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FORCE RULES: U.N. REFORM AND INTERVENTION

John Yoo⁺

As the United Nations turns 60, it suffers from a crisis of ineffectiveness and corruption. It failed to produce a consensus on whether the great powers should have used force to enforce United Nations Security Council resolutions regarding Iraq. It then failed to prevent the United States and a coalition of nations from invading Iraq without the permission of the Security Council.¹ It has reeled from corruption confirmed by the Volcker commission's investigation of U.N. administration of the Iraqi Oil-for-Food program.² As Secretary-General Kofi Annan has acknowledged, U.N. Peacekeepers in the Congo and other African countries have engaged in the sexual abuse of children.³ Recalling its failures in Bosnia and Rwanda, the United Nations has stood by while at least 400,000 have died in Darfur, Sudan and potentially hundreds of thousands more in the near future at the hands of government-backed militias.⁴

Secretary-General Kofi Annan has responded by proposing reform of the rules governing the use of force and changes in the structure of the Security Council. Presented in a new report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Annan acknowledges that nations may use force more broadly to confront the problems created by terrorism, rogue nations, and human rights catastrophes, but demands that the Security Council still retain its monopoly on the authorization of the use of force beyond that required for self-defense.⁵ He proposes the enlargement of the Security Council to increase the presence of geographic regions not currently well represented and to recognize a

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¹ See John Yoo, *International Law and the War in Iraq*, 97 *Am J Int'l L* 563 (2003).

² See generally, <http://www.iic-offp.org>.

³ Kofi Annan, *Our Mission Remains Vital*, *Wall St J* (Feb 22, 2005).

⁴ *American Interests and U.N. Reform: Report of the Task Force on the United Nations 35-36* (US Institute of Peace 2005).

⁵ Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All* (2005), at <http://www.un.org/largerfreedom/contents.htm>.

shift in global power away from the countries of “Old Europe” and to nations such as Japan, India, and Brazil. To address the new threats of terrorism and rogue states, Annan also recommends that nations agree on a definition of terrorism, which will henceforth be prohibited,⁶ and asks for an expansion in the U.N.’s peacekeeping operations by creating a “strategic reserve” of national forces that can be deployed rapidly, but only on the call of the United Nations.⁷ In making these suggestions, the Secretary-General primarily adopted the December 2004 recommendations of a “High-Level Panel on Threats, Challenges, and Change,” appointed by him.⁸

On first glance, these reforms suggest a significant change in the way that the United Nations views the use of force. These differences, however, are rhetorical in nature. Indeed, they do not represent any change in the legitimacy of the current use of force by nations, nor would they have the effect of moving legal rules in the best direction to address the world’s current problems. In fact, the Secretary General’s proposals, which have every chance of adoption by the U.N. General Assembly and the Security Council will likely have the opposite effect – they will inhibit the use of force when it would promote the goals of international peace and security. The choice for the United States is whether it has sufficient control in the United Nations to spark new reforms in promoting international peace and security, whether it ought to seek alternate rules to govern the use of force, or whether it simply ought to ignore the U.N. and create a separate security framework – as it successfully did during the Cold War.

This Essay has three parts. Part I will discuss the existing legal framework established by the U.N. Charter governing the use of force. It questions whether this structure has succeeded in regulating state practice, and it describes both the proposed reforms and the new international environment that prompted them. Part II criticizes the reforms’ response to the rise of rogue nations and international terrorism by emphasizing the legal doctrine of imminence and a recentralization of power in the U.N. Security Council. It argues that the concept of imminence does not make sense, and that it should be replaced by a cost-benefit analysis of expected harm. Part III addresses whether the reforms successfully grapple with

⁶ Id. at para 91 (“any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.”).

⁷ Id. at para. 112.

⁸ A More Secure World: Our Shared Responsibility, Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change (United Nations 2004), at <<<http://www.un.org/secureworld/report.pdf>>>.

contemporary international problems from the perspective of global welfare analysis. It argues that enforcing peace and security by eliminating rogue nations, pursuing terrorists, or ending human rights disasters supplies an international public good, and that UN reforms will suppress, rather than increase, the amount of needed intervention. Perversely, the UN reforms will have the effect of retarding international cooperation to solve the very problems they seek to prevent.

I.

The U.N. Charter creates an almost inviolable presumption in favor of state sovereignty and a strict rule against the use of force by nations. It did so in three provisions. First, Article 2(4) requires member states to refrain 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.”⁹ Article 2(4) admits of no exceptions; preventing humanitarian disasters or rooting out terrorist organizations finds no explicit approval in the text of the U.N. Charter. Second, the Charter creates a Security Council that has the authority to order nations to use force “as may be necessary to maintain or restore international peace and security.”¹⁰ Third, Article 51 reaffirms that if a nation is attacked, it may use force to defend itself:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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 the right of self-defense 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 to maintain or restore international peace and security.¹¹

Taken together, these three provisions promote what I have called elsewhere a law enforcement paradigm toward the use of force.¹² Like the domestic criminal justice system, the international legal system imposes an absolute prohibition on the use of force by nations. Nations give up their right to use force and delegate it to the U.N., just as domestic government possesses a monopoly on the legitimate use of violence. The U.N., like domestic government, may use force to maintain peace and prevent violence between

⁹ UN Charter Art 2(4).

¹⁰ Id. art 42.

¹¹ Id. art. 51.

