and *opinio juris*[5] since the terrorist attacks of 11 September 2001 strengthen the customary legal status of this prohibition.

The transfer of weapons to terrorists operating in another state would be an internationally wrongful act.[6] However, effective application of the principle is complicated by the lack of an agreed definition of terrorism at the international level, which reflects at least in part fundamental differences of view among states over the characterization of individuals or groups as terrorists or "freedom fighters" or representatives of the 'legitimate' government[7]. The maintenance by the UN Security Council Sanctions Committee on Osama Bin Laden of a list of proscribed terrorist organizations is one practical example of overcoming a hitherto seemingly intractable definitional problem.

2.2. The Genocide Convention

Most states are parties to the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* [Genocide Convention]. Additionally, the prohibition on genocide is part of customary international law, having been recognized as a peremptory norm or principle of jus cogens[8] by the International Court of Justice (ICJ) and other international tribunals. Genocide requires the specific intent ('*dolus specialis*') to destroy, in whole or in part, one of four protected groups (national, ethnical, racial or religious). This is a high threshold to meet. Article III of the Convention includes, in addition to the crime of genocide itself, conspiracy to commit genocide, incitement, attempted genocide and complicity in genocide. Although complicity is sufficient to constitute a breach of the Genocide Convention, the specific intent is not established through evidence only of the state's involvement in the transfer of weapons with knowledge that they are intended for use by the recipient state or group in perpetrating the genocide. It would be necessary to also establish evidence of an *intention* to facilitate the genocide itself. Given the *jus cogens* nature of the prohibition on genocide, if such evidence can be shown (whether directly from statements or orders or inferentially from a systematic pattern of behaviour), then a strong argument can be advanced that a state would itself have committed an internationally wrongful act if it transferred weapons to a state or group committing genocide. Absent the specific intent necessary for genocide, a state transferring weapons to a state that it knows is using them to carry out genocidal acts will likely still be in violation of international humanitarian law (IHL), particularly war crimes or crimes against humanity under the doctrine of secondary state responsibility[9]. (See the discussion *infra* of complicity in violations of IHL.)

2.3. Charter and Customary International Law Prohibitions on the Use of Force[10]

Article 2(4) prohibits the threat or use of force in international relations, when directed "against the territorial integrity or political independence of states, or in any other manner inconsistent with the purposes of the United Nations." Threats are illegal when the force threatened would itself be illegal.[11]

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[5] There are two elements for international customary law to emerge, namely practice and so called *opinio juris*. *Opinio juris* means that states are acting in a certain manner because it is their legal obligation to do so. One may find proof of international customary law by demonstrating that a certain practice is taking place and that the states who are engaged in that practice are doing so because they feel legally compelled to do so. Not all states have to be engaged in that practice to give a norm the force of customary law. If customary law exists, then it is binding upon states without them having to formally accede to it.

[6] In addition to characterization as a breach of anti-terrorism law, this would likely also qualify as an impermissible intervention in the domestic affairs of the target state. (See discussion *infra*.)

[7] The issue of self-determination is discussed at some length, *infra*.

[8] A principle of *Jus cogens* refers to a norm of international law, binding as such, and recognized by the international community as a whole as having a peremptory character. Those peremptory norms that are clearly accepted and recognized – and therefore from which no derogation is possible - include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination. This, in turn, means that a State taking countermeasures in relation to an international wrong perpetrated against it may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide. See, for e.g., *East Timor (Portugual v. Australia)*, I.C.J. Reports 1995, p.90, at p. 102, para. 29.

[9] Note that the definition of complicity under the Genocide convention is not limited to the provision of assistance to another state, unlike the customary law doctrine of secondary responsibility, discussed *infra*, which necessarily presupposes the involvement of another state as the primary actor in the wrongdoing.

[10] See also the separate section, *infra*, on assisting a state in the crime of aggression.

[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. Rep. 226 [*Nuclear Weapons*]. For example, threatening to commit an act of aggression would constitute a breach of the Article 2(4) prohibition, even in the absence of an actual attack.