Chicago Journal of International Law

Volume 1 | Number 1 Article 5

3-1-2000

Benign Hegemony? Kosovo and Article 2(4) of the U. N. Charter

Jules Lobel

Benign Hegemony?
Kosovo and Article 2(4) of the U.N. Charter

Jules Lobel *

INTRODUCTION

The 1999 U.S.-led, NATO-assisted air strike against Yugoslavia has been extolled by some as leading to the creation of a new rule of international law permitting nations to undertake forceful humanitarian intervention where the Security Council cannot act. This view posits the United States as a benevolent hegemon militarily intervening in certain circumstances in defense of such universal values as the protection of human rights.

This article challenges that view. NATO's Kosovo intervention does not represent a benign hegemon introducing a new rule of international law. Rather, the United States, freed from Cold War competition with a rival superpower, is both less restrained by the Charter's norms and more compelled to rely on different rationales to justify military action. Particularly in light of the Afghanistan, Sudan, and Iraq military interventions, the Kosovo operation does not portend a new rule of international law. Rather, it poses a serious threat to the rule of law.

Post-World War II international relations can be roughly divided into three periods. The first, stretching throughout the Cold War, was one in which the competing superpowers maintained a formal deference towards the Charter's prohibitions on non-defensive uses of force, but attempted to stretch the concept of self-defense to justify what in reality were violations of the Charter. The second was a brief unipolar yet multilateral moment between the Cold War's end and the late 1990s. During this time a United States-led U.N. authorized various military actions by the United States and other nations. The third and current era is characterized by the recent United States use of force outside of the U.N. framework against Iraq, Afghanistan, Sudan, and Yugoslavia. This era presents the grave danger that U.S. hegemony will further undermine the post-World War II quest to place the use of force under the control of a truly international organization.[1]

I. THE U.N. CHARTER IN A BIPOLAR WORLD

The drafters of the U.N. Charter attempted to create a bright-line rule limiting the use of force. The use of force by individual states was prohibited, except in self-

* University of Pittsburgh Law School. The author wishes to thank Michael Ratner, Karen Engro, Christopher Williams and the Document Technology Center staff at the University of Pittsburgh Law School.

1. UN Charter Art II (1945), 59 Stat 1031, Treaty Ser No 993 (1945).

defense, to respond to an armed attack by one country against another. The Charter required that the Security Council authorize all other uses of force.

The clear rules of the Charter were premised on a set of assumptions that proved faulty. The Charter's framers sought to prevent a recurrence of the traumatic World War II experience from which they had just emerged. They assumed that interstate violence would dominate the second half of the twentieth century as it had the first. In fact, however, intrastate conflict constituted the predominant form of warfare during the next five decades. Moreover, the framers assumed that the Security Council would intervene to stop warfare, at least where one of the five permanent members was not directly involved. This assumption also proved inaccurate, as the Security Council remained deadlocked for almost half a century during the Cold War.

Nonetheless, the bipolar Cold War struggle between the two superpowers strained, but did not break Article 2(4)'s restrictions on the use of force. While both the Soviet Union and the United States violated the Charter's prohibitions where their perceived national interest required—the Soviet invasions of Hungary, Czechoslovakia, and Afghanistan, and the U.S. military incursions against Cuba, the Dominican Republic, Nicaragua, Grenada, Libya, and Panama—both superpowers maintained a formal fealty to the principle that force not be used except in self-defense.

Neither the Soviet Union nor the United States and its allies chose to openly challenge the Charter's norms for several reasons. First, both had an interest in the stability of the formal rules stemming from World War II; neither desired the destabilizing effects that openly challenging the recently adopted Charter's scheme would bring. Second, United States foreign policy was premised on the concept of containment, which was ideologically closely attuned to the legal norm of self-defense. The policy of containment and the normative prohibition on the use of force, except to counter an armed attack, were designed to resist changes to the status quo. Both superpowers foreswore using armed force to change the status quo in Europe, a policy which avoided world war and dovetailed with the Charter. The Charter's norms coincided with the political reality that both blocs sought to avoid direct armed confrontation with each other. Therefore, when Kennedy and Kruschev resolved the Cuban Missile Crisis in 1963, the core agreement—Soviet withdrawal of missiles for a U.S. pledge not to invade Cuba—reflected Article 2(4)'s norms.

Third, the rise of scores of newly independent states in Africa and Asia also favored the rhetorical maintenance of the Charter's norms. Both superpowers sought legitimacy for their foreign policies: to openly attack the notion of sovereignty that lay behind the Charter's structure would have delegitimated the rule-breaker in the eyes of many states whose support both blocs sought. Finally, since the superpower conflict was not primarily fought militarily between states, but within the internal politics of the less industrialized states, it was possible for the two superpowers to generally foreswear the offensive use of force against other states, yet nonetheless to achieve their policy aims by covertly intervening in the target states.

The disposition of both Western and Soviet elites to at least formally support

the core Charter norms on the use of force was reflected by the rationales they proffered to justify actions that were widely perceived to violate the Charter. The United States sought to avoid sweeping justifications for its attacks on other countries that would have essentially eviscerated the Charter's norms. Instead, the United States sought to expand the self-defense exception, stretching its penumbras but not obliterating its core. The deployment of self-defense to justify maintaining hegemonic power has an ancient pedigree. Imperial powers at the height of their reach into the far corners of the world invariably viewed themselves as constantly under attack by enemies, and the United States was no exception.[2] The United States, supported by the Soviet Union, attempted to define the concept of armed attack broadly to encompass any significant aid a state provides to insurgents fighting within another state, thus expanding the collective self-defense justification against the state aiding the insurgency. This elastic view of armed attack was invoked to justify the U.S. military interventions in Vietnam and Central America.