¹² John Yoo, *Using Force*, 71 U Chi L Rev 729, 738 (2004).

nations. Force may only be used in self-defense, after another nation has attacked and thus violated the law first, just as in domestic law an individual may use deadly force to defend against an attack.

Some have argued that the right to use force internationally is even narrower than the right to use force in self-defense under domestic law. Several prominent legal scholars believe that Article 51's condition on the right to use force only "if an armed attack occurs" limits self-defense only *after* an enemy attacks has crossed a border or otherwise begun.¹³ They argue that such a strict rule is necessary to prevent pretextual claims of self-defense or international instability produced by the use of force between nations.¹⁴ Critics of this reading argue that Article 51 codified the right of self-defense as it existed under customary international law at the time of the Charter's adoption, but did not extinguish it, a view shared by the International Court of Justice in the Nicaragua case.¹⁵ Under this view, pre-Charter customary international law had permitted nations to use force in anticipation of an attack that had not yet occurred – so long as the attack is imminent. Most authorities trace the imminence test back to the *Caroline* incident, in which the United States and Great Britain agreed that a pre-emptive attack was justified if the "necessity of self-defense [was] instant, overwhelming, leaving no choice of means, an no moment for deliberation."¹⁶

While the Charter's rule remains strict, it does not appear to have succeeded in its goals of preventing war. From 1945 to 1997, according to the Correlates of War project, 23 inter-state wars have occurred.¹⁷ Another study records 38 interstate wars through 1995, which would increase to at least 2003 with the addition of Kosovo, Afghanistan, and Iraq.¹⁸ Only two – the Korean War in 1950 and the

¹³ See, e.g., See Ian Brownlie, *International Law and the Use of Force by States* 275-80 (1963).

¹⁴ See, for example, Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, in Antonio Cassese, ed, *The Current Legal Regulation of the Use of Force* 505, 515-16 (1986).

¹⁵ See, for example, Oscar Schachter, *The Right of States to Use Armed Force*, 82 *Mich L Rev* 1620, 1634 (1984); Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 *Am J Intl L* 597, 599 (1963); Abraham D. Sofaer, *International Law and Kosovo*, 36 *Stan J Intl L* 1, 16 (2000) (advocating the abandonment of rigid and often dishonest rule based evaluations of use of force decisions in favor a more flexible standard that might elicit honest reason-giving by international actors); D. Bowett, *Self-Defence in International Law* 182 (1958).

¹⁶ Daniel Webster, *Letter to Henry Fox, British Minister in Washington* (Apr. 24, 1841) in Kenneth Bourne and D. Cameron Watt, eds., *1 British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print* (Part I, Series C) 153, 159 (1986).

¹⁷ Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 *Conflict Management and Peace Science* 123-144 (2000).

¹⁸ K.J. Holsti, *The State, War, and the State of War* 24 (1996).

first Persian Gulf War in 1991 – received the authorization of the U.N. Security Council. Mark Weisburd counts more than 100 uses of force between nations, most falling short of what the Correlates of War project would define as a “war.”¹⁹ Certainly the U.N. Charter rules have not eliminated interstate war.

But has the U.N. Charter at least helped reduce war? In absolute numbers, it does not appear so. According to the Correlates of War database, from 1816 to 1945, 56 interstate wars occurred, a rate of .43 per year. From 1945 to 1997, that rate is .44 per year. A different study found that from 1715-1814 there were 36 interstate wars, from 1815-1914 there were 29 wars, from 1918-1941 25 interstate wars, and then from 1945-1995 38 wars.²⁰ According to these figures, the rate of interstate wars either roughly remained the same or increased during the period of the U.N. Charter and the League of Nations. When corrected for the number of states, however, the frequency of interstate war seems to have dropped during the U.N. Charter period. From 1715-1814, the number of interstate wars per year per state was .019; from 1815-1914, it was .014; from 1918 to 1941 .036; and from 1945-1995 it was .005.²¹

These figures suggest that the nature of armed conflict appears to have shifted since the end of World War II. First, it appears that the great majority of casualties suffered since World War II have arisen in intrastate, rather than interstate, wars. In World War I, the number of deaths was approximately 13 to 15 million; in World War II, approximately 50 to 60 million; in the conflicts since World War II, about 40 million.²² Of all of the armed conflicts since World War II, roughly 75 to 80 percent have occurred within a state, and approximately 80 percent of overall casualties during this period have resulted from such wars.²³ Second, conflicts during the post World War II period have become more localized. Since the end of World War II, there have been no global, multistate conflicts, no great power conflicts, and no war in Western Europe or North America. Third, conflicts seem to have lost their territorial focus. Most wars occur within a state, not between states, and do not seem to be fought for territorial gain, with some notable exceptions such as the Iran-Iraq war and the first Persian Gulf War.²⁴

At the outset, this data suggests that the rules of the U.N. Charter no longer fit the world we face today. On the one hand, the Charter’s rules were literally designed to fight the last war – the global, multistate, mechanized wars that had killed so many in World Wars I

¹⁹ A. Mark Weisburd, *Use of Force: The Practice of States Since World War II* (1997).

²⁰ Holsti, *supra* note , at 24.

²¹ *Id.*

²² Yoo, 71 *U Chi L Rev* at 747.

