For the international legal order created post Westphalia in 1648 – in which the sovereign independent state is supreme – armed intervention by a state or a group of states in the internal affairs of another state has traditionally been regarded as anathema. As recently as 1986, the International Court of Justice in the Nicaragua Case, at para 202, held:

The principle of non intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed [in the Corfu Channel Case]: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations'.

Indeed, for the world recreated in the aftermath of the conflagrations of the first half of the twentieth century, the principal of non-intervention was viewed as a fundamental building block. Article 2(4) of the UN Charter specifically prohibits the threat or use of force by member states
against the territorial integrity or political independence of any state’. This prohibition, in turn, is reinforced by art 2(7) of the Charter.

The Charter prohibition against intervention is, too, embodied in numerous other multilateral treaties. Examples include art 8 of the Montevideo Convention on the Rights and Duties of States (1933); art 15 of the Charter of the Organisation of American States (1948); art 8 of the Charter of the League of Arab States (1945); art 3 of the Charter of the Organisation of African Unity (1963) and in its successor document, the Constitutive Act of the African Union (2001). Further, art 3 of the International Law Commission’s Draft Declaration on Rights and Duties of States emphatically lays down that every state has the duty to refrain from intervention in the internal or external affairs of any other state.

In 1965 the General Assembly adopted a Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. The resolution declared:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned. . . .

5. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

The Declaration went on to hold that strict observance of these obligations was essential to international peace and a breach violated the letter and principles of the UN Charter.

Similar provisions can be found in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations and in Principle VI of the Declaration on Principles Guiding Relations between Participating States which forms the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1975. The high-water mark for non-intervention was the 1981 UN Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.

However, despite the many international injunctions against intervention, as the *Nicaragua Case* pragmatically concedes, examples of ‘trespass’ continue. One particularly controversial instance of armed intervention by a state in the internal affairs of another state is that of ‘humanitarian intervention’. It is this species of intervention that is addressed in a recent Cambridge University Press publication, *Humanitarian Intervention*. Edited by JL Holzgrefe and Robert O Keohane, this contribution to current discussion on the topic is a collection of nine essays, all of which offer stimulating and informative analyses of the topic from the perspective of a variety of disciplinary approaches.

Wisely, for purposes of each of the contributions, the authors agree to a particular definition of humanitarian intervention:
the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied (18).

This definition usefully emphasises that humanitarian intervention is unilateral action on the part of a single state or a collective of states; and, that the intervention is in response to a violation of the human rights of individuals other than its own citizens – thus distinguishing humanitarian intervention from intervention on behalf of one’s own nationals.

More controversial is that the definition employed distinguishes between authorised and unauthorised humanitarian intervention. The latter form of intervention is held to refer to intervention that has not been authorised by the United Nations Security Council under Chapter VII of the Charter. For some, humanitarian intervention – by its very nature – is always unauthorised. If a mandate is accorded to a state or group of states by an appropriately authorised body, such as the Security Council, any consequent intervention in terms of that mandate cannot be referred to as humanitarian intervention. The intervening state or states hold legal title for their action.

Intervention of the kind addressed in this volume – whether authorised or unauthorised – is not new. A ‘humanitarian’ justification for intervention is rooted in the jus publicum europaeum of the nineteenth century. As early as 1827 France and Britain justified their intervention in Greece against the Turks on the grounds that they were preventing the racial extermination of the Greek population. The same two powers intervened in the Kingdom of the Two Sicilies in 1856, ostensibly to suppress the arbitrary treatment of political prisoners. In the second half of the nineteenth century intervention by the Christian powers of Europe in the Ottoman territories on behalf of Christian minorities became a regular occurrence. In 1860, Britain, France, Austria, Prussia and Russia intervened in Syria, following the massacre by Syrian Druses of six thousand Maronite Christians. Interventions by the European powers in opposition to Turkish action occurred also in Crete (1866), Bosnia (1875), Bulgaria (1877) and Macedonia (1887). By the end of the nineteenth century non-European powers had embraced the concept – in 1898 the United States intervened in Cuba in an effort to suppress ‘acts of barbarism’ attributed to Spanish colonial rule.

Following the conclusion of the Second World War, supposed instances of humanitarian intervention have included Belgian military action in the Congo in 1960 and 1964; United States intervention in the Dominican Republic in 1965; India’s intervention in East Pakistan (now

1 See, for example, R Kolb ‘Note on Humanitarian Intervention’ (2003) 85 Int Rev of the Red Cross 119.
2 Ibid 121.
Bangladesh) in 1971; the 1975 Indonesian intervention in East Timor; and the 1979 Tanzanian intervention in Uganda. Since 1991, incidences of intervention by external powers justified on grounds of humanitarianism have become even more frequent: Northern Iraq (1991); Bosnia Herzegovina (1992–95); Somalia (1992–93); Rwanda (1994); Haiti (1994); Albania (1997); Kosovo (1998–99); East Timor (1999); Sierra Leone (1997–2000).