In the Dominican Republic, Panama, Grenada, and Libya, the United States relied in part on a claimed right to protect nationals from threatened attack to justify invasions or air assaults against other nations. The State Department under Reagan and Bush asserted that this right to protect citizens from attack came within Article 51's exception for self-defense. The protection of citizens' property which formed the basis for many nineteenth century military interventions against weaker powers was replaced by the protection of citizens' lives in the twentieth century parlance of self-defense. At times, when an assertion of self-defense pursuant to Article 51 would have allowed the exception to totally engulf the rule, the United States resorted to reliance on the OAS or other regional organizations to legitimate its military actions, as it did in the Cuban Missile Crisis of 1963. But even there, as in the Cuban Missile crisis or the Grenada invasion, the legal argument was still tied to self-defense, but mediated by an alleged lesser standard for regional organizations under Article 52 of the Charter.

The Soviets responded in kind. They sought to fit their military actions within the Charter's paradigm by relying on similar, if not more attenuated, theories. In Hungary and Afghanistan, the Soviets claimed that they had been invited in by the legitimate government. The 1968 Soviet invasion of Czechoslovakia, undertaken with nominal support from other Warsaw Pact countries, was justified by both a broad Brezhnev Doctrine assertion of a right to defend socialism from imperialist overthrow, and a narrower regional organization exception that paralleled the U.S.'s claimed OAS exception invoked during the Cuban Missile Crisis.

These attempts to stretch the contours of the Charter were generally rejected by

---

2. Arthur Schlesinger analogized the American Cold War mentality to the state of mind of the Roman Empire in Arthur Schlesinger, *The Imperial Presidency* 184 (Houghton Mifflin 1973), quoting Joseph A. Schumpeter, *Imperialism and Social Classes* 51 (A.M. KELLY 1951) (Heinz Norden, trans):

> There was no corner of the known world where some interest was not alleged to be in danger or under actual attack. If the interests were not Roman, they were those of Rome's allies; and if Rome had no allies, then allies would be invented... Rome was always being attacked by evil-minded neighbors, always fighting for breathing-space.

the international community. The General Assembly, for example, rejected the broad definition of armed attack proffered by the great powers. Eventually, it settled on a compromise definition of aggression that fell vaguely somewhere between the narrow position favored by the smaller countries and the more expansive imperial position. In the Nicaragua case, the International Court of Justice further narrowed that compromise, moving the definition of an armed attack closer to that favored by the non-aligned movement.

Similarly, while the United States, France, Belgium, and Israel consistently construed the Charter to permit a right to rescue nationals, the attempt to ground the Grenada and Panama invasions on that rationale was condemned by a large majority of states. The Reagan Administration's effort to legally justify its 1986 bombing of Libya as lawful self-defense in response to terrorists attacks was also repudiated by a majority of the Security Council. The Soviet invasions fared no better. Large majorities of the Security Council and General Assembly condemned the invasions of Hungary, Czechoslovakia, and Afghanistan.

In each of these situations, other states may have been responding to the weak factual cases presented by the U.S. and the Soviet Union rather than their broader view of the law. Indeed, the Grenada and Panama invasions were hard to justify as a narrow protection of citizens; to occupy a country and depose its leaders in order to "protect" citizens seems obviously a disproportionate response to whatever threat allegedly existed. The Afghanistan "invitation" to the Soviet Union to send troops to Afghanistan seemed clearly pretextual, given that the Soviets had murdered the head of the Afghan government and the invitation was issued by his Soviet-installed successor. Nonetheless, by rejecting these pretextual uses of self-defense, the majority of states indicated their preference to maintain Article 2(4), and to carefully scrutinize the use of Article 51's self-defense exception.

The world's major powers also rejected any broad exception to the Charter for humanitarian intervention. Despite occasional rhetoric to the contrary, U.S. policy officially eschewed any legal reliance on employing armed force for democracy, or for broad humanitarian goals. The U.S. supported the overwhelming majority in the U.N. that voted to condemn the Vietnamese invasion of Cambodia, despite the widely-recognized ongoing genocide of the Cambodian government. The British Foreign Office in 1986 gave three reasons that the overwhelming majority of legal opinion refused to recognize the existence of a right to use force on behalf of humanitarian intervention:

> (1) The UN Charter and corpus of modern international law do not seem to specifically to incorporate such a right.
>
> (2) State practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and
>
> (3) on prudential grounds, that the scope for abusing such a right argues

strongly against its creation.[3]

The bipolar Cold War world therefore produced a situation where the two major hegemonic powers and their allies, as well as the weaker states of Asia, Africa, and Latin America, strongly supported maintaining the Charter's restraints on the use of force. The Charter regime served the dominant states interests by legitimating containment and detente, and by precluding weaker states from resorting to force to change the status quo. It served weaker states' interests by installing state sovereignty and independence as a central norm of the international order. It also provided them with at least ideological, if not military, leverage to defend that independence. Nonetheless, despite the formal widespread agreement as to the governing formal law, both superpowers and regional powers used force to assert their national interests, and many observers noted the diminishing role of the Charter as a restraint on state conduct. A divergence emerged between the formal law and the practice of the more powerful states. Those states used force in violation of the Charter, but sought to justify such uses by fitting their actions uncomfortably within the Charter's norms. The resulting dissonance between formal law and practice could only be resolved either by a revitalization of the Security Council—a possibility precluded by the Cold War—or a formal renunciation of the Charter's norms.

II. THE UNIPOLAR AND MULTILATERAL MOMENT

The collapse of the Soviet Union left the United States as the uncontested superpower, yet also removed the central, guiding purpose of its post-World War II foreign policy. The search for a new foreign policy to replace the containment of communism led in two complementary directions. The 1990s witnessed a rebirth of Wilsonian international liberalism trumpeting a new world order, the international rule of law, and the extension of American values of democracy, market economy, and human rights throughout the world. The Bush and Clinton presidencies also sought to make combating new threats to national security more central to American policy—terrorists, drug dealers, rogue states, weapons of mass destruction, ethnic conflict, and disintegrating states. These new threats replaced the overarching Communist menace as a critical engine of U.S. foreign policy.