²³ *Id.* at 748,

²⁴ Holsti, *supra* note , at 21.

and II. The international system, however, has enjoyed a long period of freedom from the scourge of massive interstate warfare, such that the leading historian of American foreign relations during the Cold War has called the 1945-1991 period “the Long Peace.”²⁵ On the other hand, the Charter’s drafters did not anticipate that the challenges to international peace would arise not from interstate wars, but from intrastate conflicts rooted in civil wars or the collapse of government institutions. The U.N. Charter’s strict rules against intervention except in self-defense renders any outside effort to stop civil wars or prevent humanitarian disasters illegal without the permission of the Security Council.

A defender of the U.N. system could argue that the U.N. Charter has produced the post-1945 period of international peace stability. This seems to be the view of the United Nations high-level panel on reform, which argues that “the United Nations helped to reduce the threat of inter-State conflicts through the Secretary-General’s ‘good offices,’ or quiet diplomacy aimed at defusing crises and providing hostile parties the opportunity to talk freely and test intentions.”²⁶ This argument, however, confuses correlation with causation. As far as I can tell, there are no empirical studies that show that the U.N. Charter has caused any reduction in interstate warfare. In fact, leading diplomatic history and international relations scholars attribute the period of relative peace and stability in the post World War II period to the bipolar balance of power between the United States and the Soviet Union and their possession of large nuclear arsenals, which encouraged them to avoid conflict.²⁷ Even the U.N. high-level panel recognizes this in its report, with the observation that “for the first 44 years of the United Nations, Member States often violated [the Charter] rules and used military force literally hundreds of times, with a paralyzed Security Council passing very few Chapter VII resolutions and Article 51 rarely providing credible cover.”²⁸

Not only do the U.N. Charter’s rules on the use of force fail to respond to the change in the phenomenon of armed conflict, they also do not account for political and technological developments. As the September 11, 2001 attacks demonstrated, non-state actors have emerged with the ability to wage armed conflict with a power that only nation-states once possessed. Yet, international terrorist organizations, by their very methods of operation, may render the self-defense rules obsolete. Terrorists deliberately disguise themselves as civilians, have no territory or populations to defend,

²⁵ John Lewis Gaddis, *The Long Peace: Inquiries into the History of the Cold War* 219-37 (1987).

²⁶ *A More Secure World*, at 31.

²⁷ Gaddis, at 219-37; Kenneth Waltz, *A Theory of International Politics* 170-76 (1979).

²⁸ *A More Secure World*, at 62.

and attack by surprise; this makes it virtually impossible to use force in self-defense once an attack is in motion, and there is no target to threaten in retaliation. Rogue states may share the un-deterable character of terrorist organizations, because they have removed themselves from the international system and their leaders may have little regard for attacks on their territory or populations. Marrying these political developments with the proliferation of weapons of mass destruction technology has even further undermined the rules on the use of force. If nations or groups can launch a sudden attack with weapons of devastating magnitude further reduces the time to respond and the effectiveness of nonviolent measures and encourages the use of pre-emptive action to prevent a WMD attack.

Secretary-General Annan and his high-level panel on U.N. reform nod to these developments, but propose no serious measures to allow the United Nations to respond in a meaningful way. To his credit, Annan recognizes that dispute over the rules governing the use of force has divided the United Nations. Nations have disagreed about whether States have the right to use military force pre-emptively, to defend themselves against imminent threats; whether they have the right to use it preventively to defend themselves against latent or non-imminent threats; and whether they have the right — or perhaps the obligation — to use it protectively to rescue the citizens of other States from genocide or comparable crimes.”²⁹ In other words, the Secretary-General classifies the use of force into three types, in addition to pure self-defense from an attack: (i) pre-emption, which he defines as a response to an imminent attack; (ii) prevention, which he defines as a response to a latent but not yet imminent attack; and (iii) protection, which he defines as force used to stop genocide or other humanitarian disasters.

In one good sign, the Secretary General argues in favor of interpreting Article 51 to permit the use of force in self-defense to address imminent attacks. According to Annan, “imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.”³⁰ This puts the United Nations on the side with the bulk of scholarly opinion that Article 51 permits the use of force in anticipatory self-defense. But it does not represent a great change in the law, as the *Caroline* doctrine had already established the imminence doctrine.

Unfortunately, in regard to the second and third types of the use of force – prevention and protection – the Secretary General and the high-level panel report are long on rhetoric but short on practical

²⁹ In Larger Freedom, at para 122.

³⁰ Id. at para 124.

reform. With regard to both, the Secretary-General recognizes that the use of force may constitute an effective remedy for the spread of WMD to hostile hands or to humanitarian crises, but he still restricts the authority to use force only to the Security Council. “Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?”³¹ Similarly, the high-level panel similarly chose to restrict the right to use force for prevention to the Security Council. According to its report, “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies.”³² In terms of humanitarian crises, the high level panel further explains that the Security Council should stay firm in the understanding that it can use its Chapter VII powers to authorize collective military action, so long as it finds that the situation rises to the level of a threat to international peace and security.³³

Rather than loosen the restrictions on the use of force, both Annan and the high-level panel provided new criteria to guide the considerations of the Security Council. According to Annan, the Security Council “should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success.”³⁴ The high-level panel provided more explanation for the articulation of standards. As it saw it, the problem is that there is an absence of agreement on the Security Council about humanitarian intervention, and a lack of trust by non-Security Council members in the Council’s decisions. By adopting these criteria, the panel sought “to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; to maximize international support for whatever the Security Council decides; and to minimize the possibility of Member States bypassing the Security Council.”³⁵

³¹ Id. at para 125.

