use of force in very wide terms of their own making favourable to their own positions (Robertson, 1999; Cocker, 2001; Walzer, 1992; Coates, 1997; Falk, 2005)<sup>11</sup>. Other gaps exist because of deficiencies and uncertainties in the law<sup>12</sup> and in the methods of interpretation and enforcement of the law. Other gaps exist because of deficiencies in particular national laws and in the practices of some governments, allegedly being beyond international supervision. Thus some states choose to ignore their own domestic law or international law for their own perceived advantage. These gaps have become of more concern with the changes in the kinds of violence that are now of the most

worrying kind<sup>13</sup>. In an increasingly technological age, one in which the means for mass destruction and carnage are ever increasing<sup>14</sup>, the propensity for and frequency of the use of violence in world affairs is incredibly alarming. It is without doubt the greatest physical threat facing the planet, dwarfing all other issues. It is the writer's opinion that the necessity for a lasting global peace and the peaceful resolution of conflicts transcends in importance all the other great issues of the day, such as the many global environmental challenges, etc.

It is no exaggeration to say that the widespread use of force continues unabated in the world, often with disregard for the legality of the situation or in denial of any illegality, and usually in the face of ineffective methods of enforcing the law that already exists<sup>15</sup>. Many entities openly declare their right to use violence in pursuit of their purposes, and quite often do use violence, with extremely adverse effects on civilians. And many states continue to use with impunity unjustifiable violence within their national borders, and sometimes beyond those borders, usually by way of asserting the legality of what they do. This brings the law and the rule of law into disrepute. Indeed, the domestic law of some authoritarian states hardly meets the normal criterion of "law". And many commentators are reluctant to describe international law as a true system of law at all, largely for this reason, preferring instead to adopt an approach akin to nationally based political realism when describing the nature of law across national borders (Goldsmith and Posner, 2005; Falk, 2002). There is a crisis in the legitimacy of law generally, with a moral and legal vacuum as a result (Gray, 2004)<sup>16</sup>. The world community, through its various legal systems of world law, national and international, has yet to speak with one voice to say that the use of physical force is legally wrong at every level of human society by every actor and in every situation involving human beings, with only the most limited of exceptions. It is only by the world community speaking with one voice on this issue, applicable in all circumstances at all levels, and rising above particular and more limited national political or other agendas, that the law can ever hope to begin to gain any real degree of respect and credibility.

Clearly the accomplishment such a global legal ban would be no easy task and would take considerable time.

<sup>11</sup> Sometimes this practice reflects the continuing hold of the historical idea that some wars were "just" and hence defensible. But in this age, there is no such thing as a "humane" war, and arguably all forms of war and mass violence should be treated as a crime. As Falk recently pointed out, *"Each side in conflict insists that its cause is unconditionally just and that of its opponent is utterly unjust."*

<sup>12</sup> For example, the lack of any accepted international definition of the international crime of "aggression", relevant under the Statute of the International Criminal Court, see footnote below. The United Nations General Assembly has, however, adopted Resolution 3314 (XXIX) in 1975 approving of such a definition, but the task of determining whether an act of aggression has occurred is left to the Security Council under Article 39 of the United Nations Charter. The task of authoritatively defining this term for all purpose has been ongoing for quite a long time, and some very recent progress has been made in the International Criminal Court Working Group on the crime of aggression. For the relevant earlier history, see Stone J. (1958) *Aggression and World Order*, Maitland Publishing.

<sup>13</sup> For example, organized violence at the level below that between states, and in the threat posed by nuclear weapons and other weapons of mass destruction.

<sup>14</sup> This threat manifests itself in many forms. One example is the increasing ability of modern armed forces to kill and destroy at a distance with great accuracy, combined with the human capacity for abstraction. It is said that this is a particular threat to human survival – a point seen at an early time by Storr, A. (1968) *Human Aggression*, Penguin, p. 153.

<sup>15</sup> At least at the level extending beyond domestic law. Even at the domestic level, many states are experiencing increased difficulties in this regard. There is much talk of "failed states" for example.

<sup>16</sup> Gray asserts that contemporary circumstances call for a reappraisal of international law on the use of force by states and by UN forces. But her argument seems to raise the need for the extension of that reappraisal to entities other than states that are involved in the organized use of force.

There are no doubt many interests in the global community, from both east and west, and both governmental or otherwise, that continue to value the right to advocate and to use force and violence, even as a matter of last resort, and beyond that which might be reasonably justifiable, as a means of achieving their own particular ends. Such views involve an argument that postulates that certain extreme means are justifiable in order to achieve those ends, even if they cause great physical and other distress, suffering and injury, including to the innocent. But it is an irrational and unfair argument and it is not in the best interests of humanity as a whole. Arguably it is not consistent with the founding teachings of any of the great religions<sup>17</sup> nor with any sound humanitarian or ethical principles. It is certainly not consistent with concepts of universal justice. It is simply not an argument that should be allowed to succeed in an interdependent contemporary world that is seeking lasting international peace and security.

## THE ARGUMENT

In a world claiming to be civilized, but faced with monumental challenges to the wellbeing of the planet and the meaningful future of humanity, anxiously seeking after international peace and security, the continued use of brute strength as a measure of the justness or

<sup>17</sup> This raises issues of the interpretation and application of various sacred texts and teachings of particular religions. Thus there is an ongoing debate within Islam as to the extent that religion permits the use of force, at least in certain circumstances, and contrariwise, the extent to which it expresses preference for peaceful methods of dispute resolution. There seems to be a strong argument that Islam was originally intended to be a religion that advocates peaceful methods of conflict resolution. A similar debate exists within most of the great religions of old, to a greater or lesser extent. No doubt they reflect the conditions of much earlier eras when those religions originated, being times in which humanity was much more dispersed and divided, and in which war and violent conflict were generally accepted as part of life. It is said that all religions proclaim the virtues of peace, although most seem to have been perverted since they were founded to later sanction war – Braybrooke, M. (1992) *Pilgrimage of Hope, Crossroad*. 122, citing Thompson, Henry O. (1988) *World Religions in War and Peace*; Jefferson, M. and Ferguson, J. (1978) *War and Peace in the World's Religions*, Oxford U P. All those religions of old looked to a future time when a comprehensive world peace would be implemented, although their followers no doubt differ on exactly what this means. And clearly there are many religions, sects, denominations and religious groups that now advocate or express a strong preference for non-violence in conflict resolution. Thus Buddhism has a clear leaning towards non-violence, and the Founder of the Baha'i Faith, Baha'u'llah, stated from the very inception of his public mission in 1863 that his followers were to reject violence. Other groups such as the Quakers are strong advocates of non-violence. See generally Lepard, B. op. cit., 83-86. The World Council of Churches has a program for a Decade to Overcome Violence, which includes an International Day of Prayer for Peace held on the UN International Day of Peace, 21 September each year. The Declaration Toward a Global Ethic of the Parliament of the World's Religions, adopted in Chicago in 1993, declared a commitment to a culture of non-violence - Kung, H. and Kuschel, K J. (Eds.) (1993) *A Global Ethic*, Continuum. There has been some hesitancy in the United Nations in clearly identifying religious fanaticism as a motivation in some cases for violent terrorist acts despite clear evidence to the contrary, in part perhaps because of the continuing view in some religious groups that the use of force can be compatible with their religious teachings.

rightness of any cause must be an anathema<sup>18</sup>. The modern concept of civilization, with its connotations of non-violence, does not start or end at particular national borders (Toynbee, 1976)<sup>19</sup>. Indeed an important component of this concept in this age of globalization is the ascendancy of law over the use of force at every level of human society. In today's world, the concept can have no rational meaning unless extended to the planet as a whole. Uncivilized behaviour, wherever it occurs, debases everyone. It is submitted that a complete new approach is required to the use of force in human affairs, one that breaks away from the restrictions and limitations of the past.