In the immediate flush of victory over the Soviets, the United States turned to multilateralism and the United Nations to carry out its policies. The weakened, crumbling Soviet Union was no longer an obstacle to U.N. Security Council unity, and the combination of American power and persistence achieved Security Council authorization of force to counter Iraq's invasion of Kuwait. That authorization helped legitimate U.S. policy both internationally and domestically, and the Gulf War victory over Iraq demonstrated the value of exerting hegemonic power through the United Nations.

---

3. United Kingdom Foreign Office Policy Document No 148, reprinted in 57 Brit B Y Intl L 614, 619 (1986).

The demise of the Soviet Union had two somewhat contradictory effects. It portended the revitalization of the Security Council to its originally conceived role. Yet, it also set the stage for an extension of U.N. power and authority beyond the parameters of the Charter's original design.

In the first half of the decade, the expansion of authority to use force beyond self-defense was generally legitimated by United Nations Security Council authorization. In Somalia, Rwanda, Haiti, and Bosnia, the Council explicitly authorized the use of force by Western powers as a humanitarian measure not occasioned by a claim of self-defense. The protection of the Kurds in Iraq in the immediate aftermath of the Gulf War might also fall within this category, although the U.N. authorization in that case was more ambiguous and somewhat contested. While some questioned the Security Council's authority to sanction military intervention into the internal affairs of other states, most states and scholars accepted the Council's characterization of grave human rights and humanitarian crises as threats to international peace and security and therefore within its purview. Indeed, the most common critique of the Council and its permanent members was their inability to forcibly intervene in a timely fashion in crises of genocidal proportions, such as the Rwandan and Bosnian tragedies.

With one exception, the United States' resort to arms in the first half of the 1990s was conducted pursuant to U.N. authorization.[4] This authorization had replaced the traditional self-defense norm as the primary source of legal authority for U.S. military operations. Despite the weakness and perceived faults of the post-Persian Gulf U.N.-sponsored interventions, many observers and government actors hoped for a post-Cold War world where the U.S. and other nations intervened under U.N. auspices, not only to constrain rogue states like Iraq, but also to further human rights and democracy.

Commentators as diverse as the liberal Professor Lea Brilmayer and conservative William Kristol envisioned a post-Cold War world where a hegemonic United States would intervene as a benevolent empire to promote American values throughout the world. Brilmayer constructed a liberal theory of American hegemony in which the United States would use its hegemonic power through the United Nations for the good of international society. She argued that the concept of the equality of states is a legal fiction, and that the reality of contemporary world politics is one of hierarchy in which hegemonic states like the U.S. have "a right to lead and, in the process of leadership, to do things that are forbidden to other nations."[5] Brilmayer argued that

4. The one exception was the Clinton Administration's policy toward Iraq. The U.S. bombed Iraq in retaliation for its alleged assassination plot against former President Bush when he visited Kuwait, and in connection with violations of the no-fly zone. The Bush incident bombing was justified by the traditional resort to self-defense, although in reality it was more properly characterized as a reprisal, which the U.S. and other nations have generally viewed as barred by the Charter. The no-fly zone bombings were rationalized as having the de facto, if not de jure authorization of the Council, a view disputed by other Council members.

5. Lea Brilmayer, *Transforming International Politics: An American Role For the Post Cold War World*, 64 U Cin L Rev 119, 123 (1995). See also Lea Brilmayer, *American Hegemony: Political Morality in a One*

the United States should "assume the role of executive officer for the world community at large," or "something akin to an unelected monarch working in conjunction with an elected legislature."[6] In her view, American leadership would, if exercised properly, benefit not merely its own national interest, but the world as a whole. Moreover, hegemonic power, if exercised through multilateral institutions such as the U.N., would eventually become more democratic and restrained by the need to garner financial, military, and political support from other nations.

Some conservatives, such as William Kristol, argued that "American hegemony is the only reliable defense against a breakdown of peace and international order."[7] For neo-Reaganites, the purpose of American foreign policy is to preserve American hegemony; this task is only accomplished if U.S. foreign policy is based on a clear moral purpose combined with a strong military. That moral purpose meant "actively promoting American principles of governance abroad—democracy, free markets, respect for liberty"—by force if necessary.[8]

The conception of America as the "benign hegemon" whose power, virtue, and uniqueness lie in its claim to be, in the words of then-Deputy Secretary of the Treasury Lawrence H. Summers, "the first nonimperialist superpower" led U.S. officials to justify a more assertive protrusion of American virtue and power than dictated by the old containment theory. Anthony Lake, the National Security Adviser in Clinton's first administration articulated the new goals of American foreign policy in 1993 when he argued that "the successor to a doctrine of containment must be a strategy of enlargement—enlargement of the world's free community of market democracies."[9] This "new interventionism," primed by the long-standing American view of itself as exceptional, reunited the two strands of liberalism—"traditional Wilsonian liberalism with its support for international organizations and self-determination of peoples; and its Cold War cousin, defined by anticommunism."[10] Substituting "enlargement" for "containment" also led to the undermining of the Charter paradigm enshrining state sovereignty and prohibiting the use of force except in self-defense.

Superpower World (Yale 1994).

6. Id at 127-28.
7. William Kristol and Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, 75 Foreign Aff 18, 23 (July-Aug 1996); Robert Kagan, *The Benevolent Empire*, 111 Foreign Pol 24 (Summer 1998); Charles Kraithammer, *The Unipolar Moment*, 70 Foreign Aff 23 (1990/1991); Robert Tucker, *Alone or With Others; The Temptations of Post-Cold War Powers*, 78 Foreign Aff 15 (Nov-Dec 1999) (need for world order will only be met through the instrument of American power).
8. Kristol and Kagan, *Towards a Neo-Reaganite Foreign* Policy, Foreign Aff at 27 (cited in note 7).
9. Remarks of Anthony Lake, Assistant to the President for National Security Affairs, 'From Containment to Enlargement' delivered at the Paul Nitze School of Advanced International Studies of the Johns Hopkins University, Washington, D.C., Sept 21, 1993, quoted in Arthur I. Cyr, *After the Cold War, American Foreign Policy, Europe, and Asia* (NYU 1997).
10. Stephen John Stedman, *The New Interventionists*, 72 Foreign Aff 1, 4 (America and the World 1992-1993).