³² A More Secure World, at 63.

³³ A More Secure World, at 66.

³⁴ Greater Freedom, at para 126.

³⁵ A More Secure World at 67.

II.

The reforms proposed by the Secretary-General and the high-level panel fail to address the actual challenges to international peace and security. Arguably, their proposals do not work any real change in existing doctrine on the use of force. For example, they recognize that the right to self-defense is not limited to cases when a cross-border attack is actually in progress, as some academics had thought, but the imminence rule was one that state practice had recognized even before the Charter. Requiring that states receive the approval of the Security Council for all other uses of force maintains the current system, which already prohibits all use of force, except those in self-defense or approved by the council. By continuing to tie the use of force to an imminent attack, the U.N. will remain trapped in an outmoded framework that does not take account of the realities of terrorism, rogue nations, or WMD.

This Part criticizes the reforms' emphasis on imminence as the line between legitimate and illegitimate uses of force. Imminence depends on timing; only when an attack is just about to occur, can a nation use force in its self-defense. Imminence, however, does not take into account the magnitude of harm posed by a threatened attack. According to conventional doctrine, a nation must wait until an attack is imminent before using force, whether the attack comes as a small band of cross-border rebels, as in the *Caroline*, a rogue nation wielding nuclear missiles, or a terrorist organization armed with biological or chemical weapons. Imminence also fails to recognize windows of opportunity that could allow a nation to use force against an enemy, such as a terrorist operative, who comes into clear view at a time when his attack is not temporally imminent, but who could then disappear or disguise his future attack within a civilian population. Finally, imminence doctrine cannot address cases in which an attack seems certain, even if temporally far off.

Rather than imminence, we should understand the use of force in self-defense as a question of expected harm. Expected harm can be measured by multiplying the probability of an attack against the estimated magnitude of harm. Imminence under the *Caroline* test is better understood as a measure of probability, rather than of timing. An imminent attack is simply one that is close to 100 percent certain. Temporal imminence failed to account for the magnitude of potential harm. At the time of the *Caroline* decision in the early 19th century, the main weapons of war remained the sailing ship, horse cavalry and horse-drawn artillery, and infantry which marched on foot armed with single shot weapons. There was a technological limit on the destructiveness of armed conflict.

In an age of modern weapons, however, temporal imminence does not fully capture the probability of an attack. Missile technology may allow an

enemy to attack suddenly, and WMD knowledge could boost the destructiveness of those attacks well beyond anything possible before 1945, not to mention the time of the *Caroline*. In other words, modern technology may allow enemies to launch attacks so quickly that there is no real opportunity to use force preemptive to stop them. Adopting a probability-based approach, however, should allow for more finely-tuned judgments. Nations could use force pre-emptively when the probability of a hostile attack appears high, even if the timing of the attack may still be uncertain. Probability also directly affects armed responses to terrorist groups. A terrorist attack may prove extremely difficult to detect, because a terrorist organization does not go through the broad mobilization and deployment of regular armed forces that usually signal an imminent attack. To be sure, A nation may identify terrorist operatives before they are about to launch a temporally imminent attack. It may have assets nearby that could carry out a pre-emptive strike, and it cannot be sure that it will be able to locate the terrorists again when their attack is in fact imminent. A nation will have a limited window of opportunity to use force, at a time when the probability of the future attack will be lower, but without any assurance it will have the chance to attack at that future moment. Nonetheless, a temporally-based imminence test, rather than the use of probability, would prevent

Self-defense should also take into account the magnitude of harm. Nuclear weapons and other weapons of mass destruction have increased the potential harm from an attack. WMDs threaten profound, long-term damage to large segments of the civilian population and environment. As the International Court of Justice recognized in its 1996 advisory opinion on the legality of nuclear weapons, nuclear weapons possess unique characteristics, “in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.”³⁶ Missile technology means that nations can launch WMDs with very little warning, making the possibility of a pre-emptive strike within a window of temporal “imminence” extremely difficult, if not impossible. If North Korea, for example, were to have the capability to launch an inter-continental ballistic missile with a nuclear warhead with only 15 minutes warning, American military forces may very well prove unable to destroy the missiles before they left the ground. WMDs can also be delivered in unsophisticated ways—a suicide bomber could detonate a “dirty bomb” using a truck, or spread a biological agent with a small airplane. Unconventional delivery of WMD by terrorists or rogue nations makes it even more difficult, if not impossible, to prevent an imminent attack with military force. As military technology has changed, our test for the use of preemptive force should evolve beyond a test based in temporally-based imminence to one that takes into account the lethality of

³⁶ Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, 1996 ICJ 226, 244 at ¶ 36 (advisory opinion).

modern weapon systems.³⁷

An additional benefit of an expected harm approach is that it answers the difficult question of proportionality. International law requires that the use of force be proportional, but has never provided a satisfying means of determining proportionality. An expected harm approach would calculate proportionality by determining the expected harm – the magnitude of an attack factored by its probability. If a nation can use force that can forestall the attack at a lower cost than the expected harm, then the use of force would be proportional. Understanding anticipatory self-defense in this manner indicates that a nation could use force earlier, even when an attack is less probable, so long as it uses lower levels of force that are in proportion to the expected harm.