The present legal approach in the relation to the use of force in the world to date has tended to be a piecemeal one, developed from the bottom up, and reflecting the multifarious legal systems of the world and their separate development. The tendency to date has been to deal with the various forms of violence as they arise at the various levels by prescribing some form of legal prohibition at that level<sup>20</sup>. But this has sometimes tended to be an approach dogged by obscure definitions and fine distinctions, and has been subject to ongoing modification and differentiation as new laws are made at the various levels

<sup>18</sup> Of course, there can be no doubt that such an approach would require, in due course, substantial improvements in the present methods of dispute resolution in the world, other than those involving the use of force. It would also seem to require refinements in the global system of collective security and many other reforms. This paper does not enter upon a detailed consideration of these aspects, but see the discussion under the heading below "Collective Security and the Use of Force".

<sup>19</sup> The concept of "civilisation" seems to have had its birth in early Greek times, being a reference to civil society comprised of the citizens of a city-state that associated peacefully and democratically. It is a term of uncertain and variable meaning, derived from the Latin "*civis*" or citizen. Its meaning gradually expanded until colonialist times to encompass what became known as "European" or "Western" civilisation. Thus in the 19<sup>th</sup> century the Western Powers used a "standard of civilization", designed to assess whether other states were sufficiently stable to undertake binding international obligations and to protect the interests of Western foreigners. Kant thought that the civilised state depended upon the application of the rule of law to achieve a state of perpetual peace, not only within nation-states but also between them - see Kant (1795) *Perpetual Peace* and the discussion by Ramphal, S. (1988) *Making Human Society a Civilised Society*, in (1988) *Inseparable Humanity*, Hansib Publishing, 365. Gandhi was one of the first to rail against narrow western concepts of civilisation, arguing that there was only "modern" civilisation, which was materialistic and deficient. He saw true civilisation as that which assists moral excellence, moving individuals and society to truth and non-violence - see Introduction to Iyer (1986) *The Moral and Political Writings of Mahatma Gandhi*, Clarendon Press, 4 and also at 293. Other writers have sought a meaning for civilisation in ethical, non-violent, global concerns, for example Schweitzer, A. (1961) *The Decay and the Restoration of Civilization*, Unwin Books.

<sup>20</sup> For example, in the multiplicity of international agreements dealing with different aspects of terrorism. There are said to be 12 major multilateral conventions and protocols relating to states' responsibilities for combating various forms of terrorism, such as on ships and marine equipment or against aircraft or in airports, but many states are not yet a party to them or are not yet implementing them - *Conventions Against Terrorism*, [http://www.unodc/terrorism\\_conventions.html](http://www.unodc/terrorism_conventions.html). However there has yet to be an internationally accepted definition of terrorism; hence there is no international offence of terrorism generally and the international legal coverage continues to be deficient in this respect. On the approach taken in this essay, this legal problem would largely disappear. As to the definition of terrorism Saul, B. (2006) *Terrorism in International Law*, Oxford U P.

and for the various jurisdictions. There has not been a coherent, global approach to the use of force based on widely promulgated general principles to what is clearly a global issue of vital concern to every person. And as stated, when the various systems of law are viewed as one whole system of world law, there remains significant gaps in that law. Overall it might be possible to discern a gradual movement over the last century or so towards the legal prohibition of the use of force in human affairs as a matter of global legal principle, but world law is still some way from achieving such a comprehensive, consistent and coherent legal prohibition in every conceivable situation, applicable to every actor on the planet.

In a world that continues to be torn apart by violence, these variations and gaps in the law contribute enormously to human suffering and injustice. The gaps exist in part because of the pervasive dictates of state sovereignty, a view which developed and drew justification from the earlier circumstances of certain sections of humanity as they evolved into higher forms of social and political organization. But those circumstances have radically changed in recent decades. Nation-states are no longer independent agents that are able to pursue their own destinies free from any consideration of the effects on others. Modern science and technology have ensured that any such effects are no longer able to be contained within national borders. Peace and security are now irretrievably global issues. And the inherited divide between national law and international law, a product of the historical evolution of organized society, is, as a consequence, becoming increasingly blurred and out of touch with practical realities. Many of the worst examples of the present use of mass force in the world cross this divide. For example, civil wars and terrorist activities that affect international peace and security, and many gross human rights abuses and other tyrannical uses of force that breach international minimum standards.

It is argued that the international community should work together with a view to eliminating all unjustifiable gaps in the law in this respect. Variations in the law from jurisdiction to jurisdiction should be required to conform generally to universal legal principles that command global acceptance and are consonant with international human rights standards. The time has come, in the best interests of all humanity, to allow all these various forms of legal prohibitions in the various systems of law to in effect "coalesce" into a comprehensive legal ban on the use of force in accordance with such universal principles. The result of this approach would be to prescribe, in clear and consistent "*black letter*" law, a total worldwide legal ban on the use of force in all circumstances<sup>21</sup>, applicable

at every level of law and society. It is time, it is argued, for the countries of the world to begin work towards putting such a general prohibition into the express provisions of the law of the world.

## THE OPERATION OF THE PROPOSED LEGAL BAN

Such a legal ban should, it is argued, be expressed to extend to any use of force by every nation-state. No state should be exempt (Neier, 1999). It should be expressed to be subject only to the narrowest of exceptions as applicable to states, those being clearly defined. At present there is a great debate as to the circumstances in which states can legally use force consistently with the terms of the United Nations Charter and international law generally. A broad range of exceptions are advocated by some countries, resulting in many controversial instances where force has been deployed by particular countries, sometimes beyond national borders. And the international community has been unable to reach agreement on key definitions, such as that of "aggression" at international law, applicable for all purposes, notwithstanding that it is an international crime<sup>22</sup>. There are also the well-known problems of adequately defining what constitutes "*self-defence*" in Article 51 of the United Nations Charter<sup>23</sup>.

It is argued in this paper that any such exceptions should be very narrowly defined, and only extend to those circumstances where they are clearly justifiable in the interest of humanity as a whole. That is, the exceptions should be defined in a manner that is no wider than that which is essential to maintain global peace and security under a just world order, and to uphold the international rule of law and basic human rights. That this is no easy task is no reason for not embarking upon the exercise. And no one state or entity should have the final or only say on how they are defined, interpreted and/or applied, there being a need for an authoritative and independent international tribunal for this purpose with binding powers and jurisdiction to supplement the work of domestic courts and tribunals. These are critical matters that should be consulted upon, clarified and laid down in international law, if necessary by amendment to the Charter supported by a new multilateral agreement, and supplemented by state domestic law where necessary.