Nonetheless, the corrosion of the Charter paradigm seemed acceptable if U.N. Security Council authorization was to be substituted for principled norms to guide the use of force, as appeared to be the trend in the early part of the 1990s. For, while the Security Council might engage in ad hoc decision-making, it still maintained the legitimacy of the authoritative multilateral institution empowered by the Charter to make those collective decisions. Even though such decisions would not be democratically made, but would be hostage to the politics of the great powers, who also controlled the enforcement mechanism, it still appeared to many to be a reasonable compromise to promote human rights and humanitarian goals in a post-Cold War world. Brilmayer's hegemonic analogy to a U.S. executive operating pursuant to (U.S.-dominated) legislative authority made some sense.

But, the early post-Cold War euphoria unraveled quickly. The Cold War's end sharply escalated ethnic tensions and demands for self-determination that threatened to engulf the U.N. with pressure to intervene to protect human rights. The United Nations could not possibly accommodate these demands, which led to increased charges of inconsistency and favoritism. Moreover the operational difficulties attendant upon such U.N. interventions led to increasing caution on the part of the Clinton Administration in authorizing such actions, and a refusal to place U.S. troops under U.N. command. Finally, by the latter part of the 1990s, America's unipolar moment had passed, at least in the political, if not the military and economic, spheres. As Samuel Huntington has persuasively argued, global politics have now entered what he terms a transitional uni-multipolar period, characterized by one great superpower preferring unipolar hegemony, and several major regional powers who would prefer a multipolar system wherein they could restrain the superpower.[11] While American military and economic power reflect a unipolar world where the United States spends more on military spending than the next six major powers combined, the political dynamic in the U.N. Security Council suggests a multipolar world polity. The tensions inherent in the uni-multipolar system described by Huntington have led the United States to turn away from reliance on United Nations to authorize the use of force. The key turning point was the Iraqi crisis of 1998, when France, Russia, and China opposed the use of force to compel Iraqi compliance with the inspections regime, and the United States and Britain acted alone. Similarly, the threatened veto by Russia and China of authorization of military action against the Serbs in Kosovo forced the United States to rely on NATO alone.

The Kosovo air campaign propelled, at least temporarily, humanitarian intervention to center stage in American and European foreign policy, but now shorn of the legitimacy derived from Security Council authorization. The question for the twenty-first century is: will the Charter's restraint on force survive this new interventionism?

11. Samuel Huntington, *The Lonely Superpower*, 78 Foreign Aff 35 (Mar-Apr 1999).

III. BENIGN HEGEMONY?

The Spring 1999 NATO air campaign against Yugoslavia has been trumpeted as ushering in a new era of international relations, in which the U.S. and its Western allies are abandoning the old U.N. Charter rules that prohibited nations from attacking others for strictly humanitarian reasons.[12] One prominent American international law scholar terms the Kosovo air assault a "critical moment and a basic change in international legal practice."[13] In this view, international law is moving toward a new rule permitting nations to undertake forceful humanitarian intervention in certain circumstances, even without Security Council authorization.

The potential emergence of a new norm permitting non-U.N.-sponsored humanitarian intervention stems from several converging factors. The flowering and flourishing of the human rights movement in public consciousness, in nongovernmental organizations, in the media, and among elites is one critical factor. The breakdown of state sovereignty over much of the globe with the resulting ethnic warfare and slaughter is another. The final, and critical, factor is the demise of the bipolar world in which superpower competition restrained overt intervention on behalf of "universally" held values. During the Cold War, those "universal" values themselves were in dispute, and therefore, neither superpower was willing to permit the other to legally intervene to promote its values. The development of a new norm permitting humanitarian intervention would thus reflect not only the prominence of the human rights movement, but also the preeminence of the United States, mirroring in law the United States dominance in the political, economic, military, cultural, and ideological realms of global society.

What is new about the "new humanitarian intervention" in Kosovo is not that the United States asserted humanitarian reasons to justify its military actions, but rather, that it did not also rely on traditional self-defense reasons that would legitimate such action under the Charter. That it felt no obligation to do so is a product of the contemporary international order in which the United States is unchallenged politically, militarily, and economically, but faces a Security Council that still rests on a multipolar structure. With no competing superpower to either justify a broad invocation of self-defense nor to assert "humanitarian interventions" of its own, the United States apparently felt both freer and more compelled to rely primarily on humanitarian interests and not traditional national security reasons to justify its actions.

The new proposed rule permitting non-U.N.-sponsored humanitarian intervention where the Security Council cannot act is premised on a projected world order in which a benignly hegemonic United States, in conjunction with other

12. See Michael J. Glennon, *The New Interventionism, The Search for a Just International Law*, 78 Foreign Aff 2 (May-June 1999).

13. W. Michael Reisman, quoted in Neil A. Lewis, *Conflict in The Balkans*, Toronto Globe & Mail A10 (Apr 9, 1999).

Western democracies, act as protectors of human rights throughout the globe. The assumption underlying this view is that these democratic powers would intervene in cases where serious human rights abuses are occurring for primarily humanistic reasons, and not simply to promote their narrow self-interests.

The history of humanitarian military intervention suggests, however, that such a new world order would be easily subject to abuse, where "humanitarian interventions" functioned as a new rationale for the assertion of hegemonic power. That history is replete with examples of powerful states or coalitions invoking the doctrine to conceal their own geopolitical interests. A comprehensive analysis of the historical record of such interventions written in 1973 concluded that "in very few, if any instances has the right [to humanitarian intervention] been asserted under circumstances that appear more humanitarian than self-seeking and power-seeking."[14] The Charter's reliance on an armed attack to trigger a right to use force in self-defense was therefore an attempt to curb the historical, pretextual uses of force, by relying on an objective, verifiable standard to trigger a legal right to use force.