Brief examples from the Cold War may help illustrate this approach. In the Cuban Missile Crisis, the United States was confronted by a covert Soviet effort to base intermediate-range nuclear missiles in Cuba. Before the missiles were completed, President John F. Kennedy ordered a naval blockade of the island to prevent any further shipments of Soviet military equipment. While President Kennedy did not authorize a more direct use of force, such as a pre-emptive aerial attack or even an invasion, a naval blockade has long constituted an act of war and itself can require the use of force. Nonetheless, no attack on the United States by the missiles in Cuba was imminent, and President Kennedy could not claim otherwise. Rather, the United States intervened to prevent a dramatic change in the strategic status quo which would have placed most of the United States within the range of Soviet nuclear weapons for the first time. President Kennedy's response, however, makes sense legally only if it is understood as a restrained use of force that was proportional to the probability of a Soviet attack, taking into account the magnitude of potential harm from nuclear weapons. Other American uses of force during the Cold War also do not make sense unless understood in this light. President Reagan's order of precision aerial attacks on Libya in 1986 did not arise from any imminent threat of future Libyan attacks, but instead – due to Libya's covert support for terrorism against U.S. military personnel in Berlin – can be understood as limited uses of force in proportion to the threat of future Libyan-sponsored terrorist attacks. President George H.W. Bush's invasion of Panama did not pre-empt any threat of attack on the United States, but instead removed a dictator who had destabilized the canal area.

The U.N.'s proposed reforms of the use of force rules make little sense against this backdrop. If the use of force should be judged against the expected harm of an attack, as measured by probability and magnitude of harm, then the timing of the actual attack should not make any important

³⁷ Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 *Am J Intl L* 597, 598 (1963); W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo Wash L Rev* 335, 348 (1962-63)

difference for receiving Security Council approval. If North Korea gains the capability to launch nuclear missiles with little warning, and hence imminence does not provide a nation with any space for a preemptive attack, then why should a nation under threat have to go to the Security Council for permission? The timing makes no difference in estimating the probability of attack. This is further underscored by the challenges of terrorism. Because of their covert, surprise nature, terrorist attacks often present little window of opportunity that falls within temporal imminence. Again, why should a temporal line dictate when a nation must go to the Security Council or not to pre-empt a terrorist attack?

One response is offered by the Secretary-General's high level panel, which favors maintaining the imminence standard. According to its report, "in a world of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted."³⁸ This argument is common; it essentially claims that if the rules on the use of force are loosened, nations will claim self-defense pretextual as a justification for illegal interventions, and ultimately the rules will lose any binding effect at all. As the high-level panel declares, "Allowing one to so act is to allow all."³⁹ There are several problems with this critique. First, it assumes that there is a causal relationship between the relative peace and stability between the great powers over the last six decades and the strict rules on the use of force. There is no empirical study that shows this to be true, and, as observed earlier, many of the leading scholars believe that the bipolar balance of power between the nuclear-armed United States and the Soviet Union produced global order. Second, it assumes that relaxing the rule on the use of force will lead to a world without any legal rules at all. It may be the case that legal rules have no effect on any nation's decision to use force, as Michael Glennon argues,⁴⁰ in which case none of these arguments matter. But if legal rules do make a difference, there is no evidence that would support the conclusion that relaxing the rule on self-defense would encourage more warfare in undesirable places and ways. In fact, as will be explained in Part III, there is reason to believe that modifying the rules on the use of force will produce more desirable interventions.

Third, the conventional view against changing the use of force rules assumes that *ex ante* rules will be more effective than *ex post* rules. Under either set of rules, it is possible that preemptive attacks will occur against nations that had no true hostile intentions or abilities – in other words, a mistake is made – or that pretextual invasions will occur. The current U.N. Charter system follows the form of a rule that is designed to reduce the discretion of nations in the future to use force and requires less decision

³⁸ A More Secure World, at 63.

³⁹ *Id.*

⁴⁰ Michael Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2003).

costs and information to implement. It is enforced by the requirement of ex ante permission from the Security Council. A different approach to legal rules is possible. Instead of a rule, use of force could be configured as a standard. Standards allow for the balancing of different relevant factors, but require more information and expend more costs in decisionmaking. Rules generally create more ex ante legal certainty, but at the expense of higher error rates, because the rules are not shaped to the exact context of a particular case. Standards increase legal uncertainty, but because they delegate authority to ex post decisionmakers, generally reduce error costs. It would seem that the use of force is better governed by a standard than by a rule. The stakes in this area are so high, and the individual cases often so unique, that it is difficult to conclude that use of force situations have a certain similarity and regularity which makes them opportune for governance by inflexible ex ante rules. Rather, nations could judge the use of force through consideration of more information ex post, which should lead to less errors. If nations disagree with a pretextual use of force, they can take counter-actions, including the use of force or withholding cooperation in the post-conflict situation. If nations believe a use of force was in error, they can place pressure on the attacking nation to provide remedies. Defenders of the U.N. Charter system have failed to show why the use of force is more appropriately governed by an ex ante rule than an ex post standard.

III.

Proposed reforms of the use of force rules bear a second signal defect in addition to their mistaken reliance on the imminence standard. They fail to recognize that the international system has changed, and with it the means for protecting international peace and security. [Perhaps here] The U.N. Charter system was designed to prevent large interstate wars, and established a criminal justice approach to the use of force that sought to drive international armed conflict to zero, much in the way domestic criminal law attempts to eliminate all killing. The primary threats to international peace and security, however, do not come from the great power wars of the first half of the twentieth century, but instead derive from the combination of rogue states, terrorist organizations, and humanitarian disasters. Reconceiving the rules on the use of force to address a collective action problem, rather than to enforce individualized notions of liability, will lead to a more effective framework to address these contemporary problems.