Such a legal ban should also, on this argument, extend to all other international, regional or local actors, including individuals, which or who would otherwise seek to use force within, across or beyond national borders. This ban should not be limited to areas within state jurisdiction, but should extend to areas within the common heritage of

<sup>21</sup> A somewhat similar ban has been called for by writers such as Inis Claude as part of moves towards a more effective system of global collective security. To be effective, it would need to include a ban on the threat of the use of such force, and on all active and unequivocal preparations to use such force. Compare Article 39 of the United Nations Charter. This essay does not attempt to prescribe how such a legal ban should be worded – this is clearly a matter for detailed consultation and research.

<sup>22</sup> Statute of the International Criminal Court, Article 5.1 (d) and 5.2. This debate may approach the issue from the wrong end. Instead of arguing as to which forms of the use of force constitute aggression, and which do not, the starting point should be that any use of force *prima facie* constitutes aggression unless justifiable within already established and justifiable exceptions narrowly defined.

<sup>23</sup> Discussed below under a separate heading.

humanity, such as the high seas, space, other planets and heavenly bodies and in the Arctic and Antarctica. The focus at the international level should no longer just be on the actions of states, a recognition of the fact that all elements of human society now have the capacity to impact internationally. This would result in the declaration of the illegality of any such use of force both within and extending across or beyond those borders, by any actors whatsoever, subject only to the most narrowly defined exceptions. The ban should apply irrespective of the motive or purposes of those advocating or acting to the contrary.

In most cases these narrowly defined exceptions will be non controversial, necessary for protecting legitimate rights and interests of the individual, the state and other legal entities, and the maintenance of law and order and the rule of law. But in some cases there will be controversy, such as with groups describing themselves as “freedom” or “independence” fighters or other revolutionaries, and who assert that they have no alternative but to use violence to achieve their ends. Other controversy will surround the claims of states in areas such as their right to self-defense<sup>24</sup>. It is argued in this paper that the principled solution in such cases is to introduce a total legal ban on the use of force by all actors, irrespective of their motive or purpose (Butler, 2003)<sup>25</sup>, with only the most necessary and narrowly defined exceptions. The demands of a civilized and peaceful global community can tolerate nothing less. Other non-violent mechanisms and institutions should be devised over time as a means of dealing with such situations, allowing for genuine and legitimate grievances to be effectively aired and resolved in the best interests of all concerned. There is a need to put a legal end as much as possible to the use of conflicting, protracted and usually intractable arguments, one asserting the legality of the violent action taken<sup>26</sup>, and the other asserting the illegality of that same action in response, with little or no prospect of a lasting resolution in sight.

## SHOULD THE LAW LEAD OR FOLLOW

There is an ongoing debate as to whether the proper role of law, or one of its proper roles, is to lead society by way of appropriate reform, or whether the law should simply

<sup>24</sup> See discussion below.

<sup>25</sup> This must include cases where the use of force is asserted as a “right”, for example under religious law, or where that opposed is said to infringe against fundamental human rights, such as being racially discriminatory. The proposed global legal ban outlawing the use of unjustifiable force would arguably be consistent with the teachings of all the great religions and hence would not conflict with their religious law – see earlier footnote. In so far as particular sects or groups assert an unfettered right to use violence as a matter of their own choosing then it would be necessary to give the proposed ban superior legal force to any such assertions. Increasingly opinion seems to be swinging behind the view that violence cannot be justified in the assertion of such rights

<sup>26</sup> Or asserting that the legality or otherwise is its own business. This defense is often used under the domestic jurisdiction clause in Article 2.7 of the United Nations Charter, see discussion below.

follow society to reinforce that which is already widely accepted or practiced. Views will differ on this issue, depending in large part upon the perspective of the commentator, including as to the proper role of law in society, and on the particular subject for which the making of new law is indicated. In the present context, there can be expected to be strong objections to the proposed global legal ban, based on the view that such a ban would be to take the law too far in advance of present human societal conditions and expectations and threaten the existing order. It might be seen to push the law into a new arena where full compliance might well be an impossibility, at least in the foreseeable future. Traditionally, those who are professionally involved in some way with the law have tended to be conservative in approach, preferring to see change at a slow pace.

But the concept of the law leading the way has a long lineage, in international law at least. One only has to consider the history of the international human rights movement and the codification of the fundamental rights of all humanity that has occurred since World War II. The global practice still falls far short of full and universal implementation of those rights, yet few would argue that those rights should never have been codified as a result. The mere existence of those codes of rights has had, and continues to have, a profound effect on global thinking. A closer analogy for present purposes might be the provisions of the United Nations Charter requiring member-states to settle their international disputes by peaceful means and to refrain from the threat or use of force<sup>27</sup>. The existence of these provisions has not stopped the use of force by states, yet few would argue that these provisions should be deleted as a result. If anything, the arguments for reform sometimes seek a strengthening of the provisions of the Charter to prevent such breaches. In fact, the proposal for a global legal ban in this essay can be viewed as only an extension of these existing Charter provisions, moving beyond the actions just of states to encompass all entities and individuals, from the domestic level right up to the international or global level. The argument in this essay is that the issue of the use or potential use of force in these contemporary times has come to assume such importance and seriousness to the future wellbeing of humanity that the time to take positive action towards a comprehensive global legal ban has arrived. It cannot reasonably be delayed without the most serious of repercussions. It is the necessary first step to the achievement of a peaceful and united human society on this planet.

## THE PROPOSED METHODOLOGY

To move now to the question of the method of implementation of the proposed ban. Clearly there is a

<sup>27</sup> Article 2.

need for a multilateral international agreement of some kind if such a global legal ban is to be comprehensively implemented. This is a necessary initial step. It is argued in this essay that any international agreement should treat such a ban as a basic and inviolable legal rule, on par with other fundamental and universal legal standards of a *jus cogens* nature, that is, peremptory norms of international law (Orakhelashvili, 2006)<sup>28</sup>. There should be no legal provision for “opting out” at any level<sup>29</sup>. In other words, it should be a legal rule that extends automatically to every person and every entity on the planet, applying within, across and beyond national borders. Arguably the rule against the use of force, in so far as it presently extends at international law, is already a peremptory norm of international law, binding on states<sup>30</sup>. This should be expressly clarified. There is generally no similar concept or norm in the domestic law of states<sup>31</sup>, except perhaps to some extent for those states that have some kind of non-violence provision in their national constitutions<sup>32</sup>.

It is argued in this essay that a *jus cogens* or peremptory norm of the kind here advocated should be expressed to apply notwithstanding anything in the

United Nations Charter or in any other legal or other instrument of any kind, international, domestic or otherwise, present or future. As such, it should also be expressed to be binding on all states, whether a party to the proposed new multilateral agreement or otherwise, and on all individuals, corporations and other groups and entities. It should be expressed to qualify any considerations of domestic jurisdiction<sup>33</sup> or domestic law<sup>34</sup>.

There is a question whether any breach of the proposed legal ban should be made an international crime<sup>35</sup>. If so, there would be incidental questions as to the legal limits of such a crime, and whether it should replace the international crime of “aggression”. These matters also require consideration. No doubt other consequential adjustments to international humanitarian law would also be required<sup>36</sup>. Where that legal ban was already in place in the domestic criminal and/or civil law of any country, then the legal consequences attaching thereto would presumably continue, but expressly subject to the terms of any new multilateral agreement.