The United States has not been immune from asserting humanitarian reasons to justify military interventions that have served its own geopolitical interests. President McKinley justified military intervention against Spain in the cause of humanity; President Johnson claimed that U.S. intervention in Vietnam and the Dominican Republic were undertaken for humanitarian reasons; President Reagan asserted that the interventions against Nicaragua and Grenada were designed to restore freedom and human rights for those people; and President Bush articulated the restoration of human rights and democracy as a rationale for the Panama invasion.

Moreover, humanitarian intervention has been and continues to be highly selective, based on the national interests of the hegemonic state. For example, the United States used force in Kosovo, but still sells arms to Turkey despite that country's brutal repression of the Kurds. The U.S. military also sells weapons to Columbia, whose military has committed widescale human rights violations in fighting guerillas. Such selectivity both furthers doubts about the motives of the intervening states, and also highlights the difficulty of establishing a rule of law based on the humanitarian intervention model. The rule of law is inconsistent with a police force that intervenes to protect only certain people from particular thugs and not others.

Those scholars who view the Kosovo conflict as portending a new rule of international law permitting non-U.N.-authorized humanitarian intervention have therefore sought to articulate a rule that avoids the historical abuses associated with

14. Thomas M. Franck and Nigel S. Roddy, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 Am J Intl L 275, 290 (1973). That conclusion was seconded by the British Foreign Office in its 1986 study. United Kingdom Foreign Office Policy Document No 148 (cited in note 13). The International Court of Justice has similarly noted that a right of forcible intervention in the name of international justice "has, in the past, given rise to most serious abuses... [F]rom the nature of things, it would be reserved for the most powerful states." *Corfu Channel Case*, 1949 ICJ Reports (Merits) 4, 35 (1949).

such intervention. The insurmountable problems associated with any broad rule permitting humanitarian intervention have led scholars to search for a narrower construct. Such narrow constructs invariably set forth various conditions that must be met to render a humanitarian intervention lawful. For example, one could argue that NATO's Kosovo action supports a rule permitting armed humanitarian intervention where:

> (1) a nation's human rights abuses have been condemned by the Security Council as presenting a threat to peace under Chapter 7 of the Charter;
>
> (2) the Security Council is paralyzed by a veto threat and the military action is undertaken by a regional organization which asserts that it is intervening to protect human rights;
>
> (3) the Security Council subsequently is either silent or refuses to condemn the military intervention; and
>
> (4) peaceful, non-forcible diplomatic options for ending the human rights violations have been exhausted.

This narrowly tailored norm arguably ameliorates the most problematic aspects of humanitarian intervention. Security Council condemnation of the human rights abuses under Chapter 7 provides an objective, verifiable standard that serious human rights abuses do exist in the target nation.[15] The second prong—a requirement of a regional organization's intervention—seeks to mute the potential for abuse that exists where one country intervenes unilaterally. The Security Council's subsequent silence, or refusal to condemn the military intervention is proffered as evidence of implicit Council approval or ratification of the action. The last condition seeks to ensure that force is only used as a last resort.

Scholars can point to some evidence of U.N. practice supporting this narrow rule. In addition to the Kosovo case, it can be argued the Security Council impliedly authorized the Economic Community of West African States' (ECOWAS) use of force in Liberia in 1990 and in Sierra Leone in 1997-98 in response to widespread human rights abuses occurring in those countries. Similarly, the United Kingdom, United States, and French military actions establishing safe havens and no-fly zones in Northern Iraq to protect the Kurds were arguably implicitly authorized by the Council. In none of these cases did the Security Council explicitly authorize humanitarian intervention. In the African cases, the Council appears to have unanimously accepted the initiative of a regional organization after it occurred. In both African cases, the Council itself had been asked to intervene, but neither the United States nor any other permanent member desired to do so. In the Sierra Leone case, although not in Liberia, the Council had condemned the human rights abuses prior to the regional intervention. In the Kurdish case, the Security Council

---

15. United States officials have gone further and at times argued that the Security Council's invocation of Chapter VII is sufficient to implicitly authorize a resort to force. See John Goshko, *U.S., Allies Inch Closer to Kosovo Intervention; U.N. Council to Vote on Key Resolution*, Wash Post A21 (Sept 23, 1998). The later argument is dubious in that by condemning human rights violations, the Council did not authorize the use of force, which is clearly a separate issue.

condemned Iraq's treatment of the Kurds in the aftermath of the 1991 Persian Gulf War, but the U.S./U.K. and French military interventions were not supported by any regional organization and their legal claims were disputed by Secretary General Javier Perez de Cuellar and other U.N. members. In none of these examples, however, did several permanent members of Security Council vigorously object to the intervention, as happened in the Kosovo case.

Yet, even this narrow proposed rule on humanitarian intervention contains serious difficulties. Simply because the Security Council condemns human rights violations does not mean that those violations reach the level warranting armed intervention; such use of force ought to be reserved for only the most outrageous and pervasive violations, such as genocide where thousands of lives are in imminent danger.

The question, therefore, is who decides that the human rights violations are so gross and massive as to warrant armed intervention. The Kosovo case illustrates the problem. While very few would dispute that the Serbs were committing serious human rights violations prior to the NATO bombing, sharp disagreement exists as to whether those violations were sufficiently widespread and massive to justify a use of force. During the year prior to the bombings, approximately 2000 civilians had died in Kosovo's civil war between the Serbs and the KLA, and in the months immediately preceding the bombing, one mass killing of civilians by Serb forces, in which forty-five persons were killed in the town of Racak, has been documented.[16] The OSCE observer force established by the Security Council had effectively prevented the commission of massive atrocities. Massive ethnic cleansing only commenced after the bombing began. NATO therefore argued that Milosevic planned all along to evict forcibly all the Albanians from Kosovo, even had NATO not commenced bombing, a charge that cannot be objectively verified and about which independent observers express skepticism.[17] Irrespective of the accuracy of this charge, accepting such speculation as a legal basis for humanitarian intervention would permit the very type of abuses and pretextual military interventions that Article 2(4) was designed to prevent. Moreover, a rule that permits nations to use force once the Security Council condemns human rights violations could well have a perverse effect. Nations such as China may well be reluctant to vote to condemn such violations for fear that they are opening the door to armed intervention.