Unlike the domestic criminal justice system, it is not obvious that the international legal system ought to seek as its goal the reduction of the use of force to zero. Historically, states have used force in ways that have produced global benefits, such as ending the slave trade. There may be certain types of regimes whose spread

harms not just the United States, but international stability or global welfare. Fascism serves as an instance in which the use of force removed a regime devoted to coercive expansion and the systematic violation of human rights. Global welfare may have increased when the West contained the spread of totalitarian communism to new countries. A combination of the preceding two characteristics—systematic human rights abuses and dangerous ideologies—define “rogue” nations such as North Korea and the former regime of Saddam Hussein in Iraq.

Intervention may also be desirable in states where centralized authority has collapsed, or where it has been hijacked by violent non-state actors. Failed states allow for human rights catastrophes and may provide international terrorist organizations safe haven. Without an effective central government, these states cannot respond to demands from others that they apprehend terrorists or stop harmful activities within their borders. A terrorist network may project power into multiple nations, which may in turn destabilize the governments and societies of those nations. The international system may benefit from the use of force by eliminating a base that supports destabilizing terrorist attacks in nearby nations.

Intervening to stop a massive human rights catastrophe would constitute another example where the use of force could provide benefits that outweigh the costs. The post World War II period contains many examples of government repression, the collapse of state authority, or religious and ethnic fighting. The United Nations Security Council has responded by finding some humanitarian crises to be a threat to international peace and security, which allowed it to authorize the use of force in Somalia, Haiti, Bosnia, and East Timor.

Rather than applying use of force rules that arise from the criminal law, we would better understand rogue nations, terrorism, and human rights violations as collective action problems. In the study of the domestic legal system, markets allow the uncoordinated actions of self-interested actors to reach the optimal production of goods and services. Market failure, however, will result in the under-supply of public goods, which create positive externalities that are not fully captured by the producer.⁴¹ Public goods have two salient characteristics: they are non-rivalrous and non-exclusive: consumption of a public good does not leave less for others, and it is not feasible to prevent people from consuming the good without paying. As a result, private firms will not supply the good or service

⁴¹ See generally Mancur Olson, *The Logic of Collective Action* (1965).

at the optimal rate, because they do not internalize all of its benefits.⁴² In the domestic arena, classic examples of public goods include clean air and national defense, which benefit all members of a community, regardless of whether they pay for it or not. Government action also can provide a public good by suppressing activity that produces negative externalities, such as pollution or overuse of commons.

International affairs have their own share of collective action problems. Market failure at the international level can lead to an undersupply of financial stability, environmental pollution controls, health, biodiversity, and trade.⁴³ But perhaps preceding all of these, as perhaps the most important international public good, must come international peace and security. Just as domestic law and order lays the necessary stability for civil society and government to address other collective action problems, so too international peace and security establishes the environment to solve international health, environment, or financial problems. Peace and stability are international public goods because they are non-exclusive, non-rivalrous, and benefit all nations by reducing the need for defense expenditures and allowing trade to occur. If a nation or alliance maintains international peace, all nations benefit even if they do not contribute to the costs.⁴⁴

If international peace and security are public goods, then we should expect that nations rationally pursuing their self-interest will under-supply them. Nations will use force up the point where the costs equal the benefits that they capture from the intervention. But the optimal point for the use of force would occur where the costs equaled the benefits for the international system as a whole, rather than just the benefits to the intervening nations. International legal rules on the use of force, therefore, ought to encourage nations to use force in situations involving rogue nations, terrorism, or human rights disasters, rather than seek to lower the level of international armed conflict to zero.

International legal rules currently suppress the supply of

⁴² Robert Cooter and Thomas Ulen, *Law and Economics* 42 (2000).

⁴³ See generally Joseph S. Nye, *The Paradox of American Power* 137–71 (Oxford 2002); Inge Kaul, et al, eds, *Global Public Goods: International Cooperation in the 21st Century* (Oxford 1999); Todd Sandler, *Global Challenges: An Approach to Environmental, Political, and Economic Problems* (Cambridge 1997); Charles P. Kindleberger, *International Public Goods without International Government*, 76 *Am Econ Rev* 1 (1986); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 49–64, 107–08 (Princeton 1984).

⁴⁴ See Mancur Olson, Jr. and Richard Zeckhauser, *An Economic Theory of Alliances*, 48 *Rev of Econ & Stats* 266, 278 (1966) (describing NATO as a collective good); See Joseph S. Nye, Jr., *The American National Interest and Global Public Goods*, 78 *Intl Aff* 233, 243 (2002).

intervention below the already sub-optimal level predicted by public choice theory. As noted earlier, the U.N. Charter makes the political independence and territorial sovereignty of nation-states inviolable. For decades, many believed that humanitarian intervention was not even permissible under the U.N. Charter, regardless of whether the U.N. Security Council approved the use of force or not. Even though the Security Council has approved interventions to stop human rights abuses in Haiti, Somalia, and Kosovo, it failed to approve the use of force in time to stop the horrible catastrophes in Rwanda and Bosnia, and is now allowing genocide to occur in Sudan without taking action. It similarly failed before September 11 to authorize the use of force to pursue the al Qaeda terrorist network in Afghanistan and has not taken action to stop the acquisition of WMDs by rogue nations such as Iraq and North Korea.