## THE INTERNATIONAL DIMENSION

The greatest limitation arising from the present system of international law is the weakness of that system, prone

<sup>28</sup> On the basis of international law at the moment, the adoption of a new peremptory norm requires the acceptance of that norm as such by the great majority of states, if not all states. Whilst a bi-lateral treaty cannot impart the character of *jus cogens* to a new norm, a new multilateral international agreement may expressly created a new peremptory norm, if entered into by most, if not all, states. Arguably a new universal ban on the use of force would in effect be a modification of any existing peremptory norm limiting the use of force, the possibility of modification being contemplated by Article 53 of the Vienna Convention, see footnotes below.

<sup>29</sup> The notion of peremptory norms of international law already precludes any form of opting out by individual states.

<sup>30</sup> International Law Commission, Commentary on the Vienna Convention on the Law of Treaties, YBILC. 1966, II, 247-248, discussed in Harris (1998) Cases and Materials on International Law, 5th Ed. Sweet & Maxwell, 835. Also Gray, op. cit., 29; Hossain, K. (2005) The Concept of Jus Cogens and the Obligation under the UN Charter, 3 Santa Clara J of Int Law, 72, citing Kahgan, C. Jus Cogens and the Inherent Right to Self-Defense”, formerly available on the net; the Nicaragua case, ICJ Reports 1986, 100. In the Barcelona Traction case, the International Court of Justice described the outlawing of acts of aggression and genocide as examples of an international obligation *erga omnes* – ICJ Reports, 1970, para 33. However the prohibition on the use of force generally has not yet been clearly established as a peremptory norm – Tams (2005) Enforcing Obligations Erga Omnes in International Law, Cambridge UP, 144-145.

<sup>31</sup> The international law as to *jus cogens* is now based on Articles 53 and 64 of the Vienna Convention on the Law of Treaties 1969, and only applies to treaties between states – see Article 1. The proposed extension of the concept of *jus cogens* to non-state entities and persons to prohibit the unjustifiable use of force in all circumstances would not necessarily require any alteration to the Vienna Convention, given that the proposed method of achieving this extension would initially be by a new multilateral agreement. However that new agreement would need to make it clear that its terms were intended to have superior legal force to, and to override where necessary, any other international instrument or international law as well as any domestic law, including any domestic constitutional law. The new agreement should also provide that it is to be applied in good faith by the courts and other institutions of the state notwithstanding any dualist domestic concepts of the division between domestic and international law or other legal concerns. States would have to be under a legal obligation to remove any remaining domestic legal impediments to the full application of the agreement terms in their domestic law.

<sup>32</sup> For example, the Constitution of Japan, (1946), Preface and Chapter II.

<sup>33</sup> See discussion under the heading The Domestic Jurisdiction Clause, below. See also Zhang v Zemin [2010] NSWCA 255, where domestic jurisdiction was found to be lacking notwithstanding allegations of State torture.

<sup>34</sup> At present, peremptory norms of international law are only legally binding on states and not on other entities. There is at present no existing example of such an international agreement having such a wide, global application, extending down to the domestic level, but in principle there is no reason why the law of the world could not be further developed to facilitate such an agreement. The argument in this essay is that such a global legal ban is of such critical importance to the future of humanity that the novelty of the method of implementation should not be seen as a barrier. No doubt amendments would need to be made to the domestic law of many states to give full effect to it, and an obligation to do just that should be included in the proposed international agreement.

<sup>35</sup> This essay does not enter into a detailed discussion of the possible legal consequences of the implementation of the proposed global legal ban. Those consequences need not necessarily be criminal in nature from the inception of the ban, although as will be seen below, aspects of international humanitarian law would presumably continue, including certain criminal offences. The legal consequences for any breach of the proposed ban could be developed over time as new institutional and other reforms were implemented to supplement the ban and make it more effective. Initially it may be sufficient if any breach of the ban could be so designated as to potentially activate the jurisdiction of the Security Council and the principles of collective security where it threatens international peace and security. It might also be made a matter within the declaratory jurisdiction of the International Court of Justice at the instigation of any state, regardless of whether other states consent to the jurisdiction. States could be required to implement the ban in their own domestic law. Beyond that it may be too much to expect the more powerful nations of the world to immediately allow additional inroads to be made into their national sovereignty. The exact formulation in this regard would be a matter for consultation. The important point made in this essay is that the ban should first be legally prescribed in the most comprehensive terms, binding on all persons and entities at all levels of human society.

<sup>36</sup> See discussion below under the heading “International Humanitarian Law and the Proposed Ban”.



as it is to the use of “*self-help*” remedies based on lesser interests below that of humanity as a whole. This is sometimes sought to be bolstered by resort to the ancient concept of a “*just war*”, distinguishing between what are said to be the just causes for the use of war and violence as against unjust causes. But as has been pointed out, on the current state of the law it is most difficult for anyone to determine whether a war is just or not (McMahan, 2010). The tests for determining this are simply not sufficiently precise and are open to subjective and partisan judgment.

This is not to say that this is an area of no law. Great strides have been made in the last century or so, under the pressures of increasing global interdependence and in cognizance of the great dangers posed by contemporary international conflict, to provide certain legal and institutional restraints on war and violence, and to otherwise ameliorate what could potentially be the international law of the jungle<sup>37</sup>. If this was not so, we would live in a world order comprising a number of fully-autonomous “sovereign” states, each owing no allegiance to anyone or anything other than their own perceived self-interests, each asserting the right to wage war and to use force or the threat of force as a matter of free choice. This is simply not compatible with the situation of very large populations trying to cohabit on the finite and increasingly crowded surface of one very small planet.

These international legal restraints were developed to deal with the situation where the use of force was thought to be the prerogative of nation-states, and in particular western nation-states. In the main such states were the only entities that historically had any real capacity to wage war. This was still largely the case by the end of World War II. Thus it was that the United Nations Charter relevantly directed its attention in matters of international peace and security to the actions of “states” and not of other entities. But the international scene has changed quite dramatically in recent decades in this respect.

The evidence is clear that the use of self-help violent remedies is still rampant across the globe notwithstanding the great strides that have already been made internationally to contain this practice. We see this, for example, in the spread of terrorism and in the continued commission of the grossest forms of international crimes. We have also seen it recently, for example, in the conflict in the Middle East involving not only states but also other militant organizations, each asserting the right to use mass violence against the other. The international and domestic approaches to containing and preventing such use of force have generally been politically pragmatic and piecemeal, often legally and politically controversial, and as a consequence lacking in moral authority. A strong and clear statement by the global community that the law

applicable to all peoples will regard as illegal any such use of force anywhere in the world, by any participant, subject only to narrow and precise exceptions that are reasonably justifiable, would establish a firm principle and send a distinct message to those that think otherwise. That there are some governments, people and groups in the world which or who still regard the use of force as justifiable, at least in some circumstances, is clear. But it is necessary to consider whether, in the situation of an increasingly globalised community, such views are any longer acceptable to the world community. The same imperatives that drove the vesting of sovereign powers to prevent the use of force within the identified borders of the sovereign state in Europe some centuries ago now demand that attention be given to this question in the present global context.