The second proposed narrowing principle—a requirement that the intervention be undertaken by a regional organization—is also problematic. While clearly preferable to unilateral action, such multilateral action still contains the inherent problem of hegemonic interest masquerading under humanitarian goals. Thus, the

16. John M. Broder, *Conflict in the Balkans: The Overview; Clinton Says Force is Needed to Halt Kosovo Bloodshed*, NY Times A1 (Mar 19, 1999).

17. See, for example, Michael Mandelman, *A Perfect Failure, NATO's War Against Yugoslavia*, 78 Foreign Aff 2 (Sept-Oct 1999); Christopher Layne and Benjamin Schwarz, *For the Record*, 139 Nat Interest 9 (Fall 1999).

Nigerian-dominated ECOWAS intervened in Liberia and Sierra Leone to protect human rights and democracy at the same time that the Nigerian dictatorship was violating those rights and democratic principles at home. The Security Council's failure to explicitly authorize those interventions may well have been linked to uneasiness about Nigeria's role, particularly in the Sierra Leone case where Nigeria apparently misled the Council as to the nature of its operations. Other regional actions, such as the U.S.-dominated OAS intervention in the Dominican Republic, the Organization of East Carribean States/U.S. invasion of Grenada, and the Warsaw Pact invasion of Czechoslovakia, all raise the same hegemonic pretextual concerns.

Indeed, the Kosovo air assault poses similar questions. Was the United States attempting to orchestrate a new post-Cold War expanded role for NATO, as a means of exerting its influence through a more malleable instrument than the U.N.? Did Western Europe have a strategic interest in further reducing Russian and Serb interest in the Western Balkans? Was this a case of the dominant world power enforcing its will against a recalcitrant gangster to teach him and others the costs of disobedience? In June 1998, why was the United States the only NATO nation to argue that NATO did not need explicit Security Council authorization to use force in Kosovo,[18] yet only eight months later NATO nations unanimously, albeit in some cases reluctantly, lined up behind the United States' argument to circumvent the Council? Why did the Bush Administration, at a time when human rights did not purport to displace national interest as the motivating factor for military intervention, warn the Serbs in 1992 that it would use military force against Serbia itself if it escalated the conflict in Kosovo? Such a warning must have been based on U.S. strategic interests, not human rights, in that the U.S. at that very moment was allowing the slaughter in Bosnia to proceed without outside military intervention. The answers to these questions are undoubtedly complex. The fact that the intervention was a NATO/U.S. one does not, however, remove these concerns.

That the Security Council subsequently refuses to condemn the intervention is also a weak argument for implicit authorization. Security Council members might acquiesce in an unlawful action, yet not vote to approve it if given such an opportunity prior to its initiation. Moreover, another problem with a rule that recognizes after the fact, de facto ratification of unauthorized military actions is that it encourages member states to take illegal action with the expectation that the Security Council will later acquiesce. Acquiescence ought not to constitute authorization.

Finally, the requirement that all non-forcible and diplomatic means for resolving the dispute be exhausted is essentially meaningless because whether peaceful means have in fact been exhausted will typically be disputed. Thus, the key question is who decides whether that constraint has been met—the regional grouping or the Security

18. Remarks of Secretary of Defense William S. Cohen at Los Angeles Foreign Affairs Council Breakfast, Federal News Service, June 29, 1998 at 10 available in LEXIS, News Library, Fednew File.

Council? The Charter assumes that where a country is attacked, it has a right to immediately defend itself. In other situations presenting threats to world peace, the Security Council is to determine whether peaceful means of resolving the dispute have been exhausted. To eviscerate that rule essentially leaves the exhaustion requirement meaningless. Every grouping that takes such action will argue that it has met the requirement and that assertion will be unreviewable.

NATO's Kosovo campaign illustrates the dilemma. While Secretary of State Madeline Albright claimed that "before resorting to force, NATO went the extra mile to find a peaceful resolution," other observers disagree. The Rambouillet agreement, presented to the Serbs as a take-it or leave-it proposition, contained provisions that any nation would find difficult to accept. These included allowing NATO troops unimpeded access to all of Yugoslavia, not just Kosovo, and placing Yugoslav sovereignty over Kosovo in doubt. Neither the Russians nor the U.N. was involved in the negotiating process or proposed implementation of the Rambouillet agreement. That the final agreement that ended the bombing differed significantly from that offered at Rambouillet—the objectionable provisions were dropped, the U.N. received ultimate authority for Kosovo, and Russian troops were included as peacemakers—at least suggests that the "extra mile" was not regulation length. Whether more flexible diplomacy would have resolved the conflict prior to the bombing will never be known; what is ascertainable is that the U.S. diplomacy seemed unwilling to budge an inch towards the Serbs.

A final and overriding difficulty with the proposed narrow humanitarian intervention norm is its limited applicability. The occasions in which the suggested conditions will be met are rare, and certainly do not apply to most of the ethnic conflicts and slaughters occurring throughout the world. The doctrine's applicability and effectiveness is further limited by the U.S. and European disinclination to intervene where there is a risk of significant casualties to their military personnel, or where allied nations are committing those abuses. If the impetus behind amending or revising the Charter is the search for an effective solution to the problem of gross human rights violations where the Security Council is deadlocked, forcible humanitarian intervention is likely to be of little use for most cases. Indeed, by distracting the world from more long-term solutions to these problems, such "humanitarian" intervention may play a counterproductive role.