Particularly controversial have been two relatively recent instances of intervention. On the one hand, the NATO intervention in Kosovo in 1999, and, on the other, the failure adequately to intervene to prevent the Rwandan genocide. It is these two instances – the former lacking the support of international consensus and clear legal authority, and the latter constituting an omission of sorts – that form the two poles for many of the debates on the legality, or otherwise, of humanitarian intervention contained in this volume. A further dimension to the general debate on humanitarian intervention has been added by the attacks of 11 September 2001. To what extent has the response to these attacks rendered redundant the need for recourse to humanitarian intervention? The debate on the legality or otherwise of humanitarian intervention is waged within the context of the international legal order as it existed prior to American intervention in Afghanistan (October 2001) and Iraq (April 2003). In the debate as it existed prior to 2001, at issue was the balance between state sovereignty versus international concern for human rights. In any new world order that might emerge post 2001 these issues are not necessarily those that set the parameters for unilateral intervention.

Holzgrefe and Keohane’s work addresses these issues as well as a number of others – including the problem of intervention in failed states – from a variety of perspectives. The volume, which contains extensive footnotes, and a helpful select bibliography, is divided into four parts within which the nine contributions are located.

Part one is essentially concerned with context. In chapter one – ‘The Humanitarian Intervention Debate’ – Holzgrefe raises a number of issues and questions that then form the basis for discussion in succeeding contributions. More broadly, apart from offering the agreed definition for humanitarian intervention, Holzgrefe considers the ethics and the legality of humanitarian intervention. In a very enlightening section on ethics recourse is made to a variety of ethical theories: utilitarianism, natural law, social contractarianism, communitarianism, and legal positivism. When dealing with the legality of intervention, Holzgrefe’s aim is simply to map the sources of international law dealing with the issue, including international conventions (in particular the UN Charter), human rights conventions, and customary international law.

Apart from Holzgrefe’s chapter, part one also includes a contribution by Tom J Farer. In chapter two – ‘Humanitarian Intervention Before and
After 9/11: Legality and Legitimacy – Farer contrasts the debate prior to, and post, that cataclysmic event. In doing so, he focuses on a variety of legal theorists. Also of interest to Farer (and an issue of great relevance to the debate, made obvious when one considers the many examples of intervention that have been justified on humanitarian grounds) is the potential for abuse of the doctrine in circumstances where states intervene without the necessary consent of the UN Security Council.

Part II addresses the issue from an ethical perspective. The starting point for the authors of chapters three and four is that existing international law does not necessarily carry moral weight. International law is not beyond question simply because it is international law – ‘to the extent that state sovereignty is a value, it is an instrumental, not an intrinsic, value’ (93). Relying on a Kantian account of the state, Fernando R Tesón, in chapter three – ‘The Liberal Case for Humanitarian Intervention’ – posits a liberal argument in favour of humanitarian intervention when human rights are being seriously abused. ‘If human beings are denied basic human rights and are, for that reason, deprived of their capacity to pursue their autonomous projects, then others have a prima facie duty to help them’ (97). Tesón concedes that, on occasion, during intervention, others might be harmed – however, ‘... sometimes causing harm to innocent persons is justified as long as one does not will such harm in order to achieve, not a greater general welfare, but a goal that is normatively compelling under appropriate principles of morality’ (117). Indeed, depending on the circumstances, for Tesón, not only do states have a right to intervene but also a moral obligation to do so. In essence, Tesón’s argument is that the principle of non-intervention is trumped by that of protection for human rights.

The argument advanced by Allen Buchanan in chapter four – ‘Reforming the International Law of Humanitarian Intervention’ – is that of ‘lawfulness’ justification: a commitment to values embodied in the legal system (not just those of morality), in this case, the protection of human rights. Buchanan notes that the NATO intervention in Kosovo is but the most recent of a series of illegal interventions for which plausible moral justifications can be given. Other examples that he refers to are those of India in East Pakistan, Vietnam in Cambodia and Tanzania in Uganda. However, for Buchanan, while the interventions might be illegal on strictly textual grounds, the action could be defended as a means of reforming the legal system. The potential appeal of this argument is that it is ordinarily very difficult to reform the international legal system through treaties or overt efforts to change custom. Buchanan argues that while ‘the state consent supernorm’ is not always a trump, if existing rules of international law are to be breached, that breach must be in terms of a preferable alternative norm. NATO, argues Buchanan, was unable to proffer such a norm to justify its intervention in Kosovo.

Part three deals with ‘law and humanitarian intervention’. In seeking
to uphold the rules of international law the authors of chapters 5 and 6 employ different strategies. In chapter five – ‘Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law’ – Michael Byers and Simon Chesterman defend non-interventionism as a fundamental tenet of international law. The authors are of the view that the principle of sovereign equality on which the international legal order is based is one that is manifestly as valuable to weak states as it is inconvenient to powerful ones. As such, it is deserving of continued respect. ‘If intervention is morally required, it should be defended as such, and not used as part of “an unwarranted attempt to revise by stealth the fundamental principles of international law”’ (6). The authors conclude: ‘the greatest threat to an international rule of law lies not in the occasional breach of that law – laws are frequently broken in all legal systems, sometimes for the best reasons – but in attempts to mould that law to accommodate the shifting practices of the powerful’ (203).