Particular states and their national supporters can be expected to reject the need for such a global legal ban, at least initially. In so far as it would operate within their own national borders, they may argue that it is unnecessary. They may well argue that their own national laws and institutions are already adequate to contain the unjustifiable use of force within those borders, and that the making of such a new multinational agreement would be an unwarranted international intrusion into the domestic affairs of that particular state<sup>38</sup>. In so far as the proposed global legal ban would operate beyond those national borders, including with respect to any international actions that their own state may contemplate taking, they may well argue that this would infringe the inherent and sovereign right of their own state to take such actions, including by way of self-defense. Beyond that they may argue that such a ban would be an intrusion into the affairs of other states. In any event they may argue that such a ban would be ineffective in a world torn by so many divisions and conflicting interests and with such a weak international regime to enforce such a ban.

Such arguments are of course completely understandable if the world is still to be perceived as being organized around the centrality of the concept of the “sovereign” state. But the critical question at this point in time is whether this concept is and should remain the central indispensable feature of human political organization, such that everything of human value is to be measured against it. It might be said that the concept has in the main served humanity fairly well in the past, even despite the many disastrous wars and other inter-state conflicts.

But the world is constantly changing and assuming new characteristics at an ever-increasing rate. The process of globalization is now a central feature of human organization, with states themselves increasingly having to change to accommodate this developing phenomenon. That which is contrary to human wellbeing can no longer

<sup>37</sup> In an essay of this kind it is not appropriate to go into a detailed consideration of these developments. Some of them have been already mentioned briefly above.

<sup>38</sup> Discussed further under the heading The Domestic Jurisdiction Clause, below.

be effectively limited or controlled by artificial national boundaries. In particular, it is now very difficult to contain the use of violence so that it does not have effects and consequences beyond particular national boundaries. No country is immune from its effects. And with the spread of modern destructive weaponry and other rapid developments in technology, national boundaries are rapidly becoming of even less significance in this regard. Humanity is moving towards the point where the best interests of human beings have to be measured, in certain critical aspects at least, in global terms against global criteria, whether legal and otherwise, and not just in national terms. Humanity as a whole has a critical interest in the outlawing of the use of violence across the planet and in the development of more peaceful methods of dispute resolution. The alternative is an eventual descent into barbarism. The force of this realization is gradually becoming clearer. It requires the adoption of a new perspective and a new consciousness, one that extends to the planet as a whole and the best interests of all humanity. It does not dispense with the concept of the "sovereign" state, but places it into the appropriate global context rather than giving it centrality. With this perspective and consciousness, the arguments against a global ban on the use of force quickly lose their strength and validity. In fact, those arguments can be seen for what they really are: an excuse for the continuation of the present defective global system that condones and sometimes encourages the use of force in world affairs, to the detriment of humanity as a whole.

And in any event, such national arguments against the idea of a universal legal ban on the use of force should not be allowed to prevent serious discussion of the issue. The possibilities of changing the global legal system to make it more effective in preventing violence still need to be explored.

## THE DOMESTIC JURISDICTION CLAUSE

The suggestion that all actions involving the use of force, whether within, across or beyond national boundaries, should be dealt with by some kind of global legal ban, immediately runs into opposition arguments of a domestic jurisdiction nature and the likely interference with the sovereign rights of states to do whatever they like within their own national borders, particularly with respect to their own citizens. This argument is encapsulated within Article 2:7 of the United Nations Charter, commonly called the "domestic jurisdiction" clause (Conforti, 1996; United Nations General Assembly Declaration, 1965; United Nations General Assembly Declaration, 1970)<sup>39</sup>. That Article excludes any right of intervention by the

<sup>39</sup> 2:7 "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; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

United Nations in matters which are essentially within the domestic jurisdiction of any state, subject only to enforcement measures under Chapter VII of the Charter where there is a threat to international peace and security. It is complemented by Article 2:4, which requires member-states to refrain from the threat or use of force against the territorial integrity or political independence of any other state or in a manner inconsistent with the purposes of the United Nations<sup>40</sup>. Arguably, these rules apply not only to member-states of the United Nations as part of their international obligations, but also to all states, whether a member of the United Nations or not.

The principle of national sovereignty, upon which the non-intervention principles are based, were already part of international customary law, and the application of these provisions of the United Nations Charter to all states is contemplated by the Charter itself<sup>41</sup>. In the context of the United Nations, it can be subsumed within a more basic principle, described as the "*principle of the sovereign equality of all its Members*."<sup>42</sup>. This was a basic principle behind the founding of the United Nations in 1945.

But times have changed considerably since 1945. Global interdependence has accelerated exponentially, and the demands and necessities of the contemporary age are quite different from those immediately after World War II. Threats to the meaningful future of humanity are emerging from many quarters, many of which require a coordinated global response. In many ways the present Charter of the United Nations is out of touch and out of date. Reform of the Charter is now widely canvassed. And states themselves are slowly coming to a realization that assertions of the absolute sovereignty of member-states can now no longer be justified, at least in all circumstances. There has to be some limits. Witness the growing debate, for example, on the alleged right of humanitarian intervention in the affairs of other countries, on the jurisdiction and powers of international institutions to deal with gross human rights abuses and international crimes occurring within national borders, and even as to the validity of the asserted doctrine of "pre-emption" or "forward defense"<sup>43</sup>. The United Nations Security Council itself has sometimes found the existence of a threat to international peace and security arising from internal events, sufficient to justify United Nations' sponsored action under the Charter (White, 1997). The General Assembly of the United Nations has also asserted the right to pass resolutions authorizing certain peacekeeping

<sup>40</sup> 2:4 "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>41</sup> In particular, Article 2.6 and see Conforti, B. op. cit.

<sup>42</sup> United Nations Charter, Article 2:1.

<sup>43</sup> There is much written on this subject. See, for example, Raymond, GA. (2003) Military Necessity and the War Against Global Terrorism", Chapter 1 of Hensel, H M.op. cit; Byers, M. (2003) Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change. 11.2 J Political Philosophy, 171.

actions within national borders (White, 1997). The potential for states to exclude any global oversight of their excesses and abuses within their own boundaries has been much reduced by the modern media and technology, and by the rise and influence of international NGOs and world opinion. The use of organized or mass force is no longer purely an internal issue. It is now a matter of concern to every human being, no matter where it occurs.

In the context of the argument in this essay, it points to the need for an additional exception<sup>44</sup> or qualification to the domestic jurisdiction clause in the Charter<sup>45</sup>, sufficient at least to give the proposed global legal ban full legal force and effect. The prohibition on interference in the domestic affairs of any state could continue to be a binding international legal principle, but in that case it would need to be expressed in way that allowed the proposed global legal ban on the use of force and violence to operate. It must be expressed such that no state could legally hide behind this clause while using unjustifiable force within its own national boundaries, and likewise no other entity or person using force should be able to hide their forceful actions behind those boundaries. The effectiveness of the proposed legal ban cannot be held hostage by any country, entity or person which or who wishes to use force as a means of conflict resolution outside of the narrowly defined exceptions. If this was not so, the proposed ban would be of little value. The exact nature of the legal changes required in this respect would be a matter for consultation<sup>46</sup>.

## SELF-DEFENSE

At international law, just as is the case in the domestic law of most countries, there is a legal defense of "self-defense" to allegations of certain breaches of the law. In the case of state-members of the United Nations, that defense is confirmed in Article 51 of the Charter.<sup>47</sup> This

<sup>44</sup> It is not envisaged that the existing exception of collective enforcement measures through the auspices of the United Nations would be otherwise affected.