Despite these scholarly efforts to construct a viable rule, I do not believe that the world is on the cusp of accepting a change in the Charter paradigm. The difficulty of articulating a principled and effective doctrine of humanitarian intervention makes it unlikely that the Kosovo campaign will usher in a new norm of international law to replace or supplement the Charter paradigm. Two other factors militate against the development of a new rule permitting unilateral or regional humanitarian intervention. First, not only do the majority of nations oppose such a rule, but even the NATO countries appear unsupportive of a change in the Charter's regime. Second, the United States' recent military attacks on Iraq, Sudan, and Afghanistan suggest that the Kosovo action reflects its unwillingness to be restrained by

international law, not a desire to change it.

The first reason why a new world order permitting individual nations to use force to protect human rights is not in the offing is because the major powers, including the U.S. and Western Europe, do not support it. Neither NATO nor the United States offered any legal justification for their action during the Kosovo crisis. In the proceeding before the International Court of Justice on Yugoslavia's complaint, only Belgium, of the ten NATO countries, mentioned humanitarian intervention as a possible legal justification.[19] Even Belgium later stated its "hope that resorting to force without the approval of the Security Council will not constitute a precedent."[20] Others, such as the United States, referred to violations of human rights in Kosovo and the need to avoid a humanitarian catastrophe, yet did not argue for a rule of international law that would justify NATO's action.

NATO's failure to articulate and defend a legal justification for its actions based on humanitarian intervention did not stem from a paucity of legal talent available to NATO governments. Rather, it undoubtedly reflects those governments' political reluctance to support such a developing norm. NATO members do not support giving any regional group, such as the Russian-dominated Commonwealth of Independent States, the power to intervene in other nations to prevent human rights abuses from occurring. Nor do the United States or other NATO allies want to create the hydraulic pressure for intervention that would come from formally articulating and promoting a new norm that provides for humanitarian intervention. In most such cases, the United States and other NATO nations' interest is to avoid a military commitment, and not to be forced into one. Therefore, the United States and its NATO allies are likely to continue to support ad hoc intervention that allows them to pick and choose in which situations to selectively intervene, and not propound any new rules of international law.

Furthermore, the Kosovo intervention was only one of several such United States military actions of the late 1990s. When viewed in context of these other operations, the Kosovo conflict illustrates a disregard for the rule of law. The military attacks against Iraq, Afghanistan, Sudan, and Kosovo shared the common characteristics of apparent illegality under the U.N. Charter and Security Council powerlessness or acquiescence in the attack's aftermath. In this context, the Kosovo attack can neither be dismissed as an exceptional action where formal law was violated to serve the higher moral value of saving lives, nor justified as creating a new rule.[21]

---

19. See Jonathan Charney, *Anticipating Humanitarian Intervention in Kosovo*, 32 Vand J Transn L 1231, 1239 (1999).

20. Statement by the Deputy Prime Minister and Minister of Foreign Affairs of Belgium at the 54th Assembly of the United Nations, 9 available at <http://www.un.int/belgium/speech_Minister_Michel_54UNGA_ENG.html> (visited Mar 4, 2000).

21. Some scholars have argued that NATO's action in Kosovo does not reflect the demise of UN Charter Article 2(4) (1945), but was merely an exceptional case where compelling circumstances justify the violation of law. See, for example, Thomas M. Franck, *Sidelined in Kosovo?: The United Nations Demise Has Been Exaggerated; Break it, Don't Fake It*, 78 Foreign Aff 116 (July-Aug 1999).

In 1998-99, the United States engaged in three significant military operations—all bombing campaigns. The first was a one-day, retaliatory, August 1998 air strike against Afghanistan and the Sudan in response to a terrorist attack on U.S. embassies in Kenya and Tanzania. The second commenced with a concentrated four-day air operation in December 1998 against Iraq, which continued intermittently into the following year. The third was the Kosovo operation. Viewed in isolation, the Kosovo operation might be read to signal a transformation of international law. In the context of the other two uses of force, a very different picture emerges—a superpower simply ignoring the relevant law.

The Sudan and Afghanistan bombings are particularly instructive. One target was Afghanistan training facilities apparently under the control of Osama Bin Laden, the man the Clinton Administration believed masterminded the embassy bombings. The missile strikes also destroyed the El Shifa pharmaceutical plant located in Sudan's capital, Khartoum. Administration officials claimed that the Sudan factory "was producing chemical warfare-related weapons" and was linked to Bin Laden's terrorist network. The United States promptly notified the Security Council that the military strikes were legally justified as measures taken in self-defense under Article 51 of the Charter.

Some important U. S. factual assertions about the Sudan factory turned out to be erroneous. U.S. allegations that the plant did not produce any medicine and was a heavily-guarded weapons facility in which Bin Laden had a financial interest were inaccurate.[22] Officials from nations closely allied to the United States asserted that the U.S. evidence about the plant was unconvincing.[23] Sudan requested a Security Council fact-finding investigation of the U.S. claims, a request backed by the U.N. Arab Group, the OAU, and some independent observers including former President Jimmy Carter.[24]

Nonetheless, the United States refused to submit to a Security Council investigation, claiming that, despite the factual inaccuracies of its claims, no purpose would be served by independent fact-finding.[25] No Security Council member took up Sudan's call for an investigation, despite a general feeling that the U.S. bombed the wrong plant. A general distaste for the Sudanese government coupled with a disinclination among other nations to directly confront the United States in the absence of some strong national self-interest led to the whole issue being ignored.

---

22. Seymour M. Hersh, *The Missiles of August*, The New Yorker 34, 40 (Oct 12, 1998); Tim Weiner and Steven Lee Myers, *After the Attacks: The Overview, Flaws in U.S. Account Raise Questions on Strike in Sudan*, NY Times A2 (Aug 19, 1998); Paul Richter, *Sudan Attacks Claim Faulty, U.S. Admits*, LA Times A1 (Sept 1, 1998).