For Thomas M Franck, the author of chapter six – ‘Interpretation and Change in the Law of Humanitarian Intervention’ – international law is part of an evolving discourse. It is capable of reinterpretation in much the same way as is the common law. ‘Law’, he says, ‘is rarely static . . . its evolutionary response to changing circumstances may deliberately be to purchase a degree of contextual reasonableness at some cost to its absolute, one-size-fits-all, certainty’ (205). In circumstances where the strict letter of the law collide with common sense, recourse is often had to ‘necessity’ and ‘mitigation’ as justifications for what would ordinarily be interpreted as illegal action. The usefulness of these concepts is not limited to domestic law but might successfully be employed when considering the issue of humanitarian intervention. Thus, while the NATO intervention in Kosovo might per se be illegal, the result was consistent with the intention of the law.

The final chapter of part three, chapter seven – ‘Rethinking Humanitarian Intervention: the Case for Incremental Change’ – is that of Jane Stromseth. Of concern to Stromseth is whether the principles governing humanitarian intervention should be codified. In rejecting the codification option, Stromseth argues that not only would codification be a mistake, but that the uncertain legal status of humanitarian intervention is ‘a good thing’ (233), since this very ambiguity provides ‘fertile ground for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision making’ (233). In an interesting discussion on the Kosovo intervention, Stromseth examines Security Council thinking as well as the justifications advanced by the intervening states. In the process she isolates four approaches: (1) the status quo approach, which categorically affirms that military intervention in response to atrocities is lawful only if authorised by the UN Security Council or if it qualifies as an exercise of the right to self-defense;
(2) the ‘excusable breach’ approach, in terms of which humanitarian intervention without UN mandate is technically illegal under the rules of the UN Charter but may be morally and politically justified in certain exceptional cases; (3) the customary law evolution of a legal justification approach, which looks both to Security Council and broader international responses to instances of non-authorised humanitarian intervention to ascertain patterns, consistency of rationales, and degrees of acceptance, reflected in practice, if certain conditions are met; and, (4) an approach advocating a clear right of humanitarian intervention. In Stromseth’s view international law as it now stands is situated somewhere between (2) and (3). With regard to the future, she argues that ‘the most promising path . . . lies in the middle ground between rigid adherence to the text of the UN Charter and premature attempts to codify criteria for a right or doctrine of humanitarian intervention’ (272).

Moving away from law, the final part of the book deals explicitly with political issues. In chapter eight – ‘Political Authority After Intervention: Gradations in Sovereignty’ – Robert O Keohane considers the effectiveness of intervention. In doing so, Keohane argues that traditional conceptions of sovereignty constitute a serious barrier to effectiveness. Wherefore Keohane proposes the ‘unbundling’ of the concept of sovereignty. Keohane holds that:

It is important to see that the severity of the dilemma faced by the intervening powers is worsened by the persistence, in much thinking, of a unitary conception of sovereignty. In this view, ‘self determination’ is the goal of intervention; that is, restoring full sovereignty to the troubled society. But full sovereignty, with its exclusion of external authority, is more part of the problem than part of the solution. As long as the alternatives are ‘no sovereignty’ or ‘full sovereignty’ there is unlikely to be any viable ‘exit option’ for the humanitarian intervention (281), whereas, argues Keohane, sustained involvement after intervention is necessary for intervention to be effective.

In the final chapter, chapter nine – ‘State Failure and Nation-building’ – Michael Ignatieff, concentrating on state failure, also argues that, in order to address issues of state failure, the need is for a rethink of the concept of sovereignty. For Ignatieff state failure, in much of the world, has its roots in weak state capacity. However, despite a failure on the part of many states seriously to meet the preconditions for effective domestic sovereignty, such ‘quasi-states’ continue to be treated as Westphalian entities.

If our concern is to reduce chaos and to improve domestic governance and stability, we do not necessarily need to multiply the number of Westphalian states in the world. We might consider protectorates, regimes of conditional independence, and other forms of regime which provide what matters, namely, domestic self rule, without necessarily proceeding to full international legal independence. But this option is credible only if other states, or regional pacts or multilateral organizations like the UN, can enforce the conditions imposed on the conditional or limited sovereign (309).

It is in such circumstances that intervention becomes potentially relevant.
Surprisingly, what this invaluable contribution to the debate fails to do is seriously to interrogate the appropriateness of the term ‘humanitarian intervention’. After Kosovo, in response to an appeal by the UN Secretary-General, Kofi Annan, the Canadian government and a group of private foundations, created the International Commission on Intervention and State Sovereignty. This Commission, which devoted a number of important passages to the issue, rejected ‘intervention’ in favour of a ‘responsibility to protect’ (see sections 2.28-2.33 of the Report). But for many, the term remains an oxymoron of sorts – can armed intervention ever be ‘humanitarian’?

Garth Abraham
Associate Professor of Law
University of the Witwatersrand