<sup>45</sup> Article 2.7.

<sup>46</sup> This might, for example, require consideration of changes to the means whereby the international community can take action to prevent any breach of the proposed legal ban occurring wholly within national boundaries. This involves a step beyond the proposed legal ban itself and is not the subject of this essay. The right of self-defense in Article 51 of the Charter would also seem to require change as part of the implementation of the proposed legal ban; see discussion under next heading.

<sup>47</sup> Article 51 provides-

*"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."*

Article has effect against the background of earlier customary law, applicable at the international level, which incorporates principles such as those of necessity and proportionality. However controversy often surrounds the interpretation and application of this defense. What appears on the wording of Article 51 to be a quite narrow, provisional defense (Alexandrov, 1996) based on an actual armed attack, has sometimes been interpreted and applied by some states in a much broader manner to justify the use of force in circumstances of doubtful legitimacy, or to continue the use of force until the Security Council is seized of the matter. There are two opposing approaches to this defense, one of which is to keep the scope of the defense restricted in order to limit the cases of the permitted use of force to a strict minimum in international relations, and the other to expand the defense to cover new or expanded dangers, such as exist in the proliferation of weapons of mass destruction or in acts of intimidation, confrontation, subversion and terrorism, and to accommodate the notion of forward defence. This extends to the situation which involves threats that have not yet reached the point of an actual armed attack.

These two approaches are in a state of tension with each other. In a modern world that is torn by international conflict, it illustrates the difficulties of expressing accurately in words this type of defense. With the development of modern technology, the changing nature of armed conflicts, the immediacy and vast scope of some threatened forms of violence and other factors, there are considerable difficulties in providing a suitable definition that is clear and comprehensive.

And yet it seems that if the proposed comprehensive legal ban on the use of force is to be put in place, some clarification of this defense would appear to be essential at international law. If this is not done, then the value and effectiveness of such a global legal ban could be greatly reduced. Even without such a ban, there is a case for greater clarity in the definition of self-defense. But it is to be anticipated that this would be the most difficult aspect of the reforms advocated in this essay, given the predominant say that states still have in the formulation of new international legal principles. In the context of the proposed ban, it is at the very least a matter that would need the most careful consideration with a view to confining the defense as much as is reasonably possible<sup>48</sup>. It is a consideration that should perhaps extend to the role of entities other than states when subjected to or threatened with unlawful violence that has implications for international peace and security. It will no doubt also require a concurrent consideration of more effective methods of collective security at the international level and other matters.

<sup>48</sup> It may, for example, be a matter that could be considered by the International Law Commission, with a view to recommending a definition of the defense that limited it as much as possible consistent with the proposed comprehensive legal ban.

The object of any such international consideration would be to examine the present law and its application, in order to try and determine the weaknesses and strengths of that law and to consider how that defense could be better confined in law to support the proposed new global legal ban. In so doing, the system of international collective security and peaceful forms of conflict resolution should be given pre-eminence over self-help remedies. The consideration could include the question whether to expressly exclude as unlawful or otherwise qualify certain types of forceful actions presently sought to be brought within the legal scope of the defense such as pre-emptive attacks, and perhaps other related reforms (Alexandrov, 1996). Whatever the form of words that may be agreed, presumably by way of amendment to Article 51 as well as in some new and overriding multilateral agreement, it should seek to give more strength or emphasis to such a confining principle.

Even if such a consideration leads to legal changes, it is not, of course, going to solve in practice all the problems arising from the misuse of this defense. This latter task will no doubt be an ongoing task, as no one formulation of words can hope to adequately solve all the problems in this respect. Many other factors are involved, including as to the role of the United Nations and its institutions such as the Security Council and international judicial and arbitral bodies, other reforms of the United Nations Charter, the question of multilateral disarmament and restraints on the proliferation of modern weaponry, issues of international humanitarian law and other issues. But these factors should not be used as an excuse to hold up the proposed global legal ban on the use of force.

Such a need for consideration at the international level may be less obvious at the domestic law level, given the tendency in many countries to fairly strictly confine the scope of self-defence where there are allegations of domestic criminal or tortious conduct.

## **COLLECTIVE SECURITY AND THE USE OF FORCE**

Any global legal ban on the use of force must consider and take into account the present provisions of the United Nations Charter on collective security. These provisions are an exception to the ban on the use of force, or on the threat to use force, by states as contained in the Charter<sup>49</sup>. Under Chapter VII of the Charter, where the Security Council considers that other measures for peaceful resolution of disputes would be inadequate or have proved to be inadequate, it may take such forceful measures as may be necessary to maintain or restore international peace and security<sup>50</sup>. For this purpose it may use the military forces of member-states. The principle in the domestic jurisdiction clause is not to prejudice the application of such enforcement measures<sup>51</sup>.

<sup>49</sup> Article 2.

<sup>50</sup> Article 42.

<sup>51</sup> Article 2.7.

No doubt there are aspects of these present Charter provisions that may need revision to make the system of collective security more effective. For example, on the argument put in this essay, the legal ban on the use of force should not be limited in its application to states alone, and the principle of collective security should extend to control any use of force by any entity which the responsible international agency considers cannot adequately and reasonably be dealt with internally by domestic police forces. Subject to any such reforms, there can be no doubt but that some form of international collective security will be necessary for the foreseeable future for purpose of securing world peace and security. In the absence of such provisions, there is always the possibility, and indeed the likelihood, that even with a comprehensive legal ban on the use of force at every level of human society, there will be cases of non-observance which cannot be resolved by peaceful methods of dispute resolution. Thus some effective system of collective security, involving the generality of the nations of the world and specific international institutions, will still be necessary to deal with such non-observances. It would be naïve to think otherwise. Force must remain the ultimate deterrent of last resort, but restricted to the hands of some global collective system, based on globally agreed legal principles and designed to prevent unilateral forceful action by any state or other entity.

This deterrent should be seen as a kind of international policing function, parallel to that which exists in the domestic sphere. No doubt to be really effective, it would need to be accompanied by a number of other reforms, including comprehensive multilateral disarmament, global restrictions on the weapons industries and the sale of weapons, and perhaps a standing international police force under international command. These are further issues beyond the scope of this essay, and should not be used as an excuse for inaction in terms of the proposed global legal ban on the use of force.

## **HUMANITARIAN LAW AND THE PROPOSED BAN**

The implementation of the proposed legal ban on the use of force would require some consideration being given to the appropriate relationship between that ban and the principles of international humanitarian law as they presently exist. The latter is a body of law that seeks to regulate, primarily through the Geneva Conventions, but also through other international instruments as well as in customary international law, the excesses involved in the use of force ("armed conflict"), whether or not there is a declared war, and whether or not the use of force is otherwise legitimate. But it is not a comprehensive body of law extending to every kind of violence. It does not extend to a range of internal disturbances and conflicts, such as riots, isolated and sporadic acts of violence and other similar acts, not being armed conflicts. And those

Geneva Conventions only partially deal with the legality of that use of violence in the course of armed conflicts<sup>52</sup>; the broader question of the legality per se of the use of force in armed conflict is not dealt with in those Conventions (Abi-Saab, 1997; Wilmott, 2004)<sup>53</sup>. Leaving aside these provisions and those of the United Nations Charter and certain other international instruments dealing with such legality (Bourloyannis-Vrailas, 1995), international humanitarian law generally takes the fact of the violence in armed conflicts as it finds it and then attaches legal consequences only to particular actions that comprise or accompany that violence, or to the choice of and use of particular weapons in association with that violence (Ratner and Abrams, 2001)<sup>54</sup>.