23. Colum Lynch, *Allied Doubts Grow About U.S. Strike on Sudanese Plant*, Boston Globe A2 (Sept 24, 1998).

24. *Carter Urges Inquiry Into U.S. Raid on Sudan*, NY Times A4 (Sept 18, 1998). Both the *New York Times* and the *Washington Post* editorialized that the doubts about the Administration's evidence regarding the El Shifa factory required further investigation.

25. Myers, *After the Attacks*, NY Times at A1 (cited in note 22).

The attacks on Afghanistan and Sudan reflect greater disrespect for international law than that shown by the Reagan Administration in its widely criticized 1986 bombing of Libya. The Reagan Administration did publicly submit the evidence supporting its allegations against Libya to the Security Council, which then voted nine to five to condemn the U.S. action, with the U.S., Britain, and France vetoing the resolution. Attorney General Reno reportedly argued that the evidence supporting the attacks on Afghanistan and Sudan did not meet the international law standard articulated by the Reagan Administration in 1986.[26] Abraham Sofaer, former legal advisor to the Reagan Administration State Department, while generally supportive of the air strikes, found it "disturbing . . . that the Clinton Administration has been unwilling to participate in a thorough evaluation of its factual premises concerning the [Sudanese] plant."[27]

In sum, there is no imaginable rule of international law supportive of the Sudan attack. No state would argue for a legal principle that permits states to use force predicated on unilateral factual assertions based on undisclosed evidence not subject to any prior, simultaneous, or subsequent review by any independent entity.

Similarly, the air strikes against Iraq commencing in December 1998 are exceedingly difficult to justify legally. In January and February 1998, U.S. officials asserted that unless Iraq permitted unconditional access to international weapons inspections, it would face a military attack. They argued that extant U.N. resolutions provided the authority for such use of force. Representatives of a majority of the permanent members of the Security Council believed otherwise, as did a majority of the Council when they voted on Resolution 1154, which temporarily averted that crisis.[28] When, in December 1998, the United States and United Kingdom launched four days of air strikes, they failed to obtain Security Council authorization and again argued that they had legal authority to use force. Other nations again disagreed.[29] While the argumentation as to the legality of the Iraqi raids is technically complex, the gist of the matter lies in the United States' position that it will enforce Security Council resolutions by force, whether or not the Council sees fit to do so. In Iraq, a substantial group of nations on the Security Council were unwilling to grant the

---

26. Hersh, *The Missiles of August* at 36, 38 (cited in note 22).

27. Abraham Sofaer, *U.S. Acted Legally in Foreign Raids*, NY Newsday A29 (Oct 19, 1998).

28. See Christopher Wren, *Standoff With Iraq: The Law; UN Resolutions Allow Attack on the Likes of Iraq*, NY Times A6 (Feb 5, 1998); John F. Harris and John M. Goshko, *Decision to Strike Iraq Nears: Clinton Advisors Lean Toward Attack to Force Compliance with UN*, Wash Post A1 (Jan 24, 1998). See UN Doc S/PV 3858 at 14, 17 (1998).

29. Only three Security Council members—Japan, the United States and Britain—spoke in favor of the air strikes. Sec Council Press Release No SC/6611 at 5 (UK), 8 (US) 9 (Japan) (Dec 16, 1998). The Russians and Chinese accused the United States and the United Kingdom of an "unprovoked act of force" that "violated the principles of international law and the principle of the Charter," id at 4 (Russia). A number of nonpermanent members opposed the use of force and reiterated that force must be authorized by the Security Council, id at 6 (Costa Rica), 8 (Sweden), 9 (Brazil), 10 (Kenya). International reaction was generally negative, although some European and Asian allies supported the military action.

United States and Britain the authority to use force and interpreted the relevant Security Council resolutions as not permitting unilateral action. It is difficult to conceive of a rule of international law that permits a nation to use force to enforce a Security Council resolution when a majority of the Security Council affirmatively refuses to authorize such force. Nonetheless, the United States and Britain continued bombing Iraq into 1999, and the Security Council remained powerless to assert its prerogatives.

Following shortly after the Afghanistan, Sudan, and Iraq bombings, the U.S. and NATO's clear violation of Article 2(4) in Kosovo cannot be viewed as groping toward a new international law doctrine of humanitarian intervention, but rather, as a retreat to great power unilateralism. A common element of all three military operations was their disregard of both international law and the United Nations. Indeed, Secretary of State Albright has stated that multilateralism, and presumably international law, are means not ends, to be discarded when United States national interest warrants.[30] For example, when in February 1998 U.N. Secretary General Annan negotiated an agreement regarding weapons inspections with Iraq, Albright stated that if "we don't like" Annan's agreement "we will pursue our national interests" and presumably use force anyway.[31]

The United States' unlawful use of force over the past several years is reflective of a broader failure to accept international legal restrains on its conduct. The refusal to agree to an International Criminal Court or the Land Mines Treaty, the Senate's failure to ratify the Test Ban Treaty, the ratification of International Human Rights Agreements with reservations ensuring that the United States accepts no obligations not already found in domestic law, and the continuation and extension of the Cuban embargo, all bespeak an American policy unwilling to bow to normative international legal restraints.

The major legal disputes over the use of force for the first decade of the twenty-first century are therefore unlikely to revolve around whether a humanitarian exception to the U.N. Charter ought to be recognized. It is more probable that those disputes will more fundamentally involve questions of whether, in general, the use of force will be made subservient to international organization. For, the real test of the twenty-first century will be to find ways to strengthen international institutions and to subject all nations, even hegemonic ones, to the rule of law. On that issue the U.S. is likely to find itself, in Harvard Professor Samuel Huntington's words, as the lonely superpower.[32]

30. See, for example, Madeline Albright, *The United and the United Nations: Confrontation or Consensus?*, LXI Vital Speeches of the Day 354 (Apr 1, 1995), for the view that "multilateralism is a means, not an end."

31. Dan Morgan, *Administration Weighs Steps in Case U.N.-Iraq Deal Doesn't Satisfy U.S.*, Wash Post A15 (Feb 23, 1998).

32. See Huntington, 78 Foreign Aff 35 (cited in note 11).