The proposed U.N. reforms will only exacerbate the U.N.'s failure to act to solve collective action problems. While the Secretary-General calls on nations to recognize a right to protect, which could bear some similarities to an international public good, he fails to initiate any institutional reforms that could make the use of force easier to authorize. In fact, Annan's report recommends *expanding* the size of the Security Council, either by adding to the number of permanent members (but not expanding the veto), or by adding more rotating members. Under either proposal, the size of the Security Council will rise, which will only increase the transaction costs of authorizing force. David Caron and Thomas Weiss similarly express concern that increasing membership would not improve the effectiveness or legitimacy of the Security Council.⁴⁵ Not only will more nations have more foreign policy interests that will make any consensus more difficult to achieve in terms of substantive outcomes, but the sheer increase in number of members will simply hinder the ability of the members of the Security Council to negotiate and bargain to reach a decision. This is not to say, of course, that the Security Council will never authorize intervention in cases where a nation is producing negative externalities. Public choice theory, however, predicts that the increase in the size of the membership will further reduce the ability of the Council to reach decision.

These institutional changes would not have a negative impact if the substantive rules themselves were loosened. For example, if the U.N. reforms permitted nations to use force when state authority has collapsed, or when a human rights disaster has occurred, without Security Council permission then the international legal system still

⁴⁵ David Caron, *The Legitimacy of the Security Council*, 87 Am J Int'l L 552, 573 (1993); Thomas G. Weiss, *The Illusion of UN Security Council Reform*, Washington Quarterly 147, 149 (Autumn 2003).

might encourage nations to provide more intervention than it currently does. One could even argue that the current system is more desirable than the reforms. Under the current system, as it works in practice, nations have engaged in humanitarian intervention without the approval of the Security Council, most notably with India's intervention in Bangladesh, Vietnam's intervention in Cambodia, Tanzania's intervention in Uganda, and NATO's intervention in Kosovo. Meanwhile, between the Korean War and the first Persian Gulf War, the Security Council never authorized the use of force. One could argue that the international legal system was developing a norm in which nations could use force to prevent chaos in failed states or to stop humanitarian disasters without Security Council approval. Rather, such actions would be judged *ex post* by decisions of other nations whether to recognize the results of the intervention or to assist in bearing their cost. Nations, in effect, were developing a way around the literal restrictions of the U.N. Charter in order to address collective action problems..

This positive development could be brought to a halt by U.N. reform. The reports of the Secretary-General and the high-level panel go to great lengths in their desire to clarify that the U.N. Charter does not permit any interventions short of self-defense from an imminent attack without Security Council approval. This proposal would prevent nations from developing a new norm of international law norm, through the practice of the last few decades, toward permitting intervention in discrete situations involving failed states and human right disasters. It would also impose an unwieldy institutional process, made even more difficult by expansion of the Security Council, upon decisions that pose severe collective action problems.

The question of rogue nations such as Iraq may prove to be a test case of the effectiveness of these different approaches to the use of force. Many scholars have focused on the threat that the United States' invasion of Iraq has posed to the Security Council. Michael Glennon argues that the Security Council's unwillingness to support the Iraq invasion demonstrated its inability to adapt to the "unipolar world" of American hegemony.⁴⁶ According to Glennon, the power disparities and differing view on the use of force between the United States and its fellow U.N. members have led to the Security Council's collapse.⁴⁷ He does not foresee a multilateral institutional framework determining the use of force in the future.⁴⁸ Thomas Weiss asserts that the central concern for the Security Council is "whether it can engage the United States, modulate its exercise of

⁴⁶ Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 *Va J Int'l L* 91, 94-95 (2003-2004).

⁴⁷ *Id.* at 107.

⁴⁸ *Id.* at 112.

power, and discipline its impulses.”⁴⁹ If the Security Council continues frequently to disagree with United States foreign policy on central issues, it could end up resembling its “defunct predecessor, the League of Nations.”⁵⁰ Thomas Franck and Anne-Marie Slaughter share a more supportive view of the U.N. Franck emphasizes the necessity of maintaining the power of the U.N.’s “jurying function” to restrain the United States’ exercise of its option to use force.⁵¹ Slaughter insists that the United States will need the U.N. “more than ever in the aftermath of war—to provide for refugees, to monitor human rights violations, above all to establish a transitional administration with genuine legitimacy[.]”⁵²

The fate of the Security Council depends largely on the lessons learned from the use of force in Iraq. According to the Bush administration, Iraq posed a threat to international peace and security, based on the information that existed before the 2003 invasion. There can be little doubt that Iraq had been a destabilizing force in the Middle East. It pursued the acquisition of nuclear weapons, it had invaded Iran and Kuwait, and it had attacked Israel during the Gulf War. It had supported terrorist groups in the past and used chemical weapons against its own people. The United States and its allies had spent billions annually since the end of the Gulf war to contain Iraq; a good measure of the significant costs imposed by Iraq on the international system.