It can be argued that it is an exercise in futility to try to legally define what humane forms of violence are (Robertson, 1999). Seen from this perspective, arguably the whole basis of international humanitarian law is, to some extent at least, anachronistic in this modern age. But it does not follow that the use of force generally should alone be outlawed, and not also particular excesses in the use of that force that are of a very serious criminal nature. The alternate and perhaps preferable view is that those particular excesses should continue to be crimes in their own right, crimes of aggravation if you like, in addition to the proposed general illegality. In any event, principles of international humanitarian law would need to continue to apply to the legitimate use of force within the narrow exceptions to the proposed general legal ban.

It is argued that in a global human society that is aspiring to be civilized and peaceful, the primary emphasis of the law should be as to the illegality of the use of force generally, with the regulation of particular excesses in any use of force being a secondary issue. The primary question in any consideration should be whether any force was used outside of the narrow exceptions prescribed. If so, that use of force should be treated by the law as being illegal, with all the consequences flowing from that illegality. Whether those consequences should extend to criminal liability on the part of those individuals most responsible is a matter for consideration. The secondary issue of particular excesses would still be relevant to the criminality of the conduct of particular individuals, and would be viewed in

the light of that general illegality attaching to the use of force as well as of the particular nature of the excesses by those individuals. Humanitarian law would thus remain of relevance in this more secondary sense, extending to those few exceptions, narrowly defined where the use of force is to remain legitimate notwithstanding any global legal ban on the use of force.

## THE DOMESTIC DIMENSION

People living in the West and in many other countries have by and large accepted the domestic legal situation which prohibits the use of physical force to resolve their disagreements. The use of force in situations internal to the particular country may still occur, perhaps far too frequently in some cases, but it is usually contrary to the domestic law of that country. This is an idea that has been exported to other parts of the world. The domestic law of virtually all countries generally attaches criminal responsibility to such conduct, with certain resultant penalties for any conviction in breach. Civil remedies may also lie as well as other legal consequences. The domestic law can generally be enforced through the domestic courts, as part of the application of the rule of law. As a general rule, and leaving aside the situation in some of those countries with authoritarian regimes of government, no person, group or government is regarded as being above and exempt from the domestic law in this regard.

This acceptance has come with the rise of the contemporary Westphalian "sovereign" state, each state claiming the right to exercise a very wide jurisdiction over people and events located or occurring within the state boundaries. With this rise has come the establishment of the institutions and officers of the state, capable of enforcing the domestic law and exercising jurisdiction to deal with any breaches of that law in lieu of self-help remedies. It is a Lockean-type arrangement, whereby the individual and private groups within those boundaries have implicitly ceded authority to the state itself, including the authority to use justifiable force if necessary, to deal with their disagreements arising in the domestic community. It is an arrangement which is at the very heart of the notion of the "sovereign" state and its justification. It reflects the need for the maintenance of peace and security in the domestic community, a need that was often noticeably unmet in the turbulent pre Westphalian times in Europe. It is part of the rule of law and is one of the fundamental premises of modern civilization.

Of course there have to be some lawful exceptions to what otherwise would be the illegality attaching to the domestic use of force. These exceptions are generally built into this aspect of the domestic law. Some of the main exceptions are in relation to the limits of domestic criminal responsibility. For example, the criminal law defenses of lack of intent or involuntariness, of self-defense, of provocation, and of insanity. In the case of

<sup>52</sup> For example, by proscribing the use of violence against non-combatants.

<sup>53</sup> The use of violence against those not taking part in hostilities is prohibited in the Geneva Conventions, including in the case of armed conflict that is not of an international character that occurs within the territory of one of the contracting national parties – see common Article 3.1 (a) of each of the four 1949 Conventions, and generally Convention IV on civilians, as well as Article 4.2 (a) of Protocol II. Otherwise the legality of the use of force per se is not dealt with in these Conventions other than by way of reference to the relevant provisions of the United Nations Charter in the later Protocols. As to the inadequacy of the existing distinction between international and non-international conflict (Wilmott, 2004).

<sup>54</sup> The liability is directed at individuals and is expressed in terms of their criminal liability for any breach. But the creation of international criminal law has been an ad hoc process with many deficiencies.

civil or tortious liability concerned with violence or the use of force, there are somewhat similar range of defenses. The exact nature of these defenses will vary to some extent from national jurisdiction to national jurisdiction, but exceptions of this kind will not usually be of serious concern for present purposes<sup>55</sup>.

All such national jurisdictions also allow a certain measure of force to be used by specific officers in the performance of their duties in the service of the state, such as by members of the police force. Usually the special legal powers that excuse liability for such action will be defined in legislation, although sometimes they may be derived from customary or common law, or may be based on administrative instructions or directions. Normally any exercise of these special powers, going beyond those exercisable by an ordinary citizen, must be justified by reference to the legal authority under which they are exercised. The presumption is usually against interfering with the rights of the ordinary person unless expressly authorised by law. Again, leaving aside the position in certain countries with authoritarian governmental regimes, any excess or abuse of power by those exercising special powers will usually render the offender liable to either criminal or civil court action, depending on the circumstances.

For present purposes this situation is only of concern if those special powers are exercised in a tyrannical or oppressive manner, in breach of basic human rights, or where the measure of force used by state officers is disproportionate to the threat to the authorities or to the public. There have been many examples in certain countries in recent times where a systematic, arbitrary or excessive degree of domestic force has been used by such officers, beyond that reasonably necessary or justifiable in a global society committed to the elimination of the use of force as a means of dispute resolution. Such excesses have not uncommonly occurred at the direction of, or with the consent, express or implied, of those in governmental power. It is not necessarily a situation limited to countries with authoritarian regimes of government, although they may be much more common in such countries. The examples of this occurring are too numerous to mention. There is a clear need in peaceful and just global society to outlaw such abuses as a matter of general legal principle.

And in the present international climate involving threats of terrorist and other subversive acts, there are issues as to how far a government may legitimately go in legally allowing force to be used in protecting citizens and preventing such acts. These are clearly issues of public concern that should be openly discussed. It is not the purpose of this paper to enter into a debate as to the appropriate limits in such instances, but it is an issue that can not seriously be avoided.

But are there any situations where particular groups

<sup>55</sup> There may be particular issues at the margins which may need discussion, such as the extent of the right to use force against home invaders.

which regard themselves as oppressed, and which are located within a particular national boundary, are justified in using force to attain their ends? And conversely, is the government in power, *de jure* or *de facto*, entitled to use some degree of force in response to such groups and their actions? These are issues of particular concern in the post-colonial period, as many groups have struggled to attain independence and self-determination. International law recognises a right of a "people" to self-determination<sup>56</sup>, particularly for such people located over the seas from the colonising power's home territory. With the attainment of independence and entry of a large number of new nation-states into the global system in the last century, much of the pressures in this direction have subsided. But a number of independence struggles still continue today<sup>57</sup>, and some of those seeking independence assert the right to use, and do use, force. The demarcation between independence-fighters and what might be called "terrorists" has often been controversial. Perspectives have often differed, it being a very subjective issue. Most people can accept the outlawing of acts which they regard as a form of terrorism and the violence that accompanies them<sup>58</sup>, but may sometimes have serious reservations about treating as unlawful the acts of those perceived as being genuine freedom-fighters. International law itself has tended to be non-committal on the legality of the use of force by the latter, thus reflecting the controversy just spoken of (Gray, 2004)<sup>59</sup>. It is usually left to a matter of domestic law. But in the context of a suggested global ban on the use of force, it is another issue that can't be avoided.

The writer's view is that in the present global circumstances, no person or group should be entitled any longer under law to use force to attain his or their aims, no matter how meritorious those aims may appear to be, and whether having their focus within national borders or beyond. The value of a comprehensive global ban of the kind now envisaged, it is argued, far outweighs any entitlement to resort to the use of force even for purposes of asserting a right to self-determination or any other alleged right. Of course, this does not mean that human rights or other abuses by government against such persons or groups should be tolerated. More effective mechanisms need to be devised, and institutions established, that seek to prevent such abuses on a

<sup>56</sup> International Covenant on Civil and Political Rights, Article 1; International Covenant on Economic, Social and Cultural Rights, Article 1; Alston, P. (Ed.), (2001) *Peoples' Rights*, Oxford U P, in particular the contribution by James Crawford in that latter publication. A number of conflicts in the world now center on the forceful pursuit of independence by particular groups within existing countries where those countries have themselves already acquired independence from colonial rule, thus posing international legal issues as to the legality of the activity.

<sup>57</sup> Including against new states that have themselves fought for and attained independence.

<sup>58</sup> Discussed below.

<sup>59</sup> Note that the 1975 United Nations General Assembly Resolution on the definition of aggression contains a proviso as to the right to self-determination.

consistent global basis<sup>60</sup>. And governments should be legally obliged not to use unjustifiable force against dissident groups, just as those groups should likewise be legally obliged not to use force against government.

It is stressed, it is not argued here that such persons and groups should not be entitled to pursue their right to self-determination, or any other legally recognized right, by all reasonable means short of the use of force<sup>61</sup>. Non-violent methods of various kinds are not challenged in this context. The view being put forward against all forms of violence would avoid the subjective, characterising arguments of the kind just described, that is, whether violence is justifiable and legal in some particular situations involving the assertion of particular rights. Such arguments would be replaced by a general legal principle that would outlaw the use of such force in all such situations. The task before the global community would be to devise practical methods of ensuring that both governments and the relevant persons or groups hold to these new legal principles, a subject beyond the scope of this essay.

In the case of actions involving the use of force that cannot reasonably be characterised as being in pursuit of a right to self determination, or of some other recognized right<sup>62</sup>, there can be no reasonable objection to such a global legal ban. Thus, for example, terrorism based on the promotion of some ideology and involving the use of violence is incompatible with a peaceful and orderly world. The global community has already made some headway towards the outlawing of some forms of terrorism by international agreement, although work on a comprehensive ban has not so far been successful<sup>63</sup>. It has been delayed somewhat by the difficulty of agreeing on the definition of "terrorism", a difficulty that would largely be eliminated under the proposals in this essay. Acts of terrorism may already be contrary to the domestic law of many countries where those acts are committed, either as part of the general domestic criminal law and/or as part of special anti-terrorism laws. These legal prohibitions should be extended globally in a consistent and reasonable manner. No state or other entity should be legally entitled to support such violent acts.

In the case of other forms of mass violence within national boundaries that do not involve terror tactics, such as some civil wars and armed uprisings, and not involving any direct confrontation between states, similar considerations should apply. Experience has shown in a number of countries that violence is not essential to the achievement of radical apable of resulting even in a change in government (Sharp, 2005)<sup>64</sup>. A global legal ban

on the use of force would render illegal all such domestic actions involving the use of force. In most cases these actions may already be illegal under the relevant domestic law (Caney, 2006)<sup>65</sup>. The additional layer of world law can only be of benefit and avoid arguments as to whether the conflict does spill over into the international arena, thereby excluding legal arguments by other countries and groups that might wish to support such use of force for their own purposes. It would remedy the present deficiencies in international law which does not presently outlaw such use of force in all circumstances<sup>66</sup>, but merely seeks to regulate it in some cases under principles of international humanitarian law<sup>67</sup>.

## CONCLUSION

Seen from the perspective advocated in this essay, the suggestion that there should be detailed consideration of the proposal for a world-wide legal ban on the use of force and violence, within, across and beyond national borders, and with only the narrowest of justifiable exceptions, no longer seems to be too extreme or unattainable. In an increasingly interdependent world, it is becoming an imperative to work towards a culture of non violence across the face of the earth, backed up by such a comprehensive legal ban. It is a matter that demands earnest consideration and careful study by all actors on the planet. In such a process, the building of new human attitudes and beliefs about the potential and desirability of a future non-violent world should be facilitated and encouraged. The process is as important as the end goal. If such a ban necessitates the amendment of the United Nations Charter and the taking of other forms of international action, even unprecedented international action, then on the view put in this essay this should be put on the table. The matter is that important to the future of humanity. Such a ban, it is argued, is supportable not only from a rational and practical point of view, but also from a moral and humanitarian point of view. It is in the best interests of humanity, and should not be put aside or avoided because of anticipated procedural, practical or political difficulties, nor because of opposition from those who see a need to retain the right to use force, within or

<sup>60</sup> Arguably the establishment of the International Criminal Court has been a giant stride in this direction, but many think that it is still too weak and there are too many gaps in its jurisdiction and powers.

<sup>61</sup> The approach of the present Dalai Lama is illustrative of this.

<sup>62</sup> Such as appears to be the case with many acts of terrorism.

<sup>63</sup> See footnote above.

<sup>64</sup> Witness the Gandhian philosophy as used in India and later in the civil rights struggle in the USA and in the Philippines. There are other examples in recent history.

<sup>65</sup> There is a view that war and organized violence that takes place entirely within national boundaries, such as a civil war often does, and not giving rise to any issues that might justify international humanitarian intervention, is entirely a domestic matter and should not be the subject of international legal restraints. Caney, for example, excludes these types of conflict from his consideration in *Justice Beyond Borders*, Oxford U P, 2006, 190. The view put in this essay is that in this contemporary age, there cannot be any clear distinction between the domestic arena and that which extends beyond the domestic arena in this regard. The use of force should be comprehensively outlawed whatever the status of the conflict.

<sup>66</sup> Although if the domestic civil strife is found to threaten international peace and security, the Security Council may feel justified in authorizing intervention under the United Nations Charter.

<sup>67</sup> See discussion above under the heading "Humanitarian Law and the Proposed Ban".

beyond their own state boundaries, that is greater than is reasonably justifiable. In particular, it should not be allowed to disappear from the global agenda in the face of opposition from tyrannical regimes nor from other groups which might have political, religious or ideological objectives that are claimed to allow them to use violence whenever they judge it to be necessary or desirable. To do otherwise would be to continue to allow the law to accept, at least in certain circumstances, the legitimacy of the use of violence and brute strength as a means of human conflict resolution, a principle which is incompatible with the establishment of a united and peaceful world and true civilization on this planet.

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