According to the Secretary-General and the high-level panel, the legality of the war on Iraq ought to turn on whether the United States and its allies were under imminent threat of attack by Iraq. If an attack were imminent, then the United States could take pre-emptive action; if no attack were imminent, then the use of force was preventative and required Security Council approval. Without a claim of self-defense, the war in Iraq was illegal without the Security Council’s *ex ante* approval. That approval was unlikely, not just because of the difficulties of determining whether the benefits of intervention outweighed the cost, but also because of the collective action problem of forging a consensus among numerous Security Council members, several of whom had their own strategic interests in maintaining the status quo in Iraq. Yet, the Security Council’s refusal to grant authorization to use force in the lead-up to the war did not stop the United States and its allies from invading Iraq and engaging in regime change, just as the absence of Security Council

⁴⁹ Weiss, *The Illusion of UN Security Council Reform*, at 156 (quoting International Peace Academy’s president David Malone).

⁵⁰ *Id.* at 153.

⁵¹ Thomas M. Franck, *The Use of Force in International Law*, 11 *Tul J Int’l & Comp L* 7, 17 (2003).

⁵² Anne-Marie Slaughter, *The Will to Make it Work*, *Wash Post* (March 2, 2003).

approval did not prevent the many uses of force that occurred during the Cold War period.

Contrast this result with the international public goods approach suggested here. If the United States and its allies could capture many of the gains from intervention in Iraq, and those benefits outweighed the costs of the intervention, then they will use force. If the ex ante estimates turn out to be incorrect, or if there are substantial gains to the international system that would allow the overall benefits to outweigh the costs borne by the intervening nations, the United States and its allies could seek assistance and contributions after the invasion. Conversely, other nations would already have an incentive to free-ride, so they would likely be unwilling to contribute except in particularly clear cases where the intervention promoted an international public good. Thus, if other nations disagreed with the invasion of Iraq, they could refuse to provide ex post military or financial support to the U.S.-led coalition. Failure by the intervening nations to receive support will lead it to be more reluctant to bear the concentrated costs of intervention in the future. At the current time, we can see this process at work as the United States attempts to maintain its coalition and to receive new support for the reconstruction of Iraq.

To be sure, loosening the rules on the use of force expand the possibilities for pretextual uses of force. There are several reasons to believe, however, that an ex post approach to policing undesirable uses of force will prove superior to the current ex ante system. First, since the end of World War II the costs of war have risen and the benefits seem to have fallen. Before World War II, claims of self-defense or humanitarian assistance served as pretexts for conquest. But territorial conquest may no longer provide the benefits that it once did, perhaps because the advent of nuclear weapons and other WMD has made it easier for nations to impose costs on invaders, because the costs of administering a hostile territory have greatly increased, or because the talented labor or capital that can make a territory valuable are more mobile. This suggests that an over-inclusive rule that serves a prophylactic purpose – barring all uses of force out of concern over interstate invasions of territorial conquest – is unnecessarily broad because other circumstances will help enforce the prohibition on the use of force.

Second, invaders will usually claim a pretext; even World War II Germany claimed that its invasions were consistent with international law. The question is not whether a use of force rule will prevent nations from claiming pretexts, but whether it will discourage or encourage uses of force that are desirable from a normative viewpoint. It is difficult to see why an ex ante system ought to be more effective across the board to an ex post approach.

A strict rule designed to eliminate pretexts makes the most sense if most cases are fairly similar and require little decision costs. An ex post system would be more effective in judging the legality of conduct whose legality is context-specific and depends on the weighing of many factors. It would seem that intervention in other nations is often, if not always, dependent on facts unique to each crisis.

Conclusions

The last decade, if not the years of the Cold War, has demonstrated that reform of the U.N.'s use of force rules are badly needed. Under existing U.N. Charter rules, nations may only use force in response to armed aggression by another nation or when authorized by the Security Council. These rules were established when the primary threat to international peace and security arose from large, mechanized warfare between advanced nation-states that killed millions. Threats to international peace and security six decades later are quite different. Rather than great power wars between multi-nation alliances that spanned the globe, the destabilizing factors in international politics arise from rogue nations, international terrorism, and human rights catastrophes. Current use of force rules place a legal obstacle before attempts to use force to intervene in the territory of individual nations to prevent these new threats. Usually the United Nations must give its blessing before regional or international powers can intervene to end such threats to international peace and security.

Proposals from Secretary-General Annan and the high-level panel on U.N. reform do nothing to address this problem. In fact, they exacerbate it. The reforms merely repeat the imminence standard for the use of force in self defense without taking into account the probability or magnitude of an attack – this represents no change in the conventional interpretation of the use of force rules. While the reform proposals properly identify threats to international peace and security as arising outside the context of great power warfare, they make it even more difficult for nations to address these new challenges. They attempt to codify a rule that gives the Security Council complete authority over all uses of force short of national self-defense, rather than providing flexibility for the development of new international law doctrine through practice. They also expand the size of the Security Council, which will only aggravate the body's collective action troubles in authorizing force.

Rather than refusing to acknowledge the dramatic changes in international security in the post-Cold War world, reform of the U.N.'s should begin by modifying the rules to produce higher levels

of desirable uses of force. If we want the international legal system to address rogue nations, international terrorism, and WMD proliferation, then we must reconceive the imminence doctrine to take into account expected harm of an attack, rather than strictly limiting self-defense only to cases where an attack is temporally imminent. If we want to increase, rather than suppress, military intervention that will produce positive externalities to the international system by ending rogue states, by flushing out international terrorist groups, or by ending human rights disasters, we should adopt an international public goods approach to thinking about the use of force. The international legal system ought to promote, rather than deny, uses of force to solve these problems. Only then will reform of the U.N. Charter system account for the true challenges to international peace and security and adopt rules designed to